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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2013-000264-001 DT 10/14/2014

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
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

OFFICE OF ADMINISTRATIVE HEARINGS
REMAND DESK-LCA-CCC

JUDGMENT SIGNED

Pursuant to this Court's Minute Entry dated October 6, 2014, counsel for Plaintiff-Appellant Patricia Gerrodette provided notice that on behalf of all Plaintiffs-Appellants and with their knowledge and permission, she lodged a judgment on October 8, 2014.

Plaintiffs-Appellants, Robin Silver, M.D., United States of America, U.S. Department of Interior, Bureau of Land Management ("BLM"), and Patricia Gerrodette, filed individual complaints pursuant to A.R.S. § 12-901 *et seq.* seeking judicial review of the April 11, 2013 decision and order of the Director of the Arizona Department of Water Resources ("ADWR"), which this

Court subsequently consolidated. In its decision, ADWR finalized a draft decision, which an administrative law judge with the Arizona Department of Administrative Hearings recommended be affirmed on March 12, 2013. The decision granted an application filed by Pueblo del Sol Water Company ("PDS") pursuant to A.R.S. § 45-108 for a Designation of Adequate Water Supply ("the Designation") in connection with groundwater diversions PDS wishes to make to provide water service to a proposed real estate development in the city of Sierra Vista, in Cochise County, Arizona. After considering the record in this case, the pleadings of the parties and arguments of counsel, the Court finds and determines as follows:

A. BLM's Federal Reserved Water Right

1. In 1988, the United States Congress established the San Pedro Riparian National Conservation Area ("SPRNCA"), which consists of approximately 56,000 acres of BLM-managed federal public lands surrounding the San Pedro River, in Cochise County, Arizona. Congress established the SPRNCA to protect the riparian area and its aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources. Arizona-Idaho Conservation Act of 1988, Pub. L. No. 100–696, 102 Stat. 4571 ("the Act").

2. In the Act, Congress expressly reserved a quantity of water sufficient to fulfill SPRNCA's purposes. The federal reserved water right "(FRWR") has a priority date of November 18, 1988, the date the Act became law. Congress did not specify the quantity of water it expressly reserved and instead directed the Secretary of the Interior to file a claim for the quantification of such rights in an appropriate adjudication.

3. In 1989, the United States, on behalf of the BLM, filed a Statement of Claim in the ongoing Gila River General Stream Adjudication ("GRGSA"), and claimed a FRWR to maintain the resources and values of SPRNCA. BLM subsequently filed three Amended Statements of Claim for the SPRNCA that covered both surface water and groundwater. On March 4, 2009, in an interlocutory Order, the Special Master in the GRGSA found that Congress expressly and unambiguously reserved water to accomplish the purposes of the SPRNCA. In a subsequent decision on March 19, 2010, the Special Master ruled that the BLM's certificated state-based water right for instream flows in the San Pedro River, CWR No. 90103.0000, is a perfected, vested appropriative property right of the United States to surface water.

B. Pueblo Del Sol's Application for a Designation of Adequate Water Supply

4. Defendant-Appellee PDS is a private water company that was formed in 1972. That year, the Arizona Corporation Commission ("ACC") granted to PDS a Cer-

tificate of Convenience and Necessity "(CC&N"). PDS's service area covers about 4,800 acres in Cochise County.

5. Castle & Cooke ("C&C"), which owns PDS, developed plans to construct a real estate development known as Tribute on about 1,900 acres in Sierra Vista in Cochise County. As planned, Tribute would consist of approximately 7,000 homes and offices, together with other commercial development, and PDS would provide water service to the majority of the land in the development.

6. The City of Sierra Vista will not approve a proposed real estate development within its borders unless, among other things, there is an adequate supply of water, as defined in A.R.S. § 45-108, for the proposed development. As a result, on June 23, 2011, PDS filed an application with ADWR seeking a designation of adequate water supply for its service area.

7. Under Arizona law, "[t]he director shall evaluate the proposed source of water for the subdivision to determine whether there is an adequate water supply for the subdivision…." *See* A.R.S. § 45-108(B). ADWR is authorized to grant a designation of adequate water supply only after it finds that the proposed subdivision has an "adequate water supply." *See* A.R.S. § 45-108(C).

8. According to A.R.S. § 45-108, "adequate water supply" means both that there be a demonstration of financial capability to construct the water facilities necessary to make the supply of water available for the proposed use, and 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." A.R.S. § 45-108(I).

9. In contrast to A.R.S. § 45-108, ADWR's regulation A.A.C. R12-15-718 provides that if an applicant for a designation of adequate water supply is a private water company, it may establish that the quantity of water for which the designation is sought is "legally available for at least 100 years" simply by submitting evidence that it has a certificate of convenience and necessity ("CC&N") approved by the ACC for the relevant service area. A.C.C. R12-15-718.A, -C. Therefore, under the regulation, ADWR must find that an applicant private water company with a CC&N has sufficient supplies of water that will be legally available for at least 100 years without any investigation of whether there might be any possible legal constraints on the intended supplies, including ones based on hydrologic conditions or impacts on superior water rights. In processing PDS's application for a designation of adequate water supply, ADWR applied A.A.C. R12-15-718 and found that the groundwater PDS intended to use to provide water service was legally available for at least 100 years. ADWR based this finding solely on the

fact that PDS has a CC&N issued by the ACC in 1972. ADWR considered no other factors in reaching its finding.

10. Accordingly, by relying on A.A.C. R12-15-718 to find that the groundwater requested by PDS is legally available for at least 100 years based on the CC&N issued to PDS in 1972 and without taking into account BLM's FRWR in SPRNCA and the state-law instream flow water right possessed by the BLM on the availability of such supplies, ADWR failed to meet its mandatory duty under A.R.S. § 45-108 to ensure that the proposed source of water will, among other things, be legally available for at least 100 years.

11. The Court concludes that ADWR abused its discretion when it determined that PDS had a legally available water supply for at least 100 years based on the fact that PDS possesses a CC&N issued by the ACC and, therefore, ADWR's decision should be set aside. On remand, in determining whether the amount of water requested by PDS is legally available, ADWR must consider the existing legal claims and/or rights and determine whether and to what extent these claims and/or rights may affect the availability of the water supplies requested in PDS's application.

The Court therefore orders that ADWR's decision is VACATED and the matter is REMANDED to ADWR for further Proceedings in accordance with this judgment.

The Court further concludes that Plaintiffs-Appellants Silver and Gerrodette are entitled to attorneys' fees and costs pursuant A.R.S. § 12-348 and the private attorney general doctrine.

Pursuant to A.R.S. § 12-348(E)(2), the Court finds that an increase in the cap of $75.00 per hour is justified because there was a limited availability of qualified attorneys to represent the Plaintiffs-Appellants in this case thereby justifying a higher fee. Based upon their respective requests for fees, statements of costs, and supporting documentation, the Court awards Plaintiff-Appellant Silver $84,210.00 in fees plus $309.00 in costs and Plaintiff-Appellant Gerrodette $71,651.50 in fees plus $309.00 in costs against the Defendants-Appellees.

No further matters remain pending and this judgment is entered pursuant to Rule 54(c) all in accordance with the formal written Judgment signed by the Court on October 14, 2014, and filed (entered) by the Clerk on October 14, 2014.

A conformed copy of the judgment was mailed to the parties and/or counsel by separate cover.

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.