

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2013-000264-001 DT

06/06/2014

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
M. Nielsen
Deputy

ROBIN SILVER
PATRICIA GERRODETTE
UNITED STATES OF AMERICA U S
DEPARTMENT OF INTERIOR BUREAU OF
LAND MANAGMEMENT

ERIK RYBERG
JOY E HERR-CARDILLO
UNITED STATES OF AMERICA U S
DEPARTMENT OF INTERIOR BUREAU
OF LAND MANAGMEMENT
C/O LEE LEININGER 999 18TH ST S
STE 370
DENVER CO 80202

v.

PUEBLO DEL SOL WATER COMPANY (001)
SANDRA A FABRITZ-WHITNEY (001)
ARIZONA DEPARTMENT OF WATER
RESOURCES (001)
SOUTHERN ARIZONA HOME BUILDERS
ASSOCIATION (001)
HOME BUILDERS ASSOCIATION OF
CENTRAL ARIZONA (001)

WILLIAM P SULLIVAN
KENNETH C SLOWINSKI
RHETT ANTHONY BILLINGSLEY

JANET L RONALD
OFFICE OF ADMINISTRATIVE
HEARINGS
REMAND DESK-LCA-CCC

HIGHER COURT RULING / REMAND

Plaintiffs-Appellants Robin Silver, Patricia Gerrodette, and the United States of America, United States Department of the Interior, Bureau of Land Management ask this Court to review the Order, dated April 11, 2013, wherein Defendant-Appellee the Director of the Arizona Department of Water Resources affirmed the draft decision of the Administrative Law Judge and issued a Determination of Adequate Water Supply to Defendant-Appellee Pueblo Del Sol Water Co. For the following reasons, this Court vacates that Order.

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I. FACTUAL BACKGROUND.

The litigation involving the San Pedro River appears to have started on April 3, 1978, when ASARCO Inc. filed a petition with the State Land Department for the adjudication of the San Pedro River Watershed including Aravaipa Creek. Those claims and numerous other claims involving the Gila River are now being litigated in what is known as the Gila River General Stream Adjudication (GRGSA), which is currently pending in the Maricopa County Superior Court.

On August 12, 1985, the Huachuca Audubon Society, Chiricahua Sierra Club, and the Defenders of Wildlife filed with Defendant-Appellee the Arizona Department of Water Resources (ADWR) an application to appropriate instream flows in certain areas of the San Pedro River. On May 22, 1986, this application was assigned to Plaintiff-Appellant the United States Department of the Interior, Bureau of Land Management (BLM). On April 3, 1992, ADWR issued to BLM Certificated Water Right (CWR) No. 90103.0000 granting to the United States “a right to the use of the waters flowing in the San Pedro River . . . for recreation and wildlife, including fish.”

In 1988, the United States Congress established the San Pedro Riparian National Conservation Area (SPRNCA), which consisted of approximately 56,000 acres of BLM-managed federal lands surrounding the San Pedro River. Arizona-Idaho Conservation Act of 1988, Pub. L. No. 100-696, 102 Stat. 4571 (the Act). The San Pedro River is the last free-flowing river in the desert Southwest, and Congress established SPRNCA in order to protect the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources of that area. In the Act, Congress expressly reserved a quantity of water (FRWR) sufficient to fulfill SPRNCA’s purposes, and that reserved water right had a priority date of November 18, 1988, the date the Act became law. Congress did not specify the quantity of water reserved and instead directed the Secretary of the Interior to file a claim for the quantification of such rights in an appropriate adjudication.

In 1989, the United States, on behalf of the BLM, filed a Statement of Claim in the GRGSA, and subsequently filed three Amended Statements of Claim for SPRNCA, which covered both surface water as well as groundwater. On March 4, 2009, the Special Master in the GRGSA found the United States holds an express FRWR to accomplish the purposes of SPRNCA reservation. On March 19, 2010, the Special Master ruled CWR No. 90103.0000 was a perfected vested appropriative property right of the United States.

Defendant-Appellee Pueblo Del Sol Water Co. (PDS) was formed in 1972, and that year the Arizona Corporation Commission (ACC) granted to PDS a Certificate of Convenience and Necessity (CC&N). PDS’s service area covers about 4,800 acres in Cochise County. Castle & Cooke (C&C), which owns PDS, developed plans to construct a development known as Tribute, which would be located on about 1,900 acres in Sierra Vista, and would consist of approximately 7,000 homes and offices, together with other commercial development. In order to receive permission from Cochise County to construct that development, C&C and PDS had to show PDS had an adequate water supply. PDS currently pumps about 1,600 acre-feet of water, and would need to pump 4,870 acre-feet to supply water for Tribute.

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On June 23, 2011, PDS submitted an application for a Designation of Adequate Water Supply (DAWS), and on January 25, 2012, submitted a revised application. On April 18 and 25, 2012, ADWR published notice of the application, and Plaintiffs-Appellants BLM, Silver, and Gerrodette submitted timely objections. On July 23, 2012, ADWR issued a draft decision and order indicating the application satisfied all requirements for a DAWS and approved the application. BLM, Silver, and Gerrodette each file timely appeals.

On August 31, 2012, ADWR scheduled a hearing before Administrative Law Judge Thomas Shedden of the Office of Administrative Hearings. The Notice of Hearing provided Appellants raised the following issues:

A. Whether Pueblo Del Sol failed to demonstrate, and ADWR erroneously determined, that the water proposed to be pumped will be continuously, legally and, physically available to satisfy the proposed use for at least 100 years;

B. Whether ADWR erroneously refused to consider the effects of proposed pumping on the flow of the San Pedro River;

C. Whether ADWR erroneously refused to consider the effects of the proposed pumping on water rights of the Bureau of Land Management, including federal reserved water rights for the San Pedro Riparian National Conservation Area;

D. Whether Pueblo Del Sol failed to demonstrate, and ADWR erroneously determined, that the water proposed to be pumped will be physically available for at least 100 years, given evidence of declining groundwater levels and increasing pumping in the area.

November 26 through 30, 2012, the ALJ held hearings and issued a decision, dated March 12, 2013, concluding PDS's proposed diversion of 4,870 acre-feet per year was legally available. In doing so, the ALJ found (1) PDS was a private water company with a CC&N and thus the ADWR appropriately determined PDS met the requirement that the water was legally available, (2) ADWR did not err in determining it lacked the authority to consider whether the diversion of those 4,870 acre-feet of water would affect the flow of the San Pedro River, and (3) ADWR did not err in determining it lacked the authority to consider whether the diversion of those 4,870 acre-feet of water conflicted with the FRWR for the SPRNCA.

On April 11, 2013, ADWR issued its decision accepting and affirming the ALJ decision with certain modifications. On May 15, 2013, Plaintiff-Appellant Silver filed a Complaint for Judicial Review of Administrative Decision in LC 2013-000264. On May 17, 2013, Plaintiff-Appellant the BLM filed a Complaint for Judicial Review of Administrative Decision in LC 2013-000271, and Plaintiff-Appellant Gerrodette filed a Complaint for Judicial Review of Administrative Decision in LC 2013-000272, both of which have been consolidated with LC 2013-000264. This Court has jurisdiction pursuant to A.R.S. § 12-124(A) and A.R.S. § 12-905(A).

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II. GENERAL STANDARDS FOR REVIEW.

The Arizona statutory authority and case law define the scope of administrative review:

In reviewing an agency's decision pursuant to the Administrative Review Act, the superior court must affirm the agency action unless it is "not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion."

Carlson v. Arizona St. Pers. Bd., 214 Ariz. 426, 153 P.3d 1055, ¶ 13 (Ct. App. 2007), quoting A.R.S. § 12-910(E).

The court must defer to the agency's factual findings and affirm them if supported by substantial evidence. If an agency's decision is supported by the record, substantial evidence exists to support the decision even if the record also supports a different conclusion.

Gaveck v. Arizona St. Bd. of Podiatry Exam., 222 Ariz. 433, 215 P.3d 1114, ¶ 11 (Ct. App. 2009) (citations omitted).

[I]n ruling on the sufficiency of the evidence in administrative proceedings, courts should show a certain degree of deference to the judgment of the agency based upon the accumulated experience and expertise of its members.

Croft v. Arizona St. Bd. of Dent. Exam., 157 Ariz. 203, 208, 755 P.2d 1191, 1196 (Ct. App. 1988).

A trial court may not function as a "super agency" and substitute its own judgment for that of the agency where factual questions and agency expertise are involved.

DeGroot v. Arizona Racing Comm'n, 141 Ariz. 331, 336, 686 P.2d 1301, 1306 (Ct. App. 1984).

[The reviewing court must] view the evidence in a light most favorable to upholding the Board's decision and "will affirm that decision if it is supported by any reasonable interpretation of the record."

Baca v. Arizona D.E.S., 191 Ariz. 43, 46, 951 P.2d 1235, 1238 (Ct. App. 1998) (cites omitted).

A question of statutory interpretation involves a question of law, and [the reviewing court] is not bound by the trial court's or the agency's conclusions [about] questions of law.

Siegel v. Arizona St. Liq. Bd., 167 Ariz. 400, 401, 807 P.2d 1136, 1137 (Ct. App. 1991).

On appeal, [the reviewing court] is free to draw its own conclusions in determining if the Board properly interpreted the law; however, the Board's interpretation of statutes and . . . regulations is entitled to great weight.

Baca, 191 Ariz. at 45-46, 951 P.2d at 1237-38.

Judicial deference should be given to agencies charged with the responsibility of carrying out specific legislation, and ordinarily an agency's interpretation of a statute or regulation it implements is given great weight. However, the agency's interpretation is not infallible, and courts must remain the final authority on critical questions of statutory construction.

U.S. Parking Sys. v. City of Phoenix, 160 Ariz. 210, 211, 772 P.2d 33, 34 (Ct. App. 1989) (citations omitted).

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III. ISSUE: WAS THERE SUBSTANTIAL EVIDENCE TO SUPPORT THE ACTION OF THE AGENCY, AND WAS THE ACTION OF THE AGENCY CONTRARY TO LAW, ARBITRARY AND CAPRICIOUS, OR AN ABUSE OF DISCRETION.

The applicable statute provides in part as follows:

A. In areas outside of active management areas established pursuant to chapter 2, article 2 of this title, the developer of a proposed subdivision including dry lot subdivisions, regardless of subdivided lot size, prior to recordation of the plat, shall submit plans for the water supply for the subdivision and demonstrate the adequacy of the water supply to meet the needs projected by the developer to the director. The director shall evaluate the plans and issue a report on the plans.

B. The director shall evaluate the proposed source of water for the subdivision to determine whether there is an adequate water supply for the subdivision, and shall forward a copy of the director's report to the state real estate commissioner and the city, town or county responsible for platting the subdivision.

....

I. For the purposes of this section, "adequate water supply" means both of the following:

1. Sufficient groundwater, surface water or effluent of adequate quality will be continuously, legally and physically available to satisfy the water needs of the proposed use for at least 100 years.

2. The financial capability has been demonstrated to construct the water facilities necessary to make the supply of water available for the proposed use, including a delivery system and any storage facilities or treatment works. The director may accept evidence of the construction assurances required by § 9-463.01, 11-823 or 32-2181 to satisfy this requirement.

A.R.S. § 45-108.

Plaintiff-Appellant Silver contends ADWR's Final Decision was arbitrary, capricious, and contrary to law because of the following:

1. ADWR was required to determine whether PDS had a legal right to the proposed groundwater supply.
2. ADWR did not account for BLM's Federal Reserved Water Rights.
3. ADWR's interpretation conflicts with federal law.
4. All evidence demonstrated PDS's water supplies were likely inadequate.
5. ADWR's regulations conflict with A.R.S. § 45-108.
6. ADWR erroneously concluded only the Adjudication Court could determine whether PDS's water supply was adequate.

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Plaintiff-Appellant BLM contends ADWR's Final Decision was arbitrary, capricious, and contrary to law because of the following:

1. ADWR's regulations are facially contrary to A.R.S. § 45-108.
2. ADWR's regulations as applied violate to A.R.S. § 45-108.
3. ADWR erred in determining PDS had a legally available water supply for 100 years based solely on the fact that PDS possessed a CC&N issued by the ACC.

Plaintiff-Appellant Gerrodette contends ADWR's Final Decision was arbitrary, capricious, and contrary to law because of the following:

1. Arizona law requires a demonstration of legal availability.
2. Under applicable federal law, ADWR was required to consider the connection between surface water and groundwater.
3. PDS did not establish the water was legally available in light of the federal claims.
4. ADWR's reliance on a CC&N to establish legal availability was contrary to law.

Defendants-Appellees acknowledge ADWR did not consider whether PDS's proposed groundwater pumping would have an adverse effect on either CWR No. 90103.0000 granted by ADWR to the United States or the FRWR necessary to fulfill SPRNCA's purposes, but contends ADWR was not legally required to do so. Defendants-Appellees acknowledge PDS was required to demonstrate that 4,870.39 acre-feet of groundwater would be physically, continuously, and legally available to satisfy the water needs of the proposed use for at least 100 years, but contends PDS did so by the following:

1. *Physically available.* This required a showing the static water level for pumping would not exceed 1,200 feet below land surface after 100 years of groundwater pumping. PDS presented evidence the static water level for pumping would not exceed 650 feet below land surface after 100 years of groundwater pumping.
2. *Continuously available.* This required a showing that adequate delivery, storage, and treatment works would be in place in a timely manner to serve the proposed used on a continuous basis for 100 years. PDS contends it made that showing.
3. *Legally available.* This required a showing for a private water company that it has a Certificate of Convenience and Necessity issued by the Arizona Corporate Commission, which PDS has.

Defendants-Appellees contend ADWR was not required to consider the water claims of the BLM in determining whether the amount of water requested by PDS is legally available because those claims are not yet quantified, which may only be done in the GRGSA. As noted above, the litigation involving the San Pedro River started on April 3, 1978, so that litigation has been ongoing for 36 years with no end in sight. Defendants-Appellees appear to concede the BLM has FRWR necessary to fulfill SPRNCA's purposes, and that will amount to some water. Moreover, on March 19, 2010, the Special Master in the GRGSA ruled CWR No. 90103.0000 was a perfected

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vested appropriative property right of the United States, and those water rights were quantified. ADWR contend it was not required to consider CWR No. 90103.0000 because that amount of water may ultimately be determined in the GRGSA as part of the water necessary to satisfy the FRWR necessary to fulfill SPRNCA's purposes. While that may be the case in the future, that does not change the fact that the Special Master ruled CWR No. 90103.0000 was a perfected vested appropriative property right of the United States. This Court therefore concludes, in determining whether the amount of water requested by PDS is legally available, the ADWR was required to consider both the existing and potential legal claims that already exist and determine whether the amount of water requested by PDS will have an effect on those claims.

Plaintiffs-Appellants contend the purpose of requiring that "[s]ufficient groundwater, surface water or effluent of adequate quality will be continuously, legally and physically available to satisfy the water needs of the proposed use for at least 100 years" is to assure persons buying home in a development that they will not find several years later either that no water is available, or else that it is available only at exorbitant prices. When this Court asked counsel for PDS what would happen if, 20 years from now it was determined (1) SPRNCA's FRWR was a certain number of acre-feet, (2) the amount of water PDS was pumping was infringing on that FRWR, and (3) PDS no longer was able to pump enough water from its wells to satisfy the water needs of the proposed development, counsel said PDS would have to make up the difference from some other source, such as trucking it in. When asked what would happen if this raised the cost to supply water to the average homeowner from \$100 to \$500 per month, the response was PDS was a regulated industry and therefore PDS would expect the Arizona Corporation Commission would authorize a water rate that would give PDS a reasonable return on its investment. It thus appears if the purpose of the 100 year requirement is to assure home buyers that water will be available, the determination whether water is legally available should include an assessment of potential and existing legal claims against that water,

Plaintiffs-Appellants have asked this Court to vacate the April 11, 2013, Order of the ADWR and remand the matter to ADWR with directions to consider SPRNCA's federal reserved water rights and the other Arizona water rights possessed by the BLM. Plaintiffs-Appellants have provided to this Court authorities and arguments in support of their position. Defendants-Appellees have asked this Court to affirm the Order of the ADWR and have provided to this Court authorities and arguments in support of their position. This Court concludes the authorities and arguments provided by Plaintiffs-Appellants this Court adopts those authorities and arguments in support of its decision.

IV. CONCLUSION.

Based on the foregoing, this Court concludes the Arizona Department of Water Resources erred in concluding Pueblo Del Sol Water Co. had an Adequate Water Supply that was legally available. This Court further concludes the Plaintiffs-Appellants are entitled to reasonable attorneys' fees.

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IT IS THEREFORE ORDERED vacating the Order, dated April 11, 2013, of the Arizona Department of Water Resources.

IT IS FURTHER ORDERED, if any of the Plaintiffs-Appellants want this Court to award reasonable attorneys' fees, they shall submit the appropriate request and supporting documents by **June 26, 2014**.

IT IS FURTHER ORDERED, by **June 26, 2014**, counsel for one of the Plaintiffs-Appellants shall submit to this Court a proposed form of judgment.

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NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.