ARIZONA COURT OF APPEALS
DIVISION ONE

ROBIN SILVER, M.D., UNITED STATES OF AMERICA, U.S. DEPARTMENT OF INTERIOR BUREAU OF LAND MANAGEMENT, and PATRICIA GERRODETTE, Plaintiffs/Appellees vs. PUEBLO DEL SOL WATER COMPANY, an Arizona corporation; THOMAS BUSCHATZKE, acting in his official capacity as Director of the Arizona Department of Water Resources; ARIZONA DEPARTMENT OF WATER RESOURCES, an agency of the State of Arizona, Defendants/Appellants	No. 1 CA-CV 14-0811 Maricopa County Superior Court No. LC2013-000264-001 LC2013-000271-001 LC2013-000272-001 (Consolidated)

PLAINTIFF/APPELLEES SILVER AND GERRODETTE'S JOINT ANSWERING BRIEF

(ORAL ARGUMENT REQUESTED)

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INTRODUCTION

Plaintiff/appellees Dr. Robin Silver and Patricia Gerrodette hereby submit their joint answering brief pursuant to Ariz. R. Civ. App. P.13(h).

This appeal involves the Arizona Department of Water Resources'(ADWR) failure to comply with A.R.S. § 45-108, the Arizona Water Adequacy Statute, when it issued a designation of adequate water supply for a water company known as Pueblo del Sol (PDS). ADWR's designation would allow PDS to pump groundwater for a housing and commercial development of up to nearly 7,000 homes, occupying all of the remaining developable land in Sierra Vista and pumping an amount equal to about one-third of the total annual natural groundwater recharge in the entire Sierra Vista subwatershed.[1]

The Arizona Water Adequacy Statute requires ADWR to ensure that groundwater proposed to be pumped for new developments located outside Active Management Areas (AMAs) is "legally available" for at least 100 years before issuing a designation of water adequacy. Yet, in the case of PDS's designation, ADWR did not consider whether senior federal reserved water rights held by the U.S. Bureau of Land Management (BLM) for the conservation of the San Pedro Riparian National Conservation Area (SPRNCA) would constrain the amount of

[1] The upper San Pedro groundwater basin includes the Sierra Vista subwatershed. *See* http://www.azwater.gov/AzDWR/StatewidePlanning/WaterAtlas/SEArizona/Hydrology/UpperSanPedro.htm (last visited June 23, 2015).

water legally available to PDS. Under both state and federal law, if PDS's pumping infringes on BLM's s rights, the groundwater is not "legally available," and ADWR must decline to issue the adequacy designation. Nonetheless, ADWR ignored BLM's rights and their constraint on PDS's pumping when it evaluated the "legal availability" test. Accordingly, the Superior Court correctly held that ADWR's decision was arbitrary, capricious and contrary to law.

As the following discussion demonstrates, the Superior Court's remand of ADWR's designation with an instruction to consider the effect of BLM's rights on the legal availability of the groundwater PDS proposes to pump is consistent with the plain meaning of Arizona's Water Adequacy Statute, the Arizona Supreme Court's decision in *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 195 Ariz. 411 (1999) ("*Gila III*"), and the intent of the legislature to resolve groundwater issues before – not after – development occurs and investments in homes are made.

Additionally, the Superior Court did not abuse its discretion when it awarded attorneys' fees to Silver and Gerrodette because they are entitled to fees under both the private attorney general doctrine and under A.R.S. § 12-348(A)(2), *amended by* HB 2131, 2015 Ariz. Legis. Serv. Ch. 234.

STATEMENT OF THE CASE

Silver and Gerrodette adopt the Statement of the Case set forth in BLM's answering brief, including BLM's statement of the basis for this Court's jurisdiction.

Silver and Gerrodette also note that PDS's Statement of the Case and Facts inaccurately reflect some of the facts and argument below. For example, PDS asserts that "no Plaintiff suggests. . . that A.R.S. § 45-453, coupled with the Commission issued certificate of convenience and necessity ("CC&N"), does not provide PDS legal authority to withdraw and use groundwater." PDS Br. at 3. In fact, Silver and Gerrodette have argued throughout that ADWR may not rely on a CC&N alone to support its adequacy determination, but that before pumping, PDS must prove, and ADWR must determine, that the groundwater at issue is "legally available" within the meaning of the GMA. Index of Record (IR) 40 (Silver Opening Brief), at 17-25, 28-31, 33; IR. 41 (Gerrodette Opening Brief), at 12-24, 25-26.[2]

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[2] Citations to the Electronic Index of Record are herein referred to as "IR___." Record numbers IR 10-28 each include multiple documents from the administrative hearing. Citations to these documents reference the document, such as Doc__, or the applicable name, such as BLM____, ADWR____, or RS____. Documents contained in IR 10-28 relied on in this brief appear in the Appendix hereto, and we cite to the appendix in lieu of citing the page number of the IR. The Appendix Table of Contents lists the first page in the IR in which the documents appear. Ariz. R. Civ. App. P. 13.

Nor, as PDS asserts, did the Superior Court require ADWR to determine whether any of the other 96,000 claims in the Gila River adjudication may affect the legal availability of the groundwater at issue in this case. PDS Br. at 4. As discussed below, federal reserved water rights are unlike other claims to surface water rights because they are entitled to protection from the impacts of groundwater pumping. *See infra* at 33.

Finally, PDS asserts that whether any water was actually reserved to fulfill the purposes of SPRNCA "remain[s] to be determined." PDS Br. at 10. While it is true that the precise quantity of water reserved for SPRNCA has not been adjudicated, there is no question that Congress reserved water for SPRNCA for specifically articulated purposes, with a priority date of 1988. 16 U.S.C. § 460xx-1(d) (noting creation of federal reserved water right and priority date).

STATEMENT OF RELEVANT FACTS

I. The San Pedro River and San Pedro Riparian National Conservation Area

The San Pedro River flows north from northern Mexico through southeastern Arizona for about 130 miles until its confluence with the Gila River at Winkelman, Arizona. It is the last free-flowing, undammed river in the desert Southwest. *See Ctr. for Biological Diversity v. Salazar*, 804 F. Supp. 2d 987, 991 (D. Ariz. 2011). The river and its surrounding cottonwood-willow forest support

one of the most important corridors for migratory songbirds in the United States, especially because so many other desert rivers in the Southwest have been degraded or destroyed. *See* Determination of Endangered Status for Three Wetland Species Found in Southern Arizona and Northern Sonora, Mexico, 62 Fed. Reg. 665, 665 (Jan. 6, 1997) (to be codified at 50 C.F.R. Pt. 17) (noting that "up to 90 percent of the riparian habitat along Arizona's major desert watercourses has been lost, degraded, or altered"). Of the more than 800 bird species in North America, more than 45 percent use the San Pedro River at some point during their lives. Certification of Record on Review of Administrative Hearing, (Doc. #54),[3] App. B at 72, Robin Silver's Objection, (DWR-31), App. C at 80. The river is also a biological treasure chest, home to hundreds of species of mammals, reptiles, amphibians, fish, and insects, including species protected by the federal Endangered Species Act. *Id.*[4]

In 1988, Congress recognized the importance of the San Pedro River and the habitat it provides and designated 36 miles of the river's upper basin as the San

[3] Doc. 54 is the list of documents admitted in the proceeding before the Office of Administrative Hearing.

[4] The National Audubon Society has designated the lower San Pedro River an Important Bird Area because of its ecological significance. *See Lower San Pedro River IBA*, Arizona Important Bird Areas Program, http://aziba.org/?page_id=461 (last visited June 23, 2015). *See also Watchable Wildlife – San Pedro RNCA*, Bureau of Land Management Arizona, http://www.blm.gov/az/st/en/prog/blm_special_areas/ncarea/sprnca/wildlife.html (describing SPRNCA's ecological values and its visitor appeal) (last visited June 23, 2015).

Pedro Riparian National Conservation Area. 16 U.S.C. § 460xx; *see also* ADWR's Report Concerning Federal Reserved Water Rights Claims for SPRNCA, (BLM-19), App. D at 83. Congress mandated that BLM manage the SPRNCA "to protect the riparian area and the aquatic, wildlife, archaeological, paleontological, scientific, cultural, educational, and recreational resources of the public lands surrounding the San Pedro River" 16 U.S.C. § 460xx(a). In the same legislation, Congress reserved federal water rights in "a quantity of water sufficient to fulfill the purposes" of the SPRNCA, 16 U.S.C. § 460xx-1(d), including rights to springs and to groundwater to support riparian vegetation. 16 U.S.C. § 460xx(a) (establishing SPRNCA in order to protect the aquatic and wildlife resources). To protect these rights, Congress directed the Secretary of the Interior to file a claim for BLM's rights in Arizona's long-running Gila River Adjudication pending in Arizona state court. 16 U.S.C. § 460xx-1(d); BLM-19, App. D at 91.

II. The Gila River Adjudication's Recognition of BLM's Federal Reserved Water Rights for SPRNCA.

BLM filed its first statement of claim for its federal reserved water rights for SPRNCA in the Gila River Adjudication in 1989. *See, e.g.*, BLM-19, App. D at 91, IR 22, BLM-15, App. E at 133-34. Since then, BLM has filed two amended claims for federal water rights for the SPRNCA. BLM-18, App. F at 136-40.

While BLM's federal reserved water rights have not been specifically quantified in the adjudication, evidence introduced in that proceeding support their

validity and — to some extent, their quantity — and call into doubt the legal availability of the groundwater PDS proposes to pump. First, the Special Master in the adjudication confirmed the validity of BLM's federal reserved water rights, holding that BLM's claims are "superior to the rights of future appropriators," (Order, In re San Pedro Riparian National Conservation Area, Contested Case, No. W1-11-232, March 4, 2009 at 14), BLM-19, App. D at 92 and that BLM's claims "must be considered a water right available to the United States to serve the federal purposes of the SPRNCA." (Order, In re San Pedro Riparian National Conservation Area, Contested Case, No. W1-11-232, March 19, 2010 at 7), BLM-19, App. D at 93.

BLM's Second and Third Amended Statement of Claim in the adjudication quantify the amount of water it claims for SPRNCA. These include streamflow claims of 15,900 acre feet per year (AFY) at the San Pedro River Palominas gage, 28,000 AFY at the San Pedro River Charleston gage, and 30,200 AFY at the San Pedro River Tombstone gage. BLM-19, App. D at 99. Because the San Pedro River's flows have declined over the last few decades, these quantities *exceed* the total annual average flows in the river. *Id*., App. D at 112. In its capacity as a technical advisor to the Special Master in the Gila River adjudication, ADWR issued a report in May 2012 assessing BLM's quantification of its claimed water rights. *See, e.g.*, *Id.*, App. D at 83. In that report, ADWR agreed with BLM's

methodology for quantifying the streamflows at the three monitoring stations on the river. *Id*., App. D at 109 ("The Department analyzed the data from the Palominas, Charleston, and Tombstone gages and agrees with BLM's calculations.").

BLM and ADWR's filings demonstrate that both agencies have extensively researched, assessed, and documented the amount of water needed to fulfill the SPRNCA's purposes. *See* BLM-19, App. D at 83-131; Transcript of the Administrative Hearing (Tr.) 484-85, App. G at 156-57 (describing claimed rights in surface water, springs, and groundwater), In the Matter of the Decision of the Director to Grant Pueblo Del Sol Water Company's Application for Designation as Having an Adequate Water Supply, No. 40-700705.0000. (Doc. #56), App. H at 169 (describing claims). These results were available to, and sometimes validated by, ADWR, but ADWR did not consider them, or their constraint on the legal availability of groundwater, when it reviewed PDS's application for a designation of water adequacy.

III. Groundwater Pumping in the Sierra Vista Subwatershed.

Over the last several decades, the rate of groundwater pumping in the Sierra Vista subwatershed has far exceeded the rate of recharge of water to the aquifer, creating a "groundwater deficit" that was most recently estimated at 6,100 acre-feet per year. USGS 2010 Report to Congress, (BLM-29), App. I at 218, USGS

2008 Report (BLM-26), App. J at 227. Because groundwater pumping is drawing down the aquifer, it is capturing water from the river that sustains the river's surface flows and riparian vegetation. As a result, the San Pedro River and the riparian vegetation and springs which are protected by the SPRNCA and BLM's water rights have begun to dry up. ADWR itself has acknowledged that seasonal pumping from wells near the river has caused "significant trends in total monthly streamflow" and has "decreased low flows" in the river in the spring and summer. BLM-19, App. D at 107.

These declines threaten BLM's federal reserved water rights and the purpose for which the SPRNCA was created. The river's average base flows are already significantly *lower* than particular streamflow volumes BLM claimed — and ADWR approved — in the Gila River Adjudication as the minimum amount necessary to fulfill the purposes of the SPRNCA. *Supra* at 6-7; BLM-19, App. D at 109; Tr. 495-96, App. G at 158. For example, recent assessments of base flow at the Tombstone gage measured an average of 4,890 acre-feet of water per year, approximately half of the amount claimed by BLM-29, App. I at 220 (recent average base flows at Tombstone gage); BLM-19, App. D at 109 (claiming 9,400 acre-feet per year at the Tombstone gage). Similarly, recent estimates of average base flows indicate that flows are approximately two-thirds of BLM's claim at the Charleston gage, and less than half of BLM's claim at the Palominas gage.

Compare Table 3-5 with Table 4-1. BLM-19, App. D at 130-31.

ADWR acknowledged in the Gila River Adjudication what it ignored when reviewing PDS's application: "[d]ecreasing trends in streamflow of the San Pedro for the summer, spring and fall seasons suggest that current streamflow volumes will more times than not, be less than the volumes listed" in BLM's claim. BLM-19, App. D at 112. These numbers illustrate the severity of the existing threat to the San Pedro River, its riparian habitats, and BLM's federal reserved water rights. *See* BLM-26, App. J at 226-27 (reductions in aquifer and flow will threaten riparian ecosystem in the SPRNCA).

In 2003, in response to the growing threats to the San Pedro River from excessive groundwater pumping in the Sierra Vista subwatershed, Congress recognized the Upper San Pedro Partnership, a collection of Federal, State, and local governmental and nongovernmental entities that sought "to establish a collaborative water use management program in the Sierra Vista subwatershed, Arizona, to achieve the sustainable yield of the regional aquifer, so as to protect the Upper San Pedro River, Arizona, and the San Pedro Riparian National Conservation Area, Arizona." 2004 National Defense Authorization Act, No. Pub. L. 108-136, § 321(b) (2003). Congress tasked the Partnership with assisting the Department of Interior in preparing reports for Congress regarding water management and conservation measures, as well as annual targets, for meeting the

end goal of "achieving and maintaining the sustainable yield of the regional aquifer by and after September 30, 2011." *Id.* § 321(c), (d).

The sustainable yield goal has not been met. The Partnership's 2010 report (published in 2012) to Congress concluded that "[t]he overall situation in the regional aquifer of the Sierra Vista subwatershed today is not improving; rather, it continues to get worse . . . ." BLM 29, App. I at 218. As the report explained, "[u]ntil the aquifer begins to accrete storage (i.e., the annual water budget bottom line becomes greater than 0) there will be no reduction in the cumulative deficit, and until additional management measures are undertaken, it is unlikely that there will be further progress made toward this goal." *Id.* The 2010 report estimated that the groundwater deficit increased to 6,100 acre-feet per year in 2009. *Id.*

All of this points to the conclusion that the San Pedro River has no more water to spare.

IV. The Potential Impact of PDS proposed pumping on SPRNCA.

Additional groundwater depletions on the scale proposed by PDS threaten the San Pedro River and BLM's federal reserved water rights in SPRNCA because those rights depend in large part on groundwater in the Sierra Vista subwatershed, which sustains the river's "base flows." These flows include surface water that flows in the river year-round, even during the seasons with little or no rainfall – as well as the river's riparian vegetation and springs. *See* Doc. #56, App. H at 190,

BLM-19, App. D at 104. Groundwater pumping depletes these base flows, as well as the water that would otherwise feed the streamside vegetation and natural springs, by lowering the aquifer from which the water is pumped. BLM-26, App. J at 226 (explaining how pumping lowers the water level in the aquifer, thereby diminishing the river's flows); Tr. 327-29, App. G at 149-50 (Dr. Leenhouts discussing this report and noting that the same principles apply to PDS's pumping).

More specifically, groundwater pumping intercepts, or "captures," water that would otherwise provide the river's base flows and sustain riparian vegetation and springs. BLM-26, App. I at 226-27(explaining how pumping captures water from streamflows and threatens riparian vegetation). "Capture" occurs because a such pumping creates a "cone of depression" in the vicinity of a well, which can be visualized as a deep hole in the water table. Tr. 276-77, App. G at 145-46. Water that would otherwise flow underground to the river, where it would sustain surface flows and riparian vegetation, instead flows into the hole and is pumped out of the aquifer through the well. *See* BLM-26, App. J at 226(defining capture).

Plaintiff/Appellees and BLM introduced the *only* quantitative information presented at the Administrative hearing about the impact of the proposed pumping on the surface waters of the San Pedro and on BLM's federal reserved rights.[5] For

[5] PDS's assertion that the record "is devoid of any evidence that PDS's wells will withdraw a single drop of groundwater necessary to serve the purposes of SPRNCA," is wrong. PDS Br. at 10, ¶ 20. However, the Court need not reach

example, Dr. Leenhouts explained that he and his colleagues at the USGS had used their groundwater model — the same modeling method that PDS used to demonstrate physical availability[6] — to estimate, as a function of time and of location within the watershed, what fraction of a hypothetical well's pumping would come from capture of water from the San Pedro's surface waters and riparian vegetation. *See* Tr. 325-50, App. G at 149-55. The results of this work are portrayed as maps in Figures 4A and 4B of the Leenhouts publication, *Simulated Effects of Groundwater Withdrawals and Artificial Recharge on Discharge to Streams, Springs, and Riparian Vegetation in the Sierra Vista Sub Watershed of the Upper San Pedro Basin*. BLM-26, App. J at 223 (exerpted). Figure 4A shows the percentage that would come from capture after 10 years; Figure 4B shows the percentage that would come from capture after 50 years. *Id.*, App. J at 228-29. These maps demonstrate that the pumping proposed by PDS will quickly result in capture and infringe on the federal reserved rights Congress granted to SPRNCA.

V. PDS's Application for Designation of Adequate Water Supply.

In this arid environment, Castle & Cooke, Arizona, Inc. (C&C) seeks to

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the evidentiary issues. PDS bears the burden in the first instance of demonstrating that its proposed groundwater use is legally available and does not infringe on BLM's superior rights, and ADWR must answer that question in the affirmative before it can issue the designation of adequacy. A.R.S. §§ 9-463.01(J); 45-108(A)- (B), 45-108.01(E); A.A.C. R12-15-714(A)(5), (E)(3).

[6] The hydrologic model was developed by the USGS and updated by the firm of Brown & Caldwell. Tr. 871-75, App. G at 162.

build the Tribute Master Planned Community ("Tribute") in Sierra Vista and pump even more groundwater from the aquifer that provides water to SPRNCA. Tribute would include up to 6,959 new residential units, as well as commercial and office units. However, C&C cannot receive final approval for the subdivision plats within Tribute unless PDS, its water company and wholly-owned subsidiary, can show there is an "adequate water supply" for those subdivisions. ADWR's Pre-hearing Memorandum, (Doc. 43), App. K at 232.

In June 2011, PDS submitted an application (No. 40-700705.0000) to ADWR for a designation of adequate water supply. PDS Application, (DWR-2), App. L at 236. The revised Application seeks to increase PDS's pumping from 1430 AFY (which already supplies pre-existing development) to a projected annual demand of 4,870 AFY by 2032. ADWR Brief at 8. In response, ADWR did not evaluate whether the groundwater PDS proposes to pump was legally available. Instead, ADWR required only that PDS possessed a certificate of convenience and necessity ("CC&N") from the Arizona Corporation Commission ("ACC") authorizing it to serve the proposed use. *See* Doc. 43, App. O at 250. In this regard, ADWR relied upon its own regulation, A.A.C. R12-15-718 (A) and (C), which provides that the ADWR director "shall determine that an applicant will have sufficient supplies of water that will be legally available for at least 100 years if the applicant submits" a CC&N. *Id*. To obtain a CC&N from the ACC, an

applicant is not required to show the legal availability of water, which neither ADWR nor PDS dispute.

ADWR did not consider whether PDS's proposed pumping would conflict with BLM's vested, superior federal reserved right for SPRNCA. ADWR Decision Letter, DWR-63, App. M at 244-45. In its Decision Letter, ADWR concluded that "[u]ntil the federal reserved right claims associated with SPRNCA have been finally adjudicated, it would be impossible to determine whether the proposed pumping would need to be curtailed to preserve SPRNCA, and if so, to what extent." *Id*., App M at 245.

In his testimony at the administrative hearing, ADWR's only witness, Andrew Craddock, the manager of ADWR's Assured and Adequate Water Supply Program, confirmed that ADWR did not analyze what effect, if any, the proposed pumping would have on the San Pedro River and whether the federal reserved rights of SPRNCA would have any impact on PDS's legal right to pump groundwater for at least 100 years:

> Q. Did the Department consider whether there were potential impacts from PDS's proposed groundwater pumping on -- the shorthand name is SPRNCA?
>
> ***
>
> A. No. We did not look at any potential impacts on SPRNCA, as a result of the groundwater pumping.

Testimony of Andrew Craddock, Tr. 142-43, App. G at 144; *see also* ADWR Br. at 22 (acknowledging that ADWR does not consider impacts on streams when it reviews applications for adequacy designations from a proposed groundwater pumper).

In summary, the BLM holds federal reserved water rights for SPRNCA, those rights have been quantified in claims in the Gila River adjudication using a methodology with which ADWR agreed, and credible evidence shows that groundwater pumping has already left BLM short of the federal reserved water to which it is entitled. Yet ADWR refused to consider the limits that BLM's federal reserved water rights impose on PDS's pumping, leaving homebuyers without a secure source of water for 100 years — the very result the water adequacy laws sought to avoid.

STATEMENT OF ISSUES

1. Did ADWR violate A.R.S. § 45-108 when it granted PDS a Designation of Adequate Water Supply without requiring PDS to demonstrate that BLM's federal reserved rights, which are protected from groundwater pumping under state and federal law, will not constrain PDS' ability to pump groundwater, thus making the water supply legally unavailable?

2. Did ADWR abuse its discretion by relying on A.A.C. R12-15-718(C) to accept the CC&N in lieu of the statutorily-mandated demonstration that, in the

face of BLM's senior federal reserved water rights, the groundwater PDS proposes to pump is "legally available" for 100 years where the CC&N does not take into account the legal availability of water?

3. Did the Superior Court abuse its discretion when it awarded Silver and Gerrodette their attorneys' fees pursuant to A.R.S. § 12-348 and the Private Attorney General Doctrine?

STANDARD OF REVIEW

On appeal, this Court must determine whether the record contains evidence to support the Superior Court's judgment, and in so doing, review the underlying question of whether the administrative entity acted in contravention of the law, arbitrarily, capriciously, or in abuse of its discretion. *Saldate v. Montgomery*, 228 Ariz. 495, 498 ¶ 10 (App. 2012). In administrative appeals, neither the Superior Court nor this Court reweighs the evidence. *St. Joseph's Hosp. v. Ariz. Health Care Cost Containment Sys.*, 185 Ariz. 309, 312 (App. 1996) (citing *Havasu Heights Ranch & Dev. Corp. v. Desert Valley Wood Prods., Inc.*, 167 Ariz. 383, 387 (App. 1990)). The Court reviews *de novo* the legal issues, including those involving statutory interpretation. *Saldate*, 227 Ariz. at 498 ¶10; *Kromko v. City of Tucson*, 202 Ariz. 499, 501, ¶ 4 (App. 2002). While courts will accord deference to an agency's interpretations of legislation it is charged with implementing, "the agency's interpretation is not infallible, and courts must remain the final authority

on critical questions of statutory construction." *Robbins v. Ariz. Dep't of Econ. Sec.*, 232 Ariz. 21, 23 ¶ 7 (App. 2013) (quoting *U.S. Parking Sys. v. City of Phoenix*, 160 Ariz. 210, 211 (App. 1989)). Further, less deference is warranted where the agency changes its position without explanation. *See, e.g.*, *I.N.S. v. Cardozo-Fonseca*, 480 U.S. 421, 446 n. 30 (1987). Fee awards are reviewed using an abuse of discretion standard. *Kadish v. Ariz. State Land Dep't*, 177 Ariz. 322, 326 (App. 1993).

SUMMARY OF ARGUMENT

The April 11, 2013 "Decision and Order of the Director" issuing a designation of adequate water supply to PDS was arbitrary and capricious because ADWR failed to require PDS to demonstrate, and because ADWR failed to evaluate and determine, whether PDS's proposed groundwater supply is legally available for 100 years in light of the BLM's federal reserved water rights associated with SPRNCA. As a result, this Court should affirm the Superior Court's decision vacating and remanding ADWR's water adequacy designation.

ADWR's and PDS's briefs ignore decisions from the U.S. Supreme Court and the Arizona Supreme Court that are directly on point and prohibit groundwater pumping that infringes on federal reserved water rights. *See, e.g.*, *Cappeart v. United States*, 426 U.S. 128 (1976); *Gila III*. Against the weight of this authority, they primarily ground their arguments on two thin rationales for ADWR's refusal

to consider BLM's federal reserved water rights in its adequacy determination.

First, ADWR and PDS argue that remanding the decision to ADWR for further findings regarding whether BLM's water rights constrain the legal availability of the water PDS proposes to pump intrudes impermissibly on the Gila River Adjudication, which has sole jurisdiction over the quantification of BLM's rights. ADWR Br. at 25-31; PDS Br. at 35. However, ADWR's legal obligations to manage water *use* do not require *adjudication* or quantification of water rights and must be discharged independently of the Gila adjudication.

Second, they argue that an ADWR regulation, A.A.C. R12-15-718(C), limits the agency's consideration of legal availability of water to one criterion: the existence of a certificate of a CC&N from the A.C.C. But this certificate has nothing to do with legal rights to water supplies. As a result, ADWR's application of this regulation conflicts with the plain language of A.R.S. § 45-108 and is unlawful.

Finally, the trial court properly exercised its discretion in awarding attorneys fees and costs to Silver and Gerrodette under both the Private Attorney General Doctrine and under A.R.S. §12-348. First, Silver and Gerrodette vindicated a right that benefits a large number of people, required private enforcement and is of societal importance. Second, the fee recovery statute provides for a mandatory aware of fees in successful challenges to administrative action.

ARGUMENT

I. ADWR'S DECISION TO GRANT PDS A DESIGNATION OF ADEQUATE WATER SUPPLY WAS AN ABUSE OF DISCRETION BECAUSE IT DID NOT REQUIRE PDS TO DEMONSTRATE THAT THE GROUNDWATER IS LEGALLY AVAILABLE FOR AT LEAST 100 YEARS

A. The Plain Meaning of the Arizona Water Adequacy Statute Requires ADWR to Determine Whether the Groundwater PDS Proposes to Pump is "Legally Available."

Arizona's water adequacy program is designed to ensure that homes in new subdivisions that are located outside an AMA have a reliable water supply for at least 100 years. Thus, before building a new subdivision, a developer must apply for and obtain a designation of adequate water supply from ADWR. A.R.S. § 45-108(A).[7] In Cochise County, which includes Sierra Vista, a new subdivision will not be approved unless and until the developer obtains this designation. Cochise County Subdivision Regulations § 408.03(B); *see* A.R.S. §§ 11-823(A); A.R.S. § 9-463.01(J) (authorizing counties to require a designation of water supply prior to plat approval); Doc. #43, App. K at 232.

According to the statute, an "adequate water supply" means, in part, 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)(1). The applicant

[7] A subdivision is defined as land divided into six or more lots with at least one parcel (or lot) having an area of less than 36 acres. A.R.S. § 32-2101(56).

(here, PDS), bears the burden of demonstrating that its proposed water supply meets these criteria. A.R.S. § 45-108(A); A.A.C. R12-15-714(A)(5). ADWR, in turn, bears the burden of evaluating the application and determining whether it meets the criteria. A.R.S. § 45-108(B), A.R.S. § 45-108.01(E); A.A.C. R12-15-714(E)(3); *see also* A.R.S. § 9-463.01(J). At issue in this case is whether PDS and ADWR have met their burdens to demonstrate that the proposed water supply is "legally available."

The "cornerstone" of statutory interpretation is "the rule that the best and most reliable index of a statute's meaning is its language and, when the language is clear and unequivocal, it is determinative of the statute's construction." *Janson ex rel Janson v. Christensen*, 167 Ariz. 470, 471 (1991) (en banc); *Sanderson Lincoln Mercury, Inc. v. Ford Motor Co.*, 205 Ariz. 202, 205 ¶ 11 (App. 2003) ("[W]e look first to the language of the statute, and we presume that the legislature has said what it means.") Arizona courts interpret statutes to "give words their common, ordinary usage unless otherwise defined." *Sharpe v. Ariz. Health Care Cost Containment Sys.*, 220 Ariz.488, 497 ¶ 28 (App. 2009); *see also* A.R.S. § 1-213 ("Words and phrases shall be construed according to the common and approved use of the language.").

Here, the "common, ordinary usage" of "legally available" is straightforward: the water must be obtainable under applicable laws and the

applicant must have legal rights to it.[8] *See* *Fogliano v. Brain ex rel. Cnty of Maricopa*, 229 Ariz. 12, 19 ¶ 19 (App. 2011) ("'Available' can mean either present and ready for use, or capable of being gotten, obtainable.") (citing American Heritage Dictionary 123 (4th ed. 2001)); *Robson Ranch Mountains, L.L.C. v. Pinal County*, 203 Ariz. 120, 128 (App. 2002) ("available" means "accessible, obtainable") (citation omitted)).[9]

Indeed, ADWR defines "legally available" nearly exactly this way in its public information materials: "[l]egal rights to the water must exist."[10] Accordingly, to fulfill this requirement, ADWR must ensure that an applicant for a designation of adequate water supply has the legal right to its proposed water supply for the next 100 years. If another party (in this case BLM) already has senior rights to that water, it is not legally available. Here, ADWR violated the plain meaning of the statute by failing to consider BLM's senior federal reserved water rights and whether they render PDS's proposed water supply legally unavailable.

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[8] Appellees raised this issue below at IR 40, Silver Op. Br. at 2, 18-19, 24-25; IR 41, Gerrodette Op. Br. at 25.

[9] *See* Merriam-Webster Online Dictionary, available at http://www.merriam-webster.com/dictionary/legal (last visited June 23, 2015) (defining "legal" as "conforming to or permitted by law or established rules;" defining "available" as "present or ready for immediate use," or "accessible, obtainable").

[10] ADWR Assured and Adequate Water Supply Programs Fact Sheet, at 2, available at http://www.azwater.gov/azdwr/WaterManagement/AAWS/documents/AzAssuredAdequateWaterFactSheet6-1-09.pdf (last visited June 23, 2015).

B. Requiring PDS to Prove, and ADWR to Determine, Whether the Groundwater is Legally Available In View of BLM's Senior Rights Fulfills the Legislative Intent of the Water Adequacy Statute.

Because the statute is clear on its face, this Court need not examine the legislative intent of the statute to determine whether it requires PDS to prove – and ADWR to determine – whether the groundwater PDS proposes to pump is legally available. *See* *Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 268 (1994) (en banc) (citing *State v. Reynolds*, 170 Ariz. 233, 234 (1992) (en banc))("If a statute's language is clear and unambiguous, we apply it without resorting to other methods of statutory interpretation."). However, this is the only reading of the statute consistent with the Arizona legislature's intent.[11] *See* *Maldonado v. Ariz. Dep't of Econ. Sec.*, 182 Ariz. 476, 478 (App. 1994) (an interpretation that would defeat the legislative purpose is to "be frowned upon and stricken down") (quoting *Sw. Lumber Mills, Inc. v. Emp'tt Sec. Comm'n*, 66 Ariz. 1, 5 (1947)).

1. The Legislature's Longstanding Efforts to Protect Homebuyers From Purchasing Property with Insufficient Water.

When it was first developed in the 1970s, the adequacy program was designed to safeguard consumers against buying, and prevent developers from building, homes with a water source that may come in jeopardy during the next century. *See* Testimony of Former ADWR Director Herb Guenther to Arizona

[11] *See* IR 40 at 19-21, 24; IR 41 at 12-14.

Senate Committee on Natural Resources and Rural Affairs on February 14, 2007 ("The adequacy program was started in 1973 as a consumer protection program…in the wake of a lot of land sales–that became a national embarrassment to Arizona–that were sold, without water, all over the nation.").[12] Then, in 1980, the Arizona legislature passed the Groundwater Management Act ("Act") in recognition of the continuous serious threat posed by unchecked groundwater pumping. A.R.S.§§ 45-401 *et seq.* As the Act recognized:

> [I]n many basins and sub-basins withdrawal of groundwater is greatly in excess of the safe annual yield and … this is threatening to destroy the economy of certain areas of this state and is threatening to do substantial injury to the general economy and welfare of this state and its citizens.

A.R.S. § 45-401(A). The Act sought to "provide a framework for the comprehensive management and regulation" of groundwater in Arizona. *Id.* § 45-401(B).

The Act delineated the groundwater basins within the state and created five "active management areas," or "AMAs." *See* A.R.S. §§ 45-402(2), (13), 45-403, 45-411. For those five AMAs, the Act requires developers seeking to pump groundwater to meet specific requirements. A.R.S. § 45-576. These requirements fell under a new program called the Assured Water Supply Program. A.A.C. R12-

[12] Accessible online at http://azleg.granicus.com/MediaPlayer.php?view_id=3&clip_id=380 (last accessed June 24, 2015).

15-701 *et. seq.* The 1980 Act did not change the 1973 water adequacy requirements for those areas outside of an AMA, however. As a result, areas outside of AMAs remained subject only to the weaker 1973 water adequacy requirements.

In 2006, in recognition of the deficiencies in the 1973 water adequacy program, ADWR announced the formation of a Statewide Water Advisory Group composed of Arizona citizens, industry representatives, and government officials. The Statewide Water Advisory Group reviewed the adequacy program and made recommendations to enhance its effectiveness. *Id*. In 2007, the Arizona legislature adopted the group's recommendations and substantially amended the water adequacy statute to provide counties a greater ability to protect consumers, control growth, and protect and conserve their water supply. *Id*.

One of the amendments made to A.R.S. § 45-108 in the 2007 bill was the addition of the definition of an "adequate water supply" as requiring "[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." *See* S.B. 575, 2007 Ariz. Laws 240, Sec. 8. Although ADWR regulations had required this showing by an applicant, the Legislature's decision to elevate it to a statutory requirement is consistent with the purpose of the 2007 amendments to strengthen the oversight of the impacts of

future water use like groundwater pumping.[13]

Significantly, the amendments also provided counties and municipalities with the authority to require a demonstration of adequate water supplies prior to plat approval. These changes addressed the amendments' primary goals: to strengthen the original purpose of protecting consumers from buying homes without adequate water supplies, as well as to empower local governments to conserve dwindling water supplies and plan development in a way that would avoid future water conflicts. *See* SB 1575 Testimony at 2:10:34 (Director Guenther explaining need to close consumer protection loopholes in earlier statute); *id* at 2:06:15 (Senator Arzberger, the bill's sponsor, explaining intent of bill to provide counties tools to manage growth and protect water supply); *see also* SB 1575 Testimony at 2:08:35 (Director Guenther commenting that allowing new development without sufficient water harms existing users and property owners); 2:11:50 (Director Guenther explaining that inability to ensure adequate water

[13] PDS asserts for the first time that this interpretation of the "legally available" requirement would subject applicants under the Adequate Water Supply Program, which applies outside AMAs, to a new and more stringent standard than the Assured Water Supply Program, which applies inside AMAs. PDS Br. at 31. This argument was not raised below and should not be considered now. *Rand v. Porsche Fin. Serv.*, 216 Ariz. 424, 434 n. 8, ¶ 39 (App. 2007). Even so, it is without merit. First, the *Gila III* decision protects federal reserved water rights from groundwater pumping whether inside or outside AMAs, and PDS's argument is therefore irrelevant. Second, as discussed *infra*, the 2007 amendments to A.R.S. § 45-108 were intended to strengthen the adequacy program to protect consumers from buying homes with uncertain water supplies. Adopting PDS's interpretation would nullify that protection.

supply means that "you're just going to postpone it until somebody else has to deal with the crisis when your supply comes up short"). These purposes can only be fulfilled if "legally available" means what it says: that the applicant's proposed groundwater depletions do not infringe on senior, protected rights; if they do, the water is not legally available.

2. Construing A.R.S. §45-108(I) to Allow ADWR to Grant a Designation of Adequate Water Supply Without Considering Whether the Proposed Pumping Would Be Limited by Senior Rights Holders is Contrary to the Legislative Intent of the Statute.

PDS argues that the 2007 revision to A.R.S. § 45-108(I)(1) merely codified the existing language in A.A.C. R12-15-718 which allows ADWR to grant an adequacy designation without considering senior water rights, and, therefore, did not reflect the legislature's intent to change the law regarding "legal availability." PDS Br. at 22-23. However, PDS offers no evidence to support this contention and relies solely on the bare presumption that the legislature was aware of ADWR's construction of "legally available" in its regulations when it included the term in the statutory definition of adequate water supply.

If this were the case, then the end result would be — as PDS also contends — no change in the law. Yet such a result flouts the longstanding recognition by Arizona courts that when the legislature amends a statute, that amendment signals

an intent to change existing law.[14] *See* *McLeod v. Chilton*, 132 Ariz. 9, 16 (App. 1981) (recognizing presumption that by amending a statute, the legislature intends change existing law.). Indeed, the necessity for a change in the status quo, which allowed developers to build subdivisions even if they could not demonstrate an adequate water supply, is the overarching goal of the 2007 amendments.

Moreover, PDS's claim that ADWR's current interpretation of the "legally available" requirement is one of "longstanding" application is belied by a prior interpretation that is entirely consistent with the Superior Court's ruling.[15] PDS Br. at 21. In 1993, ADWR *did* consider the SPRNCA's rights in line with the lower court's reasoning. Pursuant to an earlier version of A.R.S. § 45-108, ADWR deemed a water supply for a 185-lot subdivision – less than 3% the size of Tribute – "inadequate" because, among other things, the agency could not be certain that the water supply was "legally available" for the next 100 years in light of the SPRNCA's rights. ADWR Letter to Developer, (RS-20), App. N at 247-48. The 1993 version of the statute, as now, required subdivision developers to "demonstrate" that their water supplies were adequate, but "adequate water supply" was not defined. *See* A.R.S. § 45-108. Nonetheless, ADWR used a "legal availability" standard:

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[14] *See* IR 54, Gerrodette Reply Br. at 5.
[15] *See* IR 53, Silver Reply Br. at 23-24.

> Existing hydrological studies and data suggest that there is a hydraulic connection between the San Pedro River and the underlying aquifer in the Ft. Huachuca-Sierra Vista area. In addition, certain unresolved questions currently exist as to whether such pumpage of groundwater has violated or will violate the legal rights of other persons to the surface water of the San Pedro River . . . . The resolution of these questions will require judicial action, which may not become final for many years. *Hence, while hydrological studies suggest that an adequate water supply is physically available to this subdivision, the possibility exists that it may not be legally available*. Therefore, the Department must find the water supply to be *inadequate.*

RS-20, App. N at 248 (first emphasis added). ADWR's position in 1993 not only recognized that groundwater pumping could, as a factual matter, interfere with BLM's superior rights, but also recognized that an "inadequate" determination is required if there is insufficient information to make an adequacy determination.[16] The current version of the statute, which added the requirement that the water be "legally available," requires the same result.

PDS also contends that the 2007 amendments' requirement that ADWR engage in rulemaking evidences the Legislature's endorsement of ADWR's reliance on A.A.C. R12-15-718 as a substitute for considering the legal availability of proposed groundwater use. PDS Br. at 30-31. PDS claims that the legislature "identified those few areas where it intended changes to the AAWS rules," and that it did not intend to change how ADWR applied "legally available." *Id.* This result, however, is not supported by the legislative history which is replete with

[16] Thus, a similar result in this case is not, as PDS argues, a "monumental change;" it is no change at all. PDS Br. at 31.

references to the need for protecting homebuyers from investing in properties that lacked a secure source of water. Nothing in the legislative history demonstrates that the legislature considered, was aware of, or intended to approve ADWR's policy of substituting the CC&N requirement for a substantive review of the legal availability of a proposed groundwater source.[17] All indications are to the contrary.

3. Cochise County's Referendum on the Upper San Pedro Water District is Immaterial to the Legal Availability Requirement.

Finally, ADWR (but not PDS) argues that the Superior Court's interpretation of A.R.S. § 45-108 would only apply if the voters had approved the Upper San Pedro Water District ("USPWD") in a referendum authorized by A.R.S. § 48-6403(A). ADWR Br. at 22-24. That argument is not borne out by the plain language of the legislation. According to A.R.S. § 45-108.04, if the voters approved the referendum and created the USPWD, "adequate water supply" for purposes of A.R.S. § 45-108 would still require a determination that the water was "legally available," but it would also have to be consistent with USPWD "goals." Had the referendum passed, USPWD's goals would have been "to maintain the aquifer and base flow conditions needed to sustain the upper San Pedro river and to assist in meeting the water supply needs and water conservation requirements for

[17] *See* IR 40 at 6-7; IR 41 at 5.

Fort Huachuca and the communities within the district." A.R.S. § 48-6403(B).

ADWR's argument regarding the USPWD lacks merit because Cochise County's rejection of the referendum could not absolve ADWR of its mandatory duty to ascertain whether the groundwater PDS's proposes to pump is legally available. A.R.S. § 45-108 Nor does the record demonstrate that the legislature's decision to provide Cochise County citizens the option to vote on the creation of the USPWD also opened the door for ADWR to ignore federal rights in processing adequacy applications. At any rate, discerning the voters' reasons for rejecting the USPWD, which included additional provisions unrelated to the San Pedro River that may have been objectionable to voters, is impossible. Courts struggle with determining legislative intent when voters *approve* ballot measures. *See Randolph v. Groscost*, 195 Ariz. 423, 427 ¶ 15 (1999) (en banc).

C. ADWR's Refusal to Require PDS to Account For BLM's Federally Reserved Water Rights in Evaluating Legal Availability Also Ignores an Express Directive from the Arizona Supreme Court.

Whether water in Arizona is legally available involves questions of both state and federal law. Historically, Arizona law has treated surface water and groundwater as if they are unconnected. *See Gila III*, 195 Ariz. at 415 ¶ 7. Surface water rights are governed by the doctrine of prior appropriation and groundwater rights are governed by the doctrine of "reasonable use."

Therefore, as a general rule, under Arizona law, groundwater users can pump as much groundwater as they want, so long as the water is put to "reasonable use." If pumping adversely impacts surface water rights, the surface water user usually has no recourse. *Id.* at 415 ¶ 10.

However, the rule is different under federal law, which is why ADWR and PDS are wrong in asserting that PDS has uncontested, virtually limitless rights to groundwater pumping under the "reasonable use" doctrine. ADWR Br. at 37-38; PDS Br. at 26. Federal law recognizes the hydrological connection between surface and groundwater, and holders of federal water rights may protect their surface water flows from groundwater pumping. *Cappaert*, 426 U.S. at 143. In *Cappaert*, Devil's Hole, a deep cavern on federal land in Nevada containing an underground pool inhabited by a unique species of desert fish had been designated a national monument in 1952 under the American Antiquities Preservation Act. *Id.* at 131-32. In 1968, the Cappaerts, who owned a nearby ranch, began pumping groundwater coming from the same source as the water in Devil's Hole, thereby reducing the water level in Devil's Hole and endangering its endemic fish. *Id.* at 133. When the United States filed suit in federal district court seeking to limit the Cappaerts' pumping of their wells, the district court concluded that the groundwater wells and Devil's Hole were hydrologically connected and permanently enjoined pumping that would lower the water below a certain level

necessary to preserve the fish. *Id.* at 135-36. Notably, the United States' water right had never been formally adjudicated and, indeed, the water level in the hole was marked by a copper washer installed by a USGS surveyor. *Id.* at 133. The U.S. Supreme Court affirmed, holding, among other things, that the United States can protect its water from subsequent diversion, whether the diversion is of surface water or groundwater. *Id.* at 143.

In *Gila III*, the Arizona Supreme Court relied upon *Cappaert* to hold that federal rights holders are entitled under Arizona law to protect *both* surface water and groundwater from groundwater pumping. *Gila III*, 195 Ariz. at 421-422 ¶ 37 ("What *Cappaert* holds with respect to the protection of surface waters … enables us to apply to the protection of groundwater as well."). The Arizona Supreme Court was clear in *Gila III* that the state "may not ignore" federal reserved water rights. *Id.* at 422 ¶ 42. As the Supreme Court recognized, "federal reserved rights holders enjoy greater protection from groundwater pumping than do holders of state law rights." *Id.* at 422 ¶ 38. Accordingly, the Court found that "[i]t is apparent from the case law that we may not withhold application of the reserved rights doctrine purely out of deference to state law. Rather, we may not defer to state law where to do so would defeat federal water rights." *Id.* ¶ 27.

In its opening brief, ADWR seizes upon the Supreme Court's refusal in *Gila III* enjoin all pumping that was depleting groundwater under Indian Reservations to

argue that in evaluating PDS's application ADWR cannot even consider SPRNCA's federal reserved rights. ADWR Br. at 29-30. However, the agency reads too much into the Court's preliminary denial of injunctive relief and fails to put it in context. In *Gila III*, the Supreme Court explained that injunctive relief was premature because "[t]he question before us is not whether any particular reservation is *now* entitled to broader protection than state law provides." *Id.* at 421 ¶ 35 (emphasis in original). The Court, however, made it clear that its refusal to grant injunctive relief at that stage in the proceeding did not mean such relief was unavailable on remand. *Id.* at 422 ¶ 39 ("We here decline in the abstract to define how imminent a threat to a reservation's essential waters must be in order to warrant injunctive relief. The latter standard, like the former, should be grounded in the bedrock of the facts."). Here, unlike *Gila III*, the federal reserved water rights are not presented in the abstract; nor are the appellants seeking affirmative injunctive relief that would change the status quo. Thus, the Court's denial of injunctive relief in *Gila III* has no applicability to the situation presented here.

In short, the plain language and intent of A.R.S. § 45-108(I) requires PDS to demonstrate, and ADWR to evaluate and determine, that the company's proposed water supply is "legally available" notwithstanding the legal constraints imposed by BLM's superior legal rights for the SPRNCA before ADWR may issue a designation of adequate water supply. If they are unable to meet their burdens, an

"inadequate" determination is required; however, ADWR is not entitled to refuse to require the analysis altogether.

II. THE GILA RIVER ADJUDICATION DOES NOT EXCUSE ADWR FROM FULFILLING ITS MANDATORY DUTIES.

ADWR and PDS argue that because ADWR does not have the authority to fully and finally *adjudicate* or quantify SPRNCA's federal reserved water rights within the Arizona water rights system, ADWR must ignore them when performing its regulatory function under A.R.S. § 45-108. ADWR Br. at 25-26; PDS Br. at 35. Their position, however, confuses ADWR's mandatory, administrative function to *manage water use*, with the state court's authority to *adjudicate water rights.* It also conflicts with Arizona Supreme Court and U.S. Supreme Court cases which require the protection of federal reserved water rights from interference by groundwater pumping, even when those federal rights have not been quantified in an adjudication.[18]

A. ADWR's Mandatory Administrative Duties Do Not Require, or Amount to, an Adjudication of SPRNCA's Federal Reserved Water Rights

ADWR argues that the Superior Court's decision would result in BLM's federal reserved water rights being adjudicated before ADWR instead of in the Gila River adjudication. However, ADWR overlooks its mandatory administrative

[18] *See* IR 40 at 15-20; IR 41 at 12-13.

duties which exist independent of the Gila River adjudication.[19] Pursuant to A.R.S. § 45-108, ADWR must ensure that groundwater is legally available before granting an adequacy designation. If ADWR believes it cannot make that affirmative determination in the absence of a final adjudication, it must decline to grant the adequacy determination, as it did in 1993. *Supra* at 28-29. The approach it took here – blindly issuing the designation – puts homebuyers at risk of a later court order barring further pumping to protect federal reserved water rights – exactly what the legislature sought to avoid.[20]

ADWR attempts to excuse this abdication of its statutory responsibility by relying on dicta in *Yavapai-Apache Nation v. Fabrtiz-Whitney*, 227 Ariz. 499

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[19] ADWR is not the passive functionary it paints itself to be. *See* Leshy & Belanger, ARIZONA LAW WHERE GROUND AND SURFACE WATER MEET, 20 Ariz. St. L. J. 657 (1988). Instead, the ADWR "Director is the linchpin of water management in the state. If a pressing management problem like the groundwater/surface water interface requires resolution by the application of hydrologic and regulatory expertise, the Director has authority to deal with it, unless some provision of law specifically prevents her from doing so." *Id*. at 710. Additionally, "[o]utside of the general adjudication context, the management of the state's water resources, the making of factual findings, the development of a regulatory scheme, and the resolution of water rights disputes are all part of DWR's responsibility." *Id*. at 719.

[20] ADWR also speculates that upholding the Superior Court will result in development delays in Cochise County. ADWR Br. 33-37. However, A.R.S. § 45-108 requires a "look before you leap" approach to water adequacy determinations. ADWR's preferred approach – to issue adequacy designations without looking at whether the water is legally available – creates unnecessary risk and invites future conflict when the stakes are higher and the developer may be long gone.

(App. 2011) to claim that it is without authority to determine the federal reserved water rights claims for SPRNCA. ADWR Br. at 26-27. This is not only an improper reading of that case, but it defies the clear holding from the Arizona Supreme Court in *Gila III*.[21] In *Yavapai-Apache Nation*, this Court described in detail the distinction between water resource management and water rights adjudication. *Id.* at 503-04 ¶ 18 ("Arizona's water code provides separately for water rights adjudication, which is intended to allocate water rights, and for water usage management, which is meant to regulate water usage."). Citing this discussion, ADWR argues that, as a water resource manager, it may not consider federal reserved rights. But this Court held nothing of the sort.

This Court's discussion in *Yavapai-Apache Nation* is easily reconciled with the holding in *Gila III* through an understanding of the specific *constitutional* question the Court was facing. In *Yavapai-Apache Nation*, the City of Prescott had applied to ADWR for a modification of its assured water supply. *Id.* at 502 ¶ 2. During the administrative review process, ADWR denied several parties the right to object, including the Yavapai-Apache Nation ("YAN"), on the ground that they lacked standing because they were not residents of the AMA for which the application was granted. *Id.* at 502 ¶ 3. As a result, their administrative appeals

[21] *See* IR 40 at 25-26; IR 41 at 15-16.

were not considered. *Id.* After ADWR granted Prescott's application, numerous parties filed suit in superior court to enjoin the granting of the application. *Id.* ¶ 5.

The trial court allowed YAN to intervene, where YAN argued that it was improperly denied standing during the administrative review process. *Id.* ¶ 5. However, on the merits, the trial court rejected YAN's argument, holding that A.R.S. § 45-578.B was properly applied and constitutional. *Id.* ¶ 9. On appeal, that was the only issue before this Court. *Id.* YAN argued that the statute was unconstitutional because it violated the tribe's equal protection and due process rights. With regard to its due process claim, YAN argued that A.R.S. § 45-578.B "deprive[d] it of a property interest without a meaningful opportunity to be heard." *Id.* at 508 ¶ 46.

This Court agreed that due process requires an opportunity to be heard. *Id.* ¶ 48. But it rejected the argument that ADWR's refusal to consider YAN's appeal regarding the designation was a due process violation, explaining that "to trigger this due process requirement, the party requesting to be heard must have an interest that will be adjudicated in a 'proceeding which is to be accorded *finality*.'" *Id.* at 508-09 ¶ 48 (citation omitted). It was in this portion of opinion that the Court observed that "once a general adjudication is pending that involves particular water rights parties to the case may not litigate the same water rights in another action." *Id.* at 509 ¶ 49. The Court observed that YAN had the ability to adjudicate its right

in the general stream adjudication, and that the ADWR administrative hearing was not the place to obtain a final adjudication of that property right. "Thus, it [could not] be said that the YAN [was] denied its right to a hearing." *Id.* ¶50. Because the Court concluded that YAN did not have a right to appeal ADWR's decision, it never reached the merits of YAN's objection to the City of Prescott's application.

However, none of the appellees here asked ADWR to finally "determine" the federal reserved water rights for SPRNCA in the administrative proceeding. They merely argued that ADWR, as a resource manager, and as the Arizona Supreme Court instructed in *Gila III*, must take notice of those rights and determine whether they will constrain PDS's legal ability to pump groundwater.

This is entirely consistent with the Arizona Supreme Court's holding in *Gila III*, where the Court made it clear that its decision would affect both the courts handling adjudications *and* state agencies making water resource management decisions. 195 Ariz. at 422 ¶42 ("We do not underestimate the burden that the State of Arizona will face in *accommodating federal reserved water rights within its water resource management*. Nor do we underestimate the burden that the trial court will face in adjudicating the extent and relative priority of such rights.") (emphasis added). At any rate, to the extent the holding of *Yavapai-Apache Nation* is inconsistent with the holding of *Gila III* (which, as discussed above is not the case), *Gila III* is the controlling authority and ADWR is legally bound to follow

the directives of the Arizona Supreme Court. ADWR's position that it can simply ignore BLM's federal reserved rights for SPRNCA flies in the face of the Supreme Court's unequivocal admonition.

B. The Gila River Adjudication Does Not Bar ADWR From Determining Whether The Groundwater PDS Proposes To Pump Is Legally Available.

Contrary to ADWR and PDS's arguments, federal reserved water rights need not be adjudicated or quantified to enjoy protection from groundwater pumping. Two of the seminal cases involving the enforcement of federal reserved rights enjoined infringing water uses even though the federal rights had not been quantified in any adjudication. In the first case to hold that when the United States sets aside an Indian reservation it impliedly reserves sufficient water to fulfill the purposes of the reservation, the Supreme Court recognized that "[t]he power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be." *Winters v. United States*, 207 U.S. 564, 576-77 (1908) (citations omitted). Similarly, in *Cappaert*, the Supreme Court explained that the "determination of such reserved water rights is not governed by state law but derives from the federal purpose of the reservation" and rejected the argument that the U.S. is required to "perfect its water rights in the state forum like all other landowners." 426 U.S. at 144.

At any rate, the quantity of BLM's federal reserved rights in SPRNCA is not

the subject of pure speculation, as ADWR's position would suggest.[22] Rather, there is a substantial amount of information regarding BLM's federal reserved water rights, much of it supplied by ADWR itself and which is relevant to its review of PDS's request for an adequacy designation. *See supra* at 6-8.

ADWR's position is also inconsistent with its policy for determining "legal availability" when the designation involves other types of water sources. *See* A.A.C. R12-15-718(E). When an applicant's proposed source of water is surface water other than CAP water or Colorado River water, the applicant must submit evidence that it has a certificated surface water right, decreed water right, or a pre-1919 claim. *Id.* If the applicant submits such right or claim, "[t]he Director shall determine that the volume of water that is legally available . . . is equal to the face value of the right or claim. *Id.* If the right or claim is subsequently adjudicated, the Director shall determine the volume of water that is legally available based on the adjudicated amount of water." *Id.* Thus, ADWR does, in fact, consider unadjudicated rights in other contexts, and it should do so here.

C. Cases in Montana and Nevada Require Consideration of Unadjudicated Water Rights in Analogous Water Adequacy Proceedings

If anything, the pending adjudication of the federal reserved rights should weigh against PDS's application, which is what courts in other states have held. In

[22] *See* IR 40 at 7-9, 13; IR 4 at 6-7, 21.

Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starner, 923 P.2d 1073 (Mont. 1996) ("*Ciotti*"), the Montana Supreme Court addressed a virtually identical situation — an application for a new use permit that had the potential to adversely impact federal reserved rights. It held:

> Because an applicant's burden of proof pursuant to § 85-2-311(1)(e), MCA, may not be satisfied until the Tribes' reserved water rights are quantified, we further hold that DNRC does not have authority to grant water use permits on the reservation until that quantification is complete.

Id. at 1080.

The Montana Supreme Court revisited the issue after the Montana legislature amended the statute in an effort to override the holding in *Ciotti*. *Confederated Salish and Kootenai Tribes v. Clinch*, 992 P.2d 244, 248 (Mont. 1999). In interpreting the amended statute, the Montana court concluded that if it gave effect to the clear legislative intent and allowed new permits to issue before the reserved rights were quantified, the statute would violate the provision of the Montana constitution that protects existing water rights whether adjudicated or not. *Id.* at 250. To reconcile the statute with the state constitution, the court interpreted the statute's requirement that permits only be issued upon a showing of "legal availability" to mean "there is water available which, among other things, *has not been federally reserved for Indian tribes*." *Id.* (emphasis added). Because the Department could not determine whether the issuance of the permits would affect

the existing federal reserved water rights until they were quantified, the court once again held that no new user permits could issue unless and until the Tribe's rights were quantified.

A Nevada decision recently took a similar approach. *White Pine County v. King*, 2013 WL 6911829 (Nev. Dist. Ct.), In *White Pine*, South Nevada Water Authority (SNWA) proposed to engage in large scale groundwater pumping. *Id.* at *1. The governing Nevada statute, similar to Arizona's "legally available" requirement, required the state engineer to first determine whether the proposed pumping would conflict with existing water rights before granting the permit. *Id.* at *2. However, the state agency concluded that "the hydrology of [the area] [was] not completely understood." *Id.* at *7. As a result, the court held that "[g]ranting water to SNWA [would be] premature without knowing *the impacts to existing water holders* and not having a clear standard to identify impacts, conflicts or unreasonable environmental effects so that mitigation may proceed in a timely manner" *Id.* at *10. (emphasis added).

ADWR itself took this approach in 1993 when it declined to issue an adequacy designation for much less groundwater than PDS proposes now. There is no rational basis for it to summarily reject that approach now.

III. ADWR'S APPLICATION OF A.A.C. R12-15-718(C) CONFLICTS WITH A.R.S. § 45-108 AND IS UNLAWFUL BECAUSE ITS ONLY CRITERION FOR DETERMINING THE LEGAL AVAILABILITY OF WATER IS THE ISSUANCES OF A CC&N, WHICH HAS NO BEARING ON WATER AVAILABILITY.

Despite the plain meaning and intent of A.R.S. § 45-108, ADWR and PDS contend that a regulation, A.A.C. R12-15-718(C), allows ADWR to grant an adequacy designation without determining whether the groundwater PDS proposes to pump is legally available in light of BLM's rights. ADWR Br. at 18-19; PDS Br. at 28. Instead, they argue that if a subdivision developer simply obtains a CC&N, ADWR must automatically rubber stamp the proposed water use, certifying it – without analysis – as legally available for 100 years. A CC&N, however, does not address in any way the legal availability of water, which PDS and ADWR acknowledge. *See* PDS Br. at 27. Yet, if the statutory term "legally available" has any meaning, ADWR's reliance on A.A.C. R12-15-718(C) to grant the adequacy designation unlawfully conflicts with the enabling statute and must be set aside. *Sharpe*, 220 Ariz. at 495 ¶ 19 ("[I]f the construction given by the agency is not consistent with the enabling legislation, the interpretation—whether expressed in regulation, policy, or otherwise—is invalid."); *see also Ariz. State Bd. of Regents v. Ariz. State Personnel Bd.*, 195 Ariz. 173, 175 (1999); *Ferguson v. Ariz. Dep't of Econ. Sec.*, 122 Ariz. 290, 292 (App. 1979) (agency regulations "should not be inconsistent with or contrary to the provisions of a statute,

particularly the statute it seeks to effectuate").[23]

Here, ADWR's application of A.A.C. R12-15-718(C) conflicts with the water adequacy statute because CC&Ns have nothing to do with water availability or legal rights to water. A.R.S. § 40-282(B), A.A.C. R14-2-402.[24] The Arizona Supreme Court has explained that the A.C.C., "in granting a certificate of convenience and necessity, has no jurisdiction to determine conflicting water rights, cannot purport to license the wrongful exportation of water, and cannot consider the issue of water rights that petitioners are now attempting to inject in the Superior Court action below." *Gamet v. Glenn*, 104 Ariz. 489, 491 (1969) (en banc). Instead, a CC&N is intended to ensure that a public services corporation seeking to build a utility or public service operation is viable and stable. *See* A.A.C. R14-2-402. Indeed, PDS's CC&N is typical in that there is not a single mention of the company's water supply, let alone its legal right to that supply. *See* ACC Opinion Granting CC&N, (DWR-3), App. O at 249.

In short, under ADWR's interpretation, the agency's sole criterion for determining whether a subdivision's water supply is "legally available" bears no

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[23] Although courts typically defer to an agency's legal interpretations, this is only true "so long as [agencies] operate within their statutory character." *Dioguardi v. Superior Court In & For Cnty. of Maricopa*, 184 Ariz. 414, 417 (App. 1995), as corrected on reconsideration (Dec. 29, 1995), corrected (Jan. 17, 1996). If an agency's interpretation is inconsistent with legislative intent, courts "do not defer to the agency." *Sanderson*, 205 Ariz. at 205.

[24] *See* IR 40 at 29; IR 41 at 25-26.

relation to the legal availability of water – a determination which is the crux of ADWR's duty. Courts reject regulations, or agency applications of regulations, that lead to such an irrational result. *See Sharpe*, 220 Ariz. at 493; *see also Hosea v. City of Phoenix Fire Pension Bd.*, 224 Ariz. 245, 251 (App. 2010)(explaining that courts should interpret statutes in accordance with their clear and unambiguous language unless "impossible or absurd consequences would result") (quotation and citation omitted). Accordingly, the Court should reject ADWR's application of A.A.C. R12-15-718(C) because it is contrary to the statute's plain language and leads to an absurd result. *See Sharpe*, 220 Ariz. at 497.

IV. THE SUPERIOR COURT PROPERLY AWARDED APPELLEES ATTORNEYS' FEES UNDER BOTH A.R.S. §12-348 AND THE PRIVATE ATTORNEY GENERAL DOCTRINE.

The Superior Court properly concluded that Silver and Gerrodette were entitled to attorneys' fees and costs pursuant to A.R.S. § 12-348(A)(2) and the private attorney general doctrine ("PAG"), and that an increase in the cap of $75.00 per hour was justified pursuant to A.R.S. § 12-348(E)(2). App. A at 68-69. Appellants fail to offer any evidence to show that the Superior Court abused its discretion in awarding fees. *See Kadish*, 177 Ariz. at 334.

A. The Superior Court Properly Found that Appellees Were Entitled To Recover Fees Under A.R.S. §12-348 at Increased Hourly Rates.

First, the trial court was statutorily required to award Silver and Gerrodette

fees pursuant to A.R.S. § 12-348(A)(2). (Courts "shall" award fees and costs to the prevailing party in an adjudication on the merits in "a court proceeding to review a state agency decision pursuant to . . . any . . . statute authorizing judicial review of agency . . . decisions.").[25] There can be no doubt that A.R.S. § 12-348(A)(2) applies in this case. Indeed, neither ADWR nor PDS questioned the statute's applicability at the superior court level. However, ADWR now makes the new argument that the Superior Court "erred as a matter of law" by awarding fees because Appellees have not "prevailed on the merits at this stage of the case." ADWR Br. at 40. This Court should not consider ADWR's new argument. *See, e.g.*, *In re MH 2008-002659, 224 Ariz. 25*, 27 ¶ 9 (App. 2010).

Even if it had been asserted below, the argument would fail. Under Arizona law, a party prevailing only on a *procedural* issue is not entitled to fees under A.R.S. § 12-348(A)(2). *Columbia Parcar Corp. v. Ariz. Department of Transportation*, 193 Ariz. 181, 183 ¶ 14 (App. 1999) (procedural issue not a decision on the merits when matter was remanded to the ALJ because the ALJ judge improperly excluded evidence). However, a party prevailing on a *substantive* issue is entitled to fees even if the matter is remanded for further agency consideration. *See, e.g. Phelps Dodge Corp. v. Arizona Elec. Power Coop., Inc.*, 207 Ariz. 95, 128 (App. 2004). This case is akin to *Phelps Dodge Corp.*,

[25] *See* IR 80, Silver Fees Req. at 1, 3-4; IR 78, Gerrodette Fees Req. at 2.

where the court remanded to the agency because, contrary to statute, the agency failed to submit its rules for attorney general review. *Id.* at 126 ¶ 140. The court awarded fees under A.R.S. §12-348 §12-348, explaining: "[a]lthough attorney general review and certification is a procedural requirement, whether the Commission was required to use that procedure was the substance of the Cooperatives' claim presented for judicial review." *Id.* ¶ 144. As in *Phelps Dodge Corp.*, ADWR's failure to consider the SPRNCA was the substance of Appellees' claims presented for judicial review.

ADWR and PDS also assert that the Superior Court should have imposed the statutory cap of $75/hour because Appellees failed to establish that a higher rate is justified under A.R.S. § 12-348(E)(2). Notably, in the Superior Court, ADWR and PDS did not offer any countering evidence to Appellee's fee applications. *See Arnold v. Ariz. Department of Health Services*, 160 Ariz. 593, 536 (1989) ("The Plaintiffs are entitled to attorneys' fees pursuant to A.R.S. § 12-348 … [t]here was evidence before the trial court to support a determination that no attorneys other than the Center would have undertaken this case."). Appellants' unsupported attempt to discredit the unrebutted evidence submitted by Silver and Gerrodette is insufficient.

The Superior Court, in its discretion, determined that the "limited availability of qualified attorneys for the proceeding involved" justified a higher

fee based on the "actual evidence" presented by Appellees. IR 103; *see* A.R.S. § 12-348(E)(2) (also allowing fee increase for an increase in the cost of living or another special factor); *Ariz. Water Co. v. Ariz. Dep't of Water Resources*, 205 Ariz. 532, 540 ¶ 39 (App. 2003), *aff'd in part, vacated in part*, 208 Ariz. 147 (2004). For example, Dr. Silver testified that "[t]here are very few attorneys who have the ability and experience to take on a complex water case such as this," IR 82, Silver Decl. at 7, and that he "was not able to find any other qualified attorneys other than Ms. Adams and her co-counsel Ms. Kay . . . ." *Id.* Gerrodette also provided evidence of both an increase in the cost of living and special circumstances to justify the fee increase, including declarations establishing the difficulty of finding substitute counsel upon the unexpected death of her counsel, Joseph Feller.[26]

Because of the controversial nature of the position asserted by Appellees, the complex nature of the issues involved in this litigation, and other unique issues considered by the Superior Court, the Court appropriately found that there were a limited number of attorneys who were willing and able to represent Appellees in this matter justifying the higher hourly rate under A.R.S. § 12-348(E)(2).[27]

[26] *See* IR 78 at 4-8.
[27] *See* IR 80 at 4-8; IR 78 at 1-4.

B. Appellees Were Also Entitled to Attorneys' Fees Under the Private Attorney General Doctrine.

The Superior Court appropriately awarded Appellees attorneys' fees pursuant to the PAG because Appellees satisfied the governing three-pronged test by vindicating a right that: (1) benefits a large number of people, (2) requires private enforcement, and (3) is of societal importance. *Arnold*, 160 Ariz. at 609.[28]

PDS and ADWR argue no private enforcement was required in this case because BLM participated in the action. However, BLM's participation in this action has never been a certainty, which is why Appellees filed their appeals to the Superior Court prior to BLM. BLM could have at any time — without consulting Appellees — pursued inconsistent litigation strategies, sought a settlement, or withdrawn from the case.

Moreover, BLM's interests differ from Appellees' interests. BLM's interest springs solely from its federal reserved water right, while Appellees have a direct connection to the San Pedro River by virtue of their property ownership; interests in ensuring that ADWR enforces the consumer-protective provisions of A.R.S. § 45-108; and interests in seeing that water resources throughout the state are managed in a lawful manner that is based upon the best available information. Indeed, all briefs at the Superior Court level state unique facts and emphasize different legal points. BLM could not have represented Gerrodette and Silver's

[28] *See* IR 80, at 2, 5-8; IR 78, at 4-6.

interests, and their participation in this matter was necessary to ensure that their distinctive harms would be fully redressed.

Neither Arizona law, nor law in other jurisdiction, support the proposition that fees are foreclosed simply because a public entity joins the proceedings. *See, e.g.*, *Comm. to Defend Reproductive Rights v. A Free Pregnancy CtIR*, 280 Cal. Rptr. 329, 334 (App. 1991) (finding no state authority on point, but noting that "federal cases have held that private parties who cooperate with governmental officials in litigation are not barred, by reason of the latter's participation therein, from recovering attorney fees" under the PAG theory).

Policy reasons, in part, support allowing such fee recovery:

> To deny a fee award to the [private] parties under these circumstances based on an assessment of the likelihood that the [public] parties would successfully defend the judgment in their favor on appeal would discourage future private attorneys general from seeking to join the fray in important public interest litigation and thereby defeat the purpose of the statute. We cannot countenance such a result.

In re State Water Res. Control Bd. Cases, 73 Cal. Rptr. 3d 842, 852 (App. 2008).

Nothing in *Defenders of Wildlife v. Hull*, 199 Ariz. 411 (App. 2001), relied on by PDS, is to the contrary. In that case, the court awarded fees to Defenders of Wildlife when it prosecuted an action against the State of Arizona, notwithstanding the attorney general's participation at the appellate stage. *Id.* at 428 ¶ 66 (noting that "Wildlife and the attorney general were representing different and distinct interests . . . ."). Although the government raised distinct arguments on appeal,

Defenders never ruled out recovery of fees where a private party and the government present similar legal issues, particularly where, as here, the government and private parties are protecting distinct interests. Significantly, the *Defenders* court did not reduce the fees due to Wildlife for work performed after the government entered the case. *Id; see also State ex rel. Winkleman v. Ariz. Navigable Stream Adjudication Comm'n*, 224 Ariz. 230, 245 ¶ 38 (App. 2010) (awarding attorneys' fees in part under PAG doctrine in appeal of commission decision by both State Land Department and private parties).

Appellants also argue Appellees do not meet the related prongs requiring the vindication of a right that benefits a large number of people and is of societal importance. These arguments are without merit. PDS's attempt to classify this case as an individual water rights dispute clearly minimizes the widespread effects and societal import of this case. PDS Br. at 39-40 (citing *Matter of Dearborn Drainage Area*, 240 Mont. 39, 42 (1989)). The Montana case PDS cited for this proposition provides no support for PDS's argument. That case involved an adjudication of water rights between two competing entities, not the interpretation of a law intended to protect, in this case, not only over 7,000 potential PDS consumers but all consumers who currently live in that area and future consumers for 100 years. Further, this decision affects anyone concerned about protecting the multifarious purposes for which the SPRNCA was created. Additionally, this case

is unlike the Montana case where the government did *not* fail "to properly enforce interests which are significant to its citizens," but "complied with its mandate and represented a public's interest as defined by [statute]." *Id.* at 43. Here, ADWR failed to comply with its duties pursuant to state and federal law. Certainly, Silver and Gerrodette did not act merely "for their own benefit or for the benefit of a particular class or group, but instead acted to vindicate the interests of the entire citizenry of the state." *See Kadish*, 177 Ariz. at 342.

ADWR's attempt to distinguish this case from *Kadish* and *Arizona Center for Law in the Public Interest v. Hassell* is to no avail. ADWR Br. at 48-49 (citing *Kadish* and 172 Ariz. 356 (App. 1991)). The consumer protection and environmental issues at stake here are just as important as the rights at issue in *Kadish*, 177 Ariz. at 342 (royalty provisions in mineral leases for state lands) and *Hassell*, 172 Ariz. at 361(state interest in riverbed lands).

Finally, PDS's argument that a societal benefit is speculative merely because the case has been remanded for ADWR's further consideration[29] fails because: 1) Arizona consumers are better protected when ADWR considers the impacts of proposed water use to the SPRNCA no matter what result it reaches in a particular

[29] PDS Br. at 40.

case and; 2) the evidence suggests ADWR must, if it properly considered the SPRNCA, deny PDS's application.[30]

C. Gerrodette is Entitled to Recover Fees for the Work Performed By David McDevitt Under the Supervision of Joseph Feller

ADWR's arguments regarding the fees sought for work performed by David McDevitt while representing Ms. Gerrodette under the supervision of the late Joseph Feller are without legal or factual merit. The recovery of fees for students working under the supervision of an attorney through a law clinic or otherwise, has long been allowed by Courts. *See, e.g.*, *Proulx v. Citibank, N.A.*, 709 F. Supp. 396, 398 (S.D.N.Y. 1989). Mr. McDevitt, under the supervision of a licensed attorney and in accordance with Rule 38, was one of Gerrodette's attorneys in the administrative proceedings. A.R.S. Sup. Ct. Rules, Rule 38(d)(3) ("To the extent a

[30] The Superior Court properly awarded fees against PDS because PDS actively participated in this litigation to serve its own interests rather than that of the public. As the Arizona Court of Appeals explained:

> Awarding attorneys' fees against private defendants in appropriate cases will promote important public rights to the same extent as awarding fees against governmental defendants. Moreover, we find no unfairness in requiring the intervenor-appellees to share with the state the burden of appellants' partial victory in this case. The intervenor-appellees *came to the state's aid to promote interests of their own that were more specific and substantial than those of members of the general public.*

Hassell, 172 Ariz. at 371 (emphasis added). PDS admittedly already spent millions of dollars pursuing the project at issue and has fought hard to protect its financial interests to the detriment of Arizona consumers. *See* PDS Br.at 42.

professor or a student is engaged in practice of law under this rule, the professor or student shall, for the limited purpose of performing professional services as authorized by this rule, *be deemed an active member of the state bar . . . .*") (emphasis added).

Moreover, the recovery of fees for Mr. McDevitt's time would neither compensate Mr. McDevitt in contravention of Rule 38, nor represent a "windfall" to the Center. Under the express terms of the Retainer Agreement between the Center and Ms. Gerrodette, any fees recovered for Mr. McDevitt's work in the administrative proceedings, which would have gone to the Natural Resources Law Clinic, are to be donated to the Joseph Feller Scholarship fund at Arizona State University. IR 94, Exhibit A.

D. The Appellants Wrongly Contend That Appellees' Fee Request For Attorneys' Fees Should Have Been Reduced.

1. The Time Claimed by Appellees' Attorneys Is Not Duplicative.

ADWR argues — without basis — that the time spent by counsel for Silver and Gerrodette was duplicative and should be reduced. ADWR Br. at 51. The Superior Court was correct to reject a similar argument: "If two private parties prosecute important public interest litigation together and obtain the same success, neither party's services can be deemed unnecessary simply because the other party would have succeeded without them." *In re State Water Res. Control*

Bd. Cases, 73 Cal. Rptr. 3d. 842, 850 (2008)(awarding fees under state statute that mirrors the private attorney general doctrine).

Additionally, ADWR and PDS argue that the time spent by appellees' co-counsel is "duplicative" simply because two attorneys spent time working on the same documents. Parties are "entitled to the team effort of counsel," *Stewart Title & Trust v. Pima County*, 156 Ariz. 236, 245 (App. 1987), and it is not only standard — but good — practice for more than one attorney to work on a case and contribute to the research and drafting of court filings, particularly when one attorney is more experienced. "[M]any tasks require or benefit from the attention of more than one attorney. Therefore, the presence and collaboration of multiple lawyers do not, by themselves, indicate needless duplication." *Broome v. Biondi*, 17 F.Supp.2d 230, 235 (S.D.N.Y. 1997). *see also Grover v. Grover*, 59 So.3d 333, 335 (Fla. Dist. Ct. App. 2011) ("It is not uncommon for firms . . . to allocate tasks based on an attorney's expertise."). The trial court was well within its discretion finding that the well-supported, detailed time entries were not duplicative, and Appellants have offered no evidence to the contrary.

2. Fees for Time Spent Preparing a Fee Application are Recoverable Under the Private Attorney General Doctrine.

Although A.R.S. § 12-348(H)(3) precludes recovery of fees for time spent preparing a fee application, no such restriction applies to fee applications under the

Private Attorney General Doctrine. Since Gerrodette is entitled to recover her fees under both the statute and the doctrine, fees for the time spent preparing her fee application are recoverable.

NOTICE OF INTENT TO CLAIM ATTORNEYS FEES

Pursuant to Rule 13 of the Arizona Rules of Civil Appellate Procedure, Gerrodette and Silver hereby provide notice under Ariz. R. Civ. App.. P. 21 that they intend to claim attorneys' fees incurred on appeal pursuant to the Private Attorney General doctrine and A.R.S. § 12-348 *amended by* 2015 Ariz. Legis. Serv. Ch. 234 (H.B. 2131) and 2015 Ariz. Legis. Serv. Ch. 234 (H.B. 2131); *see, e.g.*, *Cave Creek Unified Sch. Dist. v. Ducey*, 231 Ariz. 342, 353 ¶¶ 33-36 (App. 2013), *review granted in part* (May 29, 2013), *aff'd*, 233 Ariz. 106, 113 ¶ 36 (2013) (granting fees appeal under the PAG); *City of Tempe v. Outdoor Sys., Inc.*, 201 Ariz. 106, 113 ¶ 36 (App. 001) (granting fees on appeal under A.R.S. §12-348).

CONCLUSION

For all of the foregoing reasons, Appellees Silver and Gerrodette request that the Court affirm the decision of the Superior Court. In addition, Appellees request that pursuant to the private attorney general doctrine and A.R.S. §12-348 *amended by* 2015 Ariz. Legis. Serv. Ch. 234 (H.B. 2131) and 2015 Ariz. Legis. Serv. Ch. 234 (H.B. 2131), the Court award it costs and reasonable attorneys' fees incurred

in connection with this appeal and affirm the award of attorneys' fees by the lower court.

Respectfully submitted this 25th day of June, 2015.

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CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14, I certify that the forgoing brief:

☒ Uses proportionately spaced type of 14 points or more, is double-spaced using a roman font and contains 13,792 words; or

☒Uses monospaced type of no more than 10.5 characters per inch; and

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 2015, a true and correct copy of **CERTIFICATE OF SERVICE RE JOINT ANSWERING BRIEF OF PLAINTIFFS/APPELLEES ROBIN SILVER, M.D. AND PATRICIA GERRODETTE** was electronically filed with the Clerk of the Court for the Arizona Court of Appeals for Division One by using the AZTurboCourt system.

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