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ARIZONA SUPREME COURT

IN RE GENERAL ADJUDICATION
OF ALL RIGHTS TO USE WATER IN
THE GILA RIVER SYSTEM AND
SOURCE

IN RE GENERAL ADJUDICATION
OF ALL RIGHTS TO USE WATER IN
THE LITTLE COLORADO SYSTEM
AND SOURCE

No. WC-11-0001-IR

Maricopa County Superior Court
Case Nos.: W-1, W-2, W-3, and W-4
(Consolidated) (Gila)
[Contested Case No.: W1-104]

Apache County Superior Court
Case No. 6417 (LCR)
[Contested Case No.: 6417-100]

**ARIZONA DEPARTMENT OF WATER RESOURCES
AMICUS CURIAE BRIEF**

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BACKGROUND

Historically, within Arizona's populated regions, groundwater has been pumped faster than it has been replaced naturally. *See* A.R.S. § 45-401(A); Arizona Groundwater Management Study Commission, Final Report (1980) [App. A]. This condition, known as groundwater overdraft, creates significant problems, including increased costs for drilling wells, increased costs for pumping groundwater, and the eventual loss of supply. United States Geological Survey, USGS Fact Sheet 103-03, Ground-Water Depletion Across the Nation (2003) [App. B]. Water quality also suffers because groundwater pumped from greater depths typically contains more salts and minerals. *Id.* In areas of severe groundwater depletion, the earth's surface may sink, or "subside," causing cracks or fissures that can damage roads, building foundations, and other underground structures. *Id.*

Recognizing continued depletion of finite groundwater supplies was threatening to do substantial injury to the economy and welfare of the State, in 1980 the Arizona Legislature enacted the Groundwater Management Act, ("GMA") "in the interest of protecting and stabilizing the general economy and welfare of this state and its citizens." A.R.S. § 45-401(B); 1980 Ariz. Sess. Laws, 4th Spec. Sess., ch. 1. The GMA, found at A.R.S. Title 45, Chapter 2, creates a framework to manage the State's water supply for the future. To accomplish these

goals, the GMA established the Arizona Department of Water Resources (“ADWR”) and established a regulatory system of water management to respond to different groundwater conditions. The most restrictive management system is applied to the most heavily populated areas of the State, called Active Management Areas (“AMAs”), where groundwater overdraft has been most severe.¹

Among the methods² included in the GMA to preserve long-term water supplies is the assured water supply program. “Assured water supply” is defined to mean, among other things, that a water supply is available to meet the water needs of the proposed use for at least 100 years and that any projected groundwater use is consistent with achievement of the AMA’s management goal. A.R.S. § 45-576(J)(1)-(2). This program requires developers of subdivided land in an AMA to obtain a determination of assured water supply from ADWR before recording the subdivision plat or obtaining a public report from the Arizona Department of Real Estate. A.R.S. § 45-576(A).

¹ Most of the GMA’s focus on water management activities occurs within the five AMAs that are generally defined by the groundwater basins and sub-basins around Phoenix, Case Grande, Prescott, Tucson and Nogales. *See* A.R.S. §§ 45-411 and 45-411.03.

² The GMA also works to preserve long-term water supplies by restricting new groundwater withdrawals within the AMAs (*see, e.g.*, A.R.S. § 45-451(A)(1)), prohibiting new lands from being irrigated in AMAs (A.R.S. § 45-452), and requiring ADWR to establish mandatory conservation requirements for persons withdrawing, distributing and using groundwater within AMAs (A.R.S. §§ 45-563 through 45-568.02).

There are two options for a developer of a new subdivision within an AMA to receive the necessary determination of assured water supply. First, the developer can obtain a certificate of assured water supply by demonstrating that there is an assured water supply for that subdivision. *Id.* Alternatively, a developer can obtain a commitment of water service from a municipal provider³ that has been designated by ADWR as having an assured water supply. *Id.* ADWR has adopted rules to quantify the amount of groundwater an applicant for a certificate of assured water supply or a designation of assured water supply may use consistent with the AMA's management goal. Ariz. Admin. Code R12-15-722 through R12-15-727 (2011). Depending on the location of the use and type of applicant, the rules allow little or no mined groundwater to be used by an applicant.

QUESTIONS PRESENTED FOR REVIEW

ADWR does not intend to brief the Court on the two issues identified for interlocutory review in this matter. Rather, ADWR seeks to provide additional information for the Court to consider in making its determination.

I. A Grant of Federal Reserved Water Rights for State Trust Lands Could Invalidate the GMA.

In the State of Arizona's Motion for Partial Summary Judgment Establishing the Existence of Federal Reserved Water Rights for State Trust Lands filed on

³ "Municipal provider' means a city, town, private water company or irrigation district that supplies water for non-irrigation use." A.R.S. § 45-561(10); *see also* A.A.C. R12-15-701(49).

November 22, 2002 (“Motion”), the Arizona State Land Department (“ASLD”) referred to a lack of an adequate water supply as having a restraining effect on ASLD’s ability to maximize financial support for the federal purposes identified in the Enabling Act. (App. C, p. 12). ASLD argued that “[a]lmost every income-producing use of State Trust Lands depends upon the availability of water” (App. C, p. 5) and that the court “can and should determine and declare as a matter of law that State Trust Lands have reserved rights to the waters appurtenant to such lands in the minimum amount needed to fulfill the purpose of the reservation of generating the most substantial possible income for the Trust beneficiaries.” (App. C, p. 12).

ADWR does not intend to address the question of whether State Trust Lands have federal reserved water rights. Instead, the purpose of this brief is to advise the Court of the consequences on water management in the State that could result if ASLD were to prevail in its argument.

This Court noted in 1999 that “the [United States] Supreme Court has defined the reserved rights doctrine as an exception to Congress’s deference to state water law,” and “we may not defer to state law where to do so would defeat federal water rights.” *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 195 Ariz. 411, 419, 989 P.2d 739, 747 (1999). Consequently, if this Court were to hold that State Trust Lands have federal

reserved water rights, the result may be that State Trust Lands are exempt from State water law, including the pumping restrictions of the GMA.⁴

A.R.S. § 45-455 provides that the GMA “applies to all lands owned by the State of Arizona and any of its political subdivisions.”⁵ The plain language of A.R.S. § 45-455 contains no exemption for State Trust Lands. A holding that State Trust Lands have reserved water rights that are exempt from the pumping restrictions in the GMA could arguably invalidate A.R.S. § 45-455 because the statute could not be applied as written.

Invalidating A.R.S. § 45-455 could actually be much more significant than simply exempting State Trust Lands from the pumping restrictions in the GMA. When it was enacted, the GMA included a nonseverability clause which provides

⁴ In the State of Arizona’s Motion for Leave to Amend Motion for Partial Summary Judgment filed on May 19, 2006 and the accompanying State of Arizona’s Amended Motion for Partial Summary Judgment Establishing the Existence of Federal Reserved Water Rights for State Trust Lands, ASLD made it clear that it is seeking an exemption from the GMA for State Trust Lands within the Prescott AMA. (I.R. 118.) ASLD pointed to the approximately 65,000 acres of State Trust Lands within the Prescott AMA and stated that under the state regulatory scheme, these lands cannot obtain an assured water supply and consequently “cannot be sold or leased at their highest and best use in order to maximize the financial support for the federal purposes identified in the Enabling Act.” (I.R. 118, p. 14.) ASLD argued that because Congress intended that State Trust Lands generate the most substantial revenues possible, “it follows that Congress intended to reserve for the benefit of the Trust the right to use the water appurtenant to the State Trust Lands.” (I.R. 118, p. 14.) The Special Master denied ASLD’s Motion for Leave to Amend.

⁵ This provision was contained within the original GMA. 1980 Ariz. Sess. Laws, 4th Spec. Sess., ch.1, § 86.

that, “[i]f any portion of this act is finally adjudicated invalid, the entire act shall be null and void. The provisions of this act are intended to be nonseverable.” 1980 Ariz. Sess. Laws, 4th Spec. Sess., ch. 1, § 172. Through operation of this clause, the invalidation of A.R.S. § 45-455 could render the entire GMA null and void.

II. Invalidation of the GMA Could Have Significant Negative Economic Impacts on the Economy and Welfare of the State.

In the years subsequent to the enactment of the GMA, the population of Arizona has nearly tripled.⁶ Despite that growth, the GMA has generally performed as intended by restricting groundwater withdrawals and eliminating or reducing overdraft in the AMAs.

Most homebuyers or renters have no knowledge of the enormous role that the GMA plays in their purchase or lease. Most people assume that a water supply is part of the purchase or rental, which is exactly what the assured water supply program was designed to do – ensure that AMA residents need not worry about water flowing from their taps.

In the absence of the GMA and its assured water supply program, such an assumption disappears. Purchasers of new homes or even individuals who have owned a home for years would not have an assured water supply. Home prices could fall, businesses could move away and the economy of Arizona could be

⁶ According to the United States Census, Arizona’s population in 1980 was 2,716,546. [App. D.] Arizona’s population in 2010 was 6,482,505. [App. D.]

hard-hit. Worse still, the people of Arizona could witness firsthand the negative impacts of overdraft that the Legislature sought to prevent by enacting the GMA, such as the loss of supply, the degradation of water quality and subsidence of their homes or neighborhoods.

This Court acknowledged the impacts of overdraft and the importance of the GMA in its 1981 decision *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 83, 638 P.2d 1324, 1329, when the Court stated, “We do not doubt but that the overdraft of groundwater in this state is a serious problem which has no chance of correcting itself, and that it is necessary for comprehensive legislation to both limit groundwater use and allocate its use among competing interests.” Invalidation of the GMA has the potential to undo these protections and plunge the existing system of groundwater regulation, and all that relies on that system of water management and planning, into uncertainty.

If the entire GMA were to be declared null and void, unrestricted groundwater pumping could begin again with vigor subject only to restrictions imposed by the courts to protect federal reserved rights. All parties would be rewarded in the short-term by pumping as much groundwater as could reasonably be used beneficially.⁷ The Prescott AMA, which has no physical access to water

⁷ As the Arizona Groundwater Management Study Commission noted in 1980, “no uses of groundwater on the ‘land from which it is pumped’ have ever been

from the Colorado River, could expect to experience water supply problems relatively quickly. Ultimately, while ASLD might benefit in the short-term from increased revenue from State Trust Lands, the long-term outlook could be bleak.

ASLD's claim that lack of water limits the revenue that may be obtained for State Trust Lands is debatable.⁸ But even if ASLD's claim were true, the potential outcome of a decision that State Trust Lands are exempt from the GMA - the invalidation of the entire GMA – could have a much more devastating effect on the value of State Trust Lands.

As pumping draws down the aquifer, as wells are required to go deeper and deeper, as water quality declines and as subsidence begins to affect local infrastructure, land prices could fall for everyone in Arizona as a consequence. ASLD revenues could decline. It is entirely plausible that those revenues would fall below present-day values.

determined unreasonable or non-beneficial.” Arizona Groundwater Management Study Commission, Final Report (1980) [App. A].

⁸ The assured water supply program incorporates mechanisms through which State Trust Lands in all the AMAs could obtain assured water supply determinations. Although surface water supplies may be limited in some areas, effluent may be used to help demonstrate an assured water supply. A.A.C. R12-15-716(H); A.A.C. R12-15-717(E); and A.A.C. R12-15-718(E). Additionally, grandfathered rights to use groundwater may be extinguished in exchange for “extinguishment credits” to allow groundwater as an assured water supply to the extent that it is physically available. A.A.C. R12-15-722(A)(2) and A.A.C. R12-15-723.

III. Exempting State Trust Lands from the GMA Could Have Significant Negative Economic Impacts on the Economy and Welfare of the State Even If the GMA is Not Invalidated.

Finally, ADWR recognizes the possibility that the Court could find that State Trust Lands have a federal reserved water right without declaring the entire GMA null and void. However, even if the GMA remains intact, a finding that State Trust Lands hold federal reserved water rights could have substantially similar impacts to those discussed above. While everyone but ASLD would still be restricted by the GMA, the removal of restrictions from ASLD's pumping could have significant impacts on all parties.

ASLD has previously estimated that 6.2 million acre-feet per year will be needed for State Trust Lands within the Gila River Basin (I.R. 125, ¶ 1), and that a minimum of 1.7 million acre-feet per year will be needed for the State Trust Lands in the Little Colorado River Basin in order to fulfill the purposes for which the lands were reserved. (I.R. 125, ¶ 2.) The estimated amount of water needed by ASLD exceeds the present water use for the entire State of Arizona. Recent studies indicate that Arizona's total statewide water use is measured at approximately 7.0 million acre-feet per year.⁹ Should ASLD prevail on its claim and seek to utilize

⁹ United States Geological Survey, Circular 1344, Estimated Use of Water in the United States in 2005 (2009) (*available at* <http://pubs.usgs.gov/circ/1344/pdf/c1344.pdf>) [*see excerpt at App. E*].

the estimated amount of water needed to maximize the revenue from State Trust Lands, the use could have a significant negative impact on the State.

For example, unrestricted pumping on State Trust Lands within AMAs could take groundwater supplies away from existing subdivisions that obtained an assured water supply determination based at least in part on the continued availability of that groundwater supply. Existing businesses that rely on a stable water supply, such as farms, computer chip manufacturing plants and vacation resorts, may be forced to go out of business or to relocate to another state. The State's ability to attract new industries and jobs may be severely weakened because of the lack of a stable and secure water supply on lands that are not State Trust Lands.

CONCLUSION

ADWR requests that the Court consider the potential outcome that granting a federal reserved water right to State Trust Lands could have. The situation that the Arizona Legislature sought to prevent by enacting the GMA –unrestricted groundwater pumping causing “substantial injury to the general economy and welfare of this state” - could be the result. A.R.S. § 45-401(A).

Respectfully submitted this 12th day of April, 2012.

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