



Public Policy Review

by Sharon Megdal

Court Tells ADWR to Set Water-Use Standards for End Users

Time may be at hand to explore options to gallons per capita per day



For some time, the Arizona Water Company, the second largest private water company and eighth largest water provider in the state, has been at odds with the Arizona Department of Water Resources regarding the municipal conservation program.

Its discontent sparked the utility's 1990 suit when ADWR adopted its Second Management Plan. The utility challenged the

plans's water conservation strategy, claiming it was improper to impose gallons per capita per day (GPCD) requirements on municipal providers without directly regulating customers or end users by imposing limits on their water use. The utility also objected to ADWR including Central Arizona Project water within GPCD calculations.

Last year a Superior Court ruling stated that the provision of the management plan by which ADWR imposes maximum GPCD requirements "is vacated and set aside because it fails to address water utilization by end users." ADWR appealed.

In August, the Arizona Court of Appeals issued its ruling in *Arizona Water Company v. Arizona Department of Water Resources*. Although there were other issues involved in the appeal, the Appeals Court considered ADWR's GPCD policy as the central issue.

The three-person Appeals Court panel issued a split decision. While acknowledging the law includes no clear language definitively ordering ADWR to impose end-user conservation measures, the majority found that "it is difficult to read the provisions ... and not develop a firm conviction that the legislature intended just that."

Also at issue was whether the Groundwater Management Act allows ADWR to include CAP water in determining a utility's compliance with the conservation requirements. The Appeals Court rejected Arizona Water Company's position, concluding that ADWR may include use of CAP water when determining GPCD.

Before discussing this opinion, I note that I am not a lawyer. Therefore, the following analysis and viewpoints are not constrained by extensive knowledge of case law.

Regarding the appropriateness of including CAP water in GPCD calculations, all three appellate judges agreed. A ruling otherwise on the issue of CAP water would have been at odds with the entire premise of groundwater management in at least the Tucson and Phoenix Active Management Areas, namely that CAP water is supposed to serve as a substitute for groundwater use and a source of water for a growing number of customers. Excluding CAP water for municipal purposes from calculations determining GPCD compliance would have signaled that it is permissible to use as much CAP water as desired, without consideration of reasonableness of that use or waste. This is at odds with state water use goals.

Regarding the GPCD conservation program, the Court found that the Legislature expected ADWR to develop "a comprehen-

sive management and regulation framework for all phases of the groundwater cycle." The Court directed ADWR to "return to the management plan drawing board and devise appropriate conservation measures ... that include end users." It is interesting the Court did not appear to conclude that including company- or utility-level GPCD requirements in the management plan was inappropriate. Rather, another layer of conservation requirements was ordered.

In my opinion, the minority opinion relating to the GPCD program is the one that makes the most sense. The dissenting judge agrees with ADWR's interpretation of the statutes: "The Department has interpreted the statutes as giving it the authority to regulate end users, but not mandating such regulation. Given the lack of specific statutory language to the contrary, its interpretation is reasonable." The dissent goes on to note that whether it makes sense for ADWR to regulate the end users was not addressed in the record before the Court and "is completely beyond our expertise."

Dissenting Judge Patrick Irvine's states things so well that I am left with little choice but to quote him directly: "[It] is not clear to me that direct regulation of all end users is sensible water policy. ... The Groundwater Code recognizes that water providers are not in identical situations. ... Uniform end user restrictions throughout an active management area, or even a local service area, may not be the most effective conservation method. ... the resources devoted to creating and enforcing individual conservation requirements may be more effectively utilized in other ways. ... this is the type of decision the legislature has left to the Department, not to us."

I am not a big fan of the GPCD program. It has been fraught with difficulties. I support additional flexibility regarding participation in the non-per-capita-per-day program or alternative conservation programs. Many departmental resources have historically gone into development and enforcement of the program. Over 20 years after the passage of the Groundwater Management Act and in the face of declining budgets and increasing expectations regarding departmental activities outside of the AMAs, a modified approach to conservation may be appropriate.

The Governor's Water Management Commission had a hard time getting to a substantive recommendation regarding conservation. Its Final Report and Recommendations stated that many issues were raised regarding the existing conservation programs, and improvements to current programs were discussed. Yet the only recommendation that came forward was for initiation of "a process to develop a non-profit cooperative association to serve Arizona's need for effective water conservation throughout the State."

Even if ADWR's position is finally affirmed, there is justification for a renewed look at the municipal conservation program, particularly the GPCD program. One way or another, some rewrite of the statutes may be necessary. The parties should agree to work together to see that this be accomplished expeditiously. ■