

POLICY GUIDANCE MEMORANDUM # 12

August 10, 1981

GRANDFATHERED RIGHTS FOR
NURSERIES, GREENHOUSES, LANDSCAPED AREAS, ETC.

A person, such as a nursery, who grows plants (houseplants, vegetables, landscaping plants, mushrooms, etc.) in pots or containers is not eligible for an irrigation grandfathered groundwater right. Such a use is not an "irrigation use" because there is no application of water to land. If such a use is being served by a non-exempt private well (not owned by a city or private water company), the withdrawals from the well may be eligible for a Type 2 non-irrigation right.

A person who applies groundwater to two or more acres of land to grow plants with the intention of selling the plants or using them for human consumption or animal feed may be eligible for an irrigation grandfathered right. An application must be submitted no later than September 14, 1981. This category includes growing, on two or more acres, trees, landscape plants, flowers and turf for sale.

Application of water to any amount of land to grow plants, where there is no sale or human or animal consumption intended, is not an "irrigation use". Uses in this category, including golf courses, cemeteries, parks, baseball diamonds and landscaped areas, are not eligible for irrigation grandfathered rights. If such uses are being served by a non-exempt private well (not owned by a city or private water company), the withdrawals from the well may be eligible for a Type 2 non-irrigation right.

- 1 Section 45-402, Arizona Revised Statutes states:
"Irrigate" means to apply water to two or more acres of land to produce plants or parts of plants for sale or human consumption, or for use as feed for livestock, range livestock or poultry, as such terms are defined in section 24-101.
- 2 See section 45-454, Arizona Revised Statutes.
- 3 Such a use is only eligible for an irrigation grandfathered right if groundwater was applied to the land between January 1, 1975 and January 1, 1980. See section 45-452, Arizona Revised Statutes.

The following guidance regarding Irrigation Grandfathered Rights for nurseries provides the basis for carrying out the directives of PGM #12, "Grandfathered Rights for Nurseries, Greenhouses, Landscaped Areas, etc."

o Retail Nurseries

In most cases, retail nurseries are characterized by their relatively small size (1 to 3 acres) and a great majority of their plants are in pots, rolls, flats, and other types of containers. (Some bare root plants and cacti may be "planted" or stored in mulch or elevated soil mounds (e.g. Tip Top, O'Malleys). Regardless of their size and in accordance with PGM #12, they do not receive Certificates of Irrigation Grandfathered Right. The basis for PGM #12 is that the watering of containerized plants does not qualify as an irrigation use under the Groundwater Management Act because there is no application of water to the land. PGM #12 does not include any size limitation on the "non-irrigation use". In other words, if the retail nursery is considered a "non-irrigation" use due to its plants being in pots and containers, it is not eligible for and does not require a Certificate of Irrigation Grandfathered Right regardless of its size. The nursery operation could be 1, 3 or even 20 acres and still not be eligible for nor could it receive an Irrigation Grandfathered Right. Please use the following guidance regarding the treatment of retail nurseries.

* Retail nurseries in existence at the time of filing for an Irrigation Grandfathered Right and during all or a portion of the 5 year period of January 1, 1975 thru January 1, 1980. The land upon which the nursery is located has not had an irrigation history. The nursery has either been in existence since January 1, 1975 or was established at some time prior to January 1, 1980. During the period of time prior to establishment back to January 1, 1975, no "irrigation" occurred. All retail nurseries which operated as retail nurseries and where the lands occupied have no history of irrigation at some time during the required 5 year period, are ineligible for an Irrigation Grandfathered Right. They will not receive a Certificate of Irrigation Grandfathered Right based on a history of watering plants in pots, containers, etc., and they may continue their operations (including expansion activities if plants are containerized) subject to management plan provisions. As stated in PGM #12, it may have been necessary for retail nurseries as "non-irrigation" uses, to file for a Type 2 Non-Irrigation Grandfathered Right if they used their well to support the nursery during the specified five year period.

* Retail nurseries in existence at the time of filing for an Irrigation Grandfathered Right but the land upon which the nursery sits had a history of irrigation prior to the establishment of the nursery and since January 1, 1975. In this case, the land has had a history of irrigation but was replaced by a nursery operation. In this situation, retail nurseries were not required to file an application for an Irrigation Grandfathered Right to continue their retail nursery operation. HOWEVER, they could have filed for an Irrigation Grandfathered Right to permit them (or future owners) to allow plants in the ground to be irrigated. The Department could issue a Certificate of Irrigation Grandfathered Right on the number of acres historically irrigated. Such lands could also be eligible for a Type 1, Non-Irrigation Grandfathered Right. This approach, would limit the land and water associated with the Certificate to non-irrigation uses. The maximum amount of 3 acre feet per

acre would presumably be enough to support the nursery. However, the land could be used only for non-irrigation purposes.

o Wholesale Nurseries

In most cases, wholesale nurseries are characterized by their relatively large size (20 to 30 acres) and a combination of plants in pots, flats, containers, and plants in the ground (e.g. AMFAC, Highline Nursery). The areas of the wholesale nursery operation with plants in containers would be treated in a similar fashion to a retail nursery; no Certificate of Irrigation Grandfathered Right would be required to continue or begin such an activity. However, those areas of the wholesale nursery operation where plants are growing on or in the land are subject to A.R.S. 45-452.A which states that only acres of land which were legally irrigated at any time from January 1, 1975 through January 1, 1980 may be irrigated. In essence, wholesale nurseries may only "irrigate" those acres that have an irrigation history and that are covered by a Certificate. For example, if a nursery occupied 20 acres of land that has an irrigation history (and is subsequently issued a Certificate of Irrigation Grandfathered Right for 20 acres) it could put as much of the 20 acres, in any location on the parcel, under irrigation. However, if only 5 acres of the 20 acre parcel had an irrigation history, only 5 acres could ever be irrigated. The remainder of the 20 acre nursery would be restricted to other nursery activities: growing plants in containers, storage areas, etc. To allow the nursery owner the maximum flexibility in his operation, the 5 acres of irrigation right could be rotated within the 20 acre parcel as long as the 5 acre limit was not exceeded.

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The previous discussion is summarized by the following recommendations.

- o Retail nurseries, whose land has no irrigation history, are not eligible for, do not require, and shall not receive an Irrigation Grandfathered Right, regardless of their size.
- o Retail nurseries established after June 12, 1980, can continue to operate and use groundwater from a source other than an exempt well for plants in pots and containers and up to 2 acres of plants in the ground without a Certificate of Irrigation Grandfathered Right.
- o Retail nurseries can expand onto additional acreage so long as the additional acreage is devoted to plants in pots and containers. This activity would not require a Certificate of Irrigation Grandfathered Right.
- o Retail nurseries situated on the land that has an irrigation history (for example, 5 acres of cotton was grown in 1975 and 1976 but in 1977 5 acre retail nursery was built), would be given the option of receiving either an Irrigation Grandfathered Right or a Type 1 Non-Irrigation Grandfathered Right. An Irrigation Grandfathered Right could be issued because an irrigation history was established and the existing retail nursery operation could be considered "of a temporary nature" and still capable of being irrigated. A Type 1 Non-Irrigation Grandfathered Right could be issued (assuming Type 1 requirements are met) because of irrigation history and its conversion to a non-irrigation use.

- o Retail nurseries, existing or future, may use groundwater from a source other than an exempt well on up to two acres of plants in the ground. Plants in the ground could be located anywhere on the facility and rotated within the parcel so long as the acreage does not exceed 2 acres in any one year.
- o Wholesale nurseries are treated similar to standard farming operations. For wholesale nurseries to put 2 or more acres of plants in the ground and irrigate them, they must have a Certificate of Irrigation Grandfathered Right. This Certificate will identify the number of acres eligible to be irrigated. If the number of irrigated acres is less than the acreage size of the wholesale nursery operation, those irrigated acres may be located anywhere on the entire parcel and rotated within it as long as the irrigated acreage figure on the Certificate is not exceeded in any one year.
- o Wholesale nurseries can increase their certified irrigated acreage only onto land that has an Irrigation Grandfathered Right.
- o Retail nurseries, whose land has no irrigation history (plants in the ground) BUT supplied water to the nursery from its own well, are eligible for a Type 2 Non-Irrigation Grandfathered Right. It also may be appropriate in the future for new or expanding retail nurseries, if located outside of service areas, to apply for a groundwater withdrawal permit (General Industrial Use) to support their activities. Again, in these circumstances, the permittee would be subject to provisions of the respective AMA management plan.

DM/MRF/pc