

Hearing Things:

The Rumble of the 900-lb SRP Gorilla in Administrative Hearings on Prescott's Pipeline

by Candace McNulty
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Last week I spent three eight-hour days sitting on an uncomfortable chair, listening to lawyers, hydrologists, economists, citizens, lawyers, bureaucrats, biologists, and did I mention lawyers? And I'd like to tell you about it. It was an Office of Administrative Hearings proceeding. Dull as that sounds, it's the opening salvo of a shootout that, some hope, could change Arizona water law. Still, reading about it cold could be like huffing carbon monoxide.

The Spirit is Swilling

So, to power us through the procedural tedium, let's call on Arizona's most colorful ghost. He hovers over the proceedings partly because his name, **Jack Swilling**, tells you what the argument's all about: *who's swilling whose water* — and also because he's claimed as ghostfather by the two major combatants at hand, the **City of Prescott** and the **Salt River Project**. The OAH hearings are only a practice round, the sharpening of legal weapons, for lawsuits likely to come. The three days in April, and the earlier round in February, saw much airing of issues, throwing down of markers, "gotcha" questions. It's the time-honored Southwestern battle Jack Swilling would get right away — disputing a body of water. This time, though, the water dwells under the **Big Chino Valley** ranchlands, some 30 miles north of Prescott.

If you don't know Jack, you're not yet a true Arizonan. A Mexican-American War veteran, he abruptly left Georgia and arrived in Arizona in 1858, not quite 30 years old. He's claimed as founder of the city of Phoenix as well as the ditch irrigation system that is now SRP. Prescott also claims him, as he guided the Walker party here and hung out in the area with "first Prescott paleface" **Pauline Weaver**.

SRP, rising from Swilling's ditches, explains on its website, "SRP is two companies: the Salt River Project Agricultural Improvement and Power District, a political subdivision of the state of Arizona; and the Salt River Valley Water Users' Association, a private corporation." Right there's the birth of SRP's clash with Prescott: the Verde flows into the Salt, and pre-statehood dams and diversions grant Association customers/"shareholders" a senior water right in the river.

Greg Kornrumph, SRP's principal water rights analyst for the Verde insists, "we have a responsibility to our shareholders to protect their rights to the water supplies that they've used for over a hundred years." He leaves no doubt SRP will attempt legal smackdown on the least infringement of these rights.

Problem is, little did Swilling know the highlands town he helped found would eventually gulp from the Verde's sources. Territorial Prescott's enjoyed no river water rights to speak of: no *surface* water. Instead it had groundwater — rain and snowmelt soaked over millennia into the sands and gravel and broken rock, or aquifers, underground.

Scroll ahead to 1999: the Arizona Department of Water Resources, which created the Prescott Active Management Area in 1980, declares the AMA "out of safe yield," or depleting its current wells. The AMA must find a new place to sink its straws. A special statute allows the City of Prescott to pump the Big Chino, outside the AMA, and import the water. The Big Chino's underlying aquifer, however, feeds the baseflow of the Verde. Many worry the new pumping, along with development, will choke off this flow.

The Rules of the Game ...

The groundwater/surface water distinction is fundamental in Arizona law. For surface water the law is "prior appropriation" — who got there first. Priority doesn't matter for groundwater pumping; the only restriction is reasonable use; some call it "the law of the biggest straw." As for the hydrological connection between water above and below land surface — well, Arizona has dawdled in dealing with groundwater pumping's impact on rivers, even compared to other Southwestern states.

So you might think that ADWR's main task would be to determine: *Is there merit to the charge that Prescott pumps will cut the Verde flow, harming habitat and SRP shareholders' rights?* You'd think wrong. One of the Department's most emphatic, repeated reminders in the hearings was the limits on their mandate.

The rules are complex, but stripped down, the situation is this: Within the Prescott AMA, only the City of Prescott is a *water provider* designated by ADWR as having an *assured water supply*, meaning ADWR assesses Prescott can pump for 100 years without dropping its well levels below 1,000 feet. However, because Prescott is depleting its wells, the city applied in 2007 to add more to the permitted water it could deliver annually. The extra would come from Prescott's Big Chino Water Ranch, purchased in 2004.

(Prescott has a virtually equal pipeline partner: its neighbor, Prescott Valley. By intergovernmental agreement, the junior town pays nearly half the project cost and receives nearly half the water. In sunnier times, like in 2006, Prescott Valley boasted a smoking 8% growth rate. Big players in all things water-related, PV officials and the interests they represent hope those sunny times return soon, and they'll need the water.)

So when Prescott, planning its 30-mile Big Chino pipeline, asked ADWR to grant more water to its assured water supply, the Department reviewed the application and determined in late 2008 that the city could add 8,067 acre-feet a year. Right away, some disgruntled parties, powerful and less so, filed objections. Prescott itself wasn't thrilled with ADWR's water quantity ruling, having designed a pipeline for roughly twice the volume. The objections kicked the matter over to the Office of Administrative Hearings, where Judge **Thomas Shedden** was picked as the lucky guy to rule on the rules.

... And the Players

Some who have filed appeals against ADWR's acre-foot determination have been poised for years to strike as soon as ADWR dropped the dime — the Center for Biological Diversity, for

example, and the Grand Canyon chapter of the Sierra Club. Their interest, of course, is in preserving the health and wildlife habitat of the Verde's upper 24 miles. Joining them are a dozen or so like-minded citizens; they're all represented by **Joy Herr-Cardillo**, a lawyer with the Arizona Center for Law in the Public Interest.

Among the most seriously disgruntled was SRP, whose hide was chapped by a court ruling: not being an AMA resident, it couldn't file an objection.

So while SRP could not be an appealing party on paper, through its constant presence and long years of eyeballing this unfolding pipeline project, it knew other interested individuals, local folks sharing its concern for the river, if not necessarily for the same reasons. They asked **Gary Beverly** if he'd like to hire SRP's law team for cheap, and be an appellant. As the Sierra Club's local outings leader, retired environmental science professor, and a 35-year local resident with a farm in Chino Valley, Beverly spends all the time he can spare hiking the upper Verde, and now, in retirement, he's working full-time to save it. He said yes. SRP was back in the game.

Mr. Beverly put his newly hired lawyers in touch with **Dr. Anthony Krzysik**, recruited to Prescott 10 years ago to start up environmental science at Embry-Riddle Aeronautical University. Mr. Krzysik had been a Department of Defense research ecologist specializing in large landscape studies, and his personal library of ecology, vertebrates, and statistics is one of the best in the state. Dr. Krzysik is particularly entranced by records documenting the presence of fish in the Big Chino Wash as recently as 35 years ago, in a time of drought, indicating that it was a perennial stream rather than ephemeral (mostly dry), as it is today.

Dr. Krzysik knew another local, **Tom Atkins**, with his own take on water issues. Mr. Atkins' father's business occupied what is now Prescott's Raven Café. After leaving town to study zoology and teach, he returned in 1999. He too loves the river and figured that, without the pipeline and at current population, Prescott has sufficient water that everyone could safely use 35 gallons a day. Given the dispute about whether the pipeline will reduce the river's baseflow, Mr. Atkins says the precautionary principle should apply: *don't take any action until you're sure it won't do harm*. He believes the burden is on the city to prove it won't, not on the rest of us to demonstrate the reverse. He was delighted to join the appeal.

And so, Messrs. Atkins, Beverly, and Krzysik became "the Beverly appellants" in the procedure. Prescott Mayor **Jack Wilson** has been quoted as saying: "SRP used the company helicopter to fly two executives and their lawyer from Phoenix to Prescott to recruit local residents, over a nice meal at one of Prescott's more posh restaurants, to file objections on its behalf." Others say it was just the company plane, and just ol' Murphy's ...

For sure, they also met in Mr. Atkins' kitchen over sandwich fixings. Expert witnesses offered, for evidence, reports bearing SRP's logo. Mr. Kornrumph sat behind the legal team and supplied them with needed documents. Jdg. Shedden occasionally had to remind Prescott's attorney **Michael Pearce** that SRP was not a party, eliciting a frustrated "They're here, but they're not here." And no denying — **Mark McGinnis**, **John Weldon**, and **Lisa McKnight**, representing the Beverly group, work for **Salmon, Lewis, and Weldon**, SRP's law firm, and SRP guides the play.

The Play

The days of testimony aired all the concerns about Prescott's planned pipeline. Does the project appear economically feasible? Does Prescott have a clear right to that amount of water? Will pumping it reduce the aquifer's water so the springs slow or stop? What do the hydrological reports say? And if it slows, how will that affect wildlife habitat, and what endangered species would suffer? What about other projected pumping in the Big Chino? The volumes of testimony went winging back and forth, cutting into each other. ADWR kept its bureaucratic head down.

About those limits: **Sandy Fabritz-Whitney**, an ADWR Assistant Director, had charge of reviewing and approving Prescott's application. She repeatedly stated her mission: "The Department's role in the assured water process is to review, pursuant to statutes and rules that are put in front of us, applications ... that are submitted." These statutes and rules are all her review can steer by. And she highlighted another restricting reality with startling precision: "These applications are submitted to allow the entities to grow. To sell lots, in a subdivision."

An applicant for assured water supply must demonstrate to ADWR that the water in question will be *physically, legally, and continuously available* for 100 years, and that the applicant has the *financial capability* to complete the project and deliver water of acceptable quality. Despite the apparent forethoughtfulness of the 100-year view, the bureaucratic constraints keep ADWR's departmental vision firmly fixed on the task at hand, not the bigger picture. And though these rules set the parameters for the appellants' objections, many of their questions are just not on ADWR's screen.

This situation brought the hearing some laughing-while-crying moments, especially given that other limit — a shrunken departmental budget. For instance: regarding an applicant's financial capability to fund the project, Ms. Fabritz-Whitney can't consider anything other than what the applicant submits. And while ADWR has legal and hydrological staffs, there is no in-house financial expertise. Ms. Fabritz-Whitney testified that the Department's economist retired; there was no funding for a new hire. Certainly they can't engage a consultant. So as the attorney, Ms. Herr-Cardillo asked, "If a letter was submitted from a CFO of a town that said 'We're going to finance this project by lottery winnings,' is it your interpretation ... you would have to accept that as ... a demonstration of financial capability?" Ms. Fabritz-Whitney's answer was appropriately noncommittal; she did, however, acknowledge the rules don't require analyzing Prescott Valley's ability to finance their end of the deal, since it's only Prescott's application.

The Center for Biological Diversity and others objected on the grounds that the impact of pumping could damage wildlife habitat, thus violating the **Endangered Species Act**. ADWR's legal opinion held this as requiring speculation about the future, and thus not within their purview. Same for climate change; since potential impacts can't be quantified, they can't be considered. Ms. Herr-Cardillo asked whether Ms. Fabritz-Whitney knew if other states' water agencies were attempting to forecast effects of climate change; she thought maybe they were. *Has ADWR undertaken any attempt to do any sort of climate change analysis*, wondered Ms. Herr-Cardillo? "We don't have the staff to do it," the Assistant Director replied.

Magic Underground

The deepest question — *Will pumping dry the Verde Springs?* — brought similar answers: Ms. Fabritz-Whitney must listen only to the agency's hydrologist when determining continuous availability and the prospect of the water table not dropping below 1,000 in 100 years. In fact, once she begins the approval process, she must not even listen to ADWR's director. Mr. McGinnis, taking the examination floor, placed into the record several of Director **Herb Guenther's** public statements of concern about harm to the river, and the long-term viability of supply. "There's no magic underground," he said, referring to the physical laws pulling water down-gradient through the Big Chino aquifer to the springs.

Ms. Fabritz-Whitney testified that she was not allowed to have an opinion about these things when making her decision. Mr. McGinnis asked, "If your hydrology staff had told you the pumping would cause a decrease in the baseflow of the Verde River, would you have signed the letter [of approval]?" She responded that because Prescott's application was for groundwater pumped from the Big Chino sub-basin, if her hydrologist determined the groundwater was available to Prescott, she would *have to* sign the letter.

Still, ADWR has wrangled internally over these very concerns. Documents surfaced with statements like *"the elephant in the room is the impact of pumping of groundwater from the Big Chino on the baseflow of the Verde River."* An internal memo outlined the potential problems and offered this outcome for the "do-nothing" option: *"... the Prescott AMA cities invest in this water supply at their own risk that it may be pumped away by other competing demands. The Verde River headwaters will be affected by uncontrolled groundwater pumping in the Big Chino sub-basin, but the level of impact and the timing of occurrence are unknown."*

Some responses illuminated political pressure on ADWR. Mr. Pearce, attorney for the City of Prescott, asked Ms. Fabritz-Whitney: "You testified that ADWR is concerned about the rivers and streams of Arizona, including the Verde River; ... about the future of the Big Chino sub-basin. And today you testified that [ADWR] talked about a variety of solutions to those concerns. Do you anticipate that discussion will continue in the future?" Ms. Fabritz-Whitney replied, with a rueful chuckle, "I don't know whether it will or not. That was under a different governor, to be perfectly honest."

Both sides swore in hydrologists with opposing computer models, which were gleefully attacked by their respective attorneys. Prescott's consultant tried, as the city has for many years, to prove there's an obstruction athwart the valley, southeast of the ranch, that keeps the groundwater from moving "down-gradient" toward the springs. No one disputes that there's a *playa* deposit, a large blob of fine-grained material, hunkered mid-valley against the fault scarp on the northeast side. Prescott has abandoned the notion that it's a "clay plug" blocking off the water ranch from the springs. Now the city's PR website for the pipeline project asserts it constricts the flow of water "like a kink in a hose," somehow protecting the springs from the pumping.

But even ADWR's cautious hydrologist, **Frank Corkhill**, when asked to agree that water pumped from the Big Chino would reduce flows to the Verde headwaters, said, "In my opinion,

that would happen." Questioned by the Department's own attorney, he stated that groundwater may flow around the playa deposit, under it, and even, as the Beverly appellants' witness asserted, through it. He also supported a US Geological Survey report's figure, that 80–86% of the upper Verde baseflow comes from the Big Chino aquifer, which Prescott is still trying to discredit. Mr. Corkhill called it "a ballpark number ... not hugely wrong, not perfect."

Tune In Next Time

Again: these hearings were just the opening skirmish in the Prescott–SRP shootout. There'll even be another set of hearings in June... However he rules, Jdg. Shedden clearly worked to compile as much evidence as possible to pass on to another court, because one aggrieved party or another will surely sue (if not Prescott or SRP, then CBD). Some speculate that the ultimate decision could bring scientific reality to Arizona's antiquated water law. Others are not optimistic.

One knowledgeable source notes that since the groundwater/surface water issue has come before the Arizona Supreme Court three times recently, further changes are unlikely. Moreover, in Arizona, political clout of pumpers trumps that of surface water users. It would be extremely difficult to rearrange all the groundwater rights and compensate pumpers who had their straws in aquifers supporting rivers. The upshot: Arizona law leaves rivers relatively defenseless against wells swilling water from the aquifers that feed them.

And certainly ADWR won't play an active role, under current conditions, in achieving a solution. The current situation pits players against each other. Prescott's representatives rail against SRP's greedy desire to swill the bulk of the Verde's water, heedlessly wasting it — the big city wrecking our rural way of life. Ironically, little Paulden in the Big Chino says the same about Prescott Valley's thirsty, multiplying rooftops. But rather than adversarial legal actions, regional collaboration could have a much better chance at reconciling opposing interests.

Possible remedies include ones practiced elsewhere: allowing people to purchase what are called in-stream rights, in which the river rights holder is allowed *not* to put the water to human use, but to leave it in the river; or various forms of land trusts and conservation easements to protect river habitat or land over aquifers from pumping. The Nature Conservancy and Arizona Game and Fish have taken such action. Prescott has committed to something similar with the retired agricultural land on its water ranch. Others have suggested solutions requiring new legislation, like a special district to support and regulate pumping throughout the Big Chino, or even a new AMA. Any of this will take citizen involvement and support.

The Beverly appellants are those kinds of citizens. Their testimony was passionate and full of reverence for the river, with Gary Beverly offering to lead all present on a Verde hike. We can take them for models and let Jack Swilling be our guiding ghost, bringing the Verde together, from end to end.