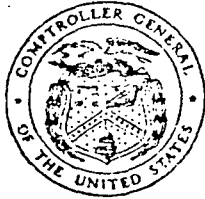


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DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

FILE: B-207695

DATE: June 13, 1983

MATTER OF: Williams Air Force Base Compliance
with Arizona Groundwater Code

DIGEST:

Arizona's imposition of a well registration fee and a fee on withdrawal of groundwater, as applied to wells on Williams Air Force Base, constitutes a tax, in the absence of a showing by the State that the fees are related to the value of some benefit being conferred on the base. Since there is no congressional authorization for this tax, the United States is constitutionally immune from paying it.

An Accounting and Finance Officer at Williams Air Force Base in Arizona has requested an advance decision whether to certify payment of well registration and groundwater withdrawal fees imposed by the Arizona Groundwater Code. Ariz. Rev. Stat. Ann. §§ 45-401 through 45-637 (West Supp. 1981). The wells in question are located on Federal property which is part of Williams Air Force Base. For reasons indicated below, we conclude that the fees imposed by the Arizona Groundwater Code are taxes, which the United States is constitutionally immune from paying. The certifying officer may not certify payment of these Arizona fees.

The Arizona Groundwater Code requires the registration of all existing water wells in the State. Ariz. Rev. Stat. Ann. § 45-593 (West Supp. 1981). Although not specified by the statute, Arizona's Department of Water Resources imposes a \$10 fee for each well so registered. In "active management areas," such as apparently occupied by Williams Air Force Base, Arizona also levies a withdrawal fee of up to \$5 per acre-foot of groundwater withdrawn and beneficially used. Ariz. Rev. Stat. Ann. § 45-611 (West Supp. 1981).

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The Arizona Groundwater Code does not exempt the United States or its installations from compliance with its provisions. See Ariz. Rev. Stat. Ann. § 45-402.23 (West Supp. 1981). Therefore, under the terms of the statute, Williams Air Force Base is subject to the fees.

Under the Supremacy Clause of the United States Constitution (Art. VI sec. 2), the States may not tax the activities of the Federal Government without the consent of the Congress. See Mayor v. United States, 319 U.S. 441 (1943); McCulloch v. Maryland, 17 U.S. (4 Wheaton) 316, 426-437 (1819). However, a charge made by a State or a political subdivision of a State for a service rendered or convenience provided is not a tax if the charge is merely fair and reasonable compensation for the service rendered or the facility used. 49 Comp. Gen. ¶ 72, 76 (1969). In order to justify such a charge, the State or subdivision must show that the charge was calculated solely on the basis of the value of the service or convenience provided to the Federal activity. See B-183094, May 27, 1975; B-179618, November 13, 1973.

Williams Air Force Base is served by four wells which are owned and operated by the Air Force. As the owner of the land on which the wells are located, the Air Force, like all other property owners in the State of Arizona, has the right to pump and use groundwater for its "beneficial use" - i.e., industrial, domestic, firefighting and similar purposes on the base, subject only to certain requirements imposed by statute relating to a 10-year mandatory conservation program. Ariz. Rev. Stat. Ann. §§ 45-451; 45-461 to 45-482 (West Supp. 1981). See also Town of Chino Valley v. State Land Dept., 119 Ariz. 243, 580, P.2d 704 (1978); State ex rel. Morrison v. Anway, 87 Ariz. 206, 349, P.2d 774 (1960).

The issue here is not failure to comply with the conservation requirements but rather the validity of the fee imposed on the Air Force's right to withdraw water from its own wells. There is no evidence that the State provides any service or assistance to the Air Force in pumping or distributing its water to various locations on the base. It does not appear that the Federal Government is receiving any measurable, tangible benefit in exchange for the fees charged by Arizona.

Moreover, the language of the code section which establishes the withdrawal fee makes it clear that the fee is not calculated on the basis of any benefit conferred but is really in the nature of a tax to defray the administrative costs of supervising compliance with the conservation measures.

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"The director shall levy and collect an annual groundwater withdrawal fee from each person withdrawing groundwater in an active management area in an amount not to exceed five dollars per acre-foot of groundwater withdrawn and beneficially used. The actual amount of the fee shall be set by the director as follows:

"1. For administration and enforcement of this chapter, an amount not less than fifty cents and not greater than one dollar per acre-foot per year. The initial fee for administration and enforcement shall be levied as soon as practicable after the effective date of this article.

"2. For augmentation of the water supply of the active management area, an amount not greater than two dollars per acre-foot per year. The initial fee for augmentation shall be levied in the first year in which the director develops and implements an augmentation program as part of the management plan of the active management area.

"3. For purchasing and retiring grandfathered rights, an amount not greater than two dollars per acre-foot per year. The initial fee for purchasing and retiring grandfathered rights shall be levied in the first year in which the director develops and implements a program for the purchase and retirement of grandfathered rights as part of the management plan for the active management area, but not earlier than January 1, 2006." Ariz. Rev. Stat. Ann. § 45-611 (West Supp. 1981).

The purposes for which the fees are to be used are ones usually paid for from general government revenues. That Arizona has chosen to place the cost for the program only on groundwater users rather than on the general population of the State does not transform the fee from a tax into a charge for a benefit conferred.

In sum, Arizona has not shown that the fee of \$10 per well registered and the fee of \$5 per acre-foot of groundwater withdrawn and beneficially used are based upon the fair and reasonable value of any benefit conferred on the Federal Government. We, therefore, conclude that these fees are actually taxes. Further, we are aware of no Federal statute which subjects the United States or its installations to these particular taxes.

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Therefore, the fees imposed under the Arizona Groundwater Code constitute impermissible State taxes on the activities of the Air Force, a Federal agency. The certifying officer may not certify payment of the Arizona fees. To the extent that any fees have already been paid to Arizona, Williams Air Force Base must seek to recover them.

for *Milton J. Fowler*
Comptroller General
of the United States