

JAN-09-1998 10:14 FROM AZ AG SOLICITOR GENERAL TO 99165567 P.02



STATE OF ARIZONA

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January 9, 1998

VIA FACSIMILE

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ACTION _____

Karen E. Baerst
Assistant Attorney General
Land and Natural Resources Section
Office of the Attorney General
1275 West Washington
Phoenix, AZ 85007-2926

Lauren J. Caster
Fennemore Craig
3003 North Central Ave., Suite 2600
Phoenix, AZ 85012-2913
Fax No.: 916-5567

Re: A.B. Nos. 997 through 1001

Dear Ms. Baerst and Mr. Caster:

Enclosed is a copy of the proposed Findings of Fact, Conclusions of Law, and Order ("Order") in the appeal of the Cyprus Bagdad Copper Corporation before the State Land Department Board of Appeals. The Board would appreciate if you would submit written comments on the Order, if any, to its Clerk, Rebecca Good, and to me no later than noon on Tuesday, January 13, 1998. Ms. Good's mailing address is at the State Land Department, 1616 West Adams, Phoenix, AZ 85007. You may fax your comments to Ms. Good at (602) 542-2590. If you disagree with any part of the Order, please provide the Board with your recommendation for replacement language.

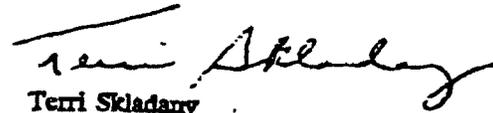
JAN-09-1998 10:14 FROM AZ AG SOLICITOR GENERAL TO

9916S567 P.03

Karen K. Baerst
Lauren J. Caster
January 9, 1998
Page 2

We appreciate your assistance in this matter and welcome your comments, which the Board will consider at its January 14, 1998 meeting in Tucson when it determines whether to adopt the Order.

Sincerely,



Terri Skladany
Assistant Attorney General

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JAN-09-1998 10:14 FROM AZ AG SOLICITOR GENERAL TO 99165567 P.04

**STATE LAND DEPARTMENT OF THE STATE OF ARIZONA
BEFORE THE BOARD OF APPEALS**

**IN THE MATTER OF APPEAL OF
APPRAISAL OF APPLICATION TO
PURCHASE GROUNDWATER NO. 21-102152
IN THE AMOUNT OF \$85 PER ACRE-FOOT,
WITH A MINIMUM ANNUAL REMOVAL OF
80 ACRE-FEET FOR A TOTAL MINIMUM
ANNUAL ROYALTY OF \$6,800 FOR A TERM
OF TEN YEARS ON STATE LAND
DESCRIBED AS:**

**SECTION 17, TOWNSHIP 13 NORTH,
RANGE 9 WEST, YAVAPAI COUNTY,
ARIZONA A.B. NO. 997**

**IN THE MATTER OF APPEAL OF
APPRAISAL OF APPLICATION TO
PURCHASE GROUNDWATER NO. 21-102153
IN THE AMOUNT OF \$85 PER ACRE-FOOT,
WITH A MINIMUM ANNUAL REMOVAL OF
80 ACRE-FEET FOR A TOTAL MINIMUM
ANNUAL ROYALTY OF \$6,800 FOR A TERM
OF TEN YEARS ON STATE LAND
DESCRIBED AS:**

**SECTION 29, TOWNSHIP 14.5 NORTH,
RANGE 8 WEST, YAVAPAI COUNTY,
ARIZONA A.B. NO. 998**

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER
for A.B. Nos. 997 through
1001**

JAN-09-1998 10:15 FROM AZ AG SOLICITOR GENERAL TO

99165567 P.05

IN THE MATTER OF APPEAL OF
APPRAISAL OF APPLICATION TO
PURCHASE GROUNDWATER NO. 21-102154
IN THE AMOUNT OF \$85 PER ACRE-FOOT,
WITH A MINIMUM ANNUAL REMOVAL OF
80 ACRE-FEET FOR A TOTAL MINIMUM
ANNUAL ROYALTY OF \$6,800 FOR A TERM
OF TEN YEARS ON STATE LAND
DESCRIBED AS:

SECTION 1, TOWNSHIP 15 NORTH,
RANGE 9 WEST, YAVAPAI COUNTY,
ARIZONA A.B. NO. 999

IN THE MATTER OF APPEAL OF
APPRAISAL OF APPLICATION TO
PURCHASE GROUNDWATER NO. 21-102155
IN THE AMOUNT OF \$85 PER ACRE-FOOT,
WITH A MINIMUM ANNUAL REMOVAL OF
80 ACRE-FEET FOR A TOTAL MINIMUM
ANNUAL ROYALTY OF \$6,800 FOR A TERM
OF TEN YEARS ON STATE LAND
DESCRIBED AS:

SECTION 11, TOWNSHIP 15 NORTH,
RANGE 9 WEST, YAVAPAI COUNTY,
ARIZONA A.B. NO. 1000

IN THE MATTER OF APPEAL OF
APPRAISAL OF APPLICATION TO
PURCHASE GROUNDWATER NO. 21-102156
IN THE AMOUNT OF \$85 PER ACRE-FOOT,
WITH A MINIMUM ANNUAL REMOVAL OF
80 ACRE-FEET FOR A TOTAL MINIMUM
ANNUAL ROYALTY OF \$6,800 FOR A TERM
OF TEN YEARS ON STATE LAND
DESCRIBED AS:

SECTION 24, TOWNSHIP 15 NORTH,
RANGE 9 WEST, YAVAPAI COUNTY,
ARIZONA A.B. NO. 1001

APPELLANT: CYPRUS BAGDAD COPPER
CORP.

JAN-09-1998 10:15 FROM AZ AG SOLICITOR GENERAL TO

99165567 P.06

Pursuant to proper notice and A.R.S. § 37-215, the above captioned matters were consolidated and came before the Board of Appeals on December 18, 1997 in Room 321, 1616 West Adams, Phoenix, Arizona. The issue on appeal was whether the appraisals for the five applications to purchase groundwater, captioned above, reflected the true value of the water.

The State Land Department ("Department") was present and represented by Karen E. Baerst, Assistant Attorney General. The Appellant was present and represented by Attorney Lauren J. Caster. Terri Skladany, Assistant Attorney General from the Solicitor General's Office, was present and represented the Board.

The Board read and considered its file and the evidence presented in this matter. Based on this record, the Board makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. The Appellant's Application to Purchase Groundwater No. 21-102152 encompassed one well located at Skunk Canyon.
2. The Department recognized several notable features related to the Skunk Canyon application: (i) the well is located approximately eight miles southwest of the central business district of Bagdad, (ii) the Applicant intended to use water extracted from this well to contribute to Bagdad's back-up water supply, (iii) before the water can be used, the successful bidder would have to construct a pipeline to transport the water from the well site to the point of treatment and use, and (iv) the application requested a lease to withdraw 80 acre feet of groundwater per year for a ten-year term.

JAN-09-1998 10:16 FROM AZ AG SOLICITOR GENERAL TO 99165567 P.07

3. The Department appraised the market value of the water from the Skunk Canyon location at \$85.00 per acre foot.
4. The Appellant's appraisal concluded that the value of the water from the Skunk Canyon location to be \$35.00 per acre foot. The factors that the Appellant's appraisal considered were: (i) the excellent location of the well, (ii) the six mile distance from the well to a power source and the eight mile distance from the well to the point of use, and (iii) the improvements needed to use this water would cost one million dollars.
5. The Appellant's Application to Purchase Groundwater No. 21-102153 encompassed two wells located at Sycamore.
6. The Department recognized several notable features related to the Sycamore application: (i) the wells are located approximately five miles southeast of Bagdad, (ii) the Applicant will use the groundwater for domestic, municipal, and industrial purposes, (iii) the water is transported to the points of treatment and use by delivery pipelines, and (iv) the application requested a lease to withdraw 80 acre feet of groundwater per year for a ten-year term.
7. The Department appraised the market value of the water from the Sycamore location at \$85.00 per acre foot.
8. The Appellant's appraisal concluded that the value of the water from the Sycamore location to be \$65.00 per acre foot. The factors that Appellant's appraisal considered were: (i) the excellent location of the well site and (ii) the requirement of a short power and delivery system.

9. The Appellant's Application to Purchase Groundwater No. 21-102154 encompassed one well located at Contreras.
10. The Department recognized several notable features related to the Contreras application: (i) the well is located approximately seven miles northeast of Bagdad, (ii) the Applicant uses the water for domestic, municipal, and industrial purposes, (iii) the water is transported to the points of treatment and use by a delivery pipeline, and (iv) the application requested a lease to withdraw 80 acre feet of groundwater per year for a ten-year term.
11. The Department appraised the market value of the water from the Contreras location at \$85.00 per acre foot.
12. The Appellant's appraisal concluded that the value of the water from the Contreras location to be \$35.00 per acre foot. The factors that appellant's appraisal considered were: (i) the poor access to the well and (ii) the need for approximately eleven miles of power and delivery system to the point of use.
13. The Appellant's Application to Purchase Groundwater No. 21-102155 encompassed one well at Urie.
14. The Department recognized several notable features related to the Urie application: (i) the well is located approximately five miles north of Bagdad, (ii) the Applicant uses the water for domestic, municipal, and industrial purposes, (iii) the water is transported to the points of treatment and use by a delivery pipeline, and (iv) the application requested a lease to withdraw 80 acre feet of groundwater per year for a ten-year term.
15. The Department appraised the market value of the water from the Urie location at \$85.00 per acre foot.

JAN-09-1998 10:16 FROM AZ AG SOLICITOR GENERAL TO 99165567 P.09

16. The Appellant's appraisal concluded that the value of the water from the Urie location to be \$35.00 per acre foot. The factors that Appellant's appraisal considered were: (i) the poor access to the well and (ii) the need for approximately seven miles of power and delivery systems to the point of use.
17. The Appellant's application to Purchase Groundwater No. 21-102156 encompassed two wells located at Warm Springs.
18. The Department recognized several notable features related to the Warm Springs application: (i) the well is located approximately five miles north of Bagdad, (ii) the Applicant uses the water for domestic, municipal, and industrial purposes, (iii) the water is transported to the points of treatment and use by a delivery pipeline, and (iv) the application requested a lease to withdraw 80 acre feet of groundwater per year for a ten-year term.
19. The Department appraised the market value of the water from the Warm Springs location at \$85.00 per acre foot.
20. The Appellant's appraisal concluded that the value of the water from the Warm Springs location to be \$30.00 per acre foot. The factors that Appellant's appraisal considered were: (i) the poor access to the wells, (ii) the need for approximately five miles of power and delivery systems to the point of use, (iii) the water contains radiochemical contaminants in concentrations that exceed drinking water standards, and (iv) the limitation that the water can be used only for industrial purposes.
21. When the Department learned of the existence of radiochemical contaminants at Warm Springs, it amended the appraisal of the market value of the water from these wells to \$75.00 per acre foot.

JAN-09-1998 10:17 FROM AZ AG SOLICITOR GENERAL TO 99165567 P.10

22. The Appellant's geologist, Dr. Phil Blacet testified that the Appellant has been looking for water to supply Bagdad for the last 40 years and that the water from the State land offers a good back-up water supply to Bagdad's approximately 2,000 residents. Dr. Blacet noted that the water from the wells on State land provides approximately 15% of the City's water needs and, without this back-up system, the community would be at risk if the main water system became inoperable.

23. The Appellant has leased the State land on which the wells are located since the 1960's. Prior to the most recent appraisals, the Appellant paid \$35.00 per acre foot for water extracted at each of the wells.

24. In arriving at its appraisal for each of the applications, the Department evaluated nine pending or actual sales or leases of water in California, Oklahoma, Colorado, and Arizona. The transactions occurred between 1992 and the present and had a value range from a low of \$65.00 per acre foot to a high of \$135.00 per acre foot. Likewise, the amount of water sold or leased ranged from 50.3 acre feet to 200,000 acre feet and some of the transactions encompassed surface water sales, rather than groundwater sales.

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to appraisals to
The Department adjusted the comparables and assigned them weight according to their similarity to the wells at issue.

26. The Department did not evaluate the location differences among the wells because it determined that location was not a true adjustment factor. The Department concentrated its focus on the value of the water.

27. The Department did not consider extraction costs in setting value because it viewed extraction as a cost of doing business and did not have a basis on which to estimate

the extraction cost because the successful bidder and the use it would make of the water would not be known until auction.

28. The parties generally agreed that rarely is there competition to purchase groundwater therefore removing the market as a factor in value and the key elements to determine water value are the water quality, quantity, usage, and location.

29. The Appellant and Department disagreed about the effect that the type of water rights authorizing withdrawal of water should have on the value of the water and whether the location of property within or outside of an irrigation district or active management area ("AMA") should be a factor in valuing the water.

30. Between December of 1996 and September of 1997, the Department conducted three public auction water sales and valued that water at \$85.00 per acre foot.

31. There are few true comparables on which to evaluate these applications. Therefore, the appraisals are necessarily very subjective.

Conclusions of Law

1. Section 28 of Arizona's Enabling Act, 36 U.S. Stat. 557, 568-79, Act of June 1910, requires that products of State land "shall be appraised at their true value, and no sale or disposal thereof shall be made for a consideration less than the value so ascertained." See also Ariz. Const. Art. 10, § 8.

2. In Arizona, water "is a thing of value directly derived from land to be considered a product of the land within the meaning of the Constitution and Enabling Act." *Farmers Investment Co. v. Pima Mining Co.*, 111 Ariz. 56, 58, 523 P.2d 487, 489 (1974).

Discussion

The standards to be applied in evaluating the true market value of the water that is the subject of these applications are: quality, location, usage, and quantity. Although the Department and the Appellant have compiled complete appraisal reports for all of the applications, the Board is concerned about the reasonableness of the appraisals in view of the standards that should be applied and the significant disparity in value between the Department's appraisals and the Appellant's appraisals. Both the Department's appraiser and the Appellant's appraiser have sound appraisal experience and have completed between 12 and 20 water appraisals. Curiously, the disparity between the Department's and Appellant's appraised values approximates 80%. Such disparity reflects the subjectivity of these evaluations. Thus, our charge is to establish a rational basis for the value of the water accounting for the economic reasonableness of each transaction, the differences among the wells, and the prior comparable sales.

The dilemma in placing great weight on the Department's 1996-97 water sales is that most purchasers have made a significant investment to develop the well sites, are in need of the water, and thus will not freely abandon the leases. Therefore, the limited Department water sales, although correctly used as comparables, should not unduly weight the value on these applications.

Therefore, the Board finds the value of water for each of the applications at issue is as follows:

JAN-09-1998 10:18 FROM AZ AG SOLICITOR GENERAL TO 99165567 P.13

A.B. 997 (Skunk Canyon): \$50.00 per acre foot because the well adjoins a highway and therefore has a superior location.

A.B. 998 (Sycamore): \$75.00 per acre foot because it has a good location and acceptable potable water quality. Although the Department priced the water at \$85.00 per acre foot, the Board finds that the Department priced the water too high because it did not account for the difference in location with the other Department sales which the Department viewed as comparable. This location should have had a downward adjustment in value because the water was not in an AMA requiring water rights for withdrawal.

A.B. 999 (Contreras): \$65.00 per acre foot because it is not readily accessible, is the worst location, and is a significant distance from the point of use.

A.B. 1000 (Urie): \$65.00 per acre foot because of its lack of accessibility and distance from the point of use.

A.B. 1001 (Warm Springs): \$45.00 per acre foot because it is unpotable water. Although this water does not meet current standards for drinking, it has a current commercially beneficial use to the Appellant and has potential for other uses.

ORDER

Based on the foregoing Findings of Fact, Conclusions of Law, and Discussion, it is hereby ordered sustaining the appeals challenging the appraisals on A.B. 997 through 1001 and setting the value of the water as follows:

A.B. 997 (Skunk Canyon):	\$50.00 per acre foot
A.B. 998 (Sycamore):	\$75.00 per acre foot
A.B. 999 (Contreras):	\$65.00 per acre foot

A.B. 1000 (Urie): \$65.00 per acre foot

A.B. 1001 (Warm Springs): \$45.00 per acre foot

This Decision is subject to rehearing or review pursuant to A.R.S. § 41-1092.09 and A.A.C. R12-5-2315. An aggrieved party may file a motion for rehearing or review within thirty days after service of this administrative decision. The motion for rehearing or review shall be in writing and shall meet the requirements in A.A.C. R12-5-2315(C). Pursuant to A.R.S. § 41-1092.09, an aggrieved party is not required to file a motion for rehearing or review of the Board's decision in order to exhaust its administrative remedies. Judicial review of the Board's decision is subject to the time restrictions and procedures in A.R.S. § 41-1092.10.

DATED: _____

JAMES M. WEBB, CHAIRPERSON

A copy of the foregoing was mailed on _____, 1998 by certified mail, return receipt requested, to:

Lauren J. Caster, Esq.
Fennemore Craig, P.C.
3003 North Central Ave., Suite 2600
Phoenix, AZ 85012-2913
Attorneys for Appellant
Cyprus Bagdad Copper Corporation

Copies were sent on _____, 1998 by interagency mail to:

J. Dennis Wells
State Land Commissioner
Arizona State Land Department
1616 W. Adams
Phoenix, AZ 85007

JAN-09-1998 10:19 FROM AZ AG SOLICITOR GENERAL TO 99165567 P.15

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By _____