

Silver v. Pueblo Del Sol Water Co.

Citation: Silver v. Pueblo Del Sol Water So., No. CV-16-0294-PR, 2018 WL 3763974 (Ariz. Aug. 9, 2018).

Date Filed: August 9, 2018

Opinion's Author: Justice Lopez

Joined By: Vice Chief Justice Brutinel, and Justices Timmer and Gould. (Chief Justice Bales and Justice Bolick authored separate opinions concurring in part and dissenting in part, in which Justice Pelander joined.)

Practitioners: For quick reference, please see the "Issue" and "Holding" sections.

Facts: The Arizona Department of Water Resources ("ADWR") gave an adequate water supply designation approving Pueblo Del Sol Water Company's ("Pueblo") application to supply water to a proposed development in Cochise County in 2013. Castle & Cooke, Inc., which owns Pueblo, proposed development approximately five miles from the San Pedro River and outside a statutory active management area, called "Tribute". Pueblo planned to provide the majority of Tribute's water services and calculated that it would need to increase its annual groundwater pumping to do so. Pueblo applied to ADWR for an adequate water supply designation. Plaintiffs objected that the increase in Pueblo's groundwater pumping would affect the flow of the San Pedro River and would therefore conflict with the Bureau of Land Management's (BLM) federal reserved water right.

Procedural History: The case is currently before the Arizona Supreme Court. The administrative law judge concluded that Pueblo demonstrated that water would be continuously, legally, and physically available and ADWR issued an order affirming this opinion. The superior court vacated ADWR's decision and concluded that the ALJ erred in concluding that Pueblo's water supply was "legally available." The Arizona Court of Appeals vacated the superior court's decision and remanded the matter to ADWR.¹ The court of appeals held that a consideration of BLM's unquantified water right under ADWR's "legal availability" regulation was not required.² The Arizona Supreme Court granted review.

Issue: A.R.S. section 45-108(I)(1) defines "adequate water supply" as meaning 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 one hundred years."³ Additionally, the statute requires a developer to demonstrate that it has "[t]he financial capability to construct the water facilities necessary to make the supply of water available for the proposed use."⁴ Is ADWR required to consider unquantified federal reserved water rights when it determines whether a developer has an adequate water supply for purposes of A.R.S. section 45-108?

¹ Silver v. Pueblo Del Sol Water Co., 384 P.3d 814, 827–28 (Ariz. Ct. App. 2016).

² *Id.* at 824–25.

³ ARIZ. REV. STAT. ANN. § 45-108(I)(1) (2018).

⁴ ARIZ. REV. STAT. ANN. § 45-108(I)(2) (2018).

Holding: No, A.R.S. section 45-108 does not require ADWR to consider unquantified federal reserved water rights.

Disposition: The decisions of the superior court and court of appeals are vacated. The approval of ADWR and the ALJ of Pueblo’s application is affirmed.

Rule: ADWR is not required to consider unquantified federal reserved water rights under its physical availability or legal availability analysis.

Reasoning:

- **Arizona Water Law:** The court began its discussion with an overview of Arizona water law and the federal reserved water rights doctrine. The court noted:

Although surface water and groundwater are governed by different legal regimes in Arizona, both are subject to the federal reserved water rights doctrine . . . [which] effectively modifies the doctrine of reasonable use . . . because it restricts an overlying landowner’s right to pump groundwater to the extent required “to preserve the waters necessary to accomplish the purpose of [a federal] reservation.”⁵

The court also noted that an adequate water supply designation from ADWR acts as another regulation on the use of water.⁶ The court considered ADWR’s regulations defining both physical and legal availability.⁷

- **Physical Availability Regulation:** The court agreed with the parties that the court of appeals “erred in directing ADWR to consider BLM’s unquantified federal reserved water right under ADWR’s physical availability regulation.”⁸ The court reasoned that Pueblo’s wells are located within its service area and its hydrologic model shows that groundwater will be withdrawn from a depth-to-static level of no more than 650 feet, thereby satisfying both prongs of ADWR’s physical availability regulation, A.A.C. R12-15-716(B)(2).⁹ Rather than require ADWR to measure the impact of the applicant’s proposed groundwater use on “existing uses”, the regulation requires ADWR measure the impact of “existing uses” on groundwater supply available for the applicant.¹⁰ The court concluded that Pueblo satisfied both prongs of the physical availability regulation, so ADWR is not required “to consider BLM’s unquantified federal reserved water right as part of the physical availability analysis.”¹¹

⁵ *Silver v. Pueblo Del Sol Water Co.*, No. CV-16-0294-PR, 2018 WL 3763974, at ¶¶ 12–13 (Ariz. Aug. 9, 2018) (quoting *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 989 P.2d 739, 749–50 (Ariz. 1999) (en banc)).

⁶ *Id.* at ¶ 14.

⁷ *Id.*

⁸ *Id.* at ¶ 16.

⁹ *Id.* at ¶ 18.

¹⁰ *Id.* at ¶ 20.

¹¹ *Id.*

- **Legal Availability Regulation:** The court then turned to an analysis of ADWR’s legal availability regulation, A.A.C. R12-15-718, and section 45-108(I). The former provides that when a private water company possesses a certificate of convenience and necessity (CC&N), it has a legally available supply of groundwater.¹² The latter requires that “a proposed development’s water supply be legally available ‘to satisfy the water needs of the proposed use for at least one hundred years.’”¹³ The court reasoned that the term “legally available” is ambiguous with regard to consideration of unquantified federal reserved water rights.¹⁴ The court noted that the statutory scheme does not mentioned federal reserved water rights, it does not define “legally available”, and it does not make apparent that it encompasses unquantified water rights that cannot be enforced now.¹⁵ However, the court turned to the history of section 45-108 and ADWR’s regulations to support the conclusion that the legislature intended to adopt ADWR’s construction of “legal availability” when it amended the statute.¹⁶ Additionally, the court underscored the nature of Arizona’s bifurcated water rights regime in explaining ADWR’s regulation addressing the legal availability of surface water.¹⁷ “ADWR’s legal availability regulation reflects the operation of the reasonable use doctrine.”¹⁸ Finally, the court noted that “ADWR does not have authority to quantify BLM’s rights; that is the exclusive domain of the Gila Adjudication.”¹⁹
 - **Injunction:** The court rejected a requirement for ADWR to conduct an anticipatory injunction analysis. Only an injunction based on a federal reserved water right could legally inhibit Pueblo’s right to pump, because groundwater is subject to both the reasonable use and federal reserved water rights doctrines.²⁰
 - **Protection:** The court then emphasized that section 45-108 provides consumers with various protections, including developer demonstration that it has a 100-year supply of water, developer demonstration that it has the financial capability to construct necessary water supply facilities, and county ability to automatically deny plat approval to a developer who fails to satisfy any of the statute’s requirements.²¹ The court further reasoned that the statute was not designed to eliminate all water supply risk for consumers, nor does it “require developers to demonstrate absolute certainty of supply.”²² In sum,

¹² *Id.* at ¶ 21 (citing ARIZ. ADMIN. CODE § R12-15-718 (2018)).

¹³ *Id.* (citing ARIZ. REV. STAT. ANN. § 45-108(I) (2018)).

¹⁴ *Id.* at ¶ 23.

¹⁵ *Id.*

¹⁶ *Id.* at ¶ 25–26.

¹⁷ *Id.* at ¶ 29.

¹⁸ *Id.*

¹⁹ *Id.* at ¶ 32.

²⁰ *Id.* at ¶ 36.

²¹ *Id.* at ¶ 39 (citing ARIZ. REV. STAT. ANN. § 45-108(I)(1)–(2) (2018); ARIZ. REV. STAT. ANN. § 11-823(A) (2018)).

²² *Id.* at ¶ 40.

the majority reasoned that it is the responsibility of the legislature to determine whether the adequate water supply designation process should further protect consumers.