



ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

CASE SUMMARY

**Arizona Water Company v. Arizona Department of Water Resources, N.W.
Plummer, (former) Director, CV03-0321-PR (Opinion)**

Parties and Counsel:

Petitioner: Arizona Department of Water Resources (“ADWR”), N.W. Plummer, (former) Director, represented by ADWR attorneys W. Patrick Schiffer, Kenneth C. Slowinski and Nicole D. Swindle.

Amicus Curiae: Leave was granted to Salt River Valley Water Users’ Association and Salt River Project Agricultural Improvement and Power District (“SRP”), represented by Lisa M. McKnight of Salmon Lewis & Weldon, to file an amicus brief supporting ADWR’s petition for review.

Respondent/Cross-Petitioner: Arizona Water Company (“AWC”), represented by Timothy Berg, Norman D. James and Thomas R. Wilmoth of Fennemore Craig.

Facts:

The Arizona legislature adopted the Groundwater Code in 1980. It created active management areas, including one for the Phoenix area, where extractors, transporters and users of groundwater are subject to special regulations. It assigned to ADWR the task of creating management plans over successive 10-year periods for the conservation of groundwater used for non-irrigation, with the goal being to reach “safe yield” (withdrawal and recharge roughly equal) by 2025.

As provided by the Code, ADWR adopted a first management plan for the ten years beginning 1980 and a second management plan (“SMP”) for the ten years beginning 1990. The first was completed unchallenged, however, AWC challenged the Director’s approval of the SMP. That plan term is over now, but the dispute is still alive, since the third management plan for the ten years beginning 2000 continues certain disputed portions of the second.

AWC sought judicial review of the SMP. It claimed that the plan covering its Apache Junction System was not in compliance with the Groundwater Code. Specifically, AWC said the plan did not include conservation measures that ADWR must impose directly on “end users of groundwater”(or customers), rather than regulating their use indirectly by imposing conservation measures on AWC as a provider. AWC also disputed whether ADWR could count water from the Central Arizona Project toward its conservation goals because ADWR can only regulate groundwater use under the Act. CAP water comes from the Colorado River, not from the ground. The trial court on its own asked the Arizona Corporation Commission to participate and inform the court of any conflict between the Commission’s authority over AWC as a utility, and ADWR’s regulation of AWC as a groundwater provider subject to the mandates of the Groundwater Code. The Commission reported, and the trial court found, no irreconcilable conflict with ADWR over regulatory issues.

The trial court vacated a portion of the SMP as it applied to the Apache Junction System and remanded to ADWR to fix the plan, but did not address how to fix it.

The court of appeals affirmed in part. A majority of the appellate court agreed that the legislature intended to create conservation requirements for both providers and their end user customers, and that ADWR must devise appropriate conservation measures for its plan(s) that include direct management of end users. The majority also held that the Groundwater Code allows ADWR to count a municipal provider's CAP water as part of overall water supply in determining a provider's compliance with conservation plan requirements. The dissenting judge agreed with counting CAP water toward conservation goals, but thought ADWR properly implemented the Act by making providers the primary focus of the per capita water conservation measures. This would give providers flexibility to develop conservation plans and programs suitable for their own customers and geographic areas and take into consideration that providers ultimately decide whether customers receive groundwater, or water from another source, such as AWC's decision to serve several new golf courses in Apache Junction with its CAP water. The dissenting judge also thought the court should decide the issue whether per capita conservation measures apply to providers, or just end users. He said it was presented adequately below and is intertwined with the end user management issue. The majority did not think that issue was presented, but said it would agree with the analysis made by the dissenting judge if it were to consider the issue. The court also considered an attorneys fees issue, but that is not presented for review.

Issue(s):

A. In ADWR's Petition

“Does the 1980 Groundwater Management Act ('Groundwater Code') require the Director of the Arizona Department of Water Resources ('ADWR') to impose mandatory conservation requirements directly on all persons receiving groundwater from municipal water providers within the state's five active management areas ('AMAs'), or does the Code give the Director discretion to regulate individual users as may be appropriate?”

Issues presented to, but not decided by, the appellate court are:

“1. Whether the Director properly imposed conservation measures requiring reasonable reductions in per capita use of water directly on municipal water providers, rather than on the individual users receiving groundwater from municipal providers, and whether those conservation measures conflict with the Arizona Corporation Commission's jurisdiction to regulate private water companies.

“2. Whether the Director of ADWR acted arbitrarily, capriciously or contrary to law in denying Arizona Water Company's ('AWC') application for a 100 percent increase in the per capita conservation requirements for its Apache Junction (AJ) System so that the System can serve disproportionately increasing non-residential uses such as golf courses.”

B. In AWC's Cross-Petition

AWC says the appellate court decided this issue:

“(1) Whether the Legislature intended that in implementing the Groundwater Code’s conservation mandate, the Department should include in its management plans conservation measures to be employed by end users of groundwater.”

AWC asks the Court to consider this issue in its cross-petition:

“(2) Whether the Department, in determining a municipal provider’s compliance with the Department’s Total Gallons-Per-Capita-Per-Day Program (‘Total GPCD Program’), may include in its calculations Colorado River water delivered through the Central Arizona Project?”

Authority:

A.R.S. § 45-492(A) provides in pertinent part:

[I]n an active management area, a city, town or private water company shall have the right to withdraw and transport groundwater within its service area for the benefit of landowners and residents within its service area, and the landowners and residents are entitled to use the groundwater delivered, subject to:

.....

2. Conservation requirements developed by the director pursuant to article 9 of this chapter. [A.R.S. § 45-561 et seq., governing Groundwater Management]

A.R.S. § 45-565 (A) (2) charges ADWR’s Director with a responsibility to establish additional conservation measures for the second management period beyond those implemented in the first, including “use of such other conservation measures as may be appropriate **for individual users.**”

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