

ADWR's Management of Private Water Wells (outside of AMAs and INAs)

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Presentation for Private Well Owners Forum

May 16, 2018



Arizona Department of Water Resources

ADWR's functions:

- administers and enforces Arizona's groundwater code, and surface water rights laws (except those related to water quality);
- negotiates with external political entities to protect Arizona's Colorado River water supply;
- oversees the use of surface and groundwater resources under state jurisdiction;
- represents Arizona in discussions of water rights with the federal government;
- explores methods of augmenting water supplies to meet future demands, and develops policies that promote conservation and equitable distribution of water;
- inspects dams and participates in flood control planning to prevent property damage, personal injury, and loss of life;
- represents Arizona in negotiations to settle Indian water rights claims.

Groundwater Management Act of 1980

The Act imposes certain regulations state-wide, but most regulations are limited to areas designated as “irrigation non-expansion areas” and “active management areas.”

Created ADWR to administer the Act.

The Act, with certain amendments, is still in effect today.



Who “owns” groundwater?

Arizona Supreme Court: Legislature has authority to regulate groundwater use under its police power.

“In the absolute sense, there can be no ownership in seeping and percolating waters until they are reduced to actual possession and control by the person claiming them because of their migratory character. Like wild animals free to roam as they please, they are the property of no one.”



Current State-Wide Regulations

- All wells must be registered with ADWR.
- New wells must be constructed in compliance with ADWR's well construction standards and by a licensed well driller.
- Groundwater may be transported within a groundwater basin, but may not be transported away from a basin (with certain exceptions).



Well Drilling Outside of AMAs

- Person must file a Notice of Intention to Drill with ADWR before drilling a new well or deepening an existing well
- If water will be used for domestic purposes on a parcel of land of five or fewer acres, the applicant must submit a well site plan that must be approved by the county health authority that controls the installation of septic tanks or sewer systems.



Adequate Water Supply Program – Outside of AMAs

- Outside the AMAs, a developer of a proposed subdivision must obtain from ADWR a report on the adequacy of the water supply for 100 years.
- Cities and counties outside of AMAs can adopt an ordinance requiring an adequate water supply in order to get plat approval (requires unanimous vote of county board of supervisors). Cochise and Yuma counties have adopted such an ordinance.
- Unless the development occurs in a “mandatory adequacy jurisdiction,” the plat can be approved if the water supply is inadequate, however the inadequate water supply must be disclosed to the first buyer.

Adequate Water Supply Program – Outside of AMAs

- Water supply must be physically, continuously and legally available for 100 years (groundwater is physically available only if it is available above 1,200 feet bls).
- Developer must have the financial capability to construct necessary water storage, treatment and delivery systems.
- Water supply must be of adequate quality.

Proposed Rule Change for C and R Aquifers

ADWR has proposed to amend its rules to allow ADWR to find that a water supply is physically available in the Coconino and Redwall aquifer systems if at least a certain percentage (50% ? 75% ?) of the estimated groundwater in storage within the area at the time the rule amendments become effective will remain after 100 years.

Sources of New Regulation

New well regulation could come about in a few ways. Each way has its own benefits, drawbacks, and obstacles.

Three potential sources:

1. Designation of INA or AMA following statutorily-prescribed procedures
2. New legislative enactment (statutes)
3. County, municipal, or other local regulation

Designation of INAs or AMAs Using Statutory Procedures

By statute, new AMAs can be established by election or by the ADWR Director after a public hearing if certain criteria are met.

New INAs can be established by the ADWR Director after a public hearing if certain criteria are met.

Pros:

- Avoid the need for legislative action
- May provide opportunity for more localized participation

Cons:

- Not a flexible solution – (all or nothing proposition)
- A decision by the ADWR is subject to judicial review and the process for designating INAs and AMA can lead to uncertainty over a span of years.

New Legislative Enactment

Pros:

- Allows for greater creativity/flexibility in devising solutions
- Enforceability
- Usually comes about through consensus-building and compromise

Cons:

- May require large degree of consensus across use sectors, which can be difficult to obtain
- May require state-wide support, which can be difficult to obtain

Local Water Management Regulation

The ability of counties and municipalities to enact water management regulations often involves at least two questions:

- Does the county/municipality have the express or implied authority to do what it proposes to do under the Arizona Constitution and/or Arizona statutes?
- Where the county or municipality is granted relatively broad authority, as in zoning, is the regulation preempted by some other generally applicable state law?

Express/Implied Authority

1. Does the county/municipality have the express or implied authority to do what it proposes to do under the Arizona Constitution and/or Arizona statutes?

- Political subdivisions of the state, like counties and municipalities, possess only those powers delegated to them in the state's Constitution or by statute.
- The primary statutes concerning the authority of counties are contained in Title 11 of the Arizona Revised Statutes.
- The primary statutes concerning the authority of municipalities are contained in Title 9 of the Arizona Revised Statutes.

Example: Express/Implied Authority

In 1972, the Yavapai County BOS denied approval of a subdivision plat because the applicant failed to provide proof of the availability of sufficient water to meet the needs of subdivision.

The County's authority to regulate subdivisions is set forth in statute (then § 11-806.01). In 1975, the Arizona Court of Appeals ordered the BOS to approve the plat, finding that the County had no authority under the statute to inquire into the availability of water before granting plat approval. *Owens v. Glenarm Land Co., Inc.*, 24 Ariz. App. 430 (App. 1975).

Preemption

2. Is the regulation preempted by some other state law?

Whether a state law preempts local regulation depends on:

A. whether the subject matter of the regulation is of statewide concern and

B. whether the regulation conflicts with state statute or the Legislature has occupied the field by enacting a statute pertaining to the same subject matter.

If the answer to both A. and B. is “yes,” the local regulation will be found to be preempted.

Example: Preemption

Coconino County denied a motel's application for a conditional use permit to transport water by truck from various locations within Coconino County to the south edge of Grand Canyon National Park. The County relied upon its planning and zoning authority and denied the permit on the ground that the additional truck traffic "would be detrimental to the public health, safety or welfare or materially injurious to the property of others."

In an unpublished memorandum decision, *Squire Motor Inns, Inc. v. Coconino County*, 2 CA-CV 90-0131 (1990), the Court of Appeals agreed with a lower court's finding that there was no competent evidence to support the County's decision based on additional truck traffic, and also noted that the County's findings "may mask reliance on what all parties agree is an impermissible factor, that the use is for water transfer. What the state permits may not be forbidden by local zoning law."

Example: Preemption

In *City of Prescott v. Town of Chino Valley*, 163 Ariz. 608 (App. 1989), the Arizona Court of Appeals upheld a transaction privilege tax imposed by the Town of Chino Valley on the operation of a water pipeline owned by and transporting water to the City of Prescott. The court found no preemption saying, “As comprehensive as the Groundwater Management Act is, we find nothing in it that preempts an otherwise appropriate, nondiscriminatory local privilege tax. In our opinion a tax like the present one was not out of the realm of the foreseeable, and if the legislature had been of a mind to preclude any such tax, we believe it would have done so in appropriate terms.”

Questions?

