

1-1-2017

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

Trevor C. Lambirth

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>



Part of the [Law Commons](#)

Custom Citation

Trevor C. Lambirth, Court Report, Silver v. Pueblo Del Sol Water Co., 384 P.3d 814 (Ariz. Ct. App. 2016), 20 U. Denv. Water L. Rev. 449 (2017).

This Court Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

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

court reasoned that appurtenance is not limited to surface water and extrapolated from Supreme Court precedent that the United States can protect groundwater and, along that vein, impliedly reserved water may include appurtenant groundwater. Further, the court considered the Tribe's reliance on groundwater when reasoning that the minimal surface water availability conditions the Tribe's survival on groundwater access. From this line of reasoning, the court clarified that the *Winters* doctrine purported to provide sustainable livelihoods to Tribes inhabiting reservations in arid areas, like the Agua Caliente Reservation, and included access to both appurtenant surface water and groundwater. Therefore, the Tribe's implied reserved water right included groundwater.

Third, the court addressed whether the above two holdings withstood the water agencies' arguments that: (1) the Tribe received water pursuant to California's correlative rights doctrine; (2) the Tribe did not need a federal reserved right to groundwater in light of its allotted surface water from the Whitewater River Decree; and (3) the Tribe never drilled for groundwater on its reservation. The court rejected each in turn. First, federal water rights, such as the implied federal reserved water right, preempt state water rights. Second, *New Mexico* did not inquire into the *current* necessity of water, it focused on whether the reservation's *inception* purported such a necessity. Third, lacking historical access to groundwater on the reservation did not foreclose the Tribe's current access to groundwater. Therefore, compounded with the federal primacy of reserved water rights, the Tribe's implied federal water right to groundwater remained intact.

Accordingly, the court affirmed the district court holding that the United States impliedly reserved appurtenant groundwater when creating the Agua Caliente Reservation.

Gia Austin

STATE COURTS

ARIZONA

Silver v. Pueblo Del Sol Water Co., 384 P.3d 814 (Ariz. Ct. App. 2016) (holding: (i) that the Arizona Department of Water Resources' ("ADWR") interpretation of "legal availability" was valid under the statute defining "adequate water supply"; (ii) that ADWR must consider an unquantified federal reserved water right for the purposes of an Adequate Water Supply Designation ("AWSD"); and (iii) that ADWR was not required to separately consider the impact of pumping on a conservation area and the local surface or groundwater).

In 1988, the United States Congress designated roughly thirty-six miles of the San Pedro River basin ("Basin") as a national conservation area ("Conservation Area"), and simultaneously created a federal reserved water right for the Conservation Area "in a quantity sufficient to fulfill the purpose" of protecting the public lands surrounding the River. The Bureau of Land Management ("BLM") manages the Conservation Area. Since 1989, BLM has filed three statements of claim for the Conservation Area covering surface and groundwater.

The General Stream Adjudication for the Gila River System (“Gila Adjudication”), active for approximately 40 years, has exclusive jurisdiction to adjudicate the conflicting claims and water rights for the Basin. BLM federal reserved rights are part of the Gila Adjudication. The Gila Adjudication will determine whether BLM “has a reserved right to the groundwater ‘where other waters are inadequate to accomplish’” the reservation’s purpose and the minimum amount necessary to achieve that purpose.

Pueblo Del Sol Water Company (Pueblo) is a private water company. Pueblo serves an area five miles from the San Pedro River. In June 2011, Pueblo applied for an AWSDD, which would allow it to pump groundwater to a planned community subdivision and other projects. Pueblo’s application included its Certificate of Convenience and Necessity (“CC&N”), a certification provided by the Arizona Corporation Commission to public utilities. Pueblo sent its application to ADWR, the agency that reviews AWSDD applications. Ariz. Rev. Stat. § 45–108 requires subdivision developments outside active water management areas to show the existence of an adequate water supply as designated by ADWR. Under ADWR’s regulations, an adequate supply requires continuously legally and physically available water to satisfy the proposed needs for at least one hundred years. BLM objected to the Pueblo’s application, citing failure to properly analyze availability of water under ADWR’s regulations.

ADWR rejected the objection and accepted Pueblo’s application. BLM appealed to the Superior Court of Arizona, which reversed ADWR’s decision. The lower court held that ADWR abused its discretion because ADWR failed to meet its statutory duty to ensure that the water source will be available for at least 100 years. The lower court found that ADWR’s definition of “legal availability” erroneously allowed a decision to be based solely on whether the applicant had a CC&N. ADWR and Pueblo appealed the judgment.

On appeal, the Court of Appeals of Arizona decided three issues: (1) whether ADWR’s interpretation of “legal availability” under the statute defining adequate water supply was valid; (2) whether ADWR should have considered BLM’s unquantified reserved water right in its AWSDD determination; (3) and whether ADWR was required to consider the impact of pumping on the Conservation Area and local surface and groundwater.

First, BLM argued that ADWR failed to make a valid determination of legal availability when it accepted Pueblo’s application without initially considering the federal government’s senior, unquantified federal reserved right. The court disagreed with BLM, finding that ADWR’s interpretation of legally available was valid when the statutes and regulations were read together.

Legal availability is a two-step determination under ADWR’s interpretation of A.R.S. § 45–108(I)(1). First, ADWR must find that the water company is using the water for a reasonable and beneficial use. Second, ADWR must find that the water company has a legal means of delivering the water. ADWR has determined under R12–15–718(C) that the second step means a private water company has a CC&N.

The court agreed with ADWR that Pueblo’s planned use of the water was reasonable and beneficial because they planned to supply a subdivision with the water, thus satisfying the first step. The court also agreed with ADWR that

Pueblo demonstrated a legal means of delivering the water because it had a CC&N, thus satisfying the second step. The court explained that ADWR's determination that the second step requires the company to have a CC&N should be given great weight because the Director is an expert in the field vested with broad powers to achieve groundwater conservation. The court explained further that the department's requirement that a water company have a CC&N kept with the consumer protection purposes of the statute because it requires the utility to be sufficiently financially viable to deliver, store, and treat such water.

The court also noted that in addition to determining mere *legal* availability, the Director of the ADWR has a more involved duty to determine whether adequate water is available. To make this determination, the Director is obligated to consider physical availability, which required the director to consider the water already committed to approximately 200 users. The ALJ determined that the Director considered Pueblo's proposed water source and the demands from other users, and that Pueblo demonstrated that sufficient water would be available for 100 years.

Second, BLM argued that ADWR should consider its unquantified federal reserved water right, which has priority over Pueblo's. ADWR countered by arguing that determination of those water rights fell under the exclusive jurisdiction of the Gila Adjudication and could not be adjudicated by ADWR in this proceeding. The court agreed with BLM, finding that ADWR not only had jurisdiction to consider the BLM's claimed right, but had a duty to do so.

The court interpreted the language of R12-15-716(B), which requires the Director to consider the existing uses of groundwater, to include the consideration of the BLM's federal reserved right. The court found that requiring ADWR to consider BLM's right was in keeping with the intent of the groundwater statutes to protect Arizona's economy and welfare, and to provide a comprehensive framework for the management and regulation of groundwater, without compromising the preservation of the conservation area.

The court stated ADWR could use its expertise and knowledge to create an educated estimate of BLM's quantified water right. However, the court distinguished ADWR's duty to consider BLM's claim from quantifying it. The court explained that quantification was the exclusive domain of the Gila Adjudication.

Finally, BLM argued that Pueblo's proposed pumping might interfere with the Conservation Area and local surface or groundwater. The court found that ADWR was not required to separately consider the impact of pumping on the Conservation Area and local surface or groundwater. The court did not want to impose an obligation beyond ADWR's obligation to consider adequate water.

Accordingly, the court vacated the judgment of the superior court, and remanded the action to ADWR with instructions to consider the BLM's water rights claim in its evaluation of Pueblo's application.

Trevor C. Lambirth