



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**

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**CASE SUMMARY**

**Arizona Water Company v. Arizona Department of Water Resources, N.W.  
Plummer, (former) Director, CV03-0321-PR (Opinion)**

**Parties and Counsel:**

Petitioner: Arizona Department of Water Resources (“ADWR”), N.W. Plummer, (former) Director, represented by ADWR attorneys W. Patrick Schiffer, Kenneth C. Slowinski and Nicole D. Swindle.

**Amicus Curiae:** Leave was granted to Salt River Valley Water Users’ Association and Salt River Project Agricultural Improvement and Power District (“SRP”), represented by Lisa M. McKnight of Salmon Lewis & Weldon, to file an amicus brief supporting ADWR’s petition for review.

**Respondent/Cross-Petitioner:** Arizona Water Company (“AWC”), represented by Timothy Berg, Norman D. James and Thomas R. Wilmoth of Fennemore Craig.

**Facts:**

The Arizona legislature adopted the Groundwater Code in 1980. It created active management areas, including one for the Phoenix area, where extractors, transporters and users of groundwater are subject to special regulations. It assigned to ADWR the task of creating management plans over successive 10-year periods for the conservation of groundwater used for non-irrigation, with the goal being to reach “safe yield” (withdrawal and recharge roughly equal) by 2025.

As provided by the Code, ADWR adopted a first management plan for the ten years beginning 1980 and a second management plan (“SMP”)for the ten years beginning 1990. The first was completed unchallenged, however, AWC challenged the Director’s approval of the SMP. That plan term is over now, but the dispute is still alive, since the third management plan for the ten years beginning 2000 continues certain disputed portions of the second.

AWC sought judicial review of the SMP. It claimed that the plan covering its Apache Junction System was not in compliance with the Groundwater Code. Specifically, AWC said the plan did not include conservation measures that ADWR must impose directly on “end users of groundwater”(or customers), rather than regulating their use indirectly by imposing conservation measures on AWC as a provider. AWC also disputed whether ADWR could count water from the Central Arizona Project toward its conservation goals because ADWR can only regulate groundwater use under the Act. CAP water comes from the Colorado River, not from the ground. The trial court on its own asked the Arizona Corporation Commission to participate and inform the court of any conflict between the Commission’s authority over AWC as a utility, and ADWR’s regulation of AWC as a groundwater provider subject to the mandates of the Groundwater Code. The Commission reported, and the trial court found, no irreconcilable conflict with ADWR over regulatory issues.

The trial court vacated a portion of the SMP as it applied to the Apache Junction System and remanded to ADWR to fix the plan, but did not address how to fix it.

The court of appeals affirmed in part. A majority of the appellate court agreed that the legislature intended to create conservation requirements for both providers and their end user customers, and that ADWR must devise appropriate conservation measures for its plan(s) that include direct management of end users. The majority also held that the Groundwater Code allows ADWR to count a municipal provider's CAP water as part of overall water supply in determining a provider's compliance with conservation plan requirements. The dissenting judge agreed with counting CAP water toward conservation goals, but thought ADWR properly implemented the Act by making providers the primary focus of the per capita water conservation measures. This would give providers flexibility to develop conservation plans and programs suitable for their own customers and geographic areas and take into consideration that providers ultimately decide whether customers receive groundwater, or water from another source, such as AWC's decision to serve several new golf courses in Apache Junction with its CAP water. The dissenting judge also thought the court should decide the issue whether per capita conservation measures apply to providers, or just end users. He said it was presented adequately below and is intertwined with the end user management issue. The majority did not think that issue was presented, but said it would agree with the analysis made by the dissenting judge if it were to consider the issue. The court also considered an attorneys fees issue, but that is not presented for review.

## **Issue(s):**

### **A. In ADWR's Petition**

Does the 1980 Groundwater Management Act (>Groundwater Code=) require the Director of the Arizona Department of Water Resources (>ADWR=) to impose mandatory conservation requirements directly on all persons receiving groundwater from municipal water providers within the state's five active management areas (>AMAs=), or does the Code give the Director discretion to regulate individual users as may be appropriate?@

Issues presented to, but not decided by, the appellate court are:

A1. Whether the Director properly imposed conservation measures requiring reasonable reductions in per capita use of water directly on municipal water providers, rather than on the individual users receiving groundwater from municipal providers, and whether those conservation measures conflict with the Arizona Corporation Commission's jurisdiction to regulate private water companies.

A2. Whether the Director of ADWR acted arbitrarily, capriciously or contrary to law in denying Arizona Water Company's (>AWC=) application for a 100 percent increase in the per capita conservation requirements for its Apache Junction (AJ=) System so that the System can serve disproportionately increasing non-residential uses such as golf courses.@

**B. In AWC's Cross-Petition**

AWC says the appellate court decided this issue:

A(1) Whether the Legislature intended that in implementing the Groundwater Code's conservation mandate, the Department should include in its management plans conservation measures to be employed by end users of groundwater.

AWC asks the Court to consider this issue in its cross-petition:

A(2) Whether the Department, in determining a municipal provider's compliance with the Department's Total Gallons-Per-Capita-Per-Day Program (Total GPCD Program), may include in its calculations Colorado River water delivered through the Central Arizona Project?

**Authority:**

**A.R.S. ' 45-492(A)** provides in pertinent part:

[I]n an active management area, a city, town or private water company shall have the right to withdraw and transport groundwater within its service area for the benefit of landowners and residents within its service area, and the landowners and residents are entitled to use the groundwater delivered, subject to:

.....

2. Conservation requirements developed by the director pursuant to article 9 of this chapter. [A.R.S. ' 45-561 et seq., governing Groundwater Management]

**A.R.S. ' 45-565 (A) (2)** charges ADWR's Director with a responsibility to establish additional conservation measures for the second management period beyond those implemented in the first, including use of such other conservation measures as may be appropriate **for individual users.**

*This Summary was prepared by the Arizona Supreme Court Staff Attorney's Office solely for educational purposes. It should not be considered official commentary by the court or any member thereof or part of any brief, memorandum or other pleading filed in this case.*



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**CASE SUMMARY**

**STATE v. AGUILAR, CR-03-0332-PR**

**Parties and Counsel:** The State of Arizona, represented by Robert A. Walsh, Assistant Attorney General. Appellant Aguilar, represented by Joel M. Glynn, Deputy Public Defender.

**Facts:**

Between November 9, 1999, and May 10, 2001 appellant allegedly committed three separate assaults against three separate adult female victims. Specifically, he (1) threatened to kill victim Amy with a knife, used force to pin her body underneath his own, and had vaginal intercourse with her while she cried; (2) brandished a gun at victim Maria, forced her to perform fellatio on him until he ejaculated into her mouth, and issued threats about the Mexican Mafia before he let her go; and (3) used a gun to force victim Sophia to perform fellatio and submit to vaginal intercourse, told her that she was going to get fucked-up to discourage further resistance, struck her three times on the head when she tried to resist, and threatened to call the Mafia if she reported the event. In interviews with detectives after the incidents, appellant admitted having sexual intercourse with the victims after encountering them on the street, but asserted that the acts were consensual.

On May 21, 2001 appellant was indicted on three counts of kidnaping; seven counts of sexual assault; four counts of sexual abuse; two counts of aggravated assault; and one count of armed robbery.

Before trial, appellant moved to sever the counts related to each victim from the counts related to the other victims as a matter of right pursuant to Rule 13.4, Rules of Criminal Procedure. Following a hearing on the motion, the trial court ruled that the counts were properly joined under 13.3(a) because all counts as to all victims involved sufficient same or similar circumstances. The trial court also denied the motion to sever based on a finding that the facts as to each case would be admissible in the other cases under Rule 404(c), Rules of Evidence, because the prior acts (1) were shown by clear and convincing evidence; and (2) demonstrated an aberrant sexual propensity; and (3) any prejudice did not outweigh the acts' probative value.

At the conclusion of trial, the court instructed the jury that evidence of abnormal sexual acts has been presented to them and that they must consider this evidence in determining whether the defendant had a character trait that predisposed him to commit the crimes charged. The jury found appellant not guilty of the counts against victim Maria and not guilty of one count each of the sexual assault and sexual abuse against victim Sophia. Appellant was found guilty of the remaining counts.

The trial court sentenced appellant to concurrent and consecutive presumptive prison terms totaling 28 years on eight of the nine counts. The court suspended sentencing on

the remaining count and placed appellant on lifetime probation.

Appellant appealed his convictions, arguing that the trial court erred in denying his motion to sever the counts because Rule 404(c) required an *aberrant* sexual propensity and was thus inapplicable to sexual assaults against adult female victims. The Court of Appeals agreed, and held that no basis existed under Rule 404(c) for admission of the “other act” evidence. Appellant’s convictions were therefore vacated to permit separate trials related to each incident unless the trial court determined that the charges could be properly joined under one of the non-character exceptions found in Rule 404(b). The Arizona Supreme Court granted the State’s Petition for Review.

**Issue:**

Whether the scope of the propensity exception codified in Rule 404(c) encompasses violent sexual assaults against adults as well as sex-related crimes against children.@

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