COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

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

AMICUS CURIAE BRIEF OF JOHN LESHY AND ROBERT GLENNON

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John D. Leshy is the Harry D. Sunderland Distinguished Professor of Law Emeritus at the University of California, Hastings College of the Law. From 1980 to 1992, he was Professor of Law at Arizona State University, where he was actively involved in Arizona water law and related issues. His roles from that period include serving as a consultant to the Arizona Department of Water Resources, working *pro bono* with then-Senator DeConcini's office to craft the water rights language of the San Pedro Riparian National Conservation Area (SPRNCA) legislation, co-authoring *Arizona Law Where Ground and Surface Water Meet*, 20 Ariz. St. L.J.657 (1988) (with James Belanger), which addressed issues relevant to this case, and serving as counsel to The Nature Conservancy in an earlier phase of the Gila River General Stream Adjudication, 175 Ariz. 382, 857 P.2d 1236 (1993) (addressing the definition of appropriable subflow of surface water under Arizona water law). John D. Leshy and James Belanger, *Arizona Law Where Ground and Surface Water Meet*, 20 Ariz. St. L.J. 657 (1988); *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 175 Ariz. 382, 857 P.2d 1236 (1993). Leshy has also authored several other articles on water law, and co-authored *Legal Control of Water Resources*, a standard casebook in water law, now in its fifth edition (2013). Barton H. Thompson, Jr., John D. Leshy

and Robert H. Abrams, *Legal Control of Water Resources: Cases and Materials*, St. Paul, MN: West Pub. Co./Thomson Reuters, 5th ed., 2013. Furthermore, Professor Leshy was Solicitor of the U.S. Department of the Interior from 1993-2001.

Robert Glennon is a Regents' Professor and the Morris K. Udall Professor of Law and Public Policy at the University of Arizona, Rogers College of Law. His interest in the San Pedro River traces to the late 1980s when he participated in a National Science Foundation-funded interdisciplinary research team that compared Arizona's San Pedro River and California's Kern River, regarding how each state handles the connection between ground and surface water. He first wrote about the San Pedro River in 1994 in a law review article, co-authored with Thomas Maddock III, a hydrology professor at the University of Arizona, *In Search of Subflow: Arizona's Futile Effort to Separate Groundwater from Surface Water*, 36 Ariz. L. Rev. 567 (1994). He devoted a chapter to the San Pedro River in his 2002 book, *Water Follies: Groundwater Pumping and the Fate of America's Fresh Waters* (Washington, D.C.: Island Press, 2002). He wrote chapters in books about the river published in 2007 and 2009.

Both Leshy and Glennon have personally visited and enjoyed the amenities of the San Pedro River and the San Pedro Riparian National Conservation Area.

General Background and Procedural History

This case presents basic and critically important questions of statutory construction and legislative intent: whether the 2007 amendments to A.R.S. §45-108 were enacted to proactively protect the future investments of homebuyers by providing prospective purchasers with reliable, evidence based, and legally sufficient assurance that into the foreseeable future their homes will have an adequate supply of water.

In a carefully considered opinion, the trial court struck the right balance in reviewing the administrative decision made by the Director of the Arizona Department of Water Resources (ADWR) as it relates to the statute. Exercising its proper role as the arbiter of the law's meaning, intent and purpose when the language of the statute is clear, the court determined that the legislature had enacted a statutory directive obligating the ADWR to determine whether Pueblo Del Sol Water Company (for the developer, Castle and Cooke, hereafter "the developer") had affirmatively demonstrated that the water supply for the proposed development will be legally available for 100 years. The court determined that the agency abused its discretion when it determined, incorrectly, that the developer had

complied with the statute's robust consumer protections simply by submitting evidence of a certificate of convenience and necessity, which was required by an ADWR regulatory provision that had been adopted prior to the enactment of relevant statutory amendments that strengthened the law's consumer protections.

The court determined that as a result of those strengthening amendments a determination of what constitutes an "adequate water supply" means both that there be a demonstration of financial capability to build infrastructure necessary to deliver the available water supply, and a determination made 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 a century. After providing the agency with this legal guidance, the court ruled that the agency's director could not give the go-ahead to a master-planned development of nearly 7,000 residential units until the developer had established that the groundwater proposed to supply the development would not be adversely impacted by a prior, vested, superior water right grounded in federal law. That federal water right was established by Congress to protect the water flows of the nearby San Pedro River, when it designated the river and the lands along it as the nation’s first Riparian National Conservation Area.

The agency and the developer have argued that the law does not mandate that an assessment be made as to the impact, if any, that the existence of this potentially conflicting federal water right may have on the developer's future customers.

As the trial court correctly determined, Arizona state law reflects a clear choice by the Arizona Legislature to opt for sensible, well planned growth in order to protect the interests of buyers of residential property in the State. That law accomplishes this goal by requiring that issues related to an obvious water conflict be addressed *before* residential units are created, built, sold and occupied, *not after*.

Arizona's Smart-Growth Law Requiring Demonstration of Adequate Water Supplies for New Development

The Adequate Water Supply Provision at the heart of this case, A.R.S. §45-108 (the Provision), was enacted as a response to widespread and intense public criticism, locally and nationally, of Arizona's woefully inadequate land development policies. Those policies spawned several scandals in the 1960s and early 1970s, as unscrupulous developers subdivided rural desert property with little or no water and sold dry lots to the unsuspecting public. Perhaps the most notorious of these, who a leading Arizona historian called the "godfather of Arizona land fraud," was Ned Warren. He set up real estate scams across the state,

selling lots without roads, water, or utilities, and siphoning off sale proceeds before the buyers realized they had been duped. One of Warren's scams, the Great Southwest Land & Cattle Co., collapsed in 1972 after it had already swindled 10,000 lot buyers out of millions of dollars. *See* Thomas Sheridan, *Arizona: A History* (U of A. Press, 1995) pp. 336-38.

In response to such instances of fraud, the Arizona Legislature enacted the Adequate Water Supply Provision of 1973. The Provision served as a consumer protection device, intended to aid potential buyers of subdivided residential lots by providing them with important information about the availability, or lack thereof, of necessary water supplies. As originally enacted, the Provision required full disclosure of water supply information, but it did not prohibit sale of lots with inadequate water supplies.

A few years later, in 1980, Arizona adopted its Groundwater Management Act (GMA). This legislation included an enhanced version of the 1973 Adequate Water Supply Provision; the GMA created "active management areas" (AMAs) in which the enhanced version of the Provision became enforceable. These AMAs covered the most heavy water-using areas of the state. The GMA required more than disclosure- the enhanced version of the Provision prohibited the sale of subdivided property that lacked an "Assured Water Supply." A.R.S. §45-576. The

San Pedro River corridor is not within an Active Management Area, and thus remains subject only to the Adequate Water Supply Provision.

In 2005, the *Arizona Republic* published a lengthy investigative report documenting the ineffectiveness of the disclosure requirement of the 1973 Adequate Water Supply Provision. *See* Shaun McKinnon, *Rural Water: Growth Taxing Water Supplies*, The Arizona Republic, June 26, 2005, available at http://archive.azcentral.com/specials/special06/articles/0626rwater-main26.html. The report demonstrated that many land developers did not even attempt to obtain an Adequate Water Supply finding from ADWR. This raised the specter of reviving Arizona's reputation as a haven for unscrupulous land development through the victimization of innocent purchasers. ADWR responded by forming the Statewide Water Advisory Group to examine shortcomings in and issue recommendations to overhaul the Provision.

The Arizona Legislature agreed with the analysis and recommendations of the Statewide Water Advisory Group, and enacted new legislation in 2007 that strengthened the Adequate Water Supply Provision. It required developers of proposed subdivisions to "submit plans for the water supply for the subdivision and demonstrate the adequacy of the water supply to meet the needs projected by the developer" to ADWR for approval. A.R.S. §45-108. Further, it defined an

adequate water supply as follows: "Sufficient 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). Underscoring its objective of protecting lot buyers, the Legislature also required ADWR, before it approves the applications, to determine whether the "financial capability has been demonstrated to construct the water facilities necessary to make the supply of water available for the proposed use, including a delivery system and any storage facilities or treatment works." A.R.S. §45-108(I)(2).

Federal Reserved Rights

In 1988, the United States Congress designated approximately 56,000 acres of federal land along the San Pedro River as the San Pedro Riparian National Conservation Area (SPRNCA). 16 U.S.C. §460-xx et seq. Congress made clear the specific purposes of the SPRNCA in the text of the legislation: "to protect the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources" of the federal lands Congress reserved. 16 U.S.C. §460xx(a). This legislation included an express Congressional reservation of water 16 U.S.C. §460xx-1(d):

> Congress reserves for the purpose of this reservation, a quantity of water sufficient to fulfill the purposes of the [SPRNCA]. The priority date of such reserved rights shall be November 18, 1988. The Secretary [of the Interior] shall file a claim for the quantification of such rights in an appropriate stream adjudication.

This straightforward language creates a right, grounded in federal law, of a quantity of water sufficient to fulfill the broad purposes of the SPRNCA, effective as of November 18, 1988, the date of enactment of the legislation. As Senator Dale Bumpers, chair of the Senate Sub-committee considering the bill, put it: "There is no point in having this legislation unless we are going to protect … the free flow of water year-round." *See* Robert Glennon, *Water Follies*, at 54.

The very next year, in 1989, the United States filed a claim to have this federal water right confirmed and quantified in the Gila River General Stream Adjudication (GSA), which had been initiated in 1974 to determine water rights in the Gila River system. The Gila River GSA has proceeded at a very slow pace. It took until 2009, twenty years after the federal claim was filed, for the trial court to confirm the existence and validity of the federal right. When it did, it described the

water right for the SPRNCA as "superior to the rights of future appropriators." Order, March 4, 2009, at 14.

In 2011, the developer applied to ADWR for a determination of an Adequate Water Supply for the proposed Tribute Master Planned Community (hereafter "Tribute") in Sierra Vista. Tribute is projected to include nearly 7,000 residential units, as well as commercial and office space. The sole source of water the application identified for Tribute is to pump nearly 5,000 acre-feet of groundwater a year from the single, large aquifer in the Lower San Pedro River basin. ADWR approved the application without making any effort whatsoever to determine whether this use of groundwater would conflict with the prior, vested right of the United States to protect the flows of the nearby San Pedro River.

Argument

I. Under Arizona state law, ADWR must determine whether proposed developments, including the Tribute development here, have an adequate, legally available water supply.

The basic issue in this case is whether Congress's reservation, in 1988, of water to protect the San Pedro River flows is relevant to ADWR's determination whether the developer has an adequate water supply under state law; state law defines an adequate water supply as a water supply "legally available for at least

the next one hundred years." ADWR and the developer effectively take the position that by the terms of the Provision, Congress's reservation of San Pedro flows to carry out the mandate of the federal statute creating the San Pedro Conservation Area has no legal relevance in analyzing the water needs for the proposed 7,000 home desert community, and thus can properly be ignored. The trial court appropriately rejected this claim.

II. The federal government holds a vested, confirmed, prior reserved water right for SPRNCA grounded in federal law.

The U.S. Supreme Court acknowledged Congress's authority to reserve unappropriated water for federal uses under federal law more than a century ago, in its landmark decision *Winters v. United States*, 207 U.S. 564 (1908). This so-called "Winters doctrine" was reaffirmed in *Cappaert v. United States*, 426 U.S. 128, 138 (1976), as follows:

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing, the United States acquires a reserved

> right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.

In its classic form, the Winters or reserved rights doctrine states that, when Congress (or, in some circumstances, the Executive) reserves federal land for particular national purposes but remains silent as to whether it intends to reserve water, the courts will imply a reservation of water sufficient to carry out that purpose. The Supreme Court has limited the implication of a reservation of water to the amount "necessary to fulfill the purposes of the reservation, no more." *Cappaert*, at 141; see also *United States v. New Mexico*, 438 U.S. 696 (1978).

Here, as in *Cappaert*, the federal reservation of water is not implied by the statute; rather, it is *explicit* in the SPRNCA legislation text. And here, as the Court held in *Cappaert*, the rights conferred by the federal reservation are protected against subsequently initiated pumping of hydrologically-related groundwater, *regardless of whether that pumping is otherwise lawful under state law*.

Because the facts of *Cappaert* mirror those of this case, they are worth summarizing briefly. In 1952, President Truman, acting under authority Congress provided in the Antiquities Act of 1906, issued a proclamation adding the Devil's Hole in Nevada to the Death Valley National Monument-- expanding an earlier

establishment of that Monument in 1932 by President Hoover. Devil's Hole contained what Truman's proclamation characterized as a "remarkable underground pool;" the pool also constituted the only habitat for a unique desert fish. The proclamation recited that the "pool is of such outstanding scientific importance that it should be given special protection." Sixteen years later, in 1968, the Cappaerts obtained state law permits to pump groundwater on their land 2.5 miles away from Devil's Hole. The Cappaerts proceeded to pump water hydrologically connected to the water in Devil's Hole. As the water in the pool in Devil's Hole began to diminish, the U.S. brought suit to enjoin the Cappaerts' pumping, and succeeded.

In a unanimous opinion written by Chief Justice Burger, the Court held that the U.S. had reserved under federal law, as of 1952, sufficient water to maintain the pool and carry out the purpose of President Truman's proclamation. Therefore, the Cappaerts' later-initiated pumping, which interfered with that purpose, had to be curtailed. The Court also concluded that the water in the pool had been expressly reserved by the Proclamation, in the same way that Congress expressly reserved the waters of the San Pedro sufficient to carry out the purposes of the SPRNCA. Because the federal government had reserved the water, the Court in *Cappaert* held "that the United States can protect its water from subsequent

diversion, whether the diversion is of surface or groundwater." *Cappaert v. United States, 426 U.S. 128, 143, 96 S. Ct. 2062, 2071, 48 L. Ed. 2d 523 (1976)*.

III. Regardless of how states internally regulate subsurface water flows and groundwater, the United States Supreme Court has held that federal water rights are protected against all hydrologically connected diversions.

The Arizona courts have long grappled with the extent to which *Arizona state* water law distinguishes between surface water and its "subflow," on the one hand, and so-called "percolating" groundwater, on the other. *See* Leshy & Belanger, *supra*, and Glennon and Maddock, *supra*. Where Arizona state water law will finally draw the line between "subflow" and "percolating groundwater" is a matter still before the courts. *See In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 195 Ariz. 411, 414, 989 P.2d 739, 742 (1999) (*Gila III*). Nonetheless, ADWR and the developer argue that, because the proposed development uses groundwater pumping, it need not consider the federal surface water right in determining the available water supply.

The currently uncertain breadth of "subflow" under state law has no bearing on the outcome of this case. The Arizona Supreme Court has acknowledged the supremacy of federal law in this area. It held in *Gila III* that holders of federal reserved water rights (like the SPRNCA) are entitled to greater protection from

groundwater pumping than are water users whose rights are based only on Arizona law. State courts "may not defer to state law where to do so would defeat federal water rights." *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 195 Ariz. 411, 419, 989 P.2d 739, 747 (1999).

As the Arizona Supreme Court said in *Gila III*, the "standard for defining subflow [in state water law] awaits our further review …." *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 195 Ariz. 411, 421, 989 P.2d 739, 749 (1999). It went on to suggest that that standard "may conceivably be set sufficiently broadly to protect the surface water rights of some or all of the federal reservations." *Ibid*). But, to repeat, federal law already protects the SPRNCA federal reserved water right from, as the U.S. Supreme Court said in *Cappaert*, "subsequent diversion, whether the diversion is of surface or groundwater." *Cappaert v. United States*, 426 U.S. 128, 143, 96 S. Ct. 2062, 2071, 48 L. Ed. 2d 523 (1976).

The SPRNCA creates an express federal water right in the San Pedro River flows, much like the Devil's Hole Monument proclamation involved in *Cappaert* reserved water in the pool as a matter of federal law. The Court in that case protected that water right from subsequent diversion by newly-initiated

groundwater pumping from an aquifer connected to the pool, even though that groundwater pumping was lawful under state law.

IV. The Federal SPRNCA water rights affect legal water availability for the proposed development.

The Court in *Gila III* also found that determining the purpose of a reservation and determining the waters necessary to accomplish that purpose "are inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis." *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 195 Ariz. 411, 420, 989 P.2d 739, 748 (1999). Regardless, the SPRNCA could not be clearer in setting out its purpose as protecting the River's flows for a variety of objectives, and the waters necessary to accomplish that purpose are those on which the River's flow depends.

The prior federal reservation of sufficient water to carry out the SPRNCA means that federal law will limit the legal availability of the proposed water supply for the Tribute development over the next 100 years. This derives from the fact that the groundwater the developer proposes to pump to satisfy the needs of the nearly 7,000 residential units originates in the San Pedro River basin. Hydrological studies have confirmed that groundwater pumping in the basin has and continues to have profound impacts on the flows in the San Pedro River. *See* Leake, S.A., Pool,

D.R., and Leenhouts, J.M., 2008, *Simulated effects of ground-water withdrawals and artificial recharge on discharge to streams, springs, and riparian vegetation in the Sierra Vista Subwatershed of the Upper San Pedro Basin, southeastern Arizona* (ver. 1.1, April 2014), U.S. Geological Survey Scientific Investigations Report 2008-5207, 14 p. As the development must use water from the same source the SPRNCA holds rights to, ADWR must take these facts into account in determining whether Tribute's proposed water supply is "legally available" as required by Arizona law.

V. The developer and ADWR both failed to address the adequacy of the development's water supply in the approval process by omitting discussion of the SPRNCA water rights in violation of Arizona state law.

A.R.S. §45-108 plainly puts the burden on the developer to show an Adequate Water Supply: "the developer … shall … demonstrate the adequacy of the water supply to meet the needs projected by the developer." A.R.S. §45-108(A). It also defines an adequate water supply as one that will be "legally … available to satisfy" the development's proposed water needs for at least 100 years. In these circumstances, as the trial court correctly held, the developer has not carried its burden because it failed to consider the pre-existing federal reservation

of water. ADWR, in its own refusal to consider that reservation, was simply wrong in concluding that the developer had met its burden.

In the developer's and ADWR's view, nearly 7,000 residential units can be built and sold without showing that groundwater actually will be available to meet their needs. Yet it is clear beyond peradventure that a senior, superior water right exists, as already recognized in the Gila River Adjudication, to protect the flows of the San Pedro River, flows that are linked to the very groundwater the developer proposes to pump. In addition to violating the plain text of the statute, ADWR and the developer's approach is precisely the opposite of what the Arizona Legislature intended.

Upholding the developer's and ADWR's position would thwart the Arizona Legislature's objective of providing reasonable assurance to future homeowners that water will be available to them into the foreseeable future. In fact, reversing the trial court's decision holds the potential to put Arizona right back where it was decades ago, with a reputation for allowing the public to be victimized by false promises of residential dreams in the desert. No doubt the developer here has honorable intentions, but it seemingly takes the view that the Provision permits potential problems with regard to the adequacy of the development's water supply to be considered and addressed in the future, whenever those problems become a

reality. Arizona law, however, requires ADWR to grapple with those potential problems now, *before* the developer sells the units. Otherwise, the buyers of these residential units may be left dry in the vast Sonoran desert.

VI. Delaying consideration of SPRNCA's senior, vested water right in connection with the Tribute development would undermine the State's interest in regulating water uses within its borders, in the process threatening to disrupt the security of residential home buyers in Arizona contrary to the intent of the Arizona legislature.

The federal government has shown, by its very presence in this case, that it fully intends to protect its senior vested water right. Moreover, Congress itself has not retreated from its 1988 reservation of sufficient water to protect the purposes of the SPRNCA it established. In 2003, it passed new legislation that underscores its concern about groundwater pumping in the basin possibly threatening the river flows and the water right of the SPRNCA. The legislation promotes a "collaborative water use management program" in the area to "achieve the sustainable yield of the regional aquifer, so as to protect the Upper San Pedro River, Arizona, and the [SPRNCA]." NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2004, PL 108–136, November 24, 2003, 117 Stat 1392.

If this Court adopts the developer's and ADWR's position, and allows the developer to move forward with Tribute, the federal government will most likely be forced to look at and pursue other options to protect its water right in the river flows. The two options that spring to mind are each more disruptive and confrontational than the course the U.S. is pursuing now. Either would take the issue out of the hands of the expert state agency charged with administering Arizona water resources, and put it in the hands of the judiciary.

One option is to seek interim relief in the Gila River GSA, to accelerate judicial quantification and enforcement of the senior federal water right in the SPRNCA. For 26 years, the federal government has been trying to protect its federal law water right to the San Pedro River flows in the Arizona state courts. While that adjudication has confirmed the existence of a superior water right in the United States, with a priority of 1988, it has not yet quantified or otherwise determined how that right will be protected against newly-initiated groundwater pumping. There is, unfortunately, no sign that the glacial pace of that Adjudication is going to accelerate anytime soon.

Another option is to file a separate lawsuit in federal court to protect its federal water right and stop the Tribute development from proceeding. Currently, the United States is participating in the Gila River GSA pursuant to the limited

waiver of the sovereign immunity of the U.S. found in the so-called McCarran Amendment, which allows state courts to exercise jurisdiction over federal water rights (including Indian water rights) in certain circumstances. *See* 43 U.S.C. § 666; *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545 (1983). Should this Court reverse the trial court ruling, the federal government could make a persuasive argument that the tardy pace of the Gila River Adjudication, in the face of a large new development going forward in the San Pedro Basin, is likely to interfere with a vested federal water right. That in turn violates the core assumption behind the McCarran Amendment: the idea that state courts provide adequate forums to protect federal water rights.

Arizona's policymakers understand the risk to the State's interest in retaining control over the adjudication of water rights in Arizona. Former United States Senator Jon Kyl, who argued *Arizona v. San Carlos Apache Tribe*, *supra* in the 1980's, recently expressed concern that the State may lose control over the Adjudication. In a summary of his written remarks, which accompanied his keynote speech at a Water Law Institute CLE on Arizona Water Law in Scottsdale, Arizona, on August 20, 2015, Senator Kyl put it this way:

> **"We want to remain in state court:** It is in Arizona's best interests for the Arizona state court to retain control of the entire Adjudication. Delays create risk for removal of federal claims, resulting in fragmented proceedings, greater expense for everyone, including Arizona taxpayers, greater difficulty in effecting Indian water settlements, and more potential delay." *See* Appendix at Page No. 36. (Emphasis in original.)

In this case, ADWR and the developer argue that the only way to protect the federal water right in the San Pedro River flows is to wait for what could well be many more years for its SPRNCA water right to be quantified and delineated in the Gila River GSA. With that dim prospect, a federal government may well conclude that the Gila River GSA is no longer an adequate forum for resolving federal reserved rights.

In its unanimous decision in *Cappaert*, the U.S. Supreme Court underscored that "[f]ederal water rights are not dependent upon state law or state procedures and they need not be adjudicated only in state courts." *Cappaert v. United States*, 426 U.S. 128, 145, 96 S. Ct. 2062, 2073, 48 L. Ed. 2d 523 (1976). The federal courts have concurrent jurisdiction under 28 U.S.C. §1345 to adjudicate and

otherwise protect the water rights of the U.S. *Id.*; *see also* *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 807-809 (1976).

If this Court fails to require ADWR to live up to its clear statutory responsibility to determine whether Tribute has carried its burden of demonstrating an "adequate water supply," that outcome should, and likely will, result in the United States instituting separate litigation in federal court to have these questions addressed. This would be counter to the strong interest of the State of Arizona in maintaining control of the adjudication and administration of all water rights in the Gila River System and source—including those of the federal government and Indian tribes.

In short, if this Court were to reverse the trial court, it would almost certainly lead to an outcome less desirable to the interests of the State of Arizona and its residents than following the clear requirements of Arizona law.

VII. Requiring ADWR to meet its statutory obligations does not serve to prevent growth in the San Pedro Basin; rather, it merely ensures that residential homebuyers are protected and that proposed growth does not exceed water availability in the desert environment.

To date, the federal government has attempted to use established mechanisms of state law to find a way to protect its interests in the flows of the San

Pedro River, while minimizing the effect on residential and other developments in the Basin. In the context of the Tribute proposal, it simply proposes to resolve the looming conflict between Tribute's proposed pumping and the superior federal water right in the River flows resolved *before* the development is built and the residential units are sold and occupied, not *after*.

The Arizona Legislature did not create the ADWR to be a helpless bystander in these situations, to simply administer whatever water rights are determined to exist in the Gila River General Stream Adjudication. To the contrary, ADWR was created to be the "linchpin of water management" in the state. Leshy & Belanger, Arizona Law Where Ground and Surface Water Meet, 20 Ariz. St. L.J. 657, 710 (1988). The parties that crafted Arizona's landmark 1980 Groundwater Management Act gave ADWR "wide-ranging authority to manage Arizona's water;" indeed, those parties informally referred to ADWR as Arizona's "water czar". *See id*., at 707-713, esp. at 708. ADWR is continually engaged in assessing and reporting on Arizona's water resources, including the relationship between groundwater withdrawals and surface water. The authority the Legislature gave ADWR in A.R.S. §45-108 to determine "Adequate Water Supply," which authority the Legislature strengthened in 2007, after the General Stream Adjudication was well underway, demonstrates that the Legislature did not intend

for ADWR to ignore relationships between proposed major new groundwater pumping and existing surface water rights, particularly when the latter were confirmed by the GSA, and when federal law makes clear those rights must be protected.

In these circumstances, the preferred resolution would be for ADWR, the United States, and other parties holding surface water rights in the relevant reach of the San Pedro River to sit down with the developer to work out a solution that would protect the superior federal water right in the River flows-- as well as potential home buyers-- while still allowing development to proceed. ADWR may begin by studying baseline water supplies as well as the impact the Tribute development would have upon those supplies. That would enable informed discussions regarding how to protect the river while still allowing development.

A win-win outcome is certainly achievable. There are many ways to protect the flows of the San Pedro River without nullifying all development that proposes to use associated groundwater. Numerous solutions to such potential conflicts have been found and implemented in various places around the nation and the world. For example, a commitment to an aggressive program of conservation and reuse of municipal effluent can substantially reduce the amount of water needed for new development. Groundwater withdrawals could be carefully located, timed, and

otherwise managed so as to minimize effects on the river's flows. The river's flows might be augmented with water withdrawn from the ground during dry periods. (The flows of the famous "River Walk" in San Antonio, Texas, depends heavily on pumped groundwater. *See* Robert Glennon, *Water Follies*) New storage and groundwater recharge facilities might be developed. New users of groundwater like Tribute could purchase and retire other water rights to the San Pedro or associated groundwater to offset their pumping. Other western states have facilitated the growth of water markets and banks, which provide mechanisms for reallocating water from lower to higher-value uses at various times. *See* Peter Culp, Robert Glennon, and Gary Libecap, *Shopping for Water: How the Market Can Mitigate Water Shortages in the American West*, Hamilton Project at the Brookings Institution, 2014.

These approaches do not halt future growth; instead, they simply insist that growth be accommodated within constraints that recognize limited water supplies. *See generally* Robert Glennon, *Unquenchable: America's Water Crisis and What To Do About It,* Washington, D.C., Island Press, 2009. The need to manage the state's always limited water supplies carefully will only grow as climate change causes more uncertainty and variation in water supplies. *See* U.S. Bureau of Reclamation, *Colorado River Basin Water Supply and Demand Study* (2012).

Instead of pursuing any of these options, the developer and ADWR have chosen to argue that under Arizona law the problem may be ignored. They are asking this Court to overturn the trial court's thoughtful interpretation of Arizona law. This Court should reject their request and require that the developer and ADWR address these issues prior to giving the go ahead to the construction of the development.

Finally, upholding the trial court will not bring all groundwater-dependent development in Arizona outside of Active Management Areas to a halt while ADWR makes an Adequate Water Supply determination. A number of features distinguish the proposed Tribute development from others that involve new groundwater pumping. Notably, the case involves the protection of an express, vested, recognized, pre-existing water right in the San Pedro. It is a property right based on federal law not just to a quantity of water, but to stream flows important for habitat and environmental values that the U.S. Congress plainly wants to protect. The proposed Tribute development requires a large amount of groundwater -- some 4,500 acre-feet annually -- in a well-studied basin where interconnections are known to exist between the groundwater Tribute proposes to pump and the water subject to the federal water right. All together, these facts help distinguish this case from nearly all others that might arise elsewhere in the state.

Conclusion

This case, to reiterate, is not about a choice between growth and no growth. It is a choice about the kind of growth that will occur. The Arizona Legislature, by enacting and then later strengthening the Adequate Water Supply Provision, has opted for sensible growth, which protects the buyers of residential units by sorting through and evaluating water issues before they become problematic. In the case here, the lower court correctly held that ADWR must consider the federal water right in its administrative decision so that homebuyers at Tribute are not left out to dry. For the foregoing reasons the Lower Court Judgment should be affirmed.

Respectfully submitted this 31st day of August, 2015

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Appendix

Arizona Water Law Conference
August 20, 2015
Outline of Remarks by Senator Jon Kyl

I. **Where We Were in August 2013**

a. **Colorado Basin Water Supply and Demand Study**(published May, 2012): confirmed significant shortfalls between projected Colorado River supplies and demand in the coming decades. One year later, the Bureau of Reclamation had launched the "Next Steps" effort, working with a large group of stakeholders to address the challenges identified in the Basin Study.

b. **General Stream Adjudications**, then in the 40th year:

i. No horizon in view

ii. Dim prospects of future Indian water settlements, partly due to a lack of funding at the federal level

iii. ADWR constrained in its resources to support the negotiation and litigation of claims (which was one of the reasons the Supreme Court recognized in favor of leaving the federal claims in the state court)

iv. Added complications of

1. Continued pumping of what is arguably subsurface flow by a variety of users in an array of basins: this puts drag on efforts to resolve claims

2. Uncertainty about Navajo Generating Station's future and the likelihood that increased power costs would alter the value of CAP-based contracts and settlements, including tribal settlements

c. **ADWR**: Following the Great Recession of 2008, the department was severely under-resourced in the face of a potential Colorado River Shortage declaration, the Adjudications and other emerging water challenges in Arizona

d. **Resulting in**: No ground for long term augmentation discussions to gain traction

II. **In the Intervening Two Years**:

a. ADWR published its **Strategic Vision**(January 2014), which fleshed out Arizona's supply gap:

"Over the next 25 to 100 years, Arizona will need to identify and develop an additional 900,000 to 3.2 MAF of water supplies to meet projected water demands. While there may be viable local water supplies that have not yet been developed, water supply acquisition and/or importation will be required for some areas of the State to realize their growth potential."

b. Increasingly, key individuals have recognized the **critical need for a group of Arizona water authorities to organize a focused, systematic and consensus-oriented discussion** about Arizona's long-term water security in order to develop and prioritize solutions.

c. This spring, **California** careened into a drought declaration, igniting public interest here in Arizona about our state's and region's water future.

i. Arizonans are getting the message that decades of hard decisions, investment and careful planning have spared us from California's plight

ii. At both the grassroots and leadership levels, there's a **growing interest** in and openness to water supply **planning and investing**.

III. **Progress to Date**

a. **Governor Ducey**: demonstrated commitment to make sure ADWR is better resourced

b. **ADWR**, under Director Tom Buschatzke: taking the lead for Arizona in multi-state and federal discussions on Colorado River Shortage and Drought Legislation

c. **Senator Flake and Senator McCain** engaged at the national level

i. Major Issues

1. Watershed / Forest Health: smarter funding for fire management and addressing unreasonable regulatory barriers to forest thinning

2. Protecting Arizona's interests in Drought Legislation discussions

ii. In April 2015, Senator Flake held standing-room-only public fora on Arizona water challenges, one in Phoenix, hosted by Morrison Institute's Kyl Center for Water Policy and one in Tucson, hosted by the Water Resources Research Center.

d. Kyl Center for Water Policy

i. Stakeholder meetings in late 2014 to identify short, medium and long-term goals

ii. Adjudication Committee

1. Convened in December – virtually all stakeholders represented

2. Progress on a package of reforms designed to streamline settlement

3. Kyl Center for Water Policy

a. Providing a forum for ongoing candid discussions about potential remedies and what we need to get to a post-Adjudication world

b. Discuss status of negotiations

IV. Why Resolving the Adjudication is the Critical Path for Arizona

a. **We need to start planning:** Financing, regulatory hurdles and other planning related to water augmentation projects require long timelines. Until there's clarity regarding water rights and priorities,

potential stakeholders do not have sufficient incentive to invest in the necessary early planning.

b. **We want to remain in state court:** It is in Arizona's best interests for the Arizona state court to retain control of the entire Adjudication. Delays create risk for removal of federal claims, resulting in fragmented proceedings, greater expense for everyone, including Arizona taxpayers, greater difficulty in effecting Indian water settlements, and more potential delay.

c. **There's an economic development impact:** The Great California Drought and prospects of a Colorado River shortage declaration have prompted corporations and other potential investors in Arizona to look more closely than ever at our state's water security. They want to know that Arizona has a plan our long term water supply.

V. **Looking to the Future**

a. **History:** We have a proud water planning story to tell starting with the Roosevelt Dam, (planning for the dam commenced at the beginning of the last century, but the final lien didn't expire until 2000!), followed by the Groundwater Management Act and the opening of the Central Arizona Project in the 1980s.

b. **Going Forward:** It's time to write the **next chapter** of our state's water story:

   i. **Adjudication:** Put the General Stream Adjudications behind us by finding consensus driven means of resolving claims

   ii. **ADWR:**

      1. ADWR is arguably Arizona's leading economic development agency

      2. We must work to ensure that Arizona Department of Water Resources has the full resources needed for its most critical functions:

         a. Technical and legal support for the Adjudications

b. Representing Arizona's interests in multi-state and multi-national discussions regarding Colorado River management

c. Assisting in regional water supply planning, particularly in rural areas

d. Leading regional water supply augmentation discussions

iii. **Leadership**: Cultivate the next generation of Arizona water leaders to start thinking about long term water supply planning

1. Arizona has benefited from leaders who understood that planning for and investing water resources were critical to our well-being and our future**:** Carl Hayden, John Rhodes, Morris Udall, Stan Turley, Bruce Babbitt and others.

2. The time has come for new leaders to come to the fore. As Arizona confronts a potential water supply gap and increasing demand, highly informed leadership in water policy is critically important. Yet, there is solid consensus in the water resources community that the vast majority of Arizona's elected officials and aspiring leaders are insufficiently-informed about our state's complex water issues.

VI. How the Kyl Center for Water Policy can help:

a. **Adjudications**: we will continue to support the Adjudication Committee's efforts

i. Provide a forum for consensus-oriented discussions about resolution

ii. Actively reach out to keep all parties involved

iii. Offer assistance in legal and other kinds of analysis as needed

iv. Promote greater awareness of the importance of resolving the claims

b. **Leadership Roundtable**: This fall, we will convene a Leadership Roundtable, inviting key leaders from throughout Arizona to be part of ongoing discussions about our water challenges and potential solutions.

i. The Roundtable will also connect leaders with our state's legal and technical experts on water—we have heard from leaders that they don't know whom to go to for that expertise.

ii. The Roundtable will also provide participants opportunities to lead public discussions about water planning.

VII. **Conclusion:** Are we better off now than we were in 2013?

a. **Less uncertainty**: We have a much better understanding of the challenges ahead.

b. **Reason for optimism**: I am strongly encouraged by the progress the Adjudication Committee is making and see a sincere commitment by the members to continue working toward solutions.

Overall: Yes, we're better off. Public will toward addressing our daunting water supply challenges is galvanizing. It won't be easy, but we can get it done—just as Arizonans have always done.

Certificate of Compliance

This document: (1) uses Times New Roman 14-point proportionately spaced typeface for text and footnotes; (2) contains 5,927 words (by computer count); and (3) averages less than 280 words per page, including footnotes and quotations.

Certificate of Service

On August 31, 2015, the below-signing lawyer certifies that he electronically filed the above-described Amicus Curiae Brief with the Clerk of the Arizona Court of Appeals, Division One, that all participants in the case will be served by the AZ Turbo Court System and that he both emailed a copy and mailed two copies of it to each of the following:

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