



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**



**ROBIN SILVER, M.D., et al. v. PUEBLO DEL  
SOL WATER COMPANY, No. CV-16-0294-PR**

**PARTIES:**

*Petitioners:* (1) Robin Silver, M.D. and Patricia Gerrodette  
(2) United States of America and U.S. Department of the Interior, Bureau of Land Management (“BLM”)  
(3) Pueblo Del Sol Water Company  
(4) Arizona Department of Water Resources (“ADWR”)

*Respondents:* All four sets of petitioners filed combined or joint responses to the four petitions.

*Amici Curiae:* (1) Gila River Indian Community; (2) Water Systems Council.

**FACTS:**

Pueblo Del Sol Water Company applied to ADWR for an Adequate Water Supply Designation. Pueblo intends to provide water to a residential/commercial development planned in its service area, which includes the subject land in Cochise County near Sierra Vista. Pueblo has provided water to customers located in its service area since 1972, when the Arizona Corporation Commission issued it a Certificate of Convenience and Necessity approving it as a water supplier. Pueblo pumps groundwater from its wells (existing and/or planned) in its service area for its customers.

The development, Tribute, is about five miles away from the San Pedro River, one of the few remaining free-flowing and undammed rivers in the arid southwest. The application is required by the Arizona Groundwater Management Act. Before developing a subdivision in a non-Active Management Area (like Sierra Vista), the Act requires a developer (and/or the proposed water supplier) to submit plans for the water supply for the project. The plans must demonstrate an adequate supply of groundwater exists to meet the needs estimated for the development. For purposes of the ADWR Director’s decision on an application, “adequate water supply” means both: (1) that sufficient groundwater, surface water or effluent of adequate quality will be “continuously, legally and physically available” to satisfy the water needs of the project for at least 100 years, and (2) the financial capability has been demonstrated to construct the water facilities necessary to provide the water. A.R.S. § 45-108. It is uncontested in this case that Pueblo Del Sol can satisfy the second requirement.

In 1988, Congress designated approximately 56,500 acres along 36 miles of the San Pedro River Basin as a national conservation area. Congress specified that the San Pedro Riparian National Conservation Area was created for several purposes: to protect the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources of the public lands. Within the designation, Congress created a “federal reserved water right” for the Conservation Area sufficient to fulfill its many purposes. Congress further specified that the federal reserved water right had a priority date of November 18, 1988. It also directed the Secretary of the Interior to file a claim for the quantification of the rights in a water rights adjudication to protect the Conservation Area’s water rights.

In 1989, the BLM filed a water rights claim in Arizona’s general stream adjudication. The

case is pending as *In re San Pedro Riparian National Conservation Area*, Maricopa County Superior Court Case No. W1-11-232. BLM later filed three amended statements of claim for the Area that cover both surfacewater and groundwater allocation. In 1992, ADWR issued a Certified Water Right to BLM for the Conservation Area based on an application commenced in 1985. The Certified Water Right granted to the United States “a right to the use of the waters flowing in the San Pedro River . . . for recreation and wildlife, including fish.” Rulings by the Special Master of the adjudication court in 2009 and 2010 have solidified BLM’s water rights claims as “vested.”

ADWR published notice of Pueblo Del Sol’s application, as required by statute. Dr. Silver, Ms. Gerrodette, and BLM filed timely objections. The objectors argued that the applicant was unable to establish water would be “legally available for 100 years” to provide to Tribute because the Conservation Area’s rights to groundwater to sustain its flows are superior to any subsequent water claimant, like Pueblo Del Sol. Specifically, they argued that ADWR must consider the Conservation Area’s senior federal reserved water rights before granting an Adequate Water Supply Designation.

Ultimately, ADWR’s Director approved the application in 2013.

Dr. Silver, Ms. Gerrodette and BLM filed complaints for judicial review of an administrative decision. They were consolidated in the superior court for the administrative appeal. The court held that the ADWR had erred in concluding that Pueblo had an adequate water supply that was legally available. It ruled that ADWR must consider both the existing and potential legal claims BLM asserted to the use of available water, and determine whether the amount of water Pueblo Del Sol planned to pump would affect those claims under the *legal availability* requirement. It awarded attorney’s fees to private plaintiffs Dr. Silver and Ms. Gerrodette based on the “private attorney general” doctrine.

The court of appeals vacated the superior court’s decision. It held that Pueblo Del Sol had sufficiently established the legal availability of the water it planned to provide, but it remanded for ADWR to take into consideration the Conservation Area’s water rights claims relating to the *physical availability* of adequate water for Tribute. It also vacated the attorney’s fees award. BLM, Silver/Gerrodette, Pueblo Del Sol, and ADWR each filed a petition for review. All four petitions agree the court of appeals’ decision is wrong, but for different reasons.

## ISSUES:

1. Whether the court of appeals erred to the extent it requires ADWR on remand to consider BLM’s federal reserved water rights under ADWR’s regulation governing the physical availability of a groundwater supply, A.A.C. 12-15-716(B).
2. Whether, under A.R.S. section 45-108, ADWR may designate Pueblo’s water supply as adequate without evaluating potential legal conflicts between Pueblo’s groundwater pumping and BLM’s senior federal reserved water rights that could render Pueblo’s water supply legally unavailable, solely because those water rights have not been adjudicated.
3. Whether the private attorney general doctrine is applicable and permits an award of fees against Pueblo.

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