

## **Home Builders Association of Central Arizona v. Arizona Department of Water Resources**

### **Executive Summary**

The Arizona Department of Water Resources (“Department”) has imposed new rules that halt all new home construction in some of the fastest growing and most affordable parts of Maricopa County. The agency has done so without formal rulemaking or legislative authorization in violation of Arizona law.

New residential construction in certain parts of Maricopa County can only start after developers receive a Certificate of Assured Water Supply from the Department. The certificates should issue if a homebuilder or developer can show that an individual development has proven sufficient groundwater supply for that development for the next 100 years. But the Department has imposed new requirements that preclude developers from making that showing based on a flawed model that applies the 100-year groundwater requirement for the entire management area, rather than the specific development.

Administrative agencies in Arizona, including the Department, can only impose these sorts of policies through formal rulemaking and with specific legislative authorization. Yet, in an unprecedented act of administrative overreach, the Department has done so with the stroke of a pen, without satisfying either requirement.

The Goldwater Institute is representing the Home Builders Association of Central Arizona (“HBACA”) in a legal challenge to these unlawful rules. We are asking the court to require the Department to follow rulemaking procedures and Arizona law to stop the Department from unlawfully halting new home construction.

### **Background**

The Home Builder’s Association of Central Arizona is a trade association for residential construction and the development industry, and many of its members are subdivision developers. They are advocates for affordable housing and work to remove unnecessary building laws and regulations that drive up the cost of housing. Several HBACA members develop within the Phoenix Active Management Area (“Phoenix AMA”) that are subject to the Department’s rules when seeking Certificates of Assured Water Supply—which are necessary to subdivide and sell residential real property.

The Department imposed two invalid rules that preclude several HBACA members from obtaining Certificates of Assured Water Supply: (1) an “AMA-Wide Unmet Demand Rule” and (2) an “AMA-Wide Depth-to-Water Rule.”

The AMA-Wide Unmet Demand Rule is a calculation model that predicts that within the next 100 years a well may not be able to fully satisfy its predicted demand in any location within the Phoenix AMA. Under this AMA-Wide Unmet Demand Rule, if there is “insufficient” groundwater in some portion of the Phoenix AMA, there is insufficient groundwater anywhere in the entire Phoenix AMA. The AMA-Wide Unmet Demand Rule requires members of the HBACA developing a subdivision to prove that not only will their project have a 100-year supply of water, but that there is a 100-year water supply throughout the Phoenix AMA.

The AMA-Wide Depth-to-Water Rule is a calculation model that predicts that within the next 100 years depth-to-water will exceed 1,000 feet in any location within the Phoenix AMA. Like the AMA-Wide Unmet Demand Rule, under the AMA-Wide Depth-to-Water Rule, the Department has concluded that if a well exceeds this water depth in some areas of the AMA, there is insufficient groundwater at the site of the development.

Under these invalid rules, no developers, including members of the HBACA, can prove a 100-year of water supply necessary to obtain a Certificate of Assured Water Supply and start construction on new development. In areas of growth, like Queen Creek and Buckeye, construction has come to a complete stop, contributing to the ongoing housing crisis in Arizona.

### Legal Analysis

The AMA-Wide Unmet Demand Rule and AMA-Wide Depth-to-Water Rule were not adopted by formal rulemaking and are not specifically authorized by statute.

Agencies are required to follow the Administrative Procedure Act (“APA”) when promulgating and implementing rules. A rule is an agency statement of general applicability that also implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of an agency. A.R.S. § 1001(21). Both rules apply to all developers in the Phoenix AMA and requires a new model to be used to calculate the “unmet demand” in the Phoenix AMA. These rules require all developers to overcome the impossible task of proving that in the next 100 years, there will be sufficient groundwater in wells throughout the AMA.

Agency rules, like the AMA-Wide Unmet Demand Rule and the AMA-Wide Depth-to-Water Rule, must be promulgated pursuant to APA procedures. These procedures include public participation by public notice and comment. The Department’s rules did not have any public participation. The Department did not substantially comply with the APA, nor were the rules reasonably necessary to carry out the purpose of the assured water supply program. Because the Department’s rules violated the APA, they are invalid.

State law must also specifically authorize agency rules. A.R.S. § 41-1030(D)(3). State law, however, requires sufficient groundwater for the “proposed use,” not for an entire management area. A.R.S. § 45-576(M). Thus, the agency’s actions are contrary to state law, and the Department did not have the authority to impose either rule. Without specific authorization to impose the AMA-Wide Unmet Demand Rule or AMA-Wide Depth-to-Water Rule, these rules are invalid.

The HBACA is seeking declaratory and injunctive relief against the AMA-Wide Unmet Demand Rule and AMA-Wide Depth-to-Water Rule because they were not adopted through rulemaking and the Department lacks legislative authorization to impose them.

### Case Logistics

The case is *Home Builders Association of Central Arizona v. Arizona Department of Water Resources*. The complaint was filed on January 22, 2025, in Maricopa County Superior Court.

### Legal Team

The Home Builders Association of Central Arizona is represented by lawyers from the Goldwater Institute and Fennemore Craig, P.C.

For the Goldwater Institute: **Jon Riches** is the Vice President for Litigation for the Goldwater Institute's Scharf-Norton Center for Constitutional Litigation and General Counsel for the Institute. He litigates in federal and state trial and appellate courts in the areas of economic liberty, regulatory reform, free speech, taxpayer protections, public labor issues, government transparency, and school choice, among others. **John Thorpe** is a Staff Attorney at the Goldwater Institute's Scharf-Norton Center for Constitutional Litigation, where he litigates in the areas of education, free speech, economic liberty, government transparency, regulatory reform, and property rights. **Stacy Skankey** is a Staff Attorney at the Goldwater Institute's Scharf-Norton Center for Constitutional Litigation, where she litigates in areas of property rights, government transparency, free speech, economic liberty, and regulatory reform.

For Fennemore Craig, P.C.: **Sean Hood** is a Director at Fennemore specializing in water law and business litigation. With nearly 20 years of experience, he advises Fortune 500 companies and other business on disputes involving water rights, environmental permitting, partnership and shareholder interests, breach of contract, business torts, and real estate. Sean litigates in state and federal courts focusing on complex water rights cases and environmental law. **Nyla Knox** is an Associate Attorney in Fennemore's Business Litigation practice group handling a diverse array of litigation matters, including breach of contract, commercial disputes, fraud, negligence, and insurance coverage.