



Fort McDowell Yavapai Nation

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August 15, 2008

Doug Dunham
Deputy Assistant Director
Arizona Department of Water Resources
3550 North Central Avenue
Phoenix, AZ 85012

Re: Draft Rules on Transportation of Groundwater to an
Active Management Area (AMA)

Dear Mr. Dunham:

This letter is in regard to the Fort McDowell Yavapai Nation's (herein the Nation) initial opinion of the Arizona Department of Water Resources (herein the Department) draft Rules on the transportation of groundwater to an AMA. On June 18, 2008 the department distributed a draft of their proposed rulemaking. At this meeting, the Nation expressed general concerns on those Rules. Enclosed you will find an outline of the Nation's concerns over the proposed provisions regarding the determination of the annual transportation allotment for lands in the Big Chino sub-basin. We have additional concerns with other sections of the proposed Rules, however we wish to discuss these issues in person (see below).

In relation to the Big Chino sub-basin, the Nation believes the Draft Rules must be revised such that they specifically require a city or town to submit credible documentary information sufficient to delineate each "farm" or "portion of a farm" from which it seeks to transport groundwater. We do not believe that the proposed Rules effectively allow for this statutory provision. Another major concern is the location from which "groundwater" can be withdrawn for transportation. In particular, the Rules must be revised such that they will not permit a city or town to withdraw a combined or aggregated amount of "groundwater" from a single well. As proposed, the aggregation of historically irrigated lands would allow water to be withdrawn from one area that may be far from the location of the historic "farm" or "portion of farm." This was not the intent of the statute with which the Rules are derived. Under the proposed Rules, a City or Town would have incentive to pump as close to the AMA boundary (and

near the headwaters of the Verde River) as possible. The results of such actions would not only have substantial environmental impacts on upper, middle, and lower Verde River but would have significant and detrimental affects on downstream Water Rights Holders.

The Nation further believes that the proposed Rules are incongruent with the governing statute (Title 54, Chapter 2, Article 8.1, sections 45-551- 45-555) outlining the withdrawal of groundwater for transportation to an AMA. This was clearly demonstrated at the aforementioned June meeting. One of the Department's attorneys presented that the Rules were designed utilizing 'previously drafted bills', 'notes', or 'draft legislation' in order to determine what the legislature had in mind when they were formulating the statutes. Utilizing documents referencing bills not passed by the State legislature, or drawing upon former bills that that failed to make it out of committee or legislative body to develop Rule making is appears arbitrary and capricious. Further, it mischaracterizes what the entire legislative body created and voted into law. Utilizing such documentation should not provide the Department guidance when composing Rules. Therefore, as elucidated below, substantial revisions are required before the Rules truly representative or express the intent of the legally binding statute.

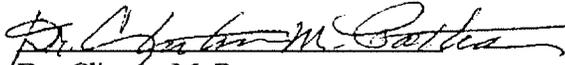
The Nation holds a significant surface water right to the Verde River. Those rights were debated for many years before they were eventually solidified under the Fort McDowell Indian Community Water Rights Settlement Act of 1990 and later modified in 2006. The Verde River, the only 'wet water' source for the Nation, has been in historic use by the Yavapai's since time immemorial. The River not only has an important role in the Yavapai culture, it is the drinking water for our residents, it is the water source for our farm and all the other enterprises that we financially depends upon, and it is part of the natural environment that the Nation is closely connected with. It is the key to our very survival. Currently, there are no other provisions to obtain any other sources of water should the Verde River be made unavailable. Given the proposed actions by the Department, the Verde River is potentially at risk. Therefore, the Nation's future is at risk and it objects to many sections within the proposed Rules.

In response to the proposed Department actions, the Nation requests a Government-to-Government consultation on this Rule making process. The Department's Government-to-Government consultation process is outlined in September 2006, State of Arizona Tribal Consultation Policies that includes a Substantive Policy statement for the Department of Water Resources and consultation process. To reiterate, the Department's current draft of the proposed transfer Rules will impact the Nation's surface water rights. Since the State is a party in the adjudication process and the actions the State are proposing will have an affect on our only 'wet' water source, the Verde River, a consultation process is warranted.

Please contact our Government Relations Director, Dr. Carole Klopatek, as she is the point person on this issue. Dr. Klopatek can be reached at (480) 789-7161.

In closing, the Nation appreciates not only the effort the Department has made in its Rulemaking process but the opportunity to comment on the proposed draft. We look forward to working with you in the near future!

Respectfully,



Dr. Clinton M. Pattea
President

Encls.

cc: Fort McDowell Yavapai Nation Tribal Council
Mr. Phil Dorchester, GM, FMYN
Mr. Tom Moriarty, Acting General Council, FMYN
Dr. Carole Klopatek, Government Relations Director, FMYN
Ms. Alinda Locklear, Esq., Attorney of Record, FMYN Water Settlement

Fort McDowell Yavapai Nation's Initial Comments on ADWR's Draft Rules on Transportation of Groundwater to an Active Management Area

The following material provides a more detailed synopsis of the Nation's concerns.

Section I

A.R.S. § 45-555(A)-(D) requires the Department to determine the "annual transportation allotment" for each "farm" "or portion of a farm.." A.R.S. § 45-555(D)(2) defines a farm as "an area of land in the sub-basin that is or was served by a *common irrigation water distribution system*." (emphasis added)

The annual allotment for each "farm" or "portion of a farm" must be withdrawn only from "historically irrigated acres" (HIA) within that farm. A.R.S. § 45-555(D)(3) defines historically irrigated acres as "means acres of land overlying an aquifer that were *irrigated with groundwater* at any time between January 1, 1975 and January 1, 1990." (emphasis added)

A.R.S. §§ 45-555(B)(C)(D)(1) states that in making a determination of the annual transportation allotment the Director is required to "rely only on *credible documentary evidence* submitted by the city or town or otherwise obtained by the department" (emphasis added). Whereas, "documentary evidence" means "correspondence, contracts, other agreements, aerial photography, affidavits, receipts or official records."

In deference to the statutory language above, there are sequential steps that must be taken by the Department in relation to groundwater transfers. It follows, utilizing *credible documentary evidence*, for each "farm" or "portion of a farm" that the Department concludes as meeting the statute's criteria (as only prescribed by statute), they must determine the number of acres that were irrigated with groundwater between January 1, 1975 and January 1, 1990 in that "farm" or "portion of a farm" that were *retired from irrigation*. The statute further states that the proof (i.e., credible documentary evidence) must exist that these lands were once irrigated with groundwater of a *common irrigation water distribution system*. Draft Rule R12-15-1405(B)(3) requires the applicant to provide the Department with information regarding "the legal location of all farms and portions of farms owned or leased by the applicant in the sub-basin and a copy of a deed or lease agreement showing that the applicant owns or leases the land." Yet, R12-15-1401(8) does not require any information that would enable the Department to verify which pieces of land that constitute "an area of land that is or was served by a common irrigation water distribution system" which is required by the statute. Compounding this, Draft Rule R12-15-1401(11)(b) states "land overlying an aquifer that were irrigated with groundwater at any time" however, left unmentioned is a phrase relating to a common

water distribution system. The Department would not be able to assess whether parcels are part of the same "farm" or "portion of a farm" and irrigated with "groundwater" from a "common irrigation water distribution system." Hence, as written, the Draft Rules are inconsistent not only with the statute but within the proposed Rules themselves.

Another inconsistency between the statute and the proposed Rules is in relation to the aggregation of HIA lands in order (for the Department) to derive an aggregated transportation allotment. In regard to location of where groundwater can be withdrawn, R12-15-1408 states that "an entity eligible to transport groundwater from the Big Chino sub-basin may withdraw the total amount of groundwater allowed under R12-15-1406 from any HIA owned or leased by the entity in the sub-basin." However, in determining the annual transportation allotment, 12-15-1405(C) effectively aggregates all of the retired HIA lands owned or leased by the city or town in the sub-basin and would not accurately and separately account for lands that were clearly associated with a "farm" or "portion of a farm." In calculating the annual transportation allotment, the statute does not authorize the Department to aggregate HIA acres in one "farm" together with those of any other "farm". Rather, §§ 45-555(B)(1) and (C) clearly states and requires the Department to determine (using credible documentary evidence) as to what constitutes each "farm" or "portion of a farm" owned or leased by the city or town in the sub-basin in order to determine and calculate the annual transportation allotment for that "farm". The word aggregation or a derivative thereof is nowhere to be found within the statute relating to the transportation of "groundwater" from a "farm" with that of other "farms" or "portion of a farm".

Confounding this issue is the substitution of the term "HIA Lands" for the statutory language of each "farm" or "portion of a farm" [for example, R12-15-1405(E)]. The net effect of this proposed Rule allows a city or town to aggregate the annual transportation allotments for all of its HIA lands located within the Big Chino sub-basin and permit the city or town to withdraw that combined amount of groundwater from one area. This equates to a single transportation allotment for all HIA lands owned or leased by a city or town. It would not generate an individual transportation allotment required for each "farm or portion of a farm" as expressed by statute (see below). Thus, to avoid a single transportation allotment for all HIA lands, the Department must include a specific method within the Rules to determine which lands are apart of or not apart of the same "farm".

The inconsistencies in regard to aggregation (as discussed above) is further underscored when one examines the draft Rules in total with that of the statutory provisions in A.R.S. § 45-552 for the McMullen Valley and § 45-555 for the Big Chino. Section 45-555 requires that the annual transportation allotment for the Big Chino sub-basin to be calculated on an individual farm basis. The resulting allotment would then represent the amount of "groundwater" that may be transported from an individual "farm" or "portion of a farm".

However, pursuant to A.R.S. § 45-552, the McMullen Valley has a specific process and calculation to define 'aggregation' of land which represents a fundamental difference between it and the Big Chino. Both the Big Chino and the McMullen Valley statutory language is similar in regard to determining what constitutes each "farm" or "portion of a farm" as it relates to HLA and subsequent transporting of "groundwater". However, for McMullen Valley, § 45-552(B)(3) states that the Department must "multiply the sum of those historically irrigation acres for all such farms or portions of farms by three acre-feet per acre." This section provides for aggregation of the HLA lands for all such "farms" or "portions of farms" for McMullen Valley. No such language is prescribed for the Big Chino anywhere within § 45-555. Thus, statutory language and intent of the statues for the Big Chino and McMullen Valley sub-basins are fundamentally different from one another and must be evaluated differently.

Section II

Throughout its entirety, the draft Rules neglect to distinguish "percolating" groundwater from appropriable waters or "subflow." They specifically fail to provide specific language establishing whether "groundwater" historically used to irrigate lands (and therefore subject to transport) is, by legal definition, "groundwater" and not "subflow". Furthermore, Rules R12-12-1401 though 1409 disregard the need for unambiguous language that requires an applicant and the Department to use and only use credible documentary evidence to show that these lands were utilizing "groundwater" and not "subflow".

Under the proposed Rule R12-15-1404, the Department will not require the city or town (applicant) to provide credible documentary information that the "farm" or "portion of a farm" in question was "historically irrigated" with "groundwater" as intended by statute. A.R.S. § 45-555(D)(2) defines a farm as "an area of land in the sub-basin that is or was served by *a common irrigation water distribution system*" (emphasis added). Furthermore, the annual allotment for each "farm" or "portion of a farm" must be withdrawn only from "historically irrigated acres" (HLA) within that farm. A.R.S. § 45-555(D)(3) defines historically irrigated acres as "means acres of land overlying an aquifer that were irrigated with groundwater at any time between January 1, 1975 and January 1, 1990." Although R12-15-1404 (A)(1-7) refers to HLA lands being "historically irrigated with groundwater," a special provision within in R12-15-1404 (A)(7) states that ".. an identification of the years between January 1, 1975 and January 1, 1990 that the lands were irrigated with groundwater, *if known*, and for each of those years" (emphasis added). Additionally, Draft Rule 12-15-1404(A)(8) states that "*if known*" the applicant is to provide the registry number and legal locations of all wells utilized to irrigate and 12-15-1404(A) (10) implicates that this information is "true and correct to the based on the representatives knowledge." R12-15-1405(C) which addresses annual transportation allotments for HLA lands also overlooks the requisite for a process to determine whether lands were "historically irrigated" with "groundwater" or whether the water to be transported is "groundwater". Thus, the provisions within the Rules are limited in nature such that they are not pursuant to the intent or statutory language of the statute.

To elaborate the aforementioned point, §§45-555(B)(C)(D)(1) states that in making a determination of the annual transportation allotment the Director is required to “rely only on *credible documentary evidence* submitted by the city or town or otherwise obtained by the department” (emphasis added). Whereas, “documentary evidence” means “correspondence, contracts, other agreements, aerial photography, affidavits, receipts or official records.” Thus, any provision that would allow an application or the Department to move forward with an application without “credible documentary evidence” that a “farm” or “portion of a farm” was “historically irrigated” with “groundwater” is contrary to the underlying statutes. However, that is exactly what the Rules would allow.

The draft Rules must differentiate between “percolating” groundwater from appropriable underground “subflow” as pursuant to Arizona water laws. Subflow, in this context, is not to be considered as water historically used to irrigate lands and available for transport. The statutes upon which these draft Rules are based only apply to “percolating” groundwater. As written, “subflow” would be allowed be transported under the proposed Rules. If waters are deemed “subflow” or appropriable under A.R.S. § 45-141, it is subject to the prior appropriation doctrine and legally protected for those with senior vested water rights. Thus, ALL underground water is NOT percolating groundwater and must clearly be differentiated within the Draft Rules. However, as stated above, absent this differentiation, the applicant and the Department may violate statutory requirements to treat “percolating” groundwater from appropriable “subflow.” They are separate under Arizona law and therefore separate under Title 45 in general.

Section III

Another major concern is the location from which “groundwater” can be withdrawn for transportation. As demonstrated above, the draft Rules would allow the pumping from a single well and for the indiscriminate, unequal withdrawal and transfer of the historic use of groundwater throughout the sub-basin. Nothing in the statute supports the Department’s interpretation that these two actions are permissible.

As detailed in the aforementioned sections, the Rules must be revised such that they will not permit a city or town to withdraw a combined or “aggregated” amount of “groundwater” from a one general area or from a single well. As proposed, the “aggregation” of historically irrigated lands would allow water to be withdrawn from one area far from the location of the historic “farm” or “portion of farm.” R12-15-1408 (B) states that “an entity eligible to transport groundwater from the Big Chino sub-basin may withdraw the total amount of groundwater allowed under R12-15-1406 from any HIA owned or leased by the entity in the sub-basin” In relation to aggregation and transport, under R12-15-1409 (B), language is non inclusive and would not prohibit the use of a single well to transport “groundwater”. Unquestionably, the Rules fail to approximate the historical distribution of pumping when the farms were in production. Aggregation

would allow the point of withdrawal to be miles away from the historical use and, in many cases this would result in large inequities in groundwater withdrawal throughout the sub-basin. The intent of the statute is to allow a city or town to withdraw "groundwater" from roughly the same locations as it was historically pumped. To avoid any misinterpretation by any landowner, city, town, or the Department, the statute plainly defined that the annual transportation allotment in the Big Chino is to be calculated for each "farm" or "portion of a farm" (See A.R.S. § 45-555).

The aggregation of pumping near the headwaters of the Verde (hence, subflow of the Verde River) would be permissible under the proposed Rules is due to the lack of clear distinction to reflect "groundwater" from "subflow". The results of such actions (pumping near the headwaters of the Verde) would not only have an substantial environmental impact on upper, middle, and lower Verde River but it would also have a significant and detrimental affect on downstream Water Rights Holders.

In conclusion, the proposed Rules in their current draft form could have catastrophic consequences that were certainly not intended by the Legislature of the State of Arizona when they signed Article 8.1 of Title 45 of the Arizona Revised Statutes into law. Hence, any Rules must be consistent with those statutes. The six points below reflect the Nation's selected revisions of the Draft Rules such that:

- (1) it requires the city or town (applicant) to submit, using credible documentary evidence, to delineate, each "farm" or "portion of a farm" from which it seeks to transport "groundwater";
- (2) the Department will only make determinations of the annual transportation allotment for the Big Chino sub-basin based on each "farm" or "portion of a farm";
- (3) the annual allotment for each "farm" or "portion of a farm" must be withdrawn only from "historically irrigated acres" that utilized "groundwater";
- (4) the Department, using credible documentary evidence, must determine whether water historically used to irrigate a farm and the water proposed to be transported is percolating "groundwater" and not appropriable "subflow";
- (5) the annual transportation allotment for each "farm" or "portion of a farm" can be withdrawn only from wells located on that "farm" or "portion of a farm" and not from a single well;
- (6) withdrawal and transfer can only be based on factual historic use of "groundwater" throughout the sub-basin, can not be aggregated, and would approximate the historical distribution of "groundwater" pumping when farms were in production.