



DEPARTMENT OF LAW
OFFICE OF THE
Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

BRUCE E. BABBITT
ATTORNEY GENERAL

March 14, 1978

The Honorable Morris Farr
Arizona State Senate
Senate Wing, State Capitol
Phoenix, Arizona 85007

LAW LIBRARY
ARIZONA ATTORNEY GENERAL
Re: 78-51 (R77-227)

Dear Senator Farr:

This is in response to your letter of June 29, 1977
in which you ask the following:

1. Is it required by state law to register or record the existence of groundwater wells?
2. Is a well that is jointly owned and which serves several parcels for domestic purposes exempt from registration?
3. Can the act of filing a notice of intent to drill a well be considered as an act of registering or recording a well?
4. What requirements and rights exist in the Arizona Revised Statutes regarding water rights registration and registration of wells?
5. Is there any differentiation between registration of wells and recordation of wells in the statutes?

Your first inquiry concerns whether state law requires one to register or record a groundwater well. The statutes governing "groundwater" appear in Article 7, Chapter 1, Title 45, Arizona Revised Statutes, (A.R.S. §§ 45-301 through 45-324, as amended Laws 1977, Ch. 29) hereafter called the "Ground Water Code".

It should be noted at the outset that § 45-301 of the Ground Water Code distinguishes between "irrigation wells" -- wells or works primarily used for irrigation purposes -- and "exempted wells" -- wells utilized for domestic, stockwatering, domestic water utility, industrial and transportation purposes (as well as certain irrigation works utilized by schools and institutions). Because your request appears to be directed toward exempted wells, we shall not consider irrigation wells as to which the Ground Water Code contains a number of procedures and restrictions that are not applicable to exempted wells.

A.R.S. § 45-322 specifically provides that the right to construct and operate an exempted well is not affected by the provisions of the Ground Water Code.

A.R.S. § 45-305 of the Ground Water Code requires that before a person may drill a well he must file a "notice of intention to drill" with the State Land Department. This provision applies to exempted wells as well as irrigation wells. Although the Land Department has no authority to deny the right to drill an exempted well, even in a critical groundwater area, the proper notice must still be filed, and, once the well has been drilled, a copy of the drilling "log" must also be filed with the Land Department by the driller along with certain other information concerning the equipment installed. See A.R.S. § 45-306. Failure to comply with these reporting requirements is a misdemeanor. A.R.S. § 45-307.

Until Chapter 29 was enacted in 1977, these were the only filing requirements when drilling an exempted well. A.R.S. § 45-317.06.I now requires review by the Land Department¹ of the change in location of any well in a critical groundwater area irrespective of whether its water supply is included in a certificate of exemption in order to prevent "unreasonably increasing damage to surrounding land from the concentration of wells by any person in any portion of a critical groundwater area and requiring that the new location bear a reasonable relationship to the retired irrigated land applicable."

That a well used for domestic purposes (exempted well as defined by A.R.S. § 45-301) is jointly owned or serves several parcels is irrelevant; the only acts required are to file a notice of intent to drill and the report on the well driller's log upon completion of drilling and to follow any procedure covering the relocation of wells in critical groundwater areas. In this regard, there is no statutory differentiation between "registration" of wells and "recordation" of wells, nor does the Ground Water Code utilize these terms.²

Some confusion apparently exists concerning "registration" requirements because of the Water Rights Registration Act enacted by the Legislature in 1974. A.R.S. §§ 45-180--45-193. The Water Rights Registration Act must be distinguished from the Ground Water Code discussed above because the Registration Act applies only to "public" waters that are owned by the State and subject to appropriation.

1. Rules on change of location of wells have not been adopted yet by the Department.

2. An exception exists as to wells for irrigation and drainage purposes drilled prior to 1945 which must be reported under A.R.S. § 45-304.

Public waters include "waters of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface. . . ." A.R.S. § 45-1016.A. In general, then, appropriable waters are all surface waters and underground streams flowing in definite channels.³

As noted, the Water Rights Registration Act provides for the registration of asserted claims to public waters, not ground waters. The only area of controversy is whether any subterranean water can be considered "public water" if there is evidence indicating that it is flowing in a definite underground channel with ascertainable beds and banks. It is impossible to resolve this question in this opinion since the issue obviously must be addressed according to a specific fact situation. In a separate opinion,⁴ the applicable case law on this issue is analyzed. Suffice it to say, however, that there is a strong presumption that subterranean water is ground water. The burden is on the person seeking to appropriate such water to establish that it is in fact an underground stream, i.e., public water.

This was the holding of the Arizona Supreme Court in Maricopa County Municipal Water Conservation District No. 1 v. Southwest Cotton Company, 39 Ariz. 65, 4 P.2d 369 (1931), modified and rehearing denied, 39 Ariz. 367, 7 P.2d 254 (1932), and it has recently been reaffirmed in Neal v. Hunt, 112 Ariz. 307, 541 P.2d 559 (1975).

There is the possibility that an underground stream could be established by hydrologic evidence, in which case the water would be appropriable. If there is clear and convincing evidence that an underground stream is the source of a well supply, the Water Registration Act should be followed. A.R.S. § 45-181 states as follows:

§ 45-181. Claim of right to withdraw, divert or use public waters; exception

A. All persons using or claiming the right to withdraw or divert or make beneficial use of public waters of the state, except as provided in subsection B, shall file with the department not later than June 30, 1978 a statement of claim for each water right asserted, on a form provided by the department. The

3. By way of comparison, ground water is defined as "water under the surface of the earth regardless of the geologic structure in which it is standing or moving. It does not include water flowing in underground streams with ascertainable beds and banks. A.R.S. § 45-301.5, as amended 1977.

4. Att'y. Gen. Op. No. 78-29 (R77-228) (February 14, 1978).

filing by any person on behalf of its members or users shall constitute the required filing of the individual users under this section.

B. The requirement of the filing of a statement of claim shall not apply to:

1. Any water rights issued pursuant to a permit or certificate issued by the department or its predecessors;
2. Rights acquired to the use of the mainstream waters of the Colorado River; or
3. Rights acquired or validated by contract with the United States of America, court decree or other adjudication.

The registration Act was enacted by the Legislature with the apparent intent of registering all water rights acquired by appropriation prior to 1919 (when the statutory provisions for appropriating public waters were adopted). It applies to any water right involving "public waters" that has not been established heretofore by one of the three methods mentioned in A.R.S. § 45-181.B supra. Thus, a well owner who has evidence that he is tapping an ascertainable underground stream may protect his right by filing a claim with the Land Department under the Registration Act prior to June 30, 1978. If the water in question proves to be appropriable and a party has failed to file such a statement of claim, he will be deemed to have waived and relinquished any right, title and interest to that water right. A.R.S. § 45-183.

One final caveat. The Water Rights Registration Act specifically exempts wells used to produce water exclusively for domestic or stock watering purposes. A.R.S. § 45-184.B states:

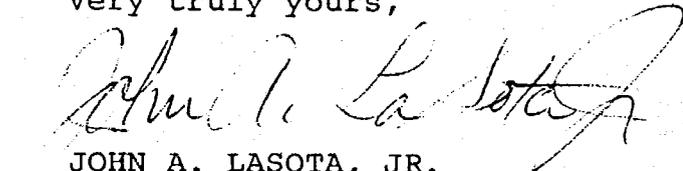
Wells used to produce water exclusively for domestic or stock watering purposes are exempt from the provisions of this article, but the granting of this exemption shall not establish the presumption that a water right exists.

Thus, claims for such wells need not be filed under the Registration Act, but here again a party who has a well drilled before 1919 that could involve "appropriable waters," i.e., an underground stream, might wish to file a claim to protect against

Page Five
Senator Morris Farr

the possibility that the water right might be extinguished
if the party fails to file.

Very truly yours,



JOHN A. LASOTA, JR.
Acting Attorney General

JAL:kd