ARIZONA DEPARTMENT OF WATER RESOURCES

BEFORE THE DIRECTOR

In the Matter of the Decision of the Director to Grant the City of Prescott's Application for Modification of its Designation as Having an Assured Water Supply Designation No. 86-401501.0001 Applicant: City of Prescott, Arizona Appellants: City of Prescott, Arizona Center for Biological Diversity Sierra Club-Grand Canyon Chapter Doris Cellarius Audrey Clark Edith A. Dillon Thomas L. Fleischner Santiago F. Galvis Leslie K. Hoy Harry M. Hollack Charles A. Johnson Jo Ann Johnson Joanne Oellers Chris Rigby Gary Beverly Tom Atkins Anthony J. Krzysik	Docket No. 08A-AWS001-DWR **DECISION AND ORDER OF THE DIRECTOR**

I. INTRODUCTION

On October 12, 2007, the City of Prescott ("Prescott") filed with the Arizona Department of Water Resources ("Department") an application for modification of its designation of assured water supply ("Application"). The Application sought to increase the volume of water supplies included in the designation by increasing the volume of effluent that is based on future long-term storage credits and by including 9,570.7 acre-feet per year of groundwater to be withdrawn by Prescott within the Big Chino sub-basin of the Verde River groundwater basin ("Big Chino sub-basin) and transported into the Prescott AMA pursuant to A.R.S. § 45-555(E). The Application

was filed pursuant to A.R.S. § 45-576 and A.A.C. R12-15-711(E).

After public notice of the Application, the Department received numerous objections to the Application, all of which related to Prescott's request to modify its designation to include groundwater to be imported from the Big Chino sub-basin. On November 12, 2008, the Department issued a decision letter granting the Application with certain adjustments to the volume of groundwater that Prescott requested to include from the Big Chino sub-basin. The Department determined that Prescott is entitled to transport a total of 8,067.40 acre-feet of groundwater per year from the Big Chino sub-basin pursuant to A.R.S. § 45-555(E) and that this volume should be added to Prescott's designation of assured water supply.

The decision letter included a draft Decision and Order ("draft Decision and Order") designating Prescott as having an assured water supply through 2021 without any groundwater from the Big Chino sub-basin, and through 2027 with 8,067.40 acre-feet per year of groundwater from the Big Chino sub-basin. The portion of the draft Decision and Order granting the designation from calendar years 2022 through 2027 was conditioned on Prescott submitting to the Department by December 31, 2019 an Approval of Construction ("AOC") from the Arizona Department of Environmental Quality for a pipeline to transport groundwater from the Big Chino sub-basin to Prescott. The draft Decision and Order also increased the volume of effluent included in the designation.

After issuance of the decision letter and draft Decision and Order, appeals of the Department's decision were filed by Prescott and the following objectors who either reside in the Prescott AMA or who have members residing in the Prescott AMA: the Center for Biological Diversity, Sierra Club-Grand Canyon Chapter, Doris Cellarius, Audrey Clark, Edith A. Dillon,

Thomas L. Fleischner, Santiago F. Galvis, Leslie K. Hoy, Harry M. Hollack, Charles A. Johnson, Jo Ann Johnson, Joanne Oellers, Chris Rigsby, Gary Beverly, Tom Atkins and Anthony J. Kryzsik. Among other things, Prescott appealed the Department's determination of the quantity of groundwater it may transport from the Big Chino sub-basin pursuant to A.R.S. § 45-555(E) and the Department's determination of the volume of effluent projected to be stored and recovered by Prescott. The objectors' appeals all related to Prescott's request to include in its designation groundwater imported from the Big Chino sub-basin. All of the appeals were referred to the Office of Administrative Hearings for an administrative hearing and recommended decision.

An administrative hearing was held on February 9, 10 and 11, April 13, 14 and 15, and June 15 and 16, 2009 in Prescott, Arizona before Administrative Law Judge Thomas Shedden ("ALJ"). Prior to the close of the hearing record, Prescott informed the ALJ that it had resolved with Department staff all of the issues raised in its appeal except for the Department's determination of the quantity of groundwater it may transport from the Big Chino sub-basin pursuant to A.R.S. § 45-555(E). On August 14, 2009, Prescott and Department staff filed with the ALJ a stipulation ("Stipulation") on two of the resolved issues: (1) the calculation of projected effluent to be stored and recovered by Prescott, and (2) the wording of Prescott's obligation to transfer effluent long-term storage credits to the Chino Valley Irrigation District. Attached to the Stipulation was a redlined version of the draft Decision and Order showing the changes agreed to by Prescott and Department staff to resolve those issues.

On October 29, 2009, the ALJ issued his recommended decision ("Recommended Decision"). The Recommended Decision contains Findings of Fact, Conclusions of Law and a

Recommended Order. Based on his Findings of Fact and Conclusions of Law, the ALJ recommended that the Director of Water Resources ("Director") modify the draft Decision and Order in the following respects: (1) to show that Prescott may import 500 acre-feet of groundwater per year from the Big Chino sub-basin to replace the Yavapai-Prescott Indian tribe's Central Arizona Project ("CAP") allocation and to include the additional 500 acre-feet per year in Prescott's designation of assured water supply, and (2) to include the changes agreed to by Prescott and Department staff in the Stipulation. The ALJ recommended that the Director affirm the draft Decision and Order in all other respects.

This matter now comes before the Director for a decision. As provided in A.R.S. § 41-1092.08(B), the Director may accept, reject or modify the Recommended Decision.

II. DIRECTOR'S DECISION

After reviewing the Recommended Decision and the administrative record in this matter, the Director has decided to accept the ALJ's recommendations with one exception. The Director does not accept the ALJ's recommendation that the draft Decision and Order be modified to show that Prescott may import 500 acre-feet per year of groundwater from the Big Chino sub-basin to replace the Yavapai-Prescott Indian tribe's CAP allocation and to include that volume in Prescott's designation of assured water supply. Based on the language in A.R.S. § 45-555(E)(1) and the evidence in the record, the Director has determined that Prescott is not authorized to import groundwater from the Big Chino sub-basin to replace the Yavapai-Prescott Indian tribe's CAP allocation. The Director accepts the ALJ's recommendations in all other respects.

In addition, the Director has decided to make certain modifications to the ALJ's Findings of Fact and Conclusions of Law to more accurately reflect the hearing record and the applicable

law. The modifications include changes consistent with the Director's determination that Prescott is not authorized to import groundwater to replace the Yavapai-Prescott tribe's CAP allocation, including the Director's reasons for making that determination. A redlined version of the ALJ's Findings of Fact and Conclusions of Law showing the Director's modifications is attached hereto as Attachment 1. The following is a description of the modifications and the Director's reasons for making the modifications.

A. Findings of Fact

1. *Modification*: The second sentence in Finding of Fact No. 10 is modified to read as follows: "Persons proposing to offer subdivided land for sale or lease within an AMA must either demonstrate to ADWR that there is a 100-year assured water supply ("AWS") for the subdivision or obtain a commitment of water service from a city, town or private water company designated as having an AWS by ADWR. *See* A.R.S. § 45-576(A)."

Reason for modification: The modified language more accurately states the assured water supply requirements in an AMA.

2. *Modification*: Finding of Fact No. 11 is modified to read as follows: "Prescott is entitled to a Designation of AWS ("DAWS") if it demonstrates that it has a 100-year AWS under the rules adopted by ADWR pursuant to A.R.S. § 45-576."

Reason for modification: The modified language is a more accurate statement of the eligibility requirements for a city to be designated as having an assured water supply.

3. *Modification*: Finding of Fact No. 13 is modified by changing the date on which Prescott filed its application for modification of its designation of assured water supply from October 11, 2007 to October 12, 2007.

Reason for modification: The record shows that Prescott's application was filed on October 12, 2007. *See* ADWR Exhibit 1 and ADWR Exhibit 2.

4. *Modification*: The first sentence in Finding of Fact No. 14 is modified to read as follows: "Under A.R.S. § 45-555(E), Prescott is authorized to withdraw and transport up to 14,000 AFY of groundwater from the Big Chino Sub-basin to the Prescott AMA if the groundwater is withdrawn and transported for the purposes set forth in the statute.[4]"

Reason for modification:

The modified language is a more accurate description of Prescott's right to transport groundwater from the Big Chino sub-basin pursuant to A.R.S. § 45-555(E).

5. *Modification*: Finding of Fact No. 15 is modified to read as follows: "In its Application, Prescott requested that 9,570.7[5] AFY of Big Chino groundwater be added to its DAWS. During the hearing, Prescott modified the amount to 9,451.7 AFY by withdrawing its request for 124 AFY of groundwater to replace effluent generated by the Tribe and by increasing its request for water delivered to the Tribe pursuant to its Water Service Agreement from 226 AFY to 231 AFY. Appellants assert that Prescott is likely not entitled to any Big Chino groundwater and, at most, Prescott is entitled to 2,300.74 AFY."

In addition, footnote 5 is modified to read as follows: "The Application states that Prescott is requesting 957,060 acre feet over 100 years, or 9,570.6 AFY. *See* Exhibits ADWR 2 and ADWR 2D. However, the Application refers to a letter from Prescott's mayor to the Director of ADWR dated October 12, 2007, which states that Prescott is currently entitled to import a total of 9,570.7 AFY from the Big Chino Sub-basin. An attachment to the letter shows that this total was calculated by adding together six separate volumes that Prescott claimed it was entitled to import under A.R.S. § 45-555(E). *See* Exhibit ADWR 2D, Letter from Mayor Rowle Simmons to Herb Guenther, dated October 12, 2007."

Reason for modification: The modified language more accurately states the amount of Big Chino groundwater Prescott requested in its application, Prescott's modification of that amount, and the maximum volume stated by the Appellants. *See* Exhibits ADWR 2 and

ADWR 2D; City of Prescott's Opening Post-Hearing Brief, pp. 8-14; Beverly Appellants' Corrected Opening Post-Hearing Memorandum, pp. 52-59; Beverly Appellants' Responsive Post-Hearing Memorandum, pp. 8-11.

6. *Modification*: The first sentence in Finding of Fact No. 16 is modified to read as follows: "In 2004, Prescott entered into an intergovernmental agreement ("IGA") with the Town of Prescott Valley under which Prescott Valley will pay for 45.9% of the project and will receive the same percentage of groundwater imported by Prescott from the Big Chino Sub-basin each year after the amount of water delivered by Prescott to the Tribe is subtracted."

Reason for modification: The modified language more accurately states the terms of the IGA. *See* ADWR Exhibit 2D.

7. *Modification*: The last sentence in Finding of Fact No. 17 is modified to read as follows: "Before developers within Prescott Valley will be allowed to subdivide using this water, they must apply for and receive their own AWS approval."

Reason for modification: The modified language clarifies that *developers* within Prescott Valley would be the entities subdividing with the groundwater.

8. *Modification*: Finding of Fact No. 21 is modified by replacing the reference to "p. 27" with "Attachment B."

Reason for modification: This modification corrects a citation error.

9. *Modification*: Finding of Fact No. 34 is deleted.

Reason for modification: This Finding of Fact is not supported by any evidence in the record.

10. *Modification*: Footnote 10 in Finding of Fact No. 45 is modified by adding the following two names to the list of names that were used to refer to the Verde River Springs: the Upper Verde River Springs and the Big Chino Springs.

Reason for modification: The springs are referred to by the USGS as the Upper

Verde River Springs (*see* Exhibit BAK 356, p. 7) and by Jon Ford as the Big Chino Springs (*see* Exhibit BAK 717, Figures 2R, 7R and 7R1).

11. *Modification*: Finding of Fact No. 49 is modified to read as follows: "The upper Big Chino Sub-basin is a graben (*i.e.*, a down fault); on the east is Big Chino fault and on the west is an unnamed fault. It is filled with alluvium and volcanics, and the bottom is limestone or carbonate."

Reason for modification: The modified language clarifies that the Big Chino is a sub-basin and not a groundwater basin, and that the Upper Big Chino sub-basin also contains volcanics. *See* Exhibit ADWR 2I, pp. 1-5 and 1-6.

12. *Modification*: Finding of Fact No. 50 is modified to read as follows: "There are 5 major lithologic units in the aquifer beneath the Big Chino Water Ranch area: (1) clay and sandy clay; (2) moderately cemented sand; (3) basalt, breccia and agglomerate; (4) alluvium; and (5) carbonate (surmised). The upper alluvium and upper basalt are considered by Southwest to be the major aquifer beneath the Big Chino Water Ranch."

Reason for modification: The modified language more accurately states the information presented in Southwest Ground-Water Consultants, Inc.'s ("Southwest") Hydrology Report. See Exhibit ADWR 2I, p. 1-6.

13. *Modification*: Finding of Fact No. 52 is deleted and replaced with the following: "Groundwater levels across much of the Big Chino Valley are currently greater than 50 feet bgs. However, there are areas along the Big Chino Wash and Williamson Valley Wash where groundwater is within 20 feet of land surface. The depth to water beneath the Big Chino Water Ranch ranges from about 20 feet bgs near the Big Chino Wash to 125 feet bgs near the western edge of the proposed well field. The basin is deepest under the eastern half of the sub-basin and adjacent to the Big Chino Fault, reaching over 2,000 feet in thickness."

Reason for modification: The substituted language more accurately states the

information presented in Southwest's Hydrology Report regarding groundwater levels in the area of the Big Chino Ranch. *See* Exhibit ADWR 2I, pp. 1-4 through 1-6.

14. *Modification*: Finding of Fact No. 53 is modified to read as follows: "Bill Greenslade testified that the static water level in borings that Southwest drilled in the area of the Big Chino Water Ranch well field averaged about 4,506 feet above mean sea level; the Verde River Springs are at about 4,230 feet above mean sea level."

Reason for Modification: The modified language clarifies that the figure for the static groundwater level in the area of the Big Chino Water Ranch came from borings in the area of Prescott's proposed well field. *See* 2-10-09 Transcript of Proceeding, p. 8.

15. *Modification*: Finding of Fact No. 59 is modified by deleting the first sentence and replacing it with the following two sentences: "Southwest's Hydrology Report indicates that there are about 1,256 acres of historically irrigated lands within the Big Chino Water Ranch (1,161 acres owned by Prescott and 95 acres of State leased land), and that about 2,377 AFY was pumped to irrigate these lands between 2000 and 2003. Prescott plans to cease irrigation of these lands, which will therefore eliminate an average of about 2,377 AFY of recent agricultural pumping within the Big Chino Water Ranch."

Reason for modification: The modified language more accurately states the information presented in Southwest's Hydrology Report regarding the number of historically irrigated acres within the Big Chino Water Ranch and the amount of recent pumping associated with those acres. *See* Exhibit ADWR 2I, pp. 3-17 and 4-23.

16. *Modification*: The last sentence in Finding of Fact No. 60 is modified to read as follows: "Sullivan Lake Dam is river-mile 0."

Reason for modification: The modified language clarifies that Sullivan Lake Dam, rather than Sullivan Lake, is river-mile 0. *See* Exhibit BAK 360, p. A4).

17. *Modification*: Finding of Fact No. 61 is modified to read as follows: "Perennial

flow in the Verde River begins about 0.1 mile below the Granite Creek confluence and about 0.1 mile upstream of the first Upper Verde River Springs."

Reason for modification: The modified language more accurately states where the perennial flow of the Verde River begins. *See* Exhibit BAK 360, p. A4).

18. *Modification*: The last sentence in Finding of Fact No. 66 is modified to read as follows: "Estimates of the percentage of the Verde River Springs originating from the Big Chino Sub-basin range from something more than 50% to a figure of 80 to 86%.[12]"

In addition, in footnote 12, the last sentence in the second paragraph is modified to read as follows: "Despite Mr. McGavock's criticisms of Ms. Wirt's model, he believes that more than 50% of the flow at the Verde River Springs comes from the Big Chino Sub-basin, though he testified that in his opinion, nobody knows the actual number."

Reason for modification: The modified language more accurately states the experts' estimates of the percentage of the Verde River Springs flow originating from the Big Chino sub-basin. Although Laurie Wirt estimated the percentage to be from 80 to 86%, Frank Corkhill testified that he did not have a range that it might fall into, but only that the 80 to 86% is a "ballpark number … not hugely wrong … not perfect." *See* 4-15-09 Transcript of Proceeding, p. 200. Mr. McGavock testified that 80 to 86% "may be at the high end, but …nobody knows." *See* 6-15-09 Transcript of Proceeding, p. 141. When asked if it was his professional opinion that 80 to 86% was close, Mr. McGavock responded by stating only that it was his professional opinion that it was more than 50%. See 6-15-09 Transcript of Proceeding, p. 142.

19. *Modification*: In Finding of Fact No. 68, the language in item No. 4 is modified to read as follows: "(4) Prescott acknowledged that the Tribe also has the right to annually divert and use Granite Creek surface water in an amount calculated by adding 50% of the flow until the Tribe has diverted 550 acre-feet plus an additional 10% of the portion of the flow that exceeds 1,100 AFY, up to a total maximum of 1,000 acre-feet."

Reason for modification: The modified language more accurately states the Tribe's rights to Granite Creek surface water under the settlement agreement. *See* Exhibit Prescott 502, p. 12.

20. *Modification*: Finding of Fact No. 82 is deleted and replaced with the following: "For purposes of showing how the CAP subcontract proceeds plus accrued interest were spent by Prescott, Prescott used the conservative 'first out' method under which Prescott assumed that the CAP subcontract proceeds plus interest were the first out of the alternative water fund once they became available to Prescott. *See* Exhibits ADWR 10 and ADWR 24. Mark Woodfill, Prescott's Finance Director, calculated that the total amount of CAP subcontract proceeds plus interest available to Prescott was $4,360,481.69 ($3,394,390.00 in proceeds and $966,091.69 in interest). *See* Exhibit ADWR 27."

Reason for modification: The modified language more accurately states how Prescott accounted for its expenditure of the CAP subcontract proceeds plus interest. *See* Exhibits ADWR 10, ADWR 24 and ADWR 27.

21. *Modification*: Finding of Fact No. 83 is deleted and replaced with the following: "Using this 'first out' accounting method, Mr. Woodfill determined that out of the $4,360,481.69 available to Prescott from the CAP subcontract proceeds, including interest, $3,632,920.83 was spent by Prescott on the CVID purchase. Prescott then determined that 17.35% of the total CVID purchase price ($20,933,059.95) can be attributed to the CAP subcontract proceeds. Prescott calculated this percentage as follows: $3,632,920.83 ÷ $20,933,059.95 = 17.35%. *See* Exhibit ADWR 27."

Reason for modification: The modified language more accurately states how Prescott determined the percentage of the total CVID purchase price that is attributable to the CAP subcontract proceeds plus interest. *See* Exhibit ADWR 27.

22. *Modification*: Finding of Fact No. 85 is modified to read as follows: "This

prohibition does not apply to the withdrawal and transportation by Prescott, or the United States in cooperation with Prescott, of up to 14,000 AFY of groundwater from the Big Chino Sub-basin if the groundwater is withdrawn and transported either: (1) in exchange for or replacement or substitution of supplies of water from the CAP allocated to Indian tribes, cities, towns or private water companies in the Prescott AMA or in the Verde river groundwater basin; or (2) for the purpose of directly or indirectly facilitating the settlement of the water rights claims of the Tribe and the Camp Verde Yavapai-Apache Indian community. *See* A.R.S. § 45-555(E)."

Reason for modification: The modified language more accurately states the provisions of A.R.S. § 45-555(E).

23. *Modification*: Finding of Fact No. 86 is modified to read as follows: "Based on A.R.S. § 45-555(E), Prescott's Application requested that 9,570.7 AFY of groundwater to be imported from the Big Chino Sub-basin be added to its DAWS."

Reason for modification: The modified language more accurately states the volume of Big Chino groundwater requested by Prescott in its Application. *See* Exhibit ADWR 2D.

24. *Modification*: In Finding of Fact No. 88, the language in item (b) is modified to read as follows: "b. 226 AFY – the volume of water that Prescott currently delivers to the Tribe pursuant to its Water Service Agreement. The volume of water requested by Prescott for this item was later increased to 231 AFY based on the volume Prescott anticipates it will deliver to the Tribe in 2027;"

Reason for modification: The substituted language more accurately states the volume of water requested by Prescott in its Application. *See* Exhibit ADWR 2D.

25. *Modification*: Finding of Fact No. 115 is modified by adding the following two sentences at the end: "Additionally, Mr. Sommers' opinion does not take into account the fact that Prescott has not yet served Type 2 water to the Tribe and it is not known whether it ever will

be required to do so. What is known is that Prescott lost the ability to extinguish the Type 2 right and receive 950.7 AFY of extinguishment credits for use in its DAWS by pledging the Type 2 right as security to facilitate the Settlement Agreement."

Reason for modification: The added language provides an additional factual basis for concluding that giving Prescott credit for the 950.7 AFY it lost when it pledged its Type 2 right as security for its obligations under the Settlement Agreement does not amount to a "double counting" of the Type 2 water.

26. *Modification*: Finding of Fact No. 121 is modified by deleting the first sentence and replacing it with the following two sentences: "As explained in Finding of Fact No. 78, ADWR previously determined that the median flow of Granite Creek is 2,034 AFY, and that the Tribe is entitled to 643 AFY of that flow under the terms of the Settlement Agreement. In its decision on Prescott's Application, ADWR determined that the Tribe's 643 AFY came from CVID and not Prescott."

Reason for modification: The modified language more accurately explains how the 643 AFY was determined.

27. *Modification*: Finding of Fact No. 129 is modified by deleting the last sentence.

Reason for modification: The Director has determined that Prescott is not authorized to import groundwater from the Big Chino sub-basin to replace the Yavapai-Prescott tribe's 500 AFY CAP allocation. The deletion of the last sentence in Finding of Fact No. 129 is consistent with that determination.

28. *Modification*: Finding of Fact No. 130 is modified to read as follows: "Because Prescott is not authorized to import the 500 AFY to replace the Tribe's CAP allocation, this 500 AFY does not meet the AWS requirements."

Reason for modification: The modified language is consistent with the Director's determination that Prescott is not authorized to import groundwater from the Big Chino sub-basin

to replace the Yavapai-Prescott tribe's CAP allocation. Because Prescott is not authorized to import the groundwater, the groundwater is not legally available to Prescott and therefore does not meet the assured water supply requirements.

29. *Modification*: The first sentence in Finding of Fact No. 135 is modified to read as follows: "The model area is a rectangle about 11.5 miles by 19.3 miles, with the southern boundary about 15 or 16 miles northwest of the Verde River Springs. *See* Exhibit 2J, Figure 2-1 (map)."

Reason for modification: The modified language more accurately states that the location of the southern boundary of the model area is *northwest* of the Verde River Springs, not *north*.

30. *Modification*: In Finding of Fact No. 146, the language in item No. 2 is modified to read as follows: "(2) the thickness of the aquifer beneath the Big Chino Water Ranch ranges from 1,200 to 1,600 feet, with an average depth to water at 105 feet bgs, which means the average saturated thickness is 1,295 feet."

Reason for modification: The modified language more accurately states Southwest's conclusions regarding the thickness of the aquifer. *See* Exhibit ADWR 2I, pp. 3-21 and 3-28.

31. *Modification*: In Finding of Fact No. 160, the language in item No. 3 is modified to read as follows: "(3) all hydrologic parameters and their distribution."

Reason for modification: The modified language clarifies that Mr. Ford did not provide *all* of the hydrologic parameters and their distributions for his model. He did provide the distribution of transmissivity in Layer 1 of his model. *See* Exhibit BAK 717, Figure 2R. He also explained the relationship between existing aquifer test data and the transmissivity values used in the model. *See* Exhibit BAK 717, Table 4 and Figure 8; 6-16-09 Transcript of Proceeding, p. 94.

32. *Modification*: Finding of Fact No. 183 is modified by adding the following

language before the colon in the first line: "when the proposed source of water is groundwater".

Reason for modification: This modification clarifies that the criteria described in the Finding of Fact apply when the proposed source of water is groundwater.

33. *Modification*: Finding of Fact No. 204 is modified by adding the following sentences between the first and second sentences: "Mr. Harvey later corrected his testimony regarding the downgrading of Prescott's bond rating. He testified that it was Prescott Valley's bond rating that had been downgraded, not Prescott's bond rating. However, Mr. Harvey did not change his opinion that the 5% interest rate used was too low."

Reason for modification: The additional language more accurately reflects Mr. Harvey's testimony regarding Prescott's bond rating. *See* 6-15-09 Transcript of Proceedings, pp. 246, 251.

34. *Modification*: The last sentence in Finding of Fact No. 216 is modified to read as follows: "And, even if Prescott's pumping does impact the Verde River in the next 100 years, as a matter of law that does not show that the water pumped by Prescott in the Big Chino Sub-basin is subflow."

Reason for modification: The substituted language clarifies that the "water in the Big Chino Sub-basin" refers to the water pumped by Prescott in sub-basin.

35. *Modification*: Finding of Fact No. 234 is modified to read as follows: "Dr. Lettenmaier did not provide any specific information about the Salt River and Verde River watersheds or the Big Chino Sub-basin, but he testified that the assumption is that the Salt and Verde are roughly equivalent to the entire Colorado River Basin."

Reason for modification: The modified language clarifies that Dr. Lettenmaier *did not* provide any specific information about the Salt River and Verde River watersheds, rather than he *could not* provide such information.

36. *Modification*: The second sentence in Finding of Fact No. 238 is modified to read

as follows: "Mr. Corkhill's opinion is that it is not possible to quantify the impact on natural recharge of base flow due to climate change."

Reason for modification: The modified language more accurately states Mr. Corkhill's testimony regarding climate change. *See* 4-15-09 Transcript of Proceedings, p. 168.

37. *Modification*: Finding of Fact No. 248 is modified to read as follows: "Although Prescott was required to show that the proposed pumping will not cause the 100-year depth-to-static water level to drop below 1000 feet bgs, Prescott would not be prohibited from pumping at a depth below 1000 feet bgs if its DAWS were revoked."

Reason for modification: The modified language more accurately states Ms. Fabritz-Whitney's testimony. *See* 4-14-09 Transcript of Proceedings, p. 278.

38. *Modification*: The first sentence in Finding of Fact No. 263 is modified to read as follows: "Mr. Corkhill agrees that groundwater in the Big Chino Sub-basin is one source of the Verde River Springs. Mr. Corkhill testified that he did not disagree "in a conceptual level" with the statement in the Wirt 2000 Report that the Big Chino Sub-basin supplies 80% of the Verde River Springs."

Reason for modification: The modified language more accurately states Mr. Corkhill's testimony regarding the Big Chino sub-basin providing groundwater to the Verde River Springs. *See* 4-15-09 Transcript of Proceeding, p. 189, 201.

39. *Modification*: The last sentence in Finding of Fact No. 281 is modified to read as follows: "Mr. Munderloh also testified about pumping that has occurred in the Big Chino Valley since the 1940's."

Reason for modification: The modified language clarifies that the pumping referred to by Mr. Munderloh was in the *Big* Chino Valley.

B. Conclusions of Law

1. *Modification*: Conclusion of Law No. 17 is modified by deleting "surface water"

on the first line and replacing it with "subflow."

Reason for modification: Appropriable underground water is referred to as "subflow." *See In re General Adjudication of All Water Rights to Use Water in the Gila River System and Source*, 198 Ariz. 330, 334, 9 P.3d 1069, 1073 (2000) ("*Gila IV*").

2. *Modification*: The second sentence in Conclusion of Law No. 18 is modified to read as follows: "This is true even though given enough time, with certain exceptions, all extractions from a tributary aquifer will cause a more-or-less corresponding depletion from stream flow volume. *See Gila IV*."

Reason for modification: The words "with certain exceptions" are added to the sentence consistent with the Arizona Supreme Court's opinion in *Gila IV*. *See Gila IV*, 198 Ariz. at 336, 9 P.3d at 1075.

3. *Modification*: Conclusion of Law No. 20 is modified to read as follows: "The judiciary is responsible for defining the limits of a subflow zone, with technical assistance from ADWR. The Arizona Supreme Court has upheld the GSA Court's determination that the saturated floodplain Holocene alluvium is a geologic marker that will be the subflow zone in the San Pedro River watershed. In other areas, the applicable criteria set out by the GSA Court, as approved by the *Gila IV* Court, must be considered. Any other criteria that are geologically and hydrologically appropriate for the particular location may also be considered."

Reason for modification: The modified language more accurately states the holding in *Gila IV*.

4. *Modification*: The first sentence in Conclusion of Law No. 36 is deleted and replaced with the following sentence: "Under the AWS rules, potential pumping by future water users, other than by issued AWS determinations, is not considered when determining physical availability of groundwater."

Reason for modification: The substituted language more accurately states how

potential groundwater pumping by future water users is treated under the assured water supply rules. *See* A.A.C. R12-15-716(B); 4-14-09 Transcript of Proceeding, pp. 268, 271-75.

5. *Modification*: Conclusion of Law No. 40 is modified by replacing the references to "R12-15-718(E)" with "R12-15-718."

Reason for modification: This modification corrects a citation error.

6. *Modification*: Conclusion of Law No. 42 is modified by replacing the reference to "R12-15-716(D)(2)" with "R12-15-716(D)."

Reason for modification: This modification corrects a citation error.

7. *Modification*: Conclusion of Law No. 43 is modified to read as follows: "The intent of the legislature was to allow imported groundwater from the Big Chino Sub-basin to be used as a basis for demonstrating an AWS if the applicable AWS criteria are met. *See* A.R.S. § 45-557(B)."

Reason for modification: The modified language clarifies that the conclusion of law is limited to groundwater imported from the Big Chino sub-basin, and that groundwater from the Big Chino sub-basin may be used to demonstrate an AWS only if all of the applicable AWS criteria are met.

8. *Modification*: The last sentence in Conclusion of Law No. 46 is deleted and replaced with the following: "In addition, the draft Decision and Order provides that groundwater from the Big Chino Sub-basin will be added to Prescott's DAWS only if Prescott submits to ADWR by December 31, 2019 evidence that ADEQ has issued an AOC for a pipeline to transport the groundwater to Prescott's service area."

Reason for modification: The substituted language more accurately states the provision in the draft Decision and Order regarding submittal of an AOC.

9. *Modification*: Conclusion of Law No. 51 is modified by adding the following sentence at the end: "In addition, the draft Decision and Order provides that groundwater from

the Big Chino Sub-basin will be added to Prescott's DAWS only if Prescott submits to ADWR by December 31, 2019 evidence that ADEQ has issued an AOC for a pipeline to transport the groundwater to Prescott's service area."

Reason for modification: The added sentence provides a further basis for concluding that the CBD Appellants have not shown that ADWR erred in determining that Prescott satisfied the financial capability requirements of the assured water supply rules.

10. *Modification*: Conclusion of Law No. 58 is modified to read as follows: "ADWR found that 17.35% of Prescott's CVID purchase was made using proceeds from the sale of its CAP water. Because Prescott's CAP water met fully the physical availability requirements for an AWS, ADWR considered only the volume of the CVID water that met the physical availability requirements for inclusion in Prescott's DAWS as being eligible as replacement water (1,391 AFY). Consequently, ADWR determined that Prescott has already replaced 241.3 AFY of its CAP water (17.35% of 1,391 AFY = 241.3 AFY)."

Reason for modification: The modified language more clearly states how ADWR determined that Prescott has already replaced 241.3 AFY of its CAP water.

11. *Modification*: Conclusion of Law No. 60 is modified by adding the following sentence at the end: "Furthermore, because 100% of Prescott's CAP water met the physical availability criteria of the AWS rules, it was reasonable for ADWR to consider only that portion of the Granite Creek water purchased from CVID that met the physical availability criteria as being eligible as replacement water."

Reason for modification: The added sentence provides an additional basis for concluding that ADWR did not err by not using the full amount of the Granite Creek water.

12. *Modification*: Conclusions of Law Nos. 66, 67 and 68 are deleted and replaced

with the following conclusions of law:

> 66. The relevant language of A.R.S. § 45-555(E)(1) authorizes Prescott to import groundwater from the Big Chino Sub-basin "[i]n exchange for or replacement or substitution of supplies of water from the central Arizona project allocated to Indian tribes ... in the Prescott active management area or in the Verde River groundwater basin." This language does not give Prescott an absolute right to import groundwater from the Big Chino Sub-basin in an amount equal to the volume of CAP water allocated to an Indian tribe in the Prescott AMA or the Verde River groundwater basin. Instead, Prescott may import groundwater under this provision only if the groundwater is imported "in exchange for or replacement or substitution of" the Indian tribe's CAP allocation.
>
> 67. There is no evidence in the record that Prescott had any right to use the Tribe's CAP allocation or that it could have leased the CAP allocation had the Tribe not sold it. Nor is there any evidence that Prescott had an agreement with the Tribe to replace the Tribe's CAP allocation. In fact, the Tribe waived all state and federal water rights as part of the Settlement Agreement. Furthermore, although Prescott agreed to provide water service to the Tribe under the Settlement Agreement, the Director has determined that Prescott has the right under A.R.S. § 45-555(E)(2) to import groundwater from the Big Chino Sub-basin in an amount equal to the amount of water it serves to the Tribe. For all of these reasons, it cannot reasonably be said that Prescott's importation of 500 AFY of groundwater from the Big Chino sub-basin would be "in exchange for or replacement or substitution of" the Tribe's CAP allocation.
>
> 68. Prescott has not met its burden to show that it is authorized to import 500 AFY from the Big Chino Sub-basin to replace the Tribe's CAP allocation. Consequently, this volume should not be included in Prescott's DAWS.

Reason for modification: The Director does not agree with the ALJ's conclusions of law regarding Prescott's claim that it has the right under A.R.S. § 45-555(E) to import 500 AFY of groundwater from the Big Chino sub-basin to replace the Yavapai-Prescott Indian tribe's CAP allocation. The Director has determined that Prescott is not authorized to import groundwater from the Big Chino sub-basin to replace the tribe's CAP allocation. This modification replaces the ALJ's conclusions with the Director's conclusions on this issue.

13. *Modification*: Conclusion of Law No. 72 is modified by adding the following sentence at the end: "Additionally, Prescott has not yet served water to the Tribe pursuant to the Type 2 right and it is not known whether it ever will be required to do so."

Reason for modification: The added sentence provides further support for the conclusion that the Appellants have not shown that ADWR erred when it determined that Prescott may import 950.7 AFY of groundwater from the Big Chino sub-basin for the Type 2 right.

14. *Modification*: Conclusion of Law No. 82 is modified to read as follows: "Prescott's entire CAP allocation of 7,127 AFY has been accounted for under A.R.S. § 45-555(E)(1) or replaced, which provides another basis on which Prescott's argument fails for that water."

Reason for modification: The substituted language adds a statutory citation.

15. *Modification*: Conclusion of Law No. 87 is modified by adding the following sentences at the end: "Additionally, the IGA between Prescott and Prescott Valley entitles Prescott Valley to 45.9% of any groundwater imported by Prescott from the Big Chino Sub-basin during a year, after subtracting the amount of water delivered to the Tribe during the year. Consequently, in order for Prescott to receive its full share of the water, it must import the entire volume allowed under A.R.S. § 45-555(E). This means that the entire volume must be recognized in Prescott's DAWS in order to ensure that Prescott's share of the water is taken into account by other assured and adequate water supply applicants. Including Prescott Valley's share of the water in Prescott's DAWS does not mean that the water is considered an AWS for new subdivisions within Prescott Valley. The draft Decision and Order expressly provides that inclusion of the water in Prescott's DAWS does not fulfill any requirement for a new subdivision in Prescott Valley to obtain a certificate of AWS or a commitment of service from a designated provider. Any entity wishing to use the water to demonstrate an AWS in Prescott Valley must apply to ADWR for a certificate of AWS or DAWS

and demonstrate that the water satisfies all of the applicable AWS requirements. For all of these reasons, ADWR did not err in including Prescott Valley's share of the water in the draft Decision and Order."

Reason for modification: The added sentences provide further support for concluding that ADWR did not err in including the water to be used by Prescott Valley in the draft Decision and Order.

16. *Modification*: The last sentence in Conclusion of Law No. 89 is modified to read as follows: "This determination was correct."

Reason for modification: The Director does not agree with the ALJ's conclusion that ADWR's determination regarding the 500 AFY for the Yavapai-Prescott Indian tribe's allocation was incorrect.

17. *Modification*: Conclusion of Law No. 90 is deleted.

Reason for modification: The Director does not agree with this conclusion of law.

III. Additional Comments

The ALJ's Findings of Fact include the following findings:

> 35. Reports show that ADWR's Director, Herb Guenther, has publically expressed concerns about the long-term effects of Prescott's proposed pumping from the Big Chino. *See e.g.*, Exhibits ADWR 78N and ADWR 78L.
>
> 36. Ms. Fabritz-Whitney was aware of these reports about Director Guenther's opinion and she testified that she had heard Director Guenther say that he does not believe that pumping from the Big Chino is a long-term solution for Prescott.

The Director would like to clarify that any statements made by him regarding the long-term effects of Prescott's pumping from the Big Chino sub-basin or his belief as to whether pumping from the Big Chino sub-basin is a long-term solution for Prescott did not relate to the

validity of Prescott's Application and do not have a bearing on whether the Application should be granted. The Director has concluded that Prescott has the right to import 8,067.4 acre-feet per year of groundwater from the Big Chino sub-basin pursuant to A.R.S. § 45-555(E), and that Prescott has demonstrated through the administrative hearing process that this volume of groundwater meets the applicable criteria for an assured water supply and should be added to Prescott's designation of assured water supply under the conditions set forth in the draft Decision and Order.

IT IS HEREBY ORDERED:

1. That the ALJ's recommended Findings of Facts and Conclusions of Law, with the modifications described in Section II above, are accepted as the Director's Findings of Fact and Conclusions of Law.

2. That the draft Decision and Order shall be modified to include the changes shown in the Stipulation, but the draft Decision and Order is affirmed in all other respects.

3. That, subject to the rehearing and review provisions in A.R.S. § 41-1092.09, the Director shall sign and issue a Decision and Order modifying Prescott's designation of assured water supply in the form set forth in Attachment 2 hereto.

DATED this 20th day of November, 2009.

Herbert R. Guenther, Director
Arizona Department of Water Resources

Electronically filed and served via
https://portal.azoah.com/oedf
this 20th day of November, 2009

Copy of the foregoing Decision and Order of the Director sent by first-class mail this 20th day of November, 2009, to:

The Honorable Thomas Shedden
Administrative Law Judge
Office of Administrative Hearings
1400 W. Washington St., Suite 101
Phoenix, AZ 85007

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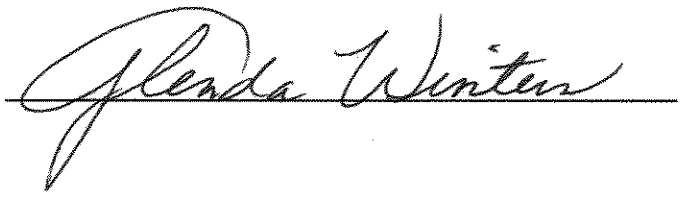
Copy of the foregoing Decision and Order of the Director hand-delivered this 20th day of November, 2009, to:

Janet L. Ronald
Arizona Department of Water Resources
Legal Division
3550 N. Central Avenue, 4th Floor
Phoenix, AZ 85012-2105



ATTACHMENT 1

FINDINGS OF FACT

PROCEDURAL BACKGROUND

1. On January 2, 2009, ADWR issued a Notice of Hearing setting this matter for hearing by the Office of Administrative Hearings ("OAH"), an independent state agency.

2. The matter involves appeals of ADWR's November 12, 2008 Draft Decision and Order that modifies the City of Prescott's designation of assured water supply. *See* Exhibits ADWR 132 (Decision Letter) and 132A (Draft Decision and Order).

3. The Notice of Hearing provided that there were "over 25 issues on appeal, which can be grouped generally into ... 10 categories...." The Notice then provided 10 issue statements that were intended to encompass all issues on appeal:

> Issue 1 – Whether the water proposed to be imported into the Prescott Active Management Area pursuant to A.R.S. § 45-555(E) will be physically, legally and continuously available for 100 years;
>
> Issue 2 – Whether the proposed transportation of water by the City of Prescott complies with the requirements of A.R.S. § 45-555(E);
>
> Issue 3 – Whether the City of Prescott demonstrated the financial capability to construct the water facilities required to transport water pursuant to A.R.S. § 45-555(E);
>
> Issue 4 – Whether the Decision and Order properly calculates the quantity of water proposed to be transported pursuant to A.R.S. § 45-555(E) for assured water supply purposes;
>
> Issue 5 – Whether the Decision and Order properly calculates projected effluent long-term storage credits;
>
> Issue 6 – Whether the Decision and Order properly recites the City of Prescott's contractual obligation to deliver water to the Chino Valley Irrigation District ["CVID"];
>
> Issue 7 – Whether the Decision and Order should be clarified regarding the recovery of surface water;
>
> Issue 8 – Whether the Decision and Order should be bifurcated;

Issue 9 – Whether the Decision and Order is required to consider the purported impacts on the Verde River by the proposed transportation of water pursuant to A.R.S. § 45-555(E); and

Issue 10 – Whether the Decision and Order is required to consider the constitutionality of A.R.S. § 45-555(E).

4. The hearing was conducted in Prescott, Arizona and held on February 9, 10 and 11, April 13, 14 and 15, and June 15 and 16, 2009.

5. In addition to ADWR and Appellant Prescott, 16 other Appellants participated in the hearing. These 16 Appellants presented their cases as two groups commonly referred to as: (1) the "CBD Appellants" or "the Center;"[1] and (2) the "Beverly Appellants" or the "BAK Appellants."[2] The CBD Appellants joined in all the Beverly Appellants' arguments and made several additional arguments of their own. Collectively, these two groups are referred to as the "Appellants."

6. During the hearing, ADWR agreed to changes proposed by Prescott that resolve Issue 5. Prescott withdrew its appeals concerning Issues 7 and 8.

7. In August, Prescott and ADWR filed a stipulation resolving Issue 6. *See* "Arizona Department of Water Resources and City of Prescott Stipulation on Prescott Issues Concerning Effluent and CVID Obligations" filed August 14, 2009 (with redline version of Draft Decision and Order). None of the other Appellants filed any objection to the redlined Draft Decision and Order.

8. In an Order dated January 29, 2009, the ALJ granted ADWR's "Motion to Dismiss Constitutional Issues Raised by Appellants." Consequently, no evidence was taken on Issue 10 regarding the constitutionality of A.R.S. § 45-555(E).

9. Issues 1, 2, 3, 4, and 9 are all related to Prescott's request to amend its assured water supply designation by adding groundwater to be imported from the Big Chino Sub-basin.

PRESCOTT'S APPLICATION

---

[1] Appellants Center for Biological Diversity, Sierra Club-Grand Canyon Chapter, Doris Cellarius, Audrey Clark, Edith A. Dillon, Thomas L. Fleischner, Santiago F. Galvis, Leslie K. Hoy, Harry M. Hollack, Charles A. Johnson, Jo Ann Johnson, Joanne Oellers, and Chris Rigby

[2] Appellants Gary Beverly, Tom Atkins, and Anthony J. Krzysik

10. Prescott is located in an Active Management Area ("AMA").[3] ~~Consequently, Prescott must show that it has a 100-year assured water supply ("AWS") before it can subdivide land for development~~ Persons proposing to offer subdivided land for sale or lease within an AMA must either demonstrate to ADWR that there is a 100-year assured water supply ("AWS") for the subdivision or obtain a commitment of water service from a city, town or private water company designated as having an AWS by ADWR. *See* A.R.S. § 45-576(A).

11. Prescott is ~~eligible for~~ entitled to a Designation of AWS ("DAWS") ~~to show~~ if it demonstrates that it has a 100-year AWS. ~~*See*~~ under the rules adopted by ADWR pursuant to A.R.S. § 45-576.

12. Prescott has a DAWS that was last modified in 2005 (the "2005 DAWS"). *See* Exhibit ADWR 145. The 2005 DAWS designates Prescott as having an assured water supply through 2014.

13. On October ~~11~~ 12, 2007, Prescott filed the current application for modification of its DAWS ("Application"). Prescott requested that its DAWS be amended by: (1) adding groundwater to be imported from the Big Chino Sub-basin pursuant to A.R.S. § 45-555(E); and (2) increasing the amount of effluent. During its review of the Application, ADWR requested additional information that was provided by Prescott. *See* Exhibits ADWR 1 (Application cover letter), ADWR 2 (Application), ADWR 2A through ADWR 2M (attachments); *see also* Exhibits ADWR 3 through ADWR 172 (the remainder of ADWR's administrative record).

14. Under A.R.S. § 45-555(E), Prescott is authorized to withdraw and transport ~~a maximum of~~ up to 14,000 AFY of groundwater from the Big Chino Sub-basin to the Prescott AMA if the groundwater is withdrawn and transported for the purposes set forth in the statute.[4] ~~*See* A.R.S. § 45-555(E).~~ Prescott owns land, commonly referred to as the Big Chino Water Ranch, in the Big Chino Valley. Prescott has started building the infrastructure required to pump groundwater from the Big Chino Water Ranch and transport it through a pipeline to its service area.

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[3] The exhibits contain numerous maps and diagrams. *See e.g.,* Exhibit ADWR 133 at pp. 12 – 27 (maps and diagrams).

15. In its Application, Prescott requested that ~~9,575.7~~ 9,570.7[5] AFY of Big Chino groundwater be added to its DAWS. During the hearing, Prescott ~~withdrew part of its request and now requests~~ modified the amount to 9,451.7 AFY by withdrawing its request for 124 AFY of groundwater to replace effluent generated by the Tribe and by increasing its request for water delivered to the Tribe pursuant to its Water Service Agreement from 226 AFY to 231 AFY. Appellants assert that Prescott is likely not entitled to any Big Chino groundwater and, at most, Prescott is entitled to ~~2,400.26~~ 2,300.74 AFY.

16. In 2004, Prescott entered an intergovernmental agreement ("IGA") with the Town of Prescott Valley under which Prescott Valley will pay for 45.9% of the project and will receive the same percentage of ~~water~~ groundwater imported by Prescott from the Big Chino Sub-basin each year after the amount of water delivered by Prescott to the Tribe is subtracted. The Draft Decision and Order shows that beginning in 2027, Prescott Valley will receive 3,597 AFY.

17. Prescott Valley is not within Prescott's service area. The Draft Decision and Order shows that the water for Prescott Valley is a projected demand for Prescott, which means that Prescott cannot use this 3,597 AFY for its own growth. Before developers within Prescott Valley will be allowed to subdivide using this water, ~~it~~ they must apply for and receive ~~its~~ their own AWS approval.

18. Prescott's Application is the first one that ADWR has received in which the applicant is requesting approval for water from outside an AMA to be transported into an AMA.

ADWR's PROCESSING OF THE APPLICATION

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[4] An acre foot is 43,560 cubic feet, which is the volume of water that would cover 1 acre to the depth of 1 foot and is approximately 325,851 gallons.

[5] The Application ~~shows~~ states that Prescott is requesting 957,060 acre feet over 100 years, or 9,570.6 AFY. *See* Exhibits ADWR 2 and ADWR 2D. ~~But Prescott made 6 separate requests that total 9,575.7 AFY~~. However, the Application refers to a letter from Prescott's mayor to the Director of ADWR dated October 12, 2007, which states that Prescott is currently entitled to import a total of 9,570.7 AFY from the Big Chino Sub-basin. An attachment to the letter shows that this total was calculated by adding together six separate volumes that Prescott claimed it was entitled to import under A.R.S. § 45-555(E). *See* Exhibit ADWR 2D, Letter from Mayor Rowle Simmons to Herb Guenther, dated October 12, 2007.

19. As required by statute, ADWR provided public notice that the Application was pending and provided the residents of the Prescott AMA an opportunity to object to the Application.

20. ADWR received 52 Objections, of which 42 were determined to be from residents of the Prescott AMA. Based on A.R.S. § 45-578(B), ADWR did not consider the substance of Objections filed by non-residents; however, many of the Objections from non-residents were duplicative of valid Objections.

21. ADWR provided the Objections to Prescott and Prescott filed Responses. *See* Exhibit ADWR 105 (Prescott's Response to Objections) and at ~~p. 27~~ Attachment B (table summarizing the Objections).

22. ADWR determined that Prescott met all the requirements for an AWS and issued the Decision Letter and the Draft Decision and Order. ADWR did not, however, approve the entire volume of water for which Prescott requested an amended DAWS. ADWR's Assistant Director of Water Management, Ms. Sandy Fabritz-Whitney, signed the Decision Letter on behalf of ADWR.

23. The Decision Letter provides ADWR's responses to the valid Objections. The Draft Decision and Order will remain a Draft until all appeals of the Decision and Order are final.

24. In the Draft Decision and Order, ADWR designated Prescott as having an AWS of 16,161.08 AFY through 2021,[6] which does not include any groundwater imported from the Big Chino. *See* Exhibit ADWR 132A at p. 7.

25. In the Draft Decision and Order, ADWR designated Prescott as having an AWS of 24,496.06 AFY[7] through 2027, which includes 8,067.4 AFY of groundwater from the Big Chino. *See* Exhibit ADWR132A at pp. 5 and 8, and at Attachment C.

26. The Draft Decision and Order conditions the approval of the 8,067.4 AFY of Big Chino groundwater on a requirement that, on or before December 31, 2019, Prescott submit to ADWR an approval of construction ("AOC") for the pipeline required to transport the water. The Arizona Department of Environmental Quality ("ADEQ") is responsible for issuing the AOC. *See* Exhibit ADWR132A at p. 6.

[6] Based on the stipulation between Prescott and ADWR, this is changed to 16,507.44 AFY in 2023.

27. Ms. Fabritz-Whitney's opinion is that ADWR followed the rules in processing Prescott's Application and that the Application met the applicable law and rules, both literally and in spirit. Ms. Fabritz-Whitney testified that she was required to sign the Decision Letter because Prescott meets the applicable requirements.

28. Ms. Fabritz-Whitney relied on the advice and opinions of people from ADWR's legal and hydrology divisions and the Office of Assured Water Supply.[8] With respect to the hydrology, Ms. Fabritz-Whitney relied exclusively on the hydrology division and testified that she does not have the expertise to make any independent findings related to hydrology.

29. Mr. Frank Corkhill, ADWR's Chief Hydrologist, testified as to the hydrology division's conclusion that Prescott demonstrated that it meets the required physical availability demonstration. *See* A.A.C R12-15-716.

THE 2006 REVISION OF THE AWS RULES

30. The AWS rules were adopted in 1995 and were revised in a process that began in 2005 and ended in 2006. Over the course of 18 months ADWR held public meetings and it received and responded to written comments from the regulated community. Ms. Fabritz-Whitney testified that no one was excluded from this process.

31. The Governor's Regulatory Review Council approved the changes to the AWS rules.

32. The rules were revised in an effort to increase efficiency and to make the rules easier to read. Ms. Fabritz-Whitney's opinion is that there were no substantive changes made to the AWS rules in 2005-06.

33. During the 2005-06 rule-making process, no stakeholder raised the issue of climate change or asked ADWR to change the rules to add a requirement that climate change be considered as part of the AWS process.

~~34. During the 2005-06 rule-making process, no stakeholder requested any changes to the rules relating to a city's ability to show that it has the financial capability to complete a project.~~

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[7] Based on the stipulation between Prescott and ADWR, this is changed to 24,574.84 AFY.

[8] ADWR asserts that attorney-client privilege exists for any legal conclusions not expressed in the Decision Letter or Draft Decision and Order.

DIRECTOR GUENTHER'S REPORTED CONCERNS

35, Reports show that ADWR's Director, Herb Guenther, has publically expressed concerns about the long-term effects of Prescott's proposed pumping from the Big Chino. *See e.g.,* Exhibits ADWR 78N and ADWR 78L.

36. Ms. Fabritz-Whitney was aware of these reports about Director Guenther's opinion and she testified that she had heard Director Guenther say that he does not believe that pumping from the Big Chino is a long-term solution for Prescott.

37. Ms. Fabritz-Whitney did not consider Director Guenther's opinions during her review of the Application because her job duties require that her decision be based on the laws and rules.

38. As part of ADWR's process for the hearing in this matter, a "wall" was put in place, with Director Guenther and staff on one side, and Ms. Fabritz-Whitney and the staff members who are working on the hearing on the other side. Ms. Fabritz-Whitney's recollection was that the wall went up the day she signed the Decision Letter.

OTHER WORK ON THE BIG CHINO BY ADWR

39. As part of ADWR's work independent of Prescott's Application, ADWR staff members have had discussions about Yavapai County and the Big Chino area. Exhibit BAK 684 is a memorandum dated April 16, 2008 that summarizes some of ADWR's opinions about the Big Chino based on discussions within ADWR.[9]

40. The memorandum provided several options for dealing with water issues in the region; creation of an AMA in the Big Chino was the recommended option.

41. Ms. Fabritz-Whitney testified that if a Big Chino AMA is created, Prescott's rights to pump from the Big Chino Sub-basin will be factored in. Consequently, if a Big Chino AMA is created after the Draft Decision and Order became final, the new AMA would not affect Prescott's amended DAWS.

42. Ms. Fabritz-Whitney believed that ADWR had other meetings related to the Big Chino and may have produced other documents about issues in the region. Work stopped because ADWR's workload did not allow for further consideration of the

[9] BAK 684's author appears to be unknown and the author's name is not on the record in the instant matter. There does not appear to be any dispute that the memo represents the opinions of ADWR's staff.

matter, in part because resources had to be devoted to the Application and the related hearing process.

43. The "wall" prohibits Ms. Fabritz-Whitney and Mr. Corkhill from discussing the issues with Director Guenther, which also limited ADWR's ability to further consider the matter.

THE BIG CHINO SUB-BASIN

44. The Big Chino Sub-basin is in the Verde River watershed, which is itself a part of the Gila River watershed. The Gila River General Stream Adjudication ("GSA"), which is pending in superior court, is a proceeding under which the nature, extent, and relative priority of surface-water rights and federal-reserved-water rights in the watershed will be determined.

45. The Big Chino Sub-basin is about 35 miles north of Prescott and is made up of Williamson Valley and Big Chino Valley. It is about 20 miles from the southern end of the Big Chino Water Ranch to the Verde River Springs that are considered to be the headwaters of the Verde River. [10]

46. The Big Chino Water Ranch is adjacent to the Big Chino Wash, which runs through the Big Chino Valley. The groundwater table is below the Wash's bottom at all locations, meaning that the Big Chino Wash is ephemeral. Ephemeral washes and streams flow only in response to precipitation.

47. Prescott's consultant, Southwest Ground-water Consultants ("Southwest"), under the direction of William Greenslade, P.E., R.G., prepared a report entitled "Hydrology Report, Big Chino Water Ranch" that includes information related to a groundwater model prepared by Southwest. Southwest prepared two supplements to that report in response to ADWR's requests for more information and changes to Southwest's groundwater model. All three were submitted to ADWR in support of the Application, and are referred to collectively as "Southwest's Report".

48. Southwest considers the aquifer as consisting of 3 parts: the upper Big Chino, the Williamson Valley, and a southern area near the Town of Paulden.

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[10] At various times these were referred to as the Verde River Springs, the headwater Springs, the Verde River headwater Springs, the Upper Verde River Springs, the Big Chino Springs, or just the Springs. There is different set of springs, Del Rio Springs that was also the subject of some testimony.

49. The upper Big Chino ~~groundwater basin~~ Sub-basin is a graben (*i.e.*, a down fault); on the east is Big Chino fault and on the west is an unnamed fault. ~~The basin~~ It is filled with alluvium and volcanics, and the bottom is limestone or carbonate.

50. There are 5 major lithologic units in the aquifer beneath the Big Chino Water Ranch area: (1) clay and sandy clay; (2) moderately cemented sand; (3) basalt, breccia and agglomerate; (4) alluvium; and (5) carbonate (surmised). The upper alluvium and upper basalt ~~portions of the Big Chino Aquifer~~ are considered by Southwest to be the major aquifer ~~in the Big Chino Sub-basin~~ beneath the Big Chino Water Ranch.

51. Based on pumping tests in the upper Big Chino Aquifer, Southwest estimates that the transmissivity is between 6,500 and 345,000 gallons per day per foot.

52. ~~The depth to water near the Big Chino Wash is about 50 feet below ground surface ("bgs"); in other areas of the Big Chino Water Ranch, the depth is about 105 feet bgs. The total basin depth ranges from about 1,600 feet to about 1,200 feet.~~ Groundwater levels across much of the Big Chino Valley are currently greater than 50 feet bgs. However, there are areas along the Big Chino Wash and Williamson Valley Wash where groundwater is within 20 feet of land surface. The depth to water beneath the Big Chino Water Ranch ranges from about 20 feet bgs near the Big Chino Wash to 125 feet bgs near the western edge of the proposed well field. The basin is deepest under the eastern half of the sub-basin and adjacent to the Big Chino Fault, reaching over 2,000 feet in thickness.

53. Bill Greenslade testified that ~~T~~the static water level in borings that Southwest drilled in the area of the proposed Big Chino Water Ranch ~~is~~ well field averaged about 4,506 feet above mean sea level; the Verde River Springs are at about 4,230 feet above mean sea level.

54. Southwest calculated that there is about 6.8 million acre feet ("MAF") of groundwater in the upper Big Chino Aquifer. Although Southwest did not do any calculations on the rest of the Big Chino Sub-basin, Mr. Greenslade estimated that there is about 13.6 MAF in the rest of the Sub-basin.

55. South of the Big Chino Water Ranch (near the southern boundary of Southwest's model) there is an area sometimes referred to as "the narrows" that causes

a restriction in groundwater flow. The narrows is formed in part by a fine-grained playa that has low permeability, meaning that water flows through it slowly. The playa extends from about 100 feet bgs to about 1,500 to 1,700 feet bgs. There is a groundwater mound at the narrows that extends back to the Big Chino Water Ranch. *See* Exhibit Prescott 509 at pp. 4 – 5.

56. Southwest's Report shows that most of the groundwater from the upper Big Chino Sub-basin must either move southwestward in the basin fill (around the playa) or move down into the limestone beneath the playa.

57. Exhibit ADWR 133 at Figure 7 is a groundwater elevation contour map; groundwater flow is perpendicular to the contour lines.

58. Since about 1940, between 500 and 2,500 acres of land near the Big Chino Water Ranch have been irrigated. Mr. John Munderloh, Prescott's witness, estimated that there were about 6,500 AFY pumped to supply this irrigated land.

59. ~~The Big Chino Water Ranch includes about 1,100 acres of historically irrigated land that Prescott plans to retire from agriculture, which would eliminate about 3,000 AFY of existing pumping.~~Southwest's Hydrology Report indicates that there are about 1,256 acres of historically irrigated lands within the Big Chino Water Ranch (1,161 acres owned by Prescott and 95 acres of State leased land), and that about 2,377 AFY was pumped to irrigate these lands between 2000 and 2003. Prescott plans to cease irrigation of these lands, which will therefore eliminate an average of about 2,377 AFY of recent agricultural pumping within the Big Chino Water Ranch. Some of the water pumped for agriculture would have recharged to the basin, whereas none of the water transported to Prescott will.

THE VERDE RIVER

60. The Verde River Springs are a series of 3 or 4 springs within about a mile of each other, located about 2 to 3 river-miles downstream from Sullivan Lake. Sullivan Lake Dam is river-mile 0.

61. Perennial flow in the Verde River ~~starts about where Granite Creek enters the River, which is~~ begins about 0.1 mile below the Granite Creek confluence and about ~~½~~ 0.1 mile upstream of the first Verde River Springs.

62. There is no gage at the Verde River Springs, so flow rates must be estimated. A United States Geologic Survey ("USGS") report by Ms. Laurie Wirt estimated the flow to be about 20 cubic feet per second ("cfs"). *See* Exhibit BAK 336 (Wirt 2000).

63. The first gage on the Verde River is the Paulden gage, located at the divide between the Big Chino Sub-basin and the Verde River Watershed Sub-basin.[11] *See* Exhibit ADWR 133 at p. 17 (figure showing gage locations). The Paulden gage is at river-mile 10.

64. Baseflow in the Verde River increases moving downstream from the Verde River Springs. The average baseflow at the Paulden gage is about 17,900 AFY, at the Camp Verde gage it is about 144,000 AFY, and at Tangle Creek it is estimated at about 188,000 AFY. Sources of the increased baseflow between the first two gages include: the springs at Mormon Pocket and Sycamore Creek; under flow to river; Oak Creek; Wet Beaver Creek; and Clear Creek.

65. Southwest's Report shows that the baseflow at the Verde River Springs includes water from the Big Chino Sub-basin, the Little Chino Aquifer, and the carbonate or limestone aquifers. Other reports show that there is also inflow from the Big Black Mesa.

66. There is strong agreement among the experts that groundwater from the Big Chino Sub-basin discharges to the Verde River Springs. Estimates ~~are that from 50 to 86%~~ of the percentage of the Verde River Springs ~~originates in~~ originating from the Big Chino Sub-basin~~, with~~ range from something more than 50% to a figure of 80 to 86% ~~being a commonly accepted value~~.[12]

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[11] The Paulden gage is not located near the town of Paulden.

[12] Two USGS Open File Reports ("OFR") prepared by Ms. Wirt (with various other authors) appear to be the primary basis for the 80 to 86% figure. *See* Exhibits BAK 336 (Wirt 2000 USGS OFR 99-0378) and BAK 360 (Wirt 2005 USG OFR 2004-1411).

In OFR 2004-1411, Ms. Wirt used an inverse-chemistry model to estimate the percentage of the Verde River Spring flow that comes from various aquifers. Mr. Ed McGavock, Prescott's witness, provided persuasive, unrebutted testimony that Ms. Wirt's model has several flaws, including using samples that had anomalously high values of silicon and sampling only one of the Verde River Springs. Mr. McGavock also criticized the model because the value for the contribution from Little Chino Sub-basin was assigned, not calculated. In Mr. McGavock's opinion, this flaw is compounded by the fact that the Little Chino Sub-basin is silicon rich. Despite Mr. McGavock's criticisms of Ms. Wirt's model, he ~~agrees that about 50% of the flow at the Verde River Springs could come from the Big Chino Sub-basin~~ believes that more than 50% of the flow at the Verde River Springs comes from the Big Chino Sub-basin, though he testified that in his opinion, nobody knows the actual number.

THE YAVAPAI-PRESCOTT INDIAN TRIBE SETTLEMENT

67. In 1994, Prescott, the Yavapai-Prescott Indian Tribe (the "Tribe"), the State of Arizona, the United States, and CVID entered into the Yavapai-Prescott Indian Tribe Water Rights Settlement Agreement that was subsequently approved through federal legislation. *See* Exhibits Prescott 502 (the "Settlement Agreement") and Prescott 504 (the federal legislation). Prescott and the Tribe also entered a related Water Services Agreement. *See* Exhibit Prescott 503.

68. Under these agreements: (1) Prescott agreed to provide the Tribe water in perpetuity with no upper limit on the volume; (2) Prescott agreed to provide the Tribe with first priority to 550 AFY (*i.e.,* this 550 AFY is senior to Prescott's own uses); (3) Prescott agreed to treat and return the Tribe's effluent; and (4) Prescott acknowledged that the Tribe also has ~~a right to 643 AFY from Granite Creek~~ the right to annually divert and use Granite Creek surface water in an amount calculated by adding 50% of the flow until the Tribe has diverted 550 AFY plus an additional 10% of the portion of the flow that exceeds 1,100 AFY, up to a total maximum of 1,000 AFY.

69. As security for its performance under the Water Services Agreement, Prescott agreed to hold in trust 3,169 acre feet of Type 2 Grandfathered Groundwater Rights. If Prescott breaches certain of its obligations to the Tribe, at the Tribe's option, the Type 2 rights must be conveyed to the Tribe. *See* Exhibit Prescott 503 at pp. 30 – 31.

70. Prescott now provides the Tribe with 226 AFY, but that is expected to rise to 231 AFY by 2027. Prescott treats the Tribe's effluent, but the Tribe is not exercising its right to have the treated effluent returned to it.

71. As part of the Settlement Agreement and related federal legislation, Prescott and the Tribe sold their CAP allocations of 7,127 AFY and 500 AFY, respectively, to the City of Scottsdale.

72. The Settlement Agreement and federal legislation limit the Tribe's use of the money it received from the sale of its CAP allocation to defraying costs associated with

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Mr. McGavock testified as to his belief that Ms. Wirt used data selectively to reach a desired outcome. Ms. Wirt has passed away and is unable to defend her integrity. Mr. Hjalmar Hjalmarson, who worked with Ms. Wirt, testified as to his opinion that Ms. Wirt would not engage in such behavior. The ALJ makes no findings as to why the model may have deficiencies, and concludes only that Mr. McGavock has raised a valid issue related to the reliability of the model.

the Water Services Agreement or to developing water related infrastructure on the Reservation.

73. The Settlement Agreement and federal legislation provide that Prescott's CAP-replacement water cannot be inconsistent with the Prescott AMA goals or the preservation of the riparian habitat, biota and flows of the Verde River.

74. Prescott received about $3.4 million from the sale of its CAP water (after expenses, operations and maintenance were deducted). The Settlement Agreement and federal legislation limit Prescott's use of this $3.4 million to defraying expenses associated with the investigation, acquisition, or development of alternate sources of water to replace the relinquished CAP water.

75. This $3.4 million was administered by the Federal Bureau of Reclamation, the State, and by Prescott. In 2008 the Bureau of Reclamation conducted an audit and determined that the money had been properly spent.

PRESCOTT'S PURCHASE FROM THE CVID

76. Prescott paid CVID about $21 million to purchase Watson Lake, Willow Lake, and surface water rights from Granite Creek. *See* Exhibit 505 (the IGA).

77. Watson Lake and Willow Lake have a combined maximum storage of 10,580 acre feet. The maximum allowable surface water diversion from Granite Creek is 4,826.26 AFY.

78. In conjunction with Prescott's 2005 DAWS, ADWR determined that the median flow of Granite Creek is 2,034 AFY. ADWR determined that the Tribe was entitled to 643 AFY of the flow, which leaves Prescott with 1,391 AFY that ADWR included in the 2005 DAWS.

79. While processing the Application, ADWR requested that Prescott provide more information about how the $3.4 million from the sale of its CAP water was spent.

80. Prescott deposited the $3.4 million into its existing alternative water fund, which is a sub-fund of its water enterprise fund. The primary source of revenue for the alternative water fund is a monthly fee on Prescott's water customers.

81. Money from the alternative water fund was used to make the purchase from CVID. Mr. Mark Woodfill, Prescott's chief financial officer, testified that Prescott did not

determine the original source of money when expenditures were made from the alternative water fund because all the money in that fund was being used for the same purpose.

82. ~~ADWR followed a "last in – first out" approach under which it considered the first money spent after the $3.4 million was deposited was from the $3.4 million (*i.e.*, the first money spent was considered to be from the sale of the CAP water).~~For purposes of showing how the CAP subcontract proceeds plus accrued interest were spent by Prescott, Prescott used the conservative "first out" method under which Prescott assumed that the CAP subcontract proceeds plus interest were the first out of the alternative water fund once they became available to Prescott. *See* Exhibits ADWR 10 and ADWR 24. Mark Woodfill, Prescott's Finance Director, calculated that the total amount of CAP subcontract proceeds plus interest available to Prescott was $4,360,481.69 ($3,394,390.00 in proceeds and $966,091.69 in interest). *See* Exhibit ADWR 27.

83. ~~Using the "last in – first out" accounting method as requested by ADWR, Mr. Woodfill determined that the CAP money (plus accrued interest) paid for 17.35% of Prescott's purchase from CVID. *See* Exhibit ADWR 27 at p. 3.~~Using this "first out" accounting method, Mr. Woodfill determined that out of the $4,360,481.69 available to Prescott from the CAP subcontract proceeds, including interest, $3,632,920.83 was spent by Prescott on the CVID purchase. Prescott then determined that 17.35% of the total CVID purchase price ($20,933,059.95) can be attributed to the CAP subcontract proceeds. Prescott calculated this percentage as follows: $3,632,920.83 ÷ $20,933,059.95 = 17.35%. *See* Exhibit ADWR 27.

COMPLIANCE WITH A.R.S. § 45-555(E)

84. Arizona law generally prohibits groundwater that is withdrawn from outside an AMA to be transported into an AMA. *See* A.R.S. § 45-551.

85. This prohibition does not apply to the withdrawal and transportation by Prescott, or the United States in cooperation with Prescott, of up to 14,000 AFY of groundwater from the Big Chino Sub-basin if the groundwater is withdrawn and transported either: (1) in exchange for or replacement or substitution of supplies of water from the CAP

allocated to Indian tribes, cities, towns or private water companies in the Prescott AMA or in the Verde river groundwater basin; or (2) for the purpose of directly or indirectly facilitating the settlement of the water rights claims of the Tribe and the Camp Verde Yavapai-Apache Indian community. *See* A.R.S. § 45-555(E).

86. Based on A.R.S. § 45-555(E), Prescott's Application requested that ~~9,575.7~~ 9,570.7 AFY of groundwater to be imported from the Big Chino Sub-basin be added to its DAWS.

87. Under subsection (E)(1) Prescott requested:

a. 7,127 AFY – to replace the CAP allocation it sold to Scottsdale; and

b. 500 AFY – to replace the CAP allocation the Tribe sold to Scottsdale.

88. Under subsection (E)(2), Prescott requested:

a. 950.7 AFY – to replace Prescott's Type 2 water rights that Prescott pledged as security to the Tribe;

b. ~~231~~226 AFY – the volume of water that Prescott currently delivers to the Tribe pursuant to its Water Service Agreement. The volume of water requested by Prescott for this item was later increased to 231 AFY based on the volume Prescott anticipates it will ~~be~~ delivered to the Tribe in 2027;

c. 643 AFY – the volume of the Tribe's right to surface water flow from Granite Creek; and

d. 124 AFY – the volume of effluent produced by the current delivery of 226 AFY to the Tribe. Prescott has now withdrawn its request for this 124 AFY.

Prescott asserts that the CAP water also qualifies under this subsection (E)(2) because the CAP relinquishments were part of the Settlement Agreement.

89. In its Draft Decision and Order, ADWR determined that Prescott is allowed to import 6,885.7 AFY under subsection (E)(1) and 1,181.7 AFY under subsection (E)(2). *See* Exhibits ADWR 132 and 132A at Attachment C.

90. Appellants assert that Prescott is likely entitled to no replacement water and, at most, Prescott it is entitled only to 2,300.74 AFY.

A.R.S. § 45-555(E)(1) CAP Water

Prescott's CAP Allocation – 7,127 AFY

91. ADWR determined that Prescott is entitled to transport groundwater from the Big Chino Sub-basin to replace its CAP allocation only to the extent that Prescott has not already replaced that CAP water.

92. ADWR considers only water that Prescott can use for AWS purposes to be replacement water because 100% of the CAP water would have met the AWS requirements.

93. In the 2005 DAWS, ADWR determined that 1,391 AFY of the Granite Creek water met the AWS requirements.

94. Because the CAP-sale proceeds purchased only 17.35% of the Granite Creek water, ADWR determined that Prescott replaced 241.3 AFY of its CAP allocation with Granite Creek surface water (17.35% of 1,391).

95. Deducting 241.3 AFY from 7,127 AFY leaves 6,885.7 AFY, which is the volume of groundwater that ADWR found Prescott is allowed to import under subsection (E)(1) as a replacement for its CAP allocation.

96. Prescott agrees that, under ADWR's method, the $3.4 million did pay for 17.35% of the CVID purchase. But Prescott argues that, as a matter of law, there are no exclusions or offsets in A.R.S. § 45-555(E)(1) and the water it bought from CVID should not count as replacement water.

97. Prescott presents no accounting method to show how the $3.4 million was spent. There is no substantial evidence showing that the $3.4 million was actually used to pay for anything other than CAP replacement water.

98. Mr. Craig Sommers is the president of ERO Resources and is an economist, scientist and consultant in land, water and environmental issues.

99. On behalf of the Beverly Appellants, Mr. Sommers testified as to his opinion that all the water Prescott bought from CVID should count as replacement water because Prescott used money from the CAP sale in that purchase.

100. Mr. Sommers is also of the opinion that the water that Prescott Valley will be receiving is not eligible for replacement purposes. According to Mr. Sommers, because this is water that Prescott is obligated to send to Prescott Valley under the 2004 IGA, it is not replacing Prescott's CAP water.

101. A more reasonable interpretation of the facts is that Prescott is replacing its CAP water and is providing 45.9% of that replacement water to Prescott Valley in exchange for Prescott Valley's financial participation in the project.

The Tribe's CAP Allocation – 500 AFY

102. In its Draft Decision and Order, ADWR found that Prescott was not entitled to replace the Tribe's 500 AFY because the statute allows replacement for the "CAP supply of an entity listed in [subsection (E)(1)] and there is no agreement between Prescott and the Tribe for Prescott to replace the Tribe's CAP allocation in the AMA." *See* Exhibit ADWR 132 at page 11.

103. Prescott asserts that under a plain reading of subsection (E)(1) it is entitled to replace any CAP allocation that has been relinquished and that ADWR's denial is based on a limitation that is not present in the statute.

104. Prescott asserts that the Tribe's 500 AFY of CAP water is now lost to the Prescott AMA and that Prescott undertook to send "wet" water to the Tribe in lieu of "paper" water based on the understanding that Prescott was entitled to replace the 500 acre feet. Prescott asserts that the testimony of Mr. James Holt and Mr. Robert Ogo supports its position.

105. Mr. Holt is Prescott's water resources manager. His testimony was limited to an opinion that Prescott is entitled to replace the Tribe's CAP water.

106. Mr. Ogo is vice-president of the Yavapai-Prescott Indian Tribe and has been for 15 years. Mr. Ogo was the Tribe's representative during the negotiations that led to the Settlement Agreement.

107. Mr. Ogo testified that there was an understanding that Prescott would be able to replace the Tribe's CAP water and that the Tribe would receive "wet" water from Prescott to replace its "paper" CAP water. But Mr. Ogo's testimony on this point is not persuasive because the testimony was not sufficient to establish that there was an understanding that Prescott would get water to replace the Tribe's CAP water, as opposed to an understanding that the Tribe would get "wet" water.

108. Mr. Sommers' opinion is that the Tribe's CAP water was not replaced because the Tribe spent its sale-proceeds to build infrastructure. This opinion does not speak to

the question of whether the statute allows Prescott to replace the Tribe's CAP water now. This interpretation also adds a limitation that is not present in the statute.

109. As another basis on which it is entitled to replace the Tribe's CAP allocation, Prescott asserts that it lost the chance to lease the CAP water from the Tribe. ADWR does not agree because there was no evidence that Prescott actually intended to lease the CAP water from the Tribe.

A.R.S. § 45-555(E)(2) Water to Facilitate Settlement of the Tribe's Claims

Type 2 Extinguishment Credits – 950.7 AFY

110. To secure its obligations under the Settlement Agreement, Prescott pledged its 3,169 AFY Type 2 rights that it now holds in trust. ADWR determined that in doing so, Prescott lost the right to extinguishment credits that would have qualified as part of Prescott's DAWS.

111. If Prescott had extinguished the Type 2 rights in 1995, Prescott would have received 950.7 AFY for 100 years for AWS purposes. *See* A.A.C. R12-15-726(B)(1) and Exhibit ADWR 132A at Attachment C (formula for conversion).

112. ADWR also determined that Prescott's pledge facilitated the Settlement Agreement and that Prescott could import 950.7 AFY under A.R.S. § 45-555(E)(2).

113. Mr. Sommers testified that because the Type 2 rights are not extinguished, Prescott can still use these rights.

114. Mr. Sommers' opinion is that Prescott should receive credit only for the actual deliveries it makes to the Tribe and not the maximum delivery obligation.

115. Mr. Sommers' opinion is that ADWR "double counted" this water based on his view that during any shortage, the Type 2 water will be delivered in place of the 231 AFY. But this opinion does not account for the fact that the Type 2 rights are pledged to secure all of Prescott's obligations to the Tribe, which, in addition to providing the Tribe with first priority, include providing minimum flow rates and pressures. Additionally, Mr. Sommers' opinion does not take into account the fact that Prescott has not yet served Type 2 water to the Tribe and it is not known whether it ever will be required to do so. What is known is that Prescott lost the ability to extinguish the Type 2 right and receive

950.7 AFY of extinguishment credits for use in its DAWS by pledging the Type 2 right as security to facilitate the Settlement Agreement.

Prescott's Water Service to the Tribe – 231 AFY

116. Under the Water Services Agreement, Prescott agreed, among other things (1) to provide water to the Tribe in perpetuity, and (2) that the Tribe would have first priority to 550 AFY.

117. ADWR determined that these commitments facilitated the settlement, even though there was an existing agreement between Prescott and the Tribe.

118. The anticipated delivery obligation for 2027 is 231 AFY, which is the volume ADWR determined meets subsection (E)(2).

119. Mr. Sommers' opinion is that there were not enough new obligations to conclude that these delivery obligations actually did facilitate settlement, so these obligations do not qualify under A.R.S. § 45-555(E)(2).

120. Mr. Ogo testified that the Settlement Agreement provided the Tribe with important benefits, including securing "wet" water in exchange for "paper" water and receiving first priority to water. Mr. Ogo negotiated the settlement for the Tribe and, consequently, his opinion carries more weight on this point than does Mr. Sommers' opinion.

Water from Granite Creek – 643 AFY

121. ~~The Settlement Agreement provides the Tribe with a right to 643 AFY from Granite Creek, but ADWR determined that this 643 AFY came from CVID, not Prescott.~~ As explained in Finding of Fact No. 78, ADWR previously determined that the median flow of Granite Creek is 2,034 AFY, and that the Tribe is entitled to 643 AFY of that flow under the terms of the Settlement Agreement. In its decision on Prescott's Application, ADWR determined that the Tribe's 643 AFY came from CVID and not Prescott. Consequently, ADWR determined that this 643 AFY does not meet the requirements of A.R.S. § 45-555(E)(2).

122. Prescott asserts that its recognition (in the Settlement Agreement) of the Tribe's 643 AFY right facilitated the settlement and does qualify for replacement under subsection (E)(2).

CAP Water under 45-555(E)(2)

123. Prescott asserts that the CAP relinquishments facilitated the settlement and, consequently, that the CAP relinquishments also qualify under subsection (E)(2).

CALCULATIONS FOR AWS PURPOSES

124. In its Draft Decision and Order, ADWR determined that Prescott is entitled to import from the Big Chino Sub-basin 8,067.4 AFY year. ADWR concluded that the entire 8,067.4 AFY meets the assured water supply rules.

125. As the facts set forth below show, Prescott has demonstrated that this 8,067.4 AFY meets the requirements of the AWS rules.

126. Appellants assert that the 3,597 AFY that Prescott will deliver to Prescott Valley does not qualify under the assured water supply rules. But as discussed in the Conclusions of Law, ADWR's determination that this water should be included in the Draft Decision and Order was not in error.

127. Because ADWR determined that Prescott is not entitled to import water for the 241.3 AFY of Prescott's CAP allocation that has already been replaced, ADWR did not include this volume in the Draft Decision and Order.

128. Because ADWR determined that Prescott is not entitled to import water based on Tribe's right to 643 AFY from Granite Creek, ADWR did not include this volume in the Draft Decision and Order.

129. ADWR determined Prescott's request to import the 500 AFY to replace the Tribe's CAP allocation does not meet the AWS requirements. The evidence shows that ADWR's conclusion was based solely on ADWR's determination that Prescott is not entitled to import the water under A.R.S. § 45-555(E). ~~As set forth in the Conclusions of Law, however, this 500 AFY does meet the requirements of A.R.S. § 45-555(E).~~

130. ~~The preponderance of the evidence shows that this 500 AFY also meets the AWS requirements.~~Because Prescott is not authorized to import the 500 AFY to replace the Tribe's CAP allocation, this 500 AFY does not meet the AWS requirements.

SOUTHWEST'S GROUNDWATER MODEL

131. Prescott hired Southwest in about 2003 at which time Southwest did a study of the CV Ranch land, which is now more commonly called Chino Grande Ranch.[13]

132. Southwest prepared a groundwater model of the CV Ranch using the using the USGS's MODFLOW program. The model Southwest developed for the CV Ranch also included the land on which the Big Chino Water Ranch is located. When Prescott bought the Big Chino Water Ranch, Southwest modified the model to move the pumping location to the Big Chino Water Ranch.

133. Southwest spent about 1 year working on the model for CV Ranch and then additional time to modify the model for use at Big Chino Water Ranch; Southwest ran the model multiples of 10 times, but less than 100 times.

134. Southwest's objective in creating the model was to determine what the maximum depth to groundwater would be after 100 years of pumping by Prescott at Big Chino Water Ranch, which is required to show compliance with the physical availability rule.

135. The model area is a rectangle about 11.5 miles by 19.3 miles, with the southern boundary about 15 or 16 miles northwest of the Verde River Springs. *See* Exhibit 2J, Figure 2-1 (map). Southwest chose the model area based on how "the basin works" and the model's objective of demonstrating compliance with the physical availability rule.

136. In choosing the model area, Southwest considered 3 main factors: (1) there were significant amounts of water-level data available for the area; (2) the area was sufficient to calculate the 100-year depth-to-groundwater because the model covers the entire alluvial aquifer and the model's boundary extends beyond the proposed well-field (6 miles to the south and 10 miles to the north); and (3) the cost and time to model a larger area were not necessary.

137. Southwest considered a larger area, but they lacked reliable data that could be used to test a model covering a larger area. Mr. Greenslade's opinion is that there is not enough data existing for the land between the southern boundary of Southwest's model

and the Verde River to allow for an accurate numerical model to be constructed of that area.

138. Southwest compiled available data and drilled three borings that were used to define the extent of the playa. Southwest also had borings drilled on the Big Chino Water Ranch and, based on Prescott's direction, installed monitoring wells down-gradient from the proposed well field. All this information was used to define the hydrogeologic conditions. According to Mr. Greenslade, Prescott had the monitoring wells installed because it is concerned about what may happen in the future and has instituted a monitoring process that involves the public and Salt River Project ("SRP").

139. Southwest calibrated its model to known data (e.g., water levels), which resulted in the model showing that the groundwater recharge was about 13,363 AFY. This is about 2,000 AFY less than Southwest had estimated in its conceptual model.

140. After the model was calibrated, Southwest used it to calculate the impact of pumping at 17,768 AFY for 100 years. This value (17,768) is intended to represent Prescott's maximum allowable pumping from the Big Chino Sub-basin, which includes Prescott's maximum allowable pumping of 14,000 AFY under A.R.S. § 45-555(E) plus 3 acre feet per acre for irrigated land.

141. Southwest calculated that if 17,768 AFY was pumped from Big Chino Water Ranch for 100 years, the maximum drawdown would yield a depth to static water of 309 feet bgs.[14]

142. Mr. Greenslade's opinion is that if the pumping were reduced to 8,067.4 AFY for 100 years (*i.e.,* the rate that ADWR approved), the drawdown would be reduced almost in direct proportion.

143. ADWR requested that Southwest include in the model the pumping expected to occur at the Chino Grande Ranch. Based on Chino Grande's Adequate Water Supply submission to ADWR, Southwest used 18,500 AFY and ran the model with a total pumping of 36,268 AFY.[15]

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[13] Chino Grande was also formerly referred to as CVCF Ranch; Chino Grande Ranch is now a proposed subdivision located near the Big Chino Water Ranch.

[14] The depth to static water level is the drawdown caused by pumping plus the original depth to water.

[15] The actual pumping volume used may have been slightly higher to account for existing agricultural uses.

144. After 100 years of pumping at 36,268 AFY, the maximum drawdown is 383 bgs. This predicted drawdown is shown by contour lines on Exhibit ADWR 23A at Figure 10. The contour lines are lines of equal drawdown. The southernmost contour line is 50 feet, which means that the model shows that there will be 50 feet of drawdown along that line after 100 years of pumping at 36,268 AFY.

145. Southwest determined that the maximum depth to static groundwater after 100 years of pumping at 36,268 AFY would be 519 feet.

146. Southwest concluded that: (1) Big Chino Water Ranch is over the thickest part of the upper Big Chino Aquifer; (2) the thickness of ~~that~~ the aquifer beneath the Big Chino Water Ranch ranges from 1,200 to 1,600 feet, with an average depth to water at 105 feet bgs, which means the average saturated thickness is 1,295 feet; (3) there are an estimated 6.8 MAF of water in storage in the principal aquifer; (4) the calibrated model shows that the recharge is 13,363 AFY; (5) if Prescott pumped 17,768 AFY for 100 years, the depth to groundwater would be 309 feet; and (6) adding the proposed pumping by Chino Grande results in a depth to groundwater of 519 feet after 100 years of pumping.

147. The model also shows that, as a result of this pumping, the volume of water crossing the model's southern boundary (and moving toward the Verde River) will decrease. But, because the model does not include the Verde River, the model can make no direct predictions about the effect pumping on the River.

148. Mr. Greenslade's opinion is that Southwest's model's results would not be affected by including in the model the outflow from the Big Chino to the Verde River because the distance is so great, much of the water will initially be withdrawn from storage, and the drawdown at the model's boundary is small in comparison the maximum drawdown.

149. A cone of depression ("COD") is the change in head surrounding a well as a result of pumping from that well. CODs tend to decrease logarithmically and flatten out at the edges.

150. The COD for pumping at 36,268 AFY for 100 years extends beyond the model boundary. Mr. Greenslade estimates that this COD would extend 4,000 feet beyond the model boundary, which would be about 15 to 16 miles from the Verde River Springs.

151. Mr. Greenslade made his estimate by drawing a line from the model cell with the maximum drawdown to the last cell and extending the line logarithmically until a result of zero for all practical purposes was reached.

152. Mr. Greenslade's opinion is that it is not likely that the COD would reach the Verde River and he added that it was not possible based on the model result.

JON FORD'S GROUNDWATER MODEL

153. Mr. Jon Ford is a vice-president of Leonard Rice Engineers. Mr. Ford is a registered professional geologic engineer in Arizona.

154. At the request of the Beverly Appellants' attorneys, Mr. Ford prepared a groundwater model using the MODFLOW program. Mr. Ford's model was prepared to determine (1) the impact on the Verde River from the aggregate of Prescott's proposed pumping and other pumping from the northern part of the Big Chino Valley; and (2) whether the drawdown from that pumping would result in a depth to groundwater of more than 1,000 feet. Mr. Ford's model includes all of the Big Chino Valley except a small portion in the northwest corner. *See* Exhibit BAK 698 (memorandum describing model results).

155. Mr. Ford used projected water-demands prepared by Mr. Ed Harvey and other information to determine the volume of pumping. Mr. Ford used a pumping value of 12,070 AFY in 2010, with values increasing to 50,870 AFY in 2060 and remaining at that value until 2110. *See* Exhibit BAK 698 at p. 4.

156. Mr. Ford's model shows that after 100 years of pumping, the average depth to groundwater would be between 700 and 800 feet.

157. Mr. Ford's model shows that after 100 years of pumping, the flow at Verde River would decline by 11 to 15 cfs.

158. Mr. Ford's model results were not provided to ADWR before the Draft Decision and Order was issued.

159. Mr. Corkhill and Mr. Greenslade each provided credible testimony that the Beverly Appellants did not provide all the information necessary to properly evaluate Mr. Ford's model.

160. Information required to evaluate Mr. Ford's model that has not been provided to ADWR includes: (1) the model input files to show how the model was constructed; (2) boundary conditions; (3) all hydrologic parameters and their distribution; (4) the model's statistics with respect to its performance; (5) an error analysis; and (6) data sets to review the inputs and verify the outputs. Without this information, Mr. Ford's model cannot be tested to see if the model can replicate existing conditions. A model must be able to replicate existing conditions in order reliably to predict future conditions.

161. Mr. Corkhill testified that:

a. It appeared that Mr. Ford assumed a constant head at the Verde River Springs, which is not appropriate;

b. Mr. Ford did not consider the sub-irrigation at Williamson Valley, which, in Mr. Corkhill's opinion, is important and could change the model's results;

c. The Beverly Appellants have provided only a general description of Mr. Ford's model; and

d. Because the Beverly Appellants did not provide enough information to allow Mr. Corkhill to properly evaluate Mr. Ford's model, Mr. Corkhill was required to make assumptions about the model.

162. Mr. Greenslade testified that that he questioned the validity of Mr. Ford's model and the model's ability to predict future impacts because:

a. Mr. Ford used transmissivity values that do not agree with values that have been calculated from pump-tests and other known data;

b. Mr. Ford's model shows that the flow at the Verde River Springs has been as high as 26 cubic feet per second, whereas Ms. Wirt's USGS report shows a value of 20 cfs. This discrepancy could affect the calibration of the model; and

c. Mr. Ford's model shows that the flow at the Verde River Springs has consistently decreased over time. Mr. Greenslade compared that to the record for the Paulden gage, which shows increasing flow from 1964, when the gage was installed, to about 1993 when the flow starts to decrease. Mr. Greenslade's opinion is that Mr. Ford's model is not calibrated to the Verde River.

163. Mr. Ford's model shows three CODs after 100 years of pumping. *See* Exhibit BAK 698 at Figure 7. Both Mr. Corkhill and Mr. Greenslade raised questions about these CODs.

164. Mr. Greenslade found one COD to be too far north of the Big Chino Water Ranch to accurately reflect Prescott's pumping. Mr. Greenslade saw this as a problem but, because the Beverly Appellants had not provided the distribution of pumping used by Mr. Ford, Mr. Greenslade did not have adequate information to resolve the problem.

165. A "second COD," about 600 feet deep, is located near the edge of the playa and is between the Big Chino Water Ranch and the Verde River Springs. *See* Exhibit BAK 698 at Figure 7.

166. Mr. Corkhill and Mr. Greenslade were each of the opinion that this second COD would have a greater effect on the flow at the Verde River Springs than Prescott's proposed pumping.

167. Mr. Ford testified that this second COD was caused by the intersection of two faults. Mr. Greenslade and Mr. Corkhill questioned Mr. Ford's conclusion in this regard.

168. Mr. Greenslade checked USGS and Bureau of Reclamation maps and cannot find any two such faults. According to Mr. Greenslade, if the faults exist now, then there would be a COD in that area now. Mr. Corkhill testified that in a model showing future impacts, a COD such as the second COD had to be caused by pumping.

169. Mr. Corkhill reviewed information in ADWR's files that was prepared by Leonard Rice Engineers for an Adequate Water Supply determination in 2007. The second COD does not appear in the 2007 analysis.

170. Mr. Ford provided rebuttal testimony that addressed some of the points raised by Mr. Corkhill and Mr. Greenslade. But this rebuttal testimony is insufficient to make up for the lack of information required for ADWR to properly evaluate Mr. Ford's model.

171. Even if Mr. Ford's model is determined to be reliable and accurate, it would not show the impact on the Verde River by Prescott's pumping because the model used a maximum value of 50,870 AFY, which is more than Prescott's legally allowed maximum. Mr. Ford's model does, however, provide confirmation that Prescott's proposed pumping will not cause the static water level to drop below 1,000 feet bgs.

172. Because the Beverly Appellant's have not provided enough information to allow ADWR to properly evaluate Mr. Ford's model and because there are potential deficiencies in that model, Mr. Ford's model is accorded no appreciable weight.

PHYSICAL AVAILABILITY OF THE WATER

173. Prescott was required to show that: (1) its wells are likely to be constructed; (2) that after pumping for 100 years the depth to static groundwater will not be more than 1,000 feet; and (3) that it is not requesting to withdraw more water than allowed by statute. *See* A.A.C. R12-15-716.

174. Prescott demonstrated that the required wells are likely to be constructed as part of its demonstration that the water will be continuously available. The statutory volume-limitation is found in A.R.S. § 45-555(E).

175. Mr. Corkhill gave credible testimony that Southwest provided ADWR with a complete model report that included all the information required for ADWR to evaluate the model and that Southwest's model was sufficient to meet its intended purpose of showing the depth to static groundwater after 100 years of pumping.

176. Southwest's groundwater model shows that if Prescott pumped 17,768 AFY for 100 years, the maximum depth to static groundwater would be 309 feet.

177. ADWR's hydrology division evaluated Southwest's model results and concluded that after 100 years of pumping at 17,768 AFY, the maximum depth to static groundwater would be 309 feet. *See* Exhibit ADWR 133; testimony of Mr. Corkhill.

178. Southwest's groundwater model shows that if the proposed pumping of Chino Grande (18,500 AFY) is added to the 17,768 AFY attributed to Prescott, the maximum depth to static groundwater after 100 years of pumping would be 519 feet.

179. ADWR's hydrology division evaluated Southwest's model results and concluded that after 100 years of pumping at the combined rate (17,768 plus 18,500 AFY) the maximum depth to static groundwater would be 519 feet. *See* Exhibit ADWR 133; testimony of Mr. Corkhill.

180. ADWR's hydrology division concluded that Prescott met the required physical availability demonstration.

181. There was no evidence adduced to show that Southwest's depth-to-static-groundwater calculations are incorrect.

182. The preponderance of the evidence shows that if Prescott pumps 17,768 AFY for 100 years, the maximum depth to static groundwater will be less than 1,000 feet.

CONTINUOUS AVAILABILITY OF THE WATER

183. A.A.C. R12-15-717 provides, in pertinent part, that when the proposed source of water is groundwater: (A) if an applicant submits sufficient evidence that adequate delivery, storage, and treatment works will be in place in a timely manner to make the water available to the applicant for 100 years; and (B) if the applicant demonstrates that wells of a sufficient capacity will be constructed in a timely manner to serve the proposed uses on a continuous basis for 100 years, then ADWR's Director shall determine that an applicant will have sufficient supplies of water that will be continuously available for 100 years.

184. ADWR concluded that Prescott's Capital Improvement Plan ("CIP") includes funding for construction of wells of sufficient capacity to withdraw more than 8,067.4 AFY of groundwater from the Big Chino Sub-basin. The Application shows that the system will have a maximum flow capacity of 19,437 AFY. *See* Exhibit ADWR 2D.

185. ADWR concluded that the groundwater from the Big Chino Sub-basin will be continuously available when a pipeline to transport the groundwater has been constructed and ADEQ has issued the AOC pursuant to the requirements of A.A.C. R18-5-507.

186. In its Draft Decision and Order, ADWR determined that Prescott demonstrated that 8,067.4 AFY of groundwater from Big Chino will be continuously available when ADEQ issues the AOC.

187. Appellants couch arguments that Prescott may be required to stop pumping as arguments that Prescott cannot show that it meets the continuous availability requirements. Because these arguments do not fall under a literal reading of A.A.C. R12-15-717, these arguments are considered elsewhere in this Decision.

188. The preponderance of the evidence shows that when ADEQ issues the AOC, the groundwater to be imported will be continuously available for 100 years.

LEGAL AVAILABILITY

189. Under A.A.C. R12-15-718, an applicant must demonstrate that the water will be legally available for 100 years. A.A.C. R12-15-718 does not have a provision for groundwater imported into an AMA.

190. The Appellants argue that, because A.A.C. R12-15-718 does not include groundwater imported from outside an AMA, Prescott cannot meet the rule.

191. Ms. Fabritz-Whitney testified that A.A.C. R12-15-718 is not intended to be an all encompassing list and that the Department may consider sources of water other than those listed. Ms. Fabritz-Whitney also testified A.R.S. § 45-555(E) provides legal authority showing that Prescott may use the imported the water as part of its DAWS.

192. As discussed below in the Conclusions of Law, the Appellants' argument is not persuasive.

193. Appellants couch arguments that Prescott may be required to stop pumping as arguments that Prescott cannot show that it meets the legal availability requirements. Because these arguments do not fall under a literal reading of A.A.C. R12-15-718, these arguments are considered elsewhere in this Decision.

PRESCOTT'S FINANCIAL CAPABILITY

194. If a city has adopted a five-year CIP that provides for the construction, or the commencement of construction, of adequate delivery, storage, and treatment works in a timely manner, and has submitted a certification by the applicant's chief financial officer that finances are available to implement that portion of the five-year plan, then ADWR's Director shall determine that the city has the financial capability to construct the required infrastructure. *See* A.A.C. R12-15-720.

195. Prescott has adopted a Water Enterprise CIP for fiscal years 2010 through 2014 that includes $142.6 million for the construction of the infrastructure required to transport the groundwater from the Big Chino Sub-basin to Prescott.

196. Mr. Woodfill, Prescott's chief financial officer, certified that Prescott has the finances available to implement that part of the Water Enterprise CIP. *See* Exhibit ADWR 28 (certification, CIP, and letter from RBC Capital Markets).

197. On direct examination, Mr. Woodfill testified that his professional opinion is that Prescott can finance the project. In his rebuttal testimony, Mr. Woodfill again testified that in his opinion Prescott can finance the project.

198. The estimated total cost for the Big Chino project is $150 million. When the certification was prepared, Prescott's Water Enterprise had an ability to issue about $225 million in bonds and, Prescott can also use other city bonds if required.

199. In determining the bonding capacity, Prescott relied on its bond advisor, Ms. Shawn Dralle of RBC Capital Markets ("RBC"). Mr. Woodfill's opinion is that Ms. Dralle is a leader in the area of municipal bonds. Mr. Woodfill did independent analysis in that he is familiar with the markets and he checks bond rates daily.

200. The Water Enterprise CIP does not include information on how the costs will be paid but there is more detail in Prescott's budget.

201. Prescott's existing water users will pay for 20% of the project and the remaining 80% will be paid for by new users and impact fees.

202. Mr. Ed Harvey is a principal in Harvey Economics, a firm that specializes in resource economics, which includes analyzing financing and funding for natural resource projects.

203. Mr. Harvey testified as to his opinion that because the CIP submitted by Prescott did not include information on the source of funding, the CIP did not have any meaning or force. Although the information from RBC was intended to provide that information, Mr. Harvey opined that RBC's work was deficient and not based on standard assumptions.

204. According to Mr. Harvey: (1) the 5% interest rate used was too low because Prescott's bond rating has been downgraded to single A; (2) it was an error to use the same interest rate for each series of bonds; and (3) the long-term bonds would not be attractive to investors. Mr. Harvey later corrected his testimony regarding the downgrading of Prescott's bond rating. He testified that it was Prescott Valley's bond rating that had been downgraded, not Prescott's bond rating. However, Mr. Harvey did not change his opinion that the 5% interest rate used was too low. Consequently, Mr. Harvey also concludes that the debt service ratio of 1.3 shown by RBC would not be met, making the bonds difficult to sell.

205. Mr. Woodfill testified in response to Mr. Harvey's criticisms. According to Mr. Woodfill, RBC deliberately set the debt service ratio to 1.3, which is often considered to be the industry standard, to determine the maximum bonding capability. The point was to show that Prescott could raise more money than is required to fund the Big Chino project.

206. With respect to the interest rate used, Mr. Woodfill testified that: (1) Prescott's bond rating has not been downgraded to single A; (2) the 5% interest rate was a blended rate intended to represent an average for all bonds that might be issued; and (3) 5% was very conservative when the CIP was prepared; (4) as of the date of his rebuttal testimony (April 15, 2009), it was "still a good number;" and (5) that Prescott could issue bonds at that rate.

207. Mr. Woodfill's opinion is that investors who buy long-term bonds are interested in those bonds for the same reasons that Mr. Harvey believes these bonds are unattractive.

208. Mr. Woodfill's opinion is the bond-capacity analysis from RBC was prepared using standard assumptions.

THE PURPORTED EFFECTS ON THE VERDE RIVER

209. The Appellants assert that ADWR was required to consider the effects on the Verde River from Prescott's proposed pumping.

210. Based on the Decision Letter, it appears that ADWR considered Appellants' arguments (as set forth in the Objections) and determined there was no legal basis and insufficient evidence to require those effects to be considered in the Draft Decision and Order.

211. The testimony of Ms. Fabritz-Whitney and Mr. Corkhill raises some doubt as to how much consideration ADWR gave to the substance of the Objections related to the purported effects. Nevertheless, Appellants have not presented sufficient evidence to show that ADWR erred by failing to include consideration of these purported effects in the Draft Decision and Order.

Call by a Senior Water-Rights Holder

212. Under Arizona law, surface water and percolating groundwater are legally distinct types of underground water. Subflow is considered part of the stream (*i.e.,* it is treated as surface water legally) and is subject to prior appropriation. Percolating groundwater is not appropriable, but may be subject to call under the federal reserved water rights doctrine.

213. Underground waters are presumed to be percolating and, one who asserts that underground water is a part of a stream's subflow must prove that fact by clear and convincing evidence.

214. Appellants assert that Prescott may be required to stop or limit its pumping because the water to be pumped may be subject to call either by holders of senior surface water rights or by the Fort McDowell Yavapai Nation and the Yavapai-Apache Nation under the federal reserved rights doctrine.

215. Appellants rely on several lines of evidence in support of their contention:

a. The agreement among experts that there is a hydraulic connection between the Big Chino Sub-basin and the Verde River Springs;
b. John Ford's model;
c. Studies conducted by the Bureau of Reclamation for a proposed settlement of the Fort McDowell Yavapai Nation claims;
d. A theory that pumping from the Big Chino in 1964 (to fill artificial lakes at a subdivision called Holiday Lakes Estates) caused the flow in the Verde River to drop; and
e. Evidence that there is saturated floodplain Holocene alluvium in the Big Chino Sub-basin and Verde River basin.

216. The evidence does show that there is a hydraulic connection between the Big Chino Sub-basin and the Verde River. But there is not sufficient evidence to show that Prescott's pumping will impact the Verde River within the next 100 years. And, even if Prescott's pumping does impact the Verde River in the next 100 years, as a matter of law that does not show that the water pumped by Prescott in the Big Chino Sub-basin is subflow.

217. To the extent that Mr. Ford's model could be given any appreciable weight, that model is not sufficient to show that Prescott will be pumping subflow, rather than percolating groundwater. Moreover, because Mr. Ford's model includes pumping in excess of the 8,067.4 AFY that ADWR approved, Mr. Ford's model is not sufficient to show whether or not Prescott's pumping will affect the Verde River during the next 100 years.

218. Mr. Munderloh testified that there may be no impact on the Verde River due to the water mounding at the narrows. In support of this assertion, Mr. Munderloh noted that there has not been a large drawdown or COD created in the Chino Valley despite the history of agricultural pumping.

219. The evidence presented is not sufficient to show that pumping at Holiday Lakes Estates actually did cause the Verde River flow to drop. Moreover, the USGS water report for 1964 does not show that there was any large-scale pumping at Holiday Lakes Estates in 1964, which provides reason to question whether the pumping occurred in that year.

220. The studies by the Bureau of Reclamation are not sufficient to show that Prescott will pump subflow or what the effect on the River will be, because those studies were based on pumping from a location substantially closer to the Verde River than the Big Chino Water Ranch. Moreover, those studies concluded that there was not enough information to determine how much of the Verde River flow originates in the Big Chino. *See* Exhibits BAK 320 through 324.

221. Under the federal reserved rights doctrine, the water being pumped could be subject to call whether it is subflow or percolating groundwater. But Appellants present no substantial evidence that such a call will occur.

222. Appellants assert that the COD may extend into the "subflow zone" of the Verde River or the Big Chino Wash, which, in Appellants' view, might also require Prescott to stop or reduce its pumping. But Mr. Greenslade testified that the COD will not reach the Verde River and, although it is not disputed that Southwest's model can make no direct predictions related to the Verde River, no one testified that Mr. Greenslade's method or calculation were in error.

223. Subflow is not a scientific or hydrologic term, but rather a legal one and it is the judiciary that is responsible for defining the limits of the subflow zone. Because there is no subflow zone mapped for the Verde River watershed, Appellants' assertion is inherently speculative.

224. Even if the GSA Court eventually finds that the COD does extend into any subflow zone that is mapped, that determination would serve only to give the GSA Court jurisdiction over Prescott's wells and that would not necessarily require Prescott to stop pumping.

Endangered Species Act

225. The Verde River is habitat for a number of species that are listed as threatened or endangered or are candidates for such listing. Because these include fish and species dependent on the riparian habitat, reduced flow in the Verde River would have an adverse impact on these species. Reduced flows would also have an adverse impact on efforts to restore native species to the Verde River.

226. Current conditions in the Verde River watershed, including the presence of non-native species, water diversions, and land management practices, have already caused reductions in the amount of habitat and the numbers of many of these threatened or endangered species. In some cases, these reductions have been to the point that some native fish have not been seen in the Verde River for years.

227. Appellants assert that Prescott's proposed pumping will have an adverse effect on the endangered or threatened species that will result in Prescott being forced to curtail that pumping. But Appellants provide no substantial evidence to show that this assertion is more than speculation.

228. Appellants rely on Jon Ford's model to show that there will be reduced flow in the Verde River but, as discussed above, that model can be accorded no appreciable weight.

229. Even if Prescott's pumping has an impact on the Verde River, there is no certainty that Prescott would be required to limit its pumping. Before that could happen, a court would need to determine that there has been a violation of the ESA that can be

attributed to Prescott.[16] Because there are numerous other water-users much closer to the Verde River, those users, and not Prescott, might be the ones that are determined to be responsible for any future ESA violation. And, even if Prescott was found to be in violation, it might be eligible to undertake mitigation efforts and would not necessarily be required to stop its pumping.

Alleged Violation of the Yavapai-Prescott Indian Tribe Settlement Act

230. The CBD Appellants assert that Prescott's pumping will violate the terms of the Settlement Agreement and federal legislation because, according to the CBD Appellants, Prescott's pumping will have an adverse impact on the Verde River and riparian habitat.

231. This assertion is premised on essentially the same facts on which Appellants base their argument that there will be a violation of the ESA or that the pumping will deplete the flow of the Verde River. But as set out above, the assertion that there will be a violation of the ESA is speculation and there is no substantial evidence to show that Prescott's approved pumping of 8,067.4 AFY actually will reduce the flow of the Verde River in the next 100 years.

CLIMATE CHANGE

232. Appellants assert that ADWR should consider the effects of climate change in its evaluation of the Application.

233. Dennis P. Lettenmaier, Ph.D., is a civil engineer licensed by the State of Washington and a professor at the University of Washington. Dr. Lettenmaier testified that large-scale models of the Colorado River Basin show that Colorado River flow may be reduced by 6 to 11% over the next 100 years due to climate change.

234. Dr. Lettenmaier ~~could~~ did not provide any specific information about the Salt River and Verde River watersheds or the Big Chino Sub-basin, but he testified that the assumption is that the Salt and Verde are roughly equivalent to the entire Colorado River Basin.

235. Dr. Lettenmaier acknowledged that he had not done any studies specifically related to the Big Chino wash.

[16] Appellants argue that ADWR can make this determination, which ADWR and Prescott dispute.

236. Dr. Lettenmaier acknowledged that he had not studied the hydrogeology, terrain, or vegetation in the Big Chino, which are all factors that should be considered in an evaluation of the recharge to a groundwater basin.

237. Mr. Corkhill testified that he is familiar with the basic principles of, and general activities related to, climate change.

238. Mr. Corkhill reviewed the Objections related to climate change and he heard Dr. Lettenmaier testify. Mr. Corkhill's opinion is that it is not possible to quantify the ~~impacts on the Verde River~~ impact on natural recharge of baseflow due to climate change.

OTHER PUMPING IN THE BIG CHINO SUB-BASIN

239. Appellants assert that because other land owners in the Big Chino are also allowed to pump groundwater, Prescott cannot show that the water will actually be physically or continuously available.

240. It is not disputed that under the current law, others are allowed to pump groundwater from the Big Chino. But Ms. Fabritz-Whitney testified that, under the rules, ADWR is not allowed to consider potential future water demands or pumping that may compete with Prescott for access to the water in the Big Chino Sub-basin. ADWR does, however, consider future water demands from assured and adequate water supply determinations it has issued, which is why ADWR had Southwest include in its model the projected pumping by Chino Grande Ranch.

241. The AWS rules are not intended to be a 100% guarantee that there will be water available in 100 years. Rather, the intent is to make a determination of reasonable likelihood that the water will be available based on the information available at the time an application is processed.

242. Mr. Harvey prepared a projection of population growth and related water-demand for an area he termed the Big Chino Water Demand Area. This information was used by Mr. Ford in his groundwater model. But Mr. Ford's model does not show that the cumulative pumping using these demands actually will result in there being insufficient groundwater for Prescott to deliver to the Prescott AMA the volume of water approved in the Draft Decision and Order.

THE WITNESSES AT HEARING

Ms. Fabritz-Whitney

243. Ms. Fabritz-Whitney has been ADWR's Assistant Director of Water Management since 2005. Ms. Fabritz-Whitney's duties include overseeing the State's AMAs, which includes the assured and adequate water supply programs. Before she became the Assistant Director, Ms. Fabritz-Whitney's duties included reviewing all applications for DAWS.

244. ADWR treated Prescott's Application in the same manner that it has treated applications for an assured water supply in other parts of the State.

245. ADWR has a duty periodically to review existing DAWS. ADWR has the authority to require a municipality to modify its designation and ADWR may also revoke a designation. *See* A.A.C. R12-15-711. The Draft Decision and Order requires Prescott to provide ADWR with annual reports that are consistent with the requirements of A.A.C. R12-15-711(A).

246. If conditions show that Prescott's DAWS is no longer valid, ADWR would allow Prescott to find a new water supply. If no new supply was approved, ADWR would revoke the DAWS.

247. If Prescott's DAWS was revoked, Prescott would not be able to rely on the DAWS for future growth, but Prescott would still be able to supply existing homes with water.

248. Although Prescott was required to show that the proposed pumping will not cause the 100-year depth-to-static water level to drop below 1000 feet bgs, Prescott ~~will~~ would not be prohibited from pumping ~~if the water table actually does fall below that level in the future~~ at a depth below 1000 feet bgs if its DAWS were revoked.

249. Based on Arizona law, the Office of Assured Water Supply presumes that wells are pumping groundwater. The hydrology division concluded that Prescott was not pumping subflow and Ms. Fabritz-Whitney relied on that determination. If the hydrology division was to determine that the water to be pumped was subflow or surface water, the Office of Assured Water Supply would consider that information.

250. Based on the legal presumption that water to be pumped is groundwater, ADWR did not consider that, in the future, the GSA Court might determine that the

water is subject to a call. But if the GSA Court rules that the water is surface water, ADWR has authority to require Prescott to modify the DAWS.

Mr. Frank Corkhill

251. Mr. Corkhill has been ADWR's Chief Hydrologist for about 18 months at time of testimony in April. Mr. Corkhill oversees the hydrology division.

252. Mr. Corkhill has been employed by ADWR for 22 years where his prior work includes developing groundwater models, including a version of the Prescott AMA groundwater model, and supervising the technical support section.

253. Mr. Corkhill was responsible for ADWR's final determination that Prescott demonstrated it meets the physical availability rule. *See* Exhibit ADWR 133 (Mr. Corkhill's memorandum dated November 12, 2008); *see also* Exhibit ADWR 25 ("Hydrology Checklist" showing that on July 18, 2008, the hydrology division determined that Prescott had demonstrated that the groundwater would be physically available).

254. Mr. Corkhill testified that he had not heard any new information or evidence that would cause him to change the findings in Exhibit ADWR 133.

255. Mr. Corkhill's conclusions were limited to the physical availability demonstration and he did not consider whether the water would be legally or continuously available.

256. In making his determination, Mr. Corkhill reviewed ADWR file information, the Application, the studies submitted in support of the Application, reviews of the Application by ADWR's groundwater modeling and assured water supply hydrology sections, and the Objections relating to hydrology.

257. Mr. Corkhill testified about Southwest's decision to use a general head boundary ("GHB") at the southern boundary of its model. Groundwater modeling requires making compromises involving boundary locations and how boundary conditions are to be simulated. Southwest chose the GHB based on physical conditions and existing pumping in the model area.

258. A sensitivity analysis is a process to examine how a model responds to various inputs and addresses uncertainty in the data (*i.e.,* if an input value is wrong, what will be the effect on the model's response). Southwest provided the results of a sensitivity analysis in Table 4 – 6 of its Report. *See* Exhibit ADWR 2I.

259. Based on all of the hydrologic information submitted by Southwest, including the sensitivity analysis, Mr. Corkhill determined that the GHB in the Southwest model was sufficient to meet the model's intended purpose, which was to demonstrate the physical availability of the water.

260. During the Application process, ADWR informed Southwest that its model might be "better constrained" if the discharge to the Verde River Springs was included. *See* Exhibit BAK 675. Southwest did not accept that suggestion and Mr. Corkhill could provide no additional information about the issue.

261. Some of the Objectors asserted that Prescott will be pumping subflow of the Verde River. Mr. Corkhill's opinion is that the Objectors did not provide evidence that the water to be pumped is subflow.

262. Mr. Corkhill's opinion is that the water to be pumped is groundwater that is derived from the basin fill aquifer.

263. Mr. Corkhill agrees that groundwater in the Big Chino Sub-basin is one source of the Verde River Springs. Mr. Corkhill ~~acknowledged that~~ testified that he did not disagree "in a conceptual level" with the statement in the Wirt 2000 Report ~~showing~~ that the Big Chino Sub-basin supplies 80% of the Verde River Springs ~~is conceptually right~~. His opinion is that this is a good ballpark figure. *See* Exhibit BAK 336.

264. Although the Wirt 2000 Report was filed with the Objections, Mr. Corkhill did not review it because he did not consider it to be relevant under the rules.

265. Mr. Corkhill's opinion is that Prescott's pumping from the Big Chino Sub-basin at some time will impact the flow of the Verde River unless there is mitigation, and that the CODs will capture groundwater that would have otherwise discharged at the Verde River Springs.

266. Mr. Corkhill does not know what the magnitude of the impact on the Verde River from Prescott's pumping will be or when it will occur. Estimates of when such an impact might occur range from years to centuries, but ADWR was presented with no credible data that addressed the issue in a scientific manner.

267. Mr. Corkhill's opinion is that the Wirt 2000 Report cannot serve as a basis to make predictions about the impact on the Verde River from pumping in the Big Chino

Sub-basin. A numerical groundwater model is generally the best way to make such a prediction.

268. Mr. Corkhill is not aware of any existing numerical groundwater model that would allow an evaluation of the impact on the Verde River from Prescott's pumping.

269. The USGS is working on a regional groundwater flow model that will give general information about the effect on the Verde River Springs from pumping at the Big Chino Water Ranch. But Mr. Corkhill's opinion is that the USGS model will not provide enough detail and a "nested model" with finer resolution, within the USGS model, will be required to predict the impact.

270. Mr. Corkhill testified that ADWR did not look at the impacts of Prescott's pumping on the Verde River because ADWR is not required to do so under the AWS rules.

James H. Holt

271. Mr. Holt was called by Prescott. Mr. Holt is Prescott's water resources manager; previously he worked for ADWR holding a number of positions, including Director of the Prescott AMA.

272. Mr. Holt testified about: Prescott's 2005 DAWS; the Application; the Settlement Agreement; Prescott's purchase from CVID; Prescott's investigations in the Big Chino; and the IGA with Prescott Valley. Mr. Holt's opinion is that the 1991 Groundwater Transportation Act included provisions that were intended to, and did, encourage Prescott and the Tribe to settle the Tribe's claims.

Robert Ogo

273. Mr. Ogo was called by Prescott. Mr. Ogo has been vice-president of the Tribe for 15 years. Mr. Ogo is also employed by the tribe as the facilities manager.

274. Mr. Ogo was the Tribe's representative during the negotiations that led to the Settlement Agreement. Mr. Ogo testified as to the benefits the Tribe received in that Settlement.

Herbert Dishlip, P.E.

275. Mr. Dishlip was called by Prescott. Mr. Dishlip is the principal in Herb Dishlip Consulting. Mr. Dishlip was employed by ADWR from 1981 to 2003, during which time he held a number of positions including Director of the Pinal AMA.

276. Mr. Dishlip testified about the Application; the application for the 2005 DAWS; his review of hydrology studies of the Big Chino Water Ranch; and his involvement in the promulgation of statutes and rules while he was employed at ADWR.

Mark Woodfill, CPA

277. Mr. Woodfill was called by Prescott. Mr. Woodfill has worked for Prescott for 22 years, during which time all of his duties were related to financial issues. For the last 8 years, Mr. Woodfill has been Prescott's finance director where he oversees all aspects of the budget and the 5-year planning process.

William Greenslade, P.E., R.G.

278. Mr. Greenslade was called by Prescott. Mr. Greenslade is a principal in Southwest; he is both an Arizona registered professional engineer and registered geologist.

279. Mr. Greenslade testified about Southwest's MODFLOW model; Southwest's Report; and his opinions regarding deficiencies in Jon Ford's model.

John Munderloh

280. Mr. Munderloh was called by Prescott. Mr. Munderloh is Prescott Valley's water resources manager; previously he worked for ADWR and Yavapai County's water advisory committee. Mr. Munderloh managed ADWR's adjudication section that advises the GSA Court on technical issues including subflow.

281. Mr. Munderloh testified as to his opinions that Big Chino Wash is ephemeral and so will not have a subflow zone, and that groundwater mounding at the playa will restrict the effect of pumping on the Verde River Springs. Mr. Munderloh also testified about pumping that has occurred in the Big Chino Valley since the 1940's.

Ed Harvey, MBA

282. Mr. Harvey is a principal in Harvey Economics, a firm he started in 2002.

283. Mr. Harvey was called by the Beverly Appellants to testify about his population and water demand projections that were used by Mr. Ford.

284. The CBD Appellants called Mr. Harvey to testify about Prescott's CIP and ability to finance the project.

Dennis P. Lettenmaier, Ph.D.

285. Dr. Lettenmaier was called by the Beverly Appellants. Dr. Lettenmaier testified about large-scale climate-change models of the Colorado River Basin.

Abe Springer, Ph.D.

286. Dr. Springer was called by the Beverly Appellants. Dr. Springer holds a Ph.D. in hydrogeology, is a professor at Northern Arizona University, and is the NAU coordinator for the Arizona Water Institute.

287. Dr. Springer testified as the to the geology and hydrology of the Big Chino Sub-basin; the effects of pumping in the Little Chino Sub-basin; and his opinion that pumping in the Big Chino will have an effect on the Verde River.

Thomas Atkins

288. Mr. Atkins is a resident of Prescott and one of the Beverly Appellants. Mr. Atkins teaches high school science and has a master degree in science education.

289. Mr. Atkins objects to Prescott's Application because he is concerned about the impact on the Verde River and the financial impact on Prescott's existing residents.

Jon R. Ford, P.E.

290. Mr. Ford was called by the Beverly Appellants. Mr. Ford has been employed at Leonard Rice Engineers since 1986.

291. Mr. Ford's professional worked is focused on evaluating the impact of pumping, water resources, and developing water for municipalities. Mr. Ford's experience includes working subflow and other issues in the GSA.

292. Mr. Ford testified about the groundwater model he prepared. Mr. Ford also testified that there is Holocene alluvium along the Verde River and the Big Chino Wash.

Gregg Ten Eyck, P.E.

293. Mr. Ten Eyck was called by the Beverly Appellants. Mr. Ten Eyck is a surface water hydrologist employed Leonard Rice Engineers.

294. Mr. Ten Eyck testified about Verde River stream-gage data and as to his opinion that the Verde River is over appropriated.

295. Mr. Ten Eyck also testified about the reduction in flow that would result from Prescott's pumping, but he acknowledged that this testimony was based on the values generated by Mr. Ford's model, and that he did not have sufficient knowledge to verify that Mr. Ford's model was accurate.

Jerome Stefferud

296. Mr. Stefferud was called by the Beverly Appellants. Mr. Stefferud is an independent fisheries biologist. Mr. Stefferud testified as to the status and needs of fish in the Verde River and as to the expected impacts of reduced river flows on those fish and other aquatic species.

Brenda Smith

297. Ms. Smith was called by the Beverly Appellants. Ms. Smith is an Assistant Field Supervisor for the U.S. Fish and Wildlife Service ("FWS").

298. Ms. Smith testified about FWS's Objection and concerns about Prescott's proposed pumping; the significance of the Upper Verde River watershed with respect to conservation and recovery of threatened and endangered species and their habitat; and the expected impacts of reduced flows on these species.

Charles Paradzick

299. Mr. Paradzick was called by the Beverly Appellants. Mr. Paradzick is a Senior Ecologist for SRP and the Administrator of the Habitat Conservation Plans at the Horseshoe and Bartlett Reservoirs.

300. Mr. Paradzick testified about the environmental impacts that reduced flows could have on the riparian ecosystem in and around the Verde River.

Anthony J. Krzysik Ph.D.

301. Dr. Krzysik is a resident of Prescott and is one of the Beverly Appellants. Dr. Krzysik holds a Ph.D. in ecology and biology.

302. Dr. Krzysik testified that he objects to the Application because his opinion is that the pumping will negatively impact the ecology of the Verde River; Prescott has not

proposed either mitigation or a habitat conservation plan; and as a resident of Prescott, he is concerned about the financial burden of the project.

Craig Sommers

303. Mr. Sommers was called by the Beverly Appellants. Mr. Sommers has been a consultant to SRP for over 20 years during which time he has been active in the GSA.

304. Mr. Sommers testified about SRP's water rights and facilities in the Verde River watershed; the CAP allocations; the Bureau of Reclamation's work related to settling the Fort McDowell Nation's claims; and CVID's sale to Prescott. Mr. Sommers represented CVID during the sale to Prescott.

Gary Beverly, Ph.D.

305. Dr. Beverly is one of the Beverly Appellants. He is a resident of, and farms in, Chino Valley. Dr. Beverly holds a Ph.D. in Physical Chemistry.

306. Dr. Beverly is concerned that Prescott's pumping will be detrimental to his ability to pump water for his farm and to the ecology of the Verde River.

307. Dr. Beverly testified about the ecology of the Verde River and the field trips he leads along the river for bird watching and other activities.

Ed McGavock

308. Mr. McGavock was called by Prescott as a rebuttal witness. Mr. McGavock is a hydrologist employed by Errol Montgomery and Associates. He was formerly employed by the USGS.

309. Mr. McGavock testified about what he perceived to be deficiencies in the USGS's OFR 2004-1411 (*i.e.,* Ms. Wirt's 2005 Report). Mr. McGavock also testified that the USGS's water report for 1964 does not show that there was large scale pumping at Holiday Lakes Estates, which was the year that such pumping is alleged to have caused the flow in the Verde River to drop.

Hjalmar W. Hjalmarson. P.E.

310. Mr. Hjalmarson was called by the Beverly Appellants as a rebuttal witness. Mr. Hjalmarson worked for the USGS and was a co-worker of Ms. Wirt's.

311. Mr. Hjalmarson responded to criticisms of Ms. Wirt and testified about reports he wrote and the pumping at Holiday Lakes Estates.

CONCLUSIONS OF LAW

PROCEDURAL MATTERS

1. The burden of proof at an administrative hearing falls to the party asserting a claim, right, entitlement, or affirmative defense. Consequently, Prescott and Appellants bear the burden to show that the Draft Decision and Order is in error. *See* A.A.C. R2-19-119; *see also* A.R.S. § 41-1092.07(G)(2).

2. One who asserts that underground water is a part of a stream's subflow must prove that fact by clear and convincing evidence. *In Re The General Adjudication Of All Rights To Use Water In The Gila River System And Source*, 198 Ariz. 330; 9 P.3d 1069 (2000) (*"Gila IV"*). The standard of proof on all other issues is that of a preponderance of the evidence. *See* A.A.C. R2-19-119.

3. A preponderance of the evidence is:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.
>
> BLACK'S LAW DICTIONARY at p. 1220 (8th ed. 2004).

4. Clear and convincing evidence is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain." BLACK'S LAW DICTIONARY at p. 596 (8th ed. 2004).

5. The matter is an appealable agency action. The hearing was set pursuant to A.R.S. § 45-578 and is subject to the requirements of A.R.S. Title 41, Chapter 6, Article 10. *See* A.R.S. § 45-114(A) and (B).

6. ADWR and Prescott argue that the ALJ should have excluded all evidence that was not submitted to ADWR before the Draft Decision and Order was issued, but they do not provide any persuasive legal authority in support of their argument. A.R.S. § 41-1092.03(B) limits the hearing to consideration of the issues that were raised in the Objections; had the legislature intended that new evidence should also be excluded it would have included such a limitation in the statute.

7. Under A.R.S. § 41-1092.07(D) all parties have a right to present evidence and legal argument on all relevant issues and, with few exceptions, all relevant evidence is admissible.

8. ADWR and Prescott objected to certain evidence at hearing, arguing that this evidence went to issues that are beyond the scope of ADWR's authority under the statutes and rules. The ALJ accepted the evidence subject to potential weighting limitations. Because the evidence ADWR and Prescott sought to exclude relates to matters that ADWR addressed in its Decision Letter, it is relevant and was properly admitted.

9. All the witnesses presented credible testimony. The weight of each witness's testimony on any issue is, however, affected by each witness's factual knowledge and particular expertise. Some testimony called for opinions that are properly considered legal conclusions; with the exception of ADWR's interpretation of the relevant statutes and rules, such opinions can be given no appreciable weight.

STATUTORY CONSTRUCTION

10. The primary goal when construing statutes is to ascertain the legislature's intent. Statutory provisions must be considered in the context of the entire statute and consideration must be given to all of the statute's provisions to determine the legislative intent manifested by the entire act. Statutes are to be interpreted so that no clause, sentence, or word is rendered superfluous or void. *See Guzman v. Guzman*, 175 Ariz. 183, 854 P.2d 1169 (App. 1993).

11. Statutes are to be liberally construed in an effort to effect their objects and to promote justice. A.R.S. § 1-211(B). Statutes should be construed to reach a reasonable result. *See State v. McFall*, 103 Ariz. 234, 439 P.2d 805 (1968). A tribunal may not expand or extend a statute to include matters not falling within its expressed provisions. *See Phoenix v. Donofrio*, 99 Ariz. 130, 407 P.2d 91 (1965).

12. ADWR's interpretation of the Arizona Groundwater Code should be given considerable weight unless there is clear statutory guidance contrary to ADWR's interpretation. *See Arizona Water Co. v. Arizona Department of Water Resources*, 208 Ariz. 147, 91 P.3d 990 (2004).

13. Generally, the principles of construction that apply to statutes apply with equal force to administrative rules and regulations. *See Daimlerchrysler Servs. N. America v. Arizona Dep't of Revenue,* 210 Ariz. 297, 110 P.3d 1031 (App. 2005).

APPLICABLE WATER LAW

14. A.R.S. § 45-576(J) sets out the statutory requirements for a DAWS:

> For the purposes of this section, "assured water supply" means all of the following:
> 1. Sufficient groundwater, surface water or effluent of adequate quality will be continuously available to satisfy the water needs of the proposed use for at least one hundred years....
> 2. The projected groundwater use is consistent with the management plan and achievement of the management goal for the active management area.
> 3. The financial capability has been demonstrated to construct the water facilities necessary to make the supply of water available for the proposed use, including a delivery system and any storage facilities or treatment works. The director may accept evidence of the construction assurances required by section 9-463.01, 11-806.01 or 32-2181 to satisfy this requirement.

15. A.A.C. R12-15-710, Designation of Assured Water Supply, provides:

> A. A municipal provider applying for a designation of assured water supply shall submit an application on a form prescribed by the Director with the fee required by R12-15-730 and provide the following:
> 1. The applicant's current demand;
> 2. The applicant's committed demand;
> 3. The applicant's projected demand for the proposed term of the designation;
> 4. The proposed term of the designation, which shall not be less than two years;
> 5. Evidence that the criteria in subsection (E) of this Section are met; and
> 6. Any other information that the Director determines is necessary to decide whether an assured water supply exists for the municipal provider.
> B. An application for a designation shall be signed by:
> 1. If the applicant is a city or town, the city or town manager or a person employed in an equivalent position. The application shall also include a resolution of the governing body of the city or town, authorizing that person to sign the application; or
> 2. If the applicant is a private water company, the applicant's authorized officer, managing member, partner, trust officer, trustee, or other person who performs similar decision-making functions for the applicant.

C. The Director shall give public notice of an application for designation in the same manner as provided for certificates in A.R.S. § 45-578.
D. After a complete application is submitted, the Director shall review the application and associated evidence to determine:
1. The annual volume of water physically, continuously, and legally available for at least 100 years;
2. The term of the designation, which shall not be less than two years;
3. The applicant's estimated water demand;
4. The applicant's groundwater allowance; and
5. Whether the applicant has demonstrated compliance with all requirements in subsection (E) of this Section.
E. The Director shall designate the applicant as having an assured water supply if the applicant demonstrates all of the following:
1. Sufficient supplies of water are physically available to meet the applicant's estimated water demand, according to the criteria in R12-15-716;
2. Sufficient supplies of water are continuously available to meet the applicant's estimated water demand, according to the criteria in R12-15-717;
3. Sufficient supplies of water are legally available to meet the applicant's estimated water demand, according to the criteria in R12-15-718;
4. The proposed sources of water are of adequate quality, according to the criteria in R12-15-719;
5. The applicant has the financial capability to construct adequate delivery, storage, and treatment works in a timely manner according to the criteria in R12-15-720;
6. Any proposed groundwater use is consistent with the management plan in effect at the time of the application, according to the criteria in R12-15-721; and
7. Any proposed use of groundwater withdrawn within an AMA is consistent with the management goal, according to the criteria in R12-15-722.
F. The Director shall review an application for a designation of assured water supply pursuant to the licensing time-frame provisions in R12-15-401.

16. Generally, groundwater may not be transported from outside an AMA into an AMA. *See* A.R.S. § 45-551. But A.R.S. § 45-555 provides an exception under which Prescott may transport up to 14,000 AFY from the Big Chino Sub-basin to the Prescott AMA. A.R.S. § 45-555(E) provides:

> This article does not apply to the withdrawal and transportation of up to fourteen thousand acre-feet per year of groundwater by the city of Prescott, or the United States in cooperation with the city of Prescott,

from the Big Chino sub-basin of the Verde River groundwater basin if the groundwater is withdrawn and transported either:
1. In exchange for or replacement or substitution of supplies of water from the central Arizona project allocated to Indian tribes, cities, towns or private water companies in the Prescott active management area or in the Verde River groundwater basin.
2. For the purpose of directly or indirectly facilitating the settlement of the water rights claims of the Yavapai-Prescott Indian tribe and the Camp Verde Yavapai-Apache Indian community.

17. Under Arizona law, ~~surface water~~ subflow and percolating groundwater are legally distinct types of underground water. Subflow is considered part of the stream (*i.e.*, surface water) and is subject to prior appropriation. Percolating groundwater is not appropriable and may be pumped by the overlying landowner, subject to the doctrine of reasonable use and the federal reserved water rights doctrine. *See Gila IV*.

18. Water in underground tributary aquifers is not a part of the surface stream and may not be considered subflow. This is true even though given enough time, with certain exceptions, all extractions from a tributary aquifer will cause a more-or-less corresponding depletion from stream flow volume. *See Gila IV*.

19. ADWR has a statutory duty to provide technical assistance to the GSA Court. *See* A.R.S. § 45-256.

20. The judiciary is responsible for defining the limits of a subflow zone ~~and has assigned that task to~~, with technical assistance from ADWR. The Arizona Supreme Court has upheld the GSA Court's determination that the saturated floodplain Holocene alluvium is a geologic marker that will be the subflow zone in the San Pedro River watershed. ~~ADWR is required to map that zone in each area, but, where applicable, ADWR must also consider the test factors set out by the GSA Court and it may also consider any appropriate local conditions.~~ In other areas, the applicable criteria set out by the GSA Court, as approved by the *Gila IV* Court, must be considered. Any other criteria that are geologically and hydrologically appropriate for the particular location may also be considered

21. Wells inside the subflow zone are under the jurisdiction of the GSA Court, but the well owner may show that they are not taking subflow. Wells outside the subflow zone

that have a COD that extends into the subflow zone are also subject to the GSA jurisdiction. *See Gila IV*.

ISSUE 9 – PURPORTED IMPACTS ON THE VERDE RIVER

22. Appellants assert that Prescott's pumping will have an impact on the Verde River that will lead to Prescott being required to reduce its pumping. Appellants then argue that, as a consequence, Prescott has not shown that it meets the requirement to show that the water will be physically, legally, and continuously available for 100 years.

Call by a Senior Water-Rights Holder

23. Appellants have not met their burden to show by clear and convincing evidence that Prescott will be pumping subflow. Consequently, Appellants have not shown that the pumped water might be subject to a call under the prior appropriation doctrine. Appellants have not shown that ADWR must consider in the Decision and Order the effect of Prescott's pumping on surface water rights to the Verde River.

24. No subflow zone has been determined or mapped for the Verde River watershed. It is the judiciary that must determine the boundaries of the subflow zone. Consequently, the mere presence of saturated floodplain Holocene alluvium in the watershed can carry no substantial weight in this proceeding.

25. Appellants argue that Prescott might be ordered to restrict its pumping because the water might be subject to call by a holder of federal reserved water rights. Appellants' argument is based on speculation that is not supported by substantial evidence. Appellants have not shown that ADWR must consider in the Decision and Order the potential impact of Prescott's pumping on the holders of federal reserved water rights.

Endangered Species Act

26. Appellants assert that in the future Prescott's pumping may be restricted because, according to Appellants, it is likely that Prescott will be found to be in violation of the ESA.

27. Because Appellants' argument is based on speculation, Appellants have not met their burden to show that Prescott's pumping will violate the ESA.

28. Appellants have not shown that ADWR must consider in the Decision and Order the potential that Prescott's pumping might violate the ESA.

Alleged Violation of the Yavapai-Prescott Indian Tribe Settlement Act

29. The CBD Appellants argue that Prescott might be ordered to restrict its pumping because that pumping will violate the Yavapai-Prescott Indian Tribe Settlement Act. But the CBD Appellants rely on essentially the same evidence intended to show that there will be a violation of the ESA and that the pumping will deplete the flow of the Verde River.

30. The CBD Appellants have not met their burden to show that Prescott's pumping will violate the Yavapai-Prescott Indian Tribe Settlement Act.

31. The CBD Appellants have not shown that ADWR must consider in the Draft Decision and Order the possibility that Prescott's pumping might violate the Yavapai-Prescott Indian Tribe Settlement Act.

ISSUE 1 – PHYSICAL, LEGAL AND CONTINUOUS AVAILABILITY

Climate Change

32. Appellants argue that ADWR must consider the impact of climate change on Prescott's ability to pump water from the Big Chino Sub-basin.

33. Appellants have not met their burden to show that the effects of climate change will prevent Prescott from pumping the water required to meet the DAWS as set forth in the Draft Decision and Order.

34. Appellants have not shown that ADWR erred in its application of the AWS statutes and rules to the Objections related to climate change.

Other Groundwater Pumping

35. Appellants argue that because others in the Big Chino Sub-basin will also be allowed to pump and use the groundwater, Prescott has not shown that the water will be physically, legally, and continuously available.

36. ~~Appellants have not met their burden to show that the anticipated pumping by other water users actually will prevent Prescott from pumping the water required to satisfy the DAWS as set forth in the Draft Decision and Order.~~Under the AWS rules, potential pumping by future water users, other than by issued AWS determinations, is not considered when determining physical availability of groundwater. Consequently, Appellants have not shown that the water will not be physically, legally, or continuously available because others may also pump groundwater from the Big Chino Sub-basin.

37. Appellants have not shown that ADWR erred in its application of the AWS statutes and rules to the Objections related to other pumping in the Big Chino Sub-basin.

Physical Availability

38. The preponderance of the evidence shows that the water proposed to be imported into the Prescott AMA pursuant to A.R.S. § 45-555(E) will be physically available for 100 years.

39. Appellants have not shown that ADWR erred in its application of the AWS statutes and rules to the Objections related to physical availability.

Legal Availability

40. Because imported groundwater is not listed in R12-15-718~~(E)~~, Appellants argue that there is no legal basis on which Prescott can show the imported groundwater qualifies for an AWS. ADWR asserts that R12-15-718~~(E)~~ is not all-inclusive and that other rules and statutory provisions show that Appellants' argument is in error.

41. A.R.S. § 45-555(E) allows Prescott to import water from the Big Chino into the Prescott AMA. Although A.R.S. § 45-557 limits when groundwater from outside an AMA may be used for an AWS, none of those limitations apply to Prescott's Application.

42. A.A.C. R12-15-716(D)~~(2)~~ provides a rule for determining the physical availability of groundwater to be withdrawn from a basin outside an AMA and imported into an AMA. Under Appellants' argument, this rule would be superfluous.

43. The intent of the legislature was to allow imported groundwater <u>from the Big Chino Sub-basin</u> to be used as a basis for demonstrating an AWS <u>if the applicable AWS criteria are met</u>.

44. Appellants have not shown that ADWR erred in its application of the AWS statutes and rules to the Objections related to legal availability.

45. The preponderance of the evidence shows that the water proposed to be imported into the Prescott AMA pursuant to A.R.S. § 45-555(E) will be legally available for 100 years.

Continuous Availability

46. The preponderance of the evidence shows that the water proposed to be imported into the Prescott AMA pursuant to A.R.S. § 45-555(E) will be continuously available for

100 years under the applicable rule. ~~ADWR has also added a requirement that conditions the final approval of the DAWS on Prescott's submission of the AOC.~~ In addition, the draft Decision and Order provides that groundwater from the Big Chino Sub-basin will be added to Prescott's DAWS only if Prescott submits to ADWR by December 31, 2019 evidence that ADEQ has issued an AOC for a pipeline to transport the groundwater to Prescott's service area

47. Appellants have not shown that ADWR erred in its application of the AWS statutes and rules to the Objections related to continuous availability.

ISSUE 3 –FINANCIAL CAPABILITY

48. In its Draft Decision and Order, ADWR determined that Prescott has submitted the documentation required by the applicable rule and, consequently, that Prescott has demonstrated that it has the required financial capability.

49. Based on Mr. Harvey's testimony, the CBD Appellants argue that: (1) Prescott's CIP does not show that Prescott has the financial capability to construct the required infrastructure; and (2) the Decision and Order is in error because the debt-capacity calculations are not based on standard assumptions. *See* Exhibit ADWR 132A at Finding of Fact 48.

50. In light of Mr. Woodfill's testimony, Mr. Harvey's opinions show only that that there may be room for disagreement among economists and financial planners engaging in long-term planning. Consequently, Mr. Harvey's testimony is not sufficient to show that Prescott does not have the financial capacity to construct the required facilities or that ADWR erred when it concluded that the debt-capacity calculations were prepared using standard assumptions.

51. The preponderance of the evidence shows that Prescott has met the requirements of the applicable rule and that Prescott has demonstrated the financial capability to construct the water facilities required to transport the water to be imported. In addition, the draft Decision and Order provides that groundwater from the Big Chino Sub-basin will be added to Prescott's DAWS only if Prescott submits to ADWR by December 31, 2019 evidence that ADEQ has issued an AOC for a pipeline to transport the groundwater to Prescott's service area.

52. The CBD Appellants have not shown that ADWR erred in its application of the AWS statutes and rules to the Objections related to financial availability.

ISSUE 2 – COMPLIANCE WITH A.R.S. § 45-555(E)

Water to Prescott Valley

53. Appellants argue that water to be used by Prescott Valley does not qualify under A.R.S. § 45-555(E) because under that statute Prescott, and not Prescott Valley, may import the groundwater.

54. A.R.S. § 45-555(E) does not address or limit who may use water imported from Big Chino Sub-basin, nor does the statute address where that water may be used. In contrast, other provisions of A.R.S., Title 45, Chapter 2, Article 8.1 do place restrictions on the use of water imported into the AMAs. As a matter of statutory construction, this shows that the legislature did not intend to place restrictions on the use of water that Prescott imports from the Big Chino Sub-basin.

55. Appellants have not shown that ADWR erred in its determination that Prescott may deliver the imported water to Prescott Valley.

A.R.S. § 45-555(E)(1) CAP Water

Prescott's CAP Allocation – 7,127 AFY

56. ADWR's position is that only CAP water that Prescott has not yet replaced is now eligible for replacement with imported water. Prescott argues that the statute has no limits or offsets that allow ADWR to make any deductions from the relinquished volume.

57. ADWR's interpretation of the statute is appropriate. It would not make sense to conclude that the legislature intended to allow Prescott to replace its CAP water more than once. Prescott has not met its burden to show that ADWR may not apply an offset to account for CAP water that has already been replaced.

58. ADWR found that 17.35% of Prescott's CVID purchase was made using ~~money that was restricted in its use~~ proceeds from the sale of its CAP water. ~~But, b~~Because Prescott's CAP water ~~meets~~ met fully the physical availability requirements for an AWS, ADWR considered only the volume of the CVID water that ~~also meets the AWS requirements to be~~ meets the physical availability requirements for inclusion in

Prescott's DAWS as being eligible as replacement water (1,391 AFY). Consequently, ADWR determined that ~~the~~ Prescott has already replaced 241.3 AFY ~~has been replaced~~ of its CAP water (17.35% of 1,391 AFY = 241.3 AFY).

59. Appellants argue that: (1) Prescott's entire purchase from CVID should be considered as replacement water because Prescott used money from the account in which it deposited the $3.4 million; and (2) because there is no relationship between the AWS statutes and A.R.S. § 45-555(E), ADWR erred by not using the full amount of Granite Creek water.

60. Contrary to Appellants' argument, these statutes are related by virtue of the fact they are within A.R.S. Title 45, Chapter 2. Appellants present no sound basis on which to conclude that by comingling the money, Prescott "tainted" money that did not carry any restrictions on its use. Furthermore, because 100% of Prescott's CAP water met the physical availability criteria of the AWS rules, it was reasonable for ADWR to consider only that portion of the Granite Creek water purchased from CVID that meets the physical availability criteria as being eligible as replacement water

61. Appellants do not present a sufficient basis on which to conclude that ADWR's interpretation of the statute is in error.

62. Prescott has not met its burden to show that ADWR erred in its determination that 241.3 AFY of Prescott's CAP allocation was previously replaced and is consequently not now eligible for replacement with imported water.

63. Appellants have not shown that ADWR erred in its determination that A.R.S. § 45-555(E)(1) allows Prescott to import 6,885.7 AFY as replacement water for its CAP allocation.

The Tribe's CAP Allocation – 500 AFY

64. ADWR determined that Prescott was not entitled to replacement water for the Tribe's 500 AFY because there was no agreement between Prescott and the Tribe for Prescott to replace the Tribe's CAP allocation in the AMA.

65. Prescott argues that under a plain reading of subsection (E)(1) it is entitled to replace any CAP allocation that has been relinquished and that ADWR is adding a limitation that is not present in the statute.

~~66.Although ADWR is entitled to deference in interpreting the statute, that deference does not extend to adding a limitation or requirement that is not in the statute. In this case, ADWR is effectively adding to the statute a requirement that any replacement is contingent on an agreement between Prescott and the original right-holder. If the legislature had intended to condition Prescott's right to replacement water on the existence of an agreement with the original right-holder, the legislature would have included such a restriction in the statute. As a matter of statutory construction, ADWR's position cannot be sustained.~~

~~67.Appellants' argument that Prescott may not replace the Tribe's CAP allocation because the Tribe spent its sale-proceeds, also requires adding a limitation that is not in the statute (*i.e.*, it requires the statute to read that Prescott can import replacement water unless the original right-holder spent the money it received for the sale of that water).~~

~~68.Prescott has met its burden to show that it is authorized to import 500 AFY from the Big Chino Sub-basin to replace the Tribe's CAP allocation.~~

66. The relevant language of A.R.S. § 45-555(E)(1) authorizes Prescott to import groundwater from the Big Chino Sub-basin "[i]n exchange for or replacement or substitution of supplies of water from the central Arizona project allocated to Indian tribes … in the Prescott active management area or in the Verde River groundwater basin." This language does not give Prescott an absolute right to import groundwater from the Big Chino Sub-basin in an amount equal to the volume of CAP water allocated to an Indian tribe in the Prescott AMA or the Verde River groundwater basin. Instead, Prescott may import groundwater under this provision only if the groundwater is imported "in exchange for or replacement or substitution of" the Indian tribe's CAP allocation.

67. There is no evidence in the record that Prescott had any right to use the Tribe's CAP allocation or that it could have leased the CAP allocation had the Tribe not sold it. Nor is there any evidence that Prescott had an agreement with the Tribe to replace the Tribe's CAP allocation. In fact, the Tribe waived all state and federal water rights as part of the Settlement Agreement. Furthermore, although Prescott agreed to provide water

service to the Tribe under the Settlement Agreement, the Director has determined that Prescott has the right under A.R.S. § 45-555(E)(2) to import groundwater from the Big Chino Sub-basin in an amount equal to the amount of water it serves to the Tribe. For all of these reasons, it cannot reasonably be said that Prescott's importation of 500 AFY of groundwater from the Big Chino sub-basin would be "in exchange for or replacement or substitution of" the Tribe's CAP allocation.

68. Prescott has not met its burden to show that it is authorized to import 500 AFY from the Big Chino Sub-basin to replace the Tribe's CAP allocation. Consequently, this volume should not be included in Prescott's DAWS.

A.R.S. § 45-555(E)(2) Water to Facilitate Settlement of the Tribe's Claims

Type 2 Extinguishment Credits – 950.7 AFY

69. The preponderance of the evidence shows that Prescott's pledge of its Type 2 rights helped facilitate settlement of the Tribe's claims.

70. Because Prescott gave up its right to extinguish the Type 2 rights, ADWR determined that Prescott should be allowed to replace a volume of water equivalent to the AWS-credit that the Type 2 rights would have provided to Prescott on extinguishment. ADWR's conclusion is not an unreasonable reading of subsection (E)(2).

71. Appellants' argument that ADWR should not have included this water because the Type 2 rights were not extinguished is not a sufficient basis on which to conclude that ADWR's determination was made in error.

72. Appellants' argument that these extinguishment credits are a double counting of the 231 AFY under Prescott's obligation to deliver water to the Tribe is not persuasive because the Type 2 rights secure more than just the delivery obligation. Additionally, Prescott has not yet served water to the Tribe pursuant to the Type 2 right and it is not known whether it ever will be required to do so.

73. Appellants have not shown that ADWR erred when it determined that Prescott may import from Big Chino Sub-basin 950.7 AFY for the Type 2 rights.

Prescott's Water Service to the Tribe – 231 AFY

74. In its Draft Decision and Order, ADWR determined that Prescott's agreement to provide the Tribe water service in perpetuity and to provide the Tribe with first priority to 550 AFY facilitated the settlement even though Prescott had existing obligations to the Tribe. Consequently, ADWR determined that the delivery obligation meets the requirement of subsection (E)(2).

75. Mr. Ogo negotiated the settlement for the Tribe and, consequently, his opinion that the new obligations were important to the Tribe carries more weight than does Mr. Sommers' opinion that these concessions were not sufficient to meet the statute. The preponderance of the evidence shows that Prescott's commitments to the Tribe facilitated the settlement.

76. Appellants have not shown that ADWR erred when it determined that Prescott may import from Big Chino Sub-basin 231 AFY for water that will be delivered to the Tribe under the terms of the Settlement Agreement.

Water from Granite Creek – 643 AFY

77. The preponderance of the evidence shows that it was CVID that provided the Tribe with the 643 AFY of Granite Creek water. Essentially, ADWR's position is that replacement water under subsection (E)(2) is limited to contributions by Prescott. Prescott argues that because it recognized these rights in the Settlement Agreement, it qualifies to import that volume of water.

78. The statute supports ADWR's position. Because Prescott benefits from imported water under (E)(2), the reasonable reading of the statute is that for Prescott to qualify for imported water, Prescott, and not CVID, must have provided something to the Tribe to facilitate the settlement. Merely acknowledging the water rights provided by CVID is not sufficient to meet the intent of the statute.

79. Prescott has not shown that ADWR erred when it determined that Prescott may not import from Big Chino Sub-basin 643 AFY for the Granite Creek water.

CAP Water under A.R.S. § 45-555(E)(2)

80. Prescott argues that the CAP relinquishments facilitated the settlement by causing Scottsdale and others to support the settlement. Consequently, according to Prescott, the CAP relinquishments also meet the requirements of subsection (E)(2).

81. Prescott's interpretation of the statute is not persuasive. Because Prescott benefits from imported water under (E)(2), the reasonable reading of the statute is that Prescott must have provided something to the Tribe to facilitate the settlement. The sale of CAP water to Scottsdale is not sufficient to meet the intent of the statute.

82. Prescott's entire CAP allocation of 7,127 AFY has been accounted for under A.R.S. § 45-555(E)(1) or replaced, which provides another basis on which Prescott's argument fails for that water.

83. Prescott has not shown that A.R.S. § 45-555(E)(2) allows it to import water for the relinquished CAP allocations.

ISSUE 4 – CALCULATION FOR ASSURED WATER SUPPLY PURPOSES

84. Appellants argue that the water to be delivered to Prescott Valley does not meet the AWS rules.

85. ADWR found that Prescott Valley is a "customer reasonably projected to be added" under the definition of "projected demand" found at A.A.C. R12-15-701(57). Appellants argue that this was an error because Prescott Valley is not in Prescott's service area.

86. A.A.C. R12-15-701(57) defines "Projected demand" as

> [T]he 100-year water demand at build-out, not including committed or current demand, of customers reasonably projected to be added and plats reasonably projected to be approved within the designated provider's service area and reasonably anticipated expansions of the designated provider's service area.

87. ADWR's determination that the water to be used by Prescott Valley meets the definition of projected demand is not an unreasonable reading of the rule. Additionally, the IGA between Prescott and Prescott Valley entitles Prescott Valley to 45.9% of any groundwater imported by Prescott from the Big Chino Sub-basin during a year, after subtracting the amount of water delivered to the Tribe during the year. Consequently, in order for Prescott to receive its full share of the water, it must import the entire volume allowed under A.R.S. § 45-555(E). This means that the entire volume must be recognized in Prescott's DAWS in order to ensure that Prescott's share of the water is taken into account by other AWS applicants. Including Prescott Valley's share of the

water in Prescott's DAWS does not mean that the water is considered an AWS for new subdivisions within Prescott Valley. The draft Decision and Order expressly provides that inclusion of the water in Prescott's DAWS does not fulfill any requirement for a new subdivision in Prescott Valley to obtain a certificate of AWS or a commitment of service from a designated provider. Any entity wishing to use the water to demonstrate an AWS in Prescott Valley must apply to ADWR for a certificate of AWS or DAWS and demonstrate that the water satisfies all of the applicable AWS requirements. For all of these reasons, ADWR did not err in including Prescott Valley's share of the water in the draft Decision and Order.

88. ADWR found that Prescott is authorized to import from the Big Chino Sub-basin 8,067.4 AFY and that all of that water meets the AWS requirements. Appellants have not shown that ADWR's determination that this 8,067.4 AFY meets the AWS requirements was made in error.

89. If the requested water does not meet the requirements of A.R.S. § 45-555(E), it necessarily does not meet the AWS requirements. Consequently, in all cases where ADWR determined that Prescott's request did not comply with A.R.S. § 45-555(E), ADWR found that Prescott did not meet the AWS requirements. ~~With the exception of the 500 AFY for the Tribe's allocation ADWR's~~ This determination was correct.

~~90. Because ADWR erred when it concluded that Prescott was not entitled to replace the Tribe's CAP allocation and because the preponderance of the evidence shows that this 500 AFY would otherwise meet the AWS requirements, the Draft Decision and Order should be amended to include the designation of an additional 500 AFY.~~

ATTACHMENT 2

DEPARTMENT OF WATER RESOURCES

BEFORE THE DIRECTOR

IN THE MATTER OF THE APPLICATION OF THE CITY OF PRESCOTT FOR A MODIFICATION OF ITS DESIGNATION AS HAVING AN ASSURED WATER SUPPLY	)))))	**AWS No. 2008-006** **DECISION AND ORDER No. 86-401501.0001**

I. INTRODUCTION

On October 12, 2007, the Arizona Department of Water Resources ("Department") received an application from the City of Prescott ("Prescott"), requesting that the Department modify Prescott's designation of assured water supply pursuant to A.R.S. § 45-576, *et seq.*, and A.A.C. R12-15-701, *et seq*. On August 21 and August 28, 2008, the Department gave public notice pursuant to A.R.S. § 45-578. Multiple objections were filed with the Department.

After receiving Prescott's request to modify its designation of assured water supply, the Department reviewed relevant information regarding the application, including: 1) the hydrologic information submitted by Prescott; 2) information regarding consistency with the management goal of the Prescott Active Management Area ("AMA"); 3) information regarding Prescott's financial capability to construct the necessary delivery system, treatment works and storage facilities; and 4) the issues raised by the objections to the application. Based on that information, the Department makes the following Findings of Fact, Conclusions of Law, and Order of Designation and Conditions of Designation:

II. FINDINGS OF FACT

A. General

1. Prescott is a city incorporated in accordance with Article XIII of the Arizona Constitution.
2. Prescott is located within the Prescott AMA.
3. Prescott currently serves water through its municipal distribution system to its customers.
4. Prescott has the legal authority to deliver water to its customers located within its service area.

5. Prescott is currently designated as having an assured water supply pursuant to Decision and Order AWS 2005-004, issued on September 16, 2005.

B. Water Demands

6. Prescott reported that its current demand as of calendar year 2007 is 8,327.1 acre-feet per year ("current demand"). The current demand includes deliveries to the Yavapai-Prescott Indian Tribe ("Tribe") in 2007.

7. Prescott's committed demand as of calendar year 2007 is 2,409.44 acre-feet per year ("committed demand"). The committed demand includes the annual average of the volume of water that Prescott is obligated to deliver to lands within the Chino Valley Irrigation District ("CVID").

8. Prescott's projected demand in 2023 is 5,660.46 acre-feet per year ("2023 projected demand"). The 2023 projected demand does not include the current demand or the committed demand, or any volume of water that Prescott would be obligated to deliver to the Town of Prescott Valley ("Prescott Valley") for use outside Prescott's service area. The 2023 projected demand does include the demand at build-out of plats reasonably projected to be approved through calendar year 2023.

9. Prescott's annual estimated water demand in 2023, which is the sum of its current demand, committed demand and 2023 projected demand, is 16,397 acre-feet per year ("2023 annual estimated water demand").

10. Prescott's projected demand in 2027 is 9.938.9 acre-feet per year ("2027 projected demand"). The 2027 projected demand does not include the current demand or the committed demand. The 2027 projected demand does include the demand at build-out of plats reasonably projected to be approved through calendar year 2027, the volume of water that Prescott is obligated to deliver to Prescott Valley for use outside Prescott's service area, and the projected demand of the Tribe.

11. Prescott's annual estimated water demand in 2027, which is the sum of its current demand, committed demand and 2027 projected demand, is 20,675.44 acre-feet per year ("2027 annual estimated water demand").

C. Groundwater Withdrawn in the Prescott AMA: Physical, Continuous and Legal Availability, Consistency with the Management Goal, and Consistency with the Management Plan

12. Prescott has the right to withdraw groundwater within its service area in the Prescott AMA and deliver the groundwater to its customers pursuant to Service Area Right No. 56-003017.0000.

13. Prescott has demonstrated that after withdrawing 11,200 acre-feet per year of groundwater or stored water recovered outside the area of impact, from within its service area for 100 years, the depth-to-static water level within its service area is not expected to exceed 1,000 feet below land surface.

14. Prescott currently has wells within its service area of sufficient capacity to withdraw a total of 13,229.63 acre-feet per year of groundwater.

15. As of the date of the application, Prescott pledged 9,448.95 acre-feet of extinguishment credits, or an average of 94.49 acre-feet per year for 100 years.

16. Pursuant to A.A.C. R12-15-726(A), Prescott's groundwater allowance is 9,371.53 acre-feet per year for 100 years. The formula used to calculate this number is included in Attachment A, attached to this Decision and Order.

17. Pursuant to A.A.C. R12-15-722(A), Prescott may withdraw 9,466.02 acre-feet of groundwater over the next 100 years, consistent with the achievement of the management goal of the Prescott AMA.

18. For purposes of increasing the groundwater allowance in Finding of Fact 16, a total of 3,527 lots ("remaining lots") were included on preliminary plats approved by Prescott on or before August 21, 1998, but final plats associated with those preliminary plats have not yet been approved by Prescott and recorded, or have not yet been reviewed by the Department. The remaining lots are listed, by subdivision, in Attachment B attached to this Decision and Order.

19. Prescott is currently regulated as a large municipal provider under the Municipal Conservation Program in the Third Management Plan for the Prescott AMA ("Management Plan"). As of the date of this order, Prescott has not been found to be out of compliance with the Management Plan.

D. Recharge and Recovery

20. Prescott holds an Underground Storage Facility Permit (Permit No. 71-519567.0000) and a Water Storage Permit (Permit No. 73-528737.0000), which allow storage of a maximum volume of 6,721 acre-feet per year of effluent and surface water.

21. Prescott holds Recovery Well Permit No. 74-569302.0000, which allows recovery of 6,700 acre-feet per year outside the area of impact of storage.

22. Prescott holds Recovery Well Permit No. 74-561500.0000, which allows recovery of 1,613 acre-feet per year within the area of impact of storage.

23. Prescott has a pending application for a recovery well permit for Well No. 55-212087, which is located within the area of impact of storage. Prescott is seeking a permit to recover up to 1,694 acre-feet per year.

E. Surface Water: Physical, Continuous and Legal Availability

24. Prescott has demonstrated the physical availability of 1,391 acre-feet per year of surface water for a minimum of one hundred years for underground storage and recovery within the area of impact.

25. The surface water is legally available to Prescott pursuant to Statement of Claimant Nos. 36-40234 and 36-102689, Certificates of Water Right Nos. 593, 594 and 1674, and the Director's Findings of Fact, Conclusions of Law, Decision and Order No. ST 98-001, dated November 17, 1998, as supplemented by the Director's Supplemental Findings of Fact, Conclusions of Law, Decision and Order No. ST 98-001, dated March 28, 2008.

26. Prescott has provided a drought response plan and a back-up supply of groundwater pursuant to A.A.C. R12-15-717(C).

F. Effluent: Physical, Continuous and Legal Availability

27. Prescott holds 16,281.66 acre-feet of existing long-term storage credits for stored effluent, averaging approximately 162.82 acre-feet per year over a 100-year period.

28. Prescott's wastewater treatment plants currently have the capacity to treat 9,353.19 acre-feet per year of effluent for non-potable uses or for storage and recovery.

29. Based on an evaluation of the current, metered production of effluent, Prescott is projected to produce 5,946.49 acre-feet per year of effluent in 2023.

30. Based on an evaluation of the current, metered production of effluent, Prescott is projected to produce 6,131.65 acre-feet per year of effluent in 2027.

31. Prescott will treat and directly deliver 1,796 acre-feet per year of effluent for non-potable use.

32. Prescott is obligated to transfer long-term storage credits to CVID for irrigation uses pursuant to an intergovernmental agreement dated March 27, 1998. CVID may request variable amounts per year, but is limited to a total quantity, which, as of the end of 2007, is 20,444 acre-feet. Averaging this remaining obligation over a 100-year period results in a reduction of long-term storage credits available to Prescott in the amount of 204.44 acre-feet per year.

33. Prescott will store and recover outside the area of impact of storage up to 1,733.98 acre-feet per year of effluent for potable use.

34. In 2023, Prescott will store and recover within the area of impact of storage up to 1,916 acre-feet per year of effluent for potable use.

35. In 2027, Prescott will store and recover within the area of impact of storage up to 1,916 acre-feet per year of effluent for potable use.

G. Groundwater Transported From the Big Chino Sub-basin: Physical, Continuous and Legal Availability

36. Pursuant to A.R.S. § 45-555(E), Prescott has the right to withdraw groundwater from the Big Chino sub-basin and transport it to the Prescott AMA.

37. Based in part on Prescott's projection that it will deliver 231 acre-feet to the Tribe in 2027, for purposes of this Decision and Order, the Department determines that in 2027, Prescott will be authorized to withdraw up to 8,067.4 acre-feet per year of groundwater from the Big Chino sub-basin and transport it to the Prescott AMA pursuant to A.R.S. § 45-555(E) ("transportation water"). The calculations for this volume are shown in Attachment C to this Decision and Order.

38. This Decision and Order does not limit Prescott's right to transport more than 8,067.4 acre-feet per year of groundwater from the Big Chino sub-basin to the Prescott AMA pursuant to A.R.S. § 45-555(E) in a year in which Prescott serves more than 231 acre-feet to the Tribe. The volume that Prescott is authorized to transport in a particular year could

be more or less than 8,067.4 acre-feet per year, depending on the volume of water that Prescott actually delivers to the Tribe in that year.

39. Prescott's application states that after subtracting the amount of water delivered to the Tribe each year, 45.9 % of the remaining transportation water must be available for delivery to Prescott Valley pursuant to an agreement between those parties.

40. Based on Prescott's projection of deliveries to the Tribe in 2027 in the amount of 231 acre-feet, the maximum annual volume of transportation water that Prescott will be obligated to deliver to Prescott Valley is 3,597 acre-feet per year. This volume is included in Prescott's 2027 projected demand. Inclusion of this volume does not fulfill any requirement to obtain a certificate of assured water supply or a commitment to provide water service from a designated provider for a new subdivision located in Prescott Valley.

41. Prescott has demonstrated that after withdrawing 17,768 acre-feet per year of groundwater for 100 years from wells located on the Big Chino Ranch in the Big Chino sub-basin, the depth-to-static water level at the well sites is not expected to exceed 1,000 feet below land surface.

42. Prescott's Capital Improvement Plan includes funding for construction of wells in the Big Chino sub-basin of sufficient capacity to withdraw more than 8,067.4 acre-feet per year of groundwater.

43. The transportation water will be considered continuously available to Prescott when a pipeline to transport the groundwater to Prescott's service area has been constructed and the Arizona Department of Environmental Quality ("ADEQ") has issued an Approval of Construction pursuant to A.A.C. R18-5-507 ("AOC") for the pipeline.

44. Prescott has demonstrated that 8,067.4 acre-feet per year of transportation water will be physically, continuously and legally available when ADEQ issues an AOC.

H. Water Quality

45. Prescott will be regulated by ADEQ as a public water system, pursuant to A.R.S. §§ 49-351, *et seq.*

I. Financial Capability

46. Prescott has constructed the delivery system and storage facilities necessary to satisfy its annual estimated water demand for calendar year 2023.

47. Prescott has included in its Capital Improvement Plan for fiscal years 2010 through 2014 $142.6 million for construction of the pipeline and other infrastructure to withdraw groundwater from the Big Chino sub-basin and transport it to the Prescott AMA. Prescott's chief financial officer has certified that finances will be available to implement that portion of the Plan.

48. The water system bond capacity spreadsheet provided by RBC Capital Markets to Mr. Mark Woodfill, Budget Finance Director for Prescott, indicates the City has remaining debt capacity for the water enterprise system of approximately $175 million. This estimated capacity is based on standard assumptions with respect to interest rates, loan term and credit requirements.

III. CONCLUSIONS OF LAW

Having reviewed the Findings of Fact, the Department makes the following Conclusions of Law:

1. Prescott has demonstrated that without the transportation water, 9,466.02 acre-feet per year of groundwater from the Prescott AMA, 1,391 acre-feet per year of surface water to be stored and recovered within the area of impact, 1,733.98 acre-feet per year of effluent to be stored and recovered outside the area of impact, 1,916 acre-feet per year of effluent to be stored and recovered within the area of impact, 1,796 acre-feet per year of effluent to be treated and directly delivered for non-potable use, and 204.44 acre-feet per year of long-term storage credits to be transferred to CVID will be physically available, continuously available and legally available for at least 100 years and will be consistent with the management goal of the Prescott AMA. *See* A.A.C. R12-15-716; R12-15-717; R12-15-718; R12-15-722. This volume, 16,507.44 acre-feet per year, is sufficient to meet the 2023 annual estimated water demand of 16,397 acre-feet per year. *See* Attachment D to this Decision and Order.

2. Prescott has demonstrated that with the transportation water, 9,466.02 acre-feet per year of groundwater from the Prescott AMA, 1,391 acre-feet per year of surface water to be

stored and recovered within the area of impact, 1,733.98 acre-feet per year of effluent to be stored and recovered outside the area of impact, 1,916 acre-feet per year of effluent to be stored and recovered within the area of impact, 1,796 acre-feet per year of effluent to be treated and directly delivered for non-potable use, 204.44 acre-feet per year of long-term storage credits to be transferred to CVID, and 8,067.4 acre-feet per year of groundwater to be withdrawn from the Big Chino sub-basin and transported to the Prescott AMA will be physically available, continuously available and legally available for at least 100 years and will be consistent with the management goal of the Prescott AMA. *See* A.A.C. R12-15-716; R12-15-717; R12-15-718; R12-15-722. This volume, 24,574.84 acre-feet per year, is sufficient to meet the 2027 annual estimated water demand of 20,675.44 acre-feet per year. *See* Attachment D to this Decision and Order

3. For purposes of A.A.C. R12-15-716(B)(3)(c)(ii), Prescott's annual estimated water demand that will be met with groundwater from the Prescott AMA is 11,200 acre-feet per year and Prescott's annual estimated water demand that will be met with groundwater from the Big Chino sub-basin is 8,067.4 acre-feet per year.

4. In accordance with A.A.C. R12-15-721, Prescott meets the standard established for determining consistency with the Management Plan for the Prescott AMA.

5. The water supply served by Prescott will be of adequate quality, pursuant to A.A.C. R12-15-719.

6. Prescott has satisfied the financial capability criteria in A.A.C. R12-15-720.

7. Prescott has satisfied all requirements for a designation of assured water supply.

8. The groundwater allowance set forth in Finding of Fact No. 16 of this Decision and Order may increase following the recording of a final plat for each of the subdivisions listed in Attachment B to this Decision and Order, subject to Condition 8 of this Decision and Order. The groundwater allowance will increase in accordance with Formula 1 in Attachment E to this Decision and Order. However, an increase in groundwater allowance does not affect the volume or term of this designation.

9. The groundwater allowance set forth in Finding of Fact No. 16 of this Decision and Order may increase if any residential groundwater use and associated non-residential use in existence on August 21, 1998, is replaced by permanent groundwater service by Prescott.

The groundwater allowance will increase in accordance with Formula 2 in Attachment E to this Decision and Order. However, an increase in groundwater allowance does not affect the volume or term of this designation.

IV. ORDER OF DESIGNATION AND CONDITIONS OF DESIGNATION

Having reviewed the Findings of Fact and Conclusions of Law, the Director hereby issues this Decision and Order designating Prescott as having an assured water supply, subject to the following conditions:

1. The Director reserves the right under A.A.C. R12-15-711(C) to periodically review and modify the designation as conditions warrant.
2. Pursuant to A.A.C. R-12-15-711(F), the Director may revoke this designation if the findings of fact or the conclusions of law upon which the designation is based change or are invalid, or if an assured water supply no longer exists.
3. The Director's determination that an assured water supply exists for Prescott is based on its review of the water supplies pledged by Prescott.
4. If Prescott does not submit to the Department on or before December 31, 2019, evidence that ADEQ has issued an AOC for the pipeline, Prescott shall submit an application to modify this decision and order designating Prescott as having an assured water supply when the sum of Prescott's current demand, committed demand and two-year projected demand exceeds 16,397 acre-feet per year, or by December 31, 2021, whichever is earlier.
5. If Prescott submits to the Department on or before December 31, 2019, evidence that ADEQ has issued an AOC for the pipeline, Prescott shall submit an application to modify this decision and order designating Prescott as having an assured water supply when the sum of Prescott's current demand, committed demand and two-year projected demand exceeds 20,675.44 acre-feet per year, or by December 31, 2025, whichever is earlier.
6. Pursuant to A.A.C. R12-15-719, Prescott shall satisfy any state water quality requirements established for its proposed use after the date of this designation.
7. Prescott shall annually provide to the Department the following information in the manner prescribed in A.A.C. R12-15-711(A):

a. An estimate of the demand of platted, undeveloped lots located in Prescott's service area.

b. An estimate of the demand at build-out of customers with which Prescott has entered into a notice of intent to serve agreement in the previous calendar year.

c. A report regarding Prescott's compliance with water quality requirements.

d. The depth-to-static water level of all wells from which Prescott withdrew water during the previous calendar year.

e. Any other information requested by the Director to determine whether Prescott is continuing to meet all the requirements necessary to maintain this designation of assured water supply.

f. If Prescott submits to the Department on or before December 31, 2019, evidence that ADEQ has issued an AOC for the pipeline, Prescott shall also include the volume of transportation water actually delivered to Prescott Valley in the previous year.

g. If Prescott submits to the Department on or before December 31, 2019, evidence that ADEQ has issued an AOC for the pipeline, Prescott shall also include in its committed demand 3,597 acre-feet per year, less any volume of transportation water actually delivered to Prescott Valley in the previous year.

8. To increase the groundwater allowance in accordance with Conclusion of Law No. 8 of this Decision and Order, the following shall apply:

a. Prescott shall submit the following information to the Department for each subdivision listed in Attachment B for which a final plat has been approved by Prescott:

i. A request to increase the groundwater allowance and reference to the subdivision listed in Attachment B for which the request is made.

ii. A copy of the preliminary plat approved for the subdivision. The preliminary plat must have been approved prior to August 21, 1998.

iii. A copy of the approved, recorded final plat of the subdivision.

iv. A copy of the standard report of the Prescott Community Development Department to the Prescott City Council on the subdivision explaining any changes between the preliminary plat and the final plat, explaining why

the plat is in substantial conformance with the preliminary plat and finding that the original plat was feasible to develop.

v. A calculation of the difference in projected water use, including groundwater use, between the preliminary plat and the final, recorded plat. The information used in making the calculation shall also be submitted, including, but not limited to, the landscaping plans for the open areas of the subdivision, a copy of any proposed deed restrictions or covenants relating to water use at the subdivision and a projection of the nature and type of any commercial properties included in the subdivision.

b. The Director shall increase Prescott's groundwater allowance in accordance with Formula 1 on Attachment E if the Director finds that all of the following apply:

i. Prescott has found that the final plat for the subdivision is in substantial conformance with the preliminary plat approved by Prescott on or before August 21, 1998.

ii. The total projected water use, including groundwater use, for the subdivision, based on the final plat, is equal to or less than the projected water use based on the approved preliminary plat.

iii. The total number of residential lots of the final plat is equal to or less than the total number of residential lots of the approved preliminary plat, or if the plat is part of a "master planned community," as defined by A.R.S. § 32-2101, the total number of residential lots of the final plats within the master planned community is equal to or less than the total number of residential lots of the approved preliminary plats within the master planned community.

c. Condition 8(b)(i) of this Decision and Order shall be evaluated in accordance with the current policy of the City of Prescott as expressed in Resolution No. 3213, adopted November 23, 1999. If at any time, the City of Prescott alters the policy expressed in Resolution No. 3213 through amendment, repeal, or adoption of any other policy, ordinance, regulation or enactment, the Department may modify or revoke this Decision and Order.

d. Within 180 days of receiving the request and information specified in Condition 8(a) of this Decision and Order, the Director shall notify Prescott whether the criteria of Condition 8(b) of this Decision and Order have been met, whether the groundwater allowance will be increased and the volume of the increase. If the request is approved, the Director shall add the volume to Prescott's groundwater allowance. However, an increase in the groundwater allowance does not affect the volume or term of this designation.

9. To increase the groundwater allowance in accordance with Conclusion of Law No. 9 of this Decision and Order, Prescott shall submit evidence of the number of housing units receiving the replacement water service, evidence that the housing units were receiving water service from a source other than Prescott as of August 21, 1998, and evidence of the permanent replacement groundwater service by Prescott after August 21, 1998. At such time as the Director determines that the requirements of Conclusion of Law No. 9 have been met, the Director shall add the volume to Prescott's groundwater allowance. However, an increase in the groundwater allowance does not affect the volume or term of this designation.

IT IS HEREBY ORDERED THAT THE CITY OF PRESCOTT BE DESIGNATED AS HAVING AN ASSURED WATER SUPPLY UNTIL DECEMBER 31, 2023.

IF THE CITY OF PRESCOTT SUBMITS TO THE DEPARTMENT EVIDENCE OF AN APPROVAL OF CONSTRUCTION FROM THE ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY FOR A PIPELINE TO TRANSPORT GROUNDWATER FROM THE BIG CHINO SUB-BASIN TO THE PRESCOTT AMA ON OR BEFORE DECEMBER 31, 2019, THE CITY OF PRESCOTT SHALL BE DESIGNATED AS HAVING AN ASSURED WATER SUPPLY UNTIL DECEMBER 31, 2027.

DATED this ___ day of _____, 200__

_____
Herbert R. Guenther, Director
Arizona Department of Water Resources

A copy of the foregoing **Decision and Order** mailed by certified mail this ___ day of _____, 200_, to:

Steve Norwood, City Manager
City of Prescott
P.O. Box 2059
Prescott, AZ 86302

Certified Mail No. _____

A copy of the foregoing **Decision and Order** mailed by first class mail this ___ day of _____, 200_, to:

Rita P. Maguire
Michael J. Pearce
Maguire & Pearce, P.L.L.C.
2999 N. 44th St., Suite 630
Phoenix, AZ 85018

Arizona's Real Estate Commissioner
Arizona Department of Real Estate
2910 N. 44th St., Suite 100
Phoenix, AZ 85018

Ms. Gerry Wildeman, Area Director
Prescott Active Management Area Office
2200 East Hillsdale Road
Prescott, Arizona 86301-4941

By: _____

Attachment A: Calculation of Groundwater Allowance

R12-15-726(A). Prescott AMA Calculation of Groundwater Allowance and Extinguishment Credits

The Director shall calculate the groundwater allowance for a certificate or designation in the Prescott AMA as follows:

1. [Not selected by Prescott]
2. If the application is for a designation of assured water supply:

a. Except as provided in subsections (A)(3) and (A)(5), if the applicant was in existence as of January 12, 1999, and the application is filed before calendar year 2026, the Director shall:

i. Multiply by 100 the largest volume of groundwater determined by the Director to have been withdrawn by the applicant from within the Prescott AMA for use within the applicant's service area in any calendar year from 1995 through 1998, consistent with the municipal conservation requirements applicable under the second management plan for the Prescott active management area:

1997 Annual Report shows 6,534.7 withdrawn minus deliveries outside the service area of 26.0 AF yielding a value of 6,508.7. Rounded to 6,509.

6,509 * 100 = **650,900**

ii.-v. This portion of the calculation was replaced with the calculation in (A)(3). See below (shaded).

---

3. For the purpose of determining the groundwater allowance under subsection (A)(2)(a), at the request of the applicant, the Director shall replace the volume of groundwater calculated in subsection (A)(2)(a)(ii) through (v) with the amount of groundwater necessary for the applicant to serve the residential lots described in subsection (A)(4):

a. To compute this amount of groundwater, the Director shall:

i. Determine the average dwelling occupancy within the applicant's service area and multiply that average occupancy by an amount of groundwater, calculated by multiplying 150 gallons per capita per day by 365 days; and

2.15 persons per dwelling unit (PPDU) based on 2005 D&O
2.15 * 150 * 365 = 117,712.5 gals per dwelling unit (DU)

ii. Multiply the product in subsection (A)(3)(a)(i) by the number of residential lots described in subsection (A)(4), and then multiply that product by 100.

b. The Director shall not include the amount computed in subsection (A)(3)(a) within the amount of groundwater that the applicant may use under subsection (A)(2)(a) until a final plat for the lots has been recorded.

117,713 * 7,924 / 325,851 * 100 = **286,253**

vi. If any residential groundwater uses, including residential groundwater uses served by any exempt well, in existence on August 21, 1998, have been replaced by permanent water service from the applicant after August 21, 1998, multiply one-half acre-foot of groundwater by the number of housing units receiving the service and then multiply that product by 100;

Per discussions with Prescott and per application, this volume is **0 AF**.

vii. Determine the volume of groundwater withdrawn by the applicant from within the Prescott active management area during the period beginning January 1, 1999 and ending December 31 of the calendar year before the date of the application;

Year	Groundwater Withdrawn (AF)
1999	6704
2000	6642
2001	6808
2002	8214
2003	7009
2004	7236
2005	6337
2006	7979
Total	**56,929**

viii. This portion of the calculation was replaced with the calculation in (A)(5). See below (shaded).

5. For the purpose of determining the groundwater allowance under subsection (A)(2)(a), if the applicant makes the request described in subsection (A)(3), the Director shall replace the volume of groundwater calculated in subsection (A)(2)(a)(viii) with an amount of groundwater calculated as follows. The Director shall:
a. Determine the number of calendar years in the period beginning with 1999 and ending with the calendar year before the date of application and multiply that number of years by the largest volume of groundwater determined by the Director to have been withdrawn by the applicant from within the Prescott active management area for use within the applicant's service area in any calendar year from

1995 through 1998, consistent with the municipal conservation requirements applicable under the second management plan for the Prescott active management area;

Number of Calendar years = 8
1997 Annual Report Amount = 6,509
6,509 * 8 = **52,072 AF**

b. Determine the average dwelling occupancy within the applicant's service area and multiply that average dwelling occupancy by an amount of groundwater calculated by multiplying 150 gallons per capita per day by 365 days;

2.15 PPDU based on 2005 D&O
2.15 * 150 * 365 = **117,712.5 gals per DU**

c. For each year in the period beginning with 1999 and ending with the calendar year before the date of application, determine the number of the residential lots that meet the criteria in subsection (A)(4) and were served water by the applicant as of July 1 of the relevant year and add the number of these residential lots determined for each year;

This number is cumulative.

1999	345 * 8 = 2,760	2003	589 * 4 = 2,356
2000	438 * 7 = 3,066	2004	536 * 3 = 1,608
2001	430 * 6 = 2,580	2005	491 * 2 = 982
2002	580 * 5 = 2,900	2006	404 * 1 = 404
		TOTAL	**16,656**

d. Multiply the volume of groundwater calculated in subsection (A)(5)(b) by the number of residential lots in subsection (A)(5)(c); and

With corrected lot number is
16,656 du * 117,713 gals / DU / 325,851
= 6,017 AF

e. Add the volumes of groundwater from subsections (A)(5)(a) and (A)(5)(d).

52,072 + 6,017 = **58,089 AF**

ix. Subtract from the volume calculated in subsection (A)(2)(a)(vii) the volume calculated in subsection (A)(2)(a)(viii). The volume calculated in this subsection shall not be less than zero, and;

56,929 - 58,089 = -1,160 = **0**

x. Add the volumes calculated in subsections (A)(2)(a)(i), (A)(2)(a)(v), and (A)(2)(a)(vi), and then subtract from the sum the volume calculated in subsection (A)(2)(a)(ix).

650,900 + 286,253 + 0 - 0 = **937,153**

The final groundwater allowance = **937,153 acre-feet** or **9,371.53 acre-feet per year for 100 years**.

Attachment B: Subdivisions Eligible to Receive the Groundwater Allowance

Subdivision Name	Number of Lots on Preliminary Plat	Number of Lots on Final Plats Submitted to ADWR	Remaining Lots
Cliff Rose, Unit 3	21	0	21
Dells at Prescott Lakes	167	101	66
Lakeside@ Prescott Lakes	240	35	205
Mason Ridge	14	0	14
Peaks Unit I @ Prescott Lakes	665	0	665
Peaks Unit II @ Prescott Lakes	150	124	26
Prescott Lakes: Estates Unit 2	239	163	76
Prescott Lakes: Estates Unit 3	12	0	12
Prescott Lakes: Pines	231	216	15
Prescott Lakes: Pinnacle Unit 1	62	0	62
Prescott Lakes: Pinnacle Unit 2	340	0	340
Summit Unit 2	227	133	94
The Club at Forest Trails	49	0	49
Yavapai Hills	1,632	239	1,393
Yavapai Hills in Prescott Valley	489	0	489
Total	**4,538**	**1,011**	**3,527**

Attachment C: Calculations Pursuant to A.R.S. § 45-555(E)

1. Replacement of Prescott's CAP Allocation—A.R.S. § 45-555(E)(1) (6,885.7 acre-feet per year)

If Prescott had retained its 7,127 AFY CAP allocation that it sold to Scottsdale in 1995, the entire amount would have been physically, legally and continuously available for its designation of assured water supply. A.A.C. R12-15-716, 717 and 718. A.R.S. § 45-555(E)(1) authorizes Prescott to transport an amount of groundwater from the Big Chino sub-basin to replace its CAP allocation, to the extent Prescott has not already replaced the CAP allocation. In 1998, Prescott replaced a portion of the CAP allocation by purchasing water rights from the Chino Valley Irrigation District ("CVID"). However, only 17.35% of the water rights were purchased with the proceeds of the sale of Prescott's CAP allocation. In 2005, the Department determined that 1,391 acre-feet per year of the water rights purchased from CVID are physically, continuously and legally available for its designation of assured water supply. Therefore, the Department has determined that 17.35% of 1,391 acre-feet per year is the volume of CAP water that Prescott has already replaced. The volume of groundwater that Prescott is authorized to transport from the Big Chino sub-basin to the Prescott AMA to replace its CAP allocation is calculated as follows:

7,127 acre-feet per year – (1,391 acre-feet per year x 17.35% = 241.3)
= **6,885.7 acre-feet per year**

2. Loss of Potential Extinguishment Credits Due to Pledge of Type 2 Non-Irrigation Grandfathered Groundwater Right ("Type 2 Right") to Facilitate Settlement—A.R.S. § 45-555(E)(2) (950.7 acre-feet per year)

By pledging its 3,169 AFY Type 2 Right to guarantee water service to the Yavapai-Prescott Indian Tribe ("Tribe") in facilitation of the Yavapai-Prescott Indian Tribe Settlement ("YPIT Settlement"), Prescott lost potential assured water supply extinguishment credits it otherwise could have earned by extinguishing the right in 1995. The volume of extinguishment credits is determined pursuant to the formula provided in A.A.C. R12-15-726(B)(1). The volume of groundwater that Prescott is authorized to transport from the Big Chino sub-basin to the Prescott AMA under A.R.S. § 45-555(E))(2) due to the pledging of its Type 2 Right is calculated as follows:

3,169 acre-feet per year x 30 years = 95,070 acre-feet for 100 years, or
950.7 acre-feet per year for 100 years

3. Water Deliveries to the Tribe to Facilitate Settlement—A.R.S. § 45-555(E)(2) (231 acre-feet per year)

By extending water service to the Tribe in perpetuity and giving priority to the Tribe in its Water Service Agreement with the Tribe as part of the YPIT Settlement, Prescott directly or indirectly facilitated the YPIT Settlement and therefore is authorized to transport from the Big Chino sub-

basin an amount equal to the amount of water it serves to the Tribe each year pursuant to A.R.S. § 45-555(E)(2). Prescott projects that the Tribe's water demand in 2027 will be **231 acre-feet.**

4. Total

The total volume of groundwater that Prescott is authorized to withdraw from the Big Chino sub-basin and transport to the Prescott AMA pursuant to A.R.S. § 45-555(E) for purposes of this Decision and Order:

6,885.70 acre-feet per year + 950.70 acre-feet per year + 231 acre-feet per year
= 8,067.40 acre-feet per year

ATTACHMENT D
CITY OF PRESCOTT MODIFICATION OF DESIGNATION APPLICATION
WATER SOURCES AND SUPPLY

Source	AF/year	Treatment Options	Recharge Options	Legal Authority	Comments
Big Chino Groundwater*	**8,067.4 af/yr***	Well Head Treatment Well capacity: 17,768 AF/YR (Future wells, as included in Capital Improvement Plan)		A.R.S § 45-555(E)*	17,768 AF/YR Physically Demonstrated; limited by legal availability
Groundwater Allowance	9,371.53 af/yr	Well Head Treatment Permitted well volume: 13,229.63 af/yr		Service Area Right	
Groundwater Extinguishment Credits	94.49 af/yr				
Total AMA Groundwater	**9,466.02 af/yr**				
Existing LTSC	**162.82 af/yr**	Well Head Treatment	(See Effluent Recovery below) Presumed to transfer to CVID	USF # 71-519567	(See Effluent Recovery below) Presumed to transfer to CVID
Effluent Direct Deliveries	**1,796 af/yr**	Sun Dog WWTP Capacity = 6,888.88 af/yr			
Effluent Storage & Recovery	**41.62 acre-feet per year accrued as long-term storage credits and transferred to CVID** **1,733.98 af/yr recovered outside area of impact of storage**	Airport WTF Capacity = 2,464.31 af/yr Total Treatment Capacity = 9,353.19 af/yr Available Effluent (based on 2023 Potable Demands, minus YPIT, CV, and Prop 400) = 10,919 * 0.5446 (Effluent production factor) = 5,946.49 af/yr	Water Storage Permitted Volume: 6,721 af/yr Current Recovery Well Capacity: 8,313 af/yr Pending Capacity: 1,694 af/yr Recovery within are of impact of storage (AOI), with pending: 3,307 af/yr Recovery outside AOI: 6,700 af/yr	USF # 71-519567	Recovery outside the area of impact of storage limited to 1,733.98 acre-feet per year, due to overall physical availability

ATTACHMENT D
CITY OF PRESCOTT MODIFICATION OF DESIGNATION APPLICATION
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	1,916 af/yr recovered within area of impact	Available Effluent (based on 2027 Potable Demands, minus YPIT, CV, and Prop 400) = 11,259 * 0.5446 (Effluent production factor) = 6,131.65 af/yr			
Surface Water delivered through Annual Storage and Recovery within the area of impact	**1,391.00 af/yr**	Well Head Treatment	(See recovery options on previous page)	SOC: 36-40234, 36-102689 CWR: 593,594,1674 D&O ST 98-001 USF# 71-519567	From 2005 Decision and Order
Total Supplies in 2023:	**16,507.44 af/yr**				
Total Supplies in 2027:*	**24,574.84 af/yr***				

* See Conditions 4 and 5 of the Decision and Order.

Attachment E

Formula 1:

The groundwater allowance will increase following the recording of a final plat for each of the subdivisions listed in Attachment B, so long as the conditions of this Decision and Order are met. The groundwater allowance will increase in accordance with the following formula:

> The number of lots in the subdivision x 2.15 (average dwelling occupancy) x 150 gallons per capita per day x 365 days x 100
>
> Divide product by 325,851 gallons/acre-foot to convert to acre-feet.

Formula 2:

The groundwater allowance will increase if Prescott replaces any residential groundwater use, including any non-residential use associated with the residential use, in existence on August 21, 1998, with permanent groundwater service by Prescott. The groundwater allowance will increase in accordance with the following formula:

> 0.5 acre-foot x the number of housing units receiving replacement water service x 100