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HAND DELIVERED

August 15, 2008

Director Herb Guenther
Arizona Department of Water Resources
3550 N. Central Avenue
Phoenix, Arizona 85012

Re: Draft Rules on the Transportation of Groundwater to Initial Active Management Areas pursuant to the provisions of A.R.S. Title 45, Chapter 2, Article 8.1

Dear Director Guenther:

We represent the City of Prescott and are pleased to have the opportunity to comment on the Department's proposed rules related to the transportation of groundwater from a basin located outside an initial Active Management Area (AMA)¹ into an AMA. Our comments are directed toward the updated version of the Department's draft rules dated June 18, 2008.

In particular, the City of Prescott (Prescott) is keenly interested in how the Department interprets the statutes that govern the transportation of groundwater from the Big Chino Sub-basin into the Prescott Active Management Area (PrAMA) pursuant to the provisions of A.R.S. § 45-555. Only recently has the growth in the PrAMA necessitated and enabled Prescott, in a cooperative effort with the Town of Prescott Valley, to pursue an interbasin groundwater transfer pursuant to the rights granted to both communities by the state legislature in 1991.²

The precise language found in A.R.S. § 45-555 was carefully crafted by the state legislature after hearing extensive public testimony from representatives from all parts of the state and water-related industries. After thoroughly reviewing the language of A.R.S. § 45-555, as well as the numerous background documents associated with this statute, the City of Prescott believes that the Department's proposed rules applicable to the rights granted pursuant to this statute

¹ Phoenix, Tucson, Pinal, and Prescott AMAs.

² Laws 1991, Ch. 212, § 28 (A.R.S. §§ 45-551 through 559).

accurately reflect the legislature's intent to offer eligible cities and towns a limited, but realistic, opportunity to transport groundwater from the Big Chino Sub-basin into the PrAMA.

As you know, A.R.S. § 45-555 became law on September 21, 1991. It reserves limited supplies of groundwater in the Big Chino Sub-basin for importation into the PrAMA under two clearly defined circumstances described in Subsections A and E of the statute. Subsection A allows any city or town to acquire or lease historically irrigated acres (HIA) within the Big Chino Sub-basin, retire those acres from active irrigation, and import a prescribed quantity of groundwater associated with the retired acreage into the PrAMA. The Director is required, under Subsection B of the statute, to determine whether all or a portion of the retired acreage qualifies as HIA. The Director is limited in the type of evidence he may consider by the language in Subsection C, while Subsection D defines the terms "[D]ocumentary evidence," "[F]arm," and "[H]istorically irrigated acres" for the purposes of determining the rights granted under Subsection A.

The prescriptive nature of Subsections B, C, and D necessitates that the Department create an administrative process to consider an application to import groundwater under A.R.S. § 45-555 (A). The Director's application of these provisions will result in an agency determination about how much water may be imported from the Sub-basin, from which lands, during the statutorily prescribed time period for determining what constitutes "historically irrigated acreage" (HIA). The initial step in this administrative process was taken when the Department published its report identifying the lands in the Big Chino Sub-basin that qualify as HIA for the purposes of A.R.S. § 45-555 (A).³ As long as such acreage is available for lease or purchase in the Big Chino Sub-basin, any city or town, including the City of Prescott, may submit an application to the Department for its administrative review and determination of transportation rights.

In contrast, the legislature expressly exempted the groundwater rights granted under A.R.S. § 45-555 (E) from the administrative requirements set-forth in Subsections A through D as well as all other provisions of Article 8.1 which governs the withdrawal of groundwater for transportation from four separate basins around the state.⁴ We are pleased to see that the Department appropriately omitted the groundwater transportation rights granted under Subsection E from the umbrella of these proposed administrative regulations.

Draft rules R12-15-1404 through R12-15-1406 mirror the requirements set-forth in A.R.S. § 45-555. The statute is unusually detailed, carefully defining eligible lands, dictating a precise allocation formula, limiting the amount of groundwater that may be transported in any one year or period of years, even restricting the type of evidence that may be used to demonstrate

³ "Identification of Historically Irrigated Acres in the Big Chino Sub-Basin," 2005, prepared by the Prescott AMA.

⁴ See A.R.S. § 45-555 (E), "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..."

conformance with the statute's criteria, leaving little discretion to ADWR as it drafts the administrative rules which will implement the legislature's groundwater transportation scheme. It is clear that the legislature went to great lengths to develop a rational scheme to facilitate the interbasin transfer of groundwater in this state.⁵

Previously filed comments on ADWR's proposed rules have argued that the rules pertaining to the Big Chino Sub-basin should require an eligible importer to withdraw groundwater from the individual parcels that qualify as HIA rather than aggregate the groundwater supplies and pump from a single location. Such arguments misconstrue the clear language of A.R.S. § 45-555 and are inconsistent with the approach taken in the three other groundwater transportation basins. They amount to little more than a thinly veiled attempt to thwart any effort to transport groundwater from the Big Chino Sub-basin.

The Department's draft rule, R12-15-1408 (B), correctly states that "[a]n 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." (emphasis added) This language is consistent with the language of Subsection A of the statute which provides that "a city or town that owns *land consisting of historically irrigated acres* in the Big Chino Sub-basin...may withdraw from the land for transportation to an adjacent initial active management area..." In this context, the word "land" must be read in the plural because it is defined as "historically irrigated acres" *not* each historically irrigated acre. Subsection B of the same statute requires the Director to determine a single "annual transportation allotment" based upon "each farm or portion of a farm owned or leased by the city or town..." Read together, these provisions support ADWR's rule authorizing the aggregation of the water rights granted under this statute.

Moreover, this reading of the statute is consistent with the practical reality of transporting water over some distance. It allows a city or town to develop one well site and pump its groundwater from a single location, rather than requiring multiple well sites pumping small quantities of water from locations throughout the basin. Such an approach would be neither fiscally feasible nor practical, and would effectively prohibit the importation of any water from the basin, a result clearly contrary to the legislature's intent expressed by its passage of the legislation in 1991.

Perhaps most importantly, the assertion that a city or town must own and operate as many wells as parcels of HIA it owns or leases, effectively prohibits any opportunity to develop a comprehensive water management scheme in the basin designed to promote the long-term availability of the groundwater supply and minimize the impacts, if any, on surface flows in the Upper Verde River. It certainly frustrates any opportunity for the municipalities with rights to

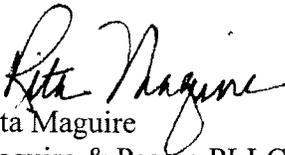
⁵ Article 8.1 authorizes the transportation of groundwater to an initial AMA from the Butler, McMullen, Harquahala, and Big Chino basins.

transport the basin's groundwater to work cooperatively to meet the water needs of their residents while protecting the rights of other water users in the basin and elsewhere in the state.

There are those that will go to great lengths to parse the language of A.R.S. § 45-555 in such a way as to effectively prevent the transportation of little, if any, groundwater from the Big Chino Sub-basin. To the extent there is any doubt about the correct interpretation of these statutes, deference should be given to the Department's interpretation. The case law in Arizona is unequivocal on this point, "[i]n circumstances like these, in which the legislature has not spoken definitively to the issue at hand, 'considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.'" *Arizona Water Co. v. Arizona Dept. of Water Resources*, 208 Ariz. 147, 155 (2004) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)). The Department's draft rules are consistent with a common sense interpretation of the statutes and give effect to the legislature's intent evidenced by the mere passage of the statute. As noted by the state supreme court in *Arizona Water Co.*, "ADWR is precisely the type of agency to which deference should presumptively be afforded." *Id.* at 155.

The City of Prescott appreciates the extraordinary efforts made by the staff at ADWR to communicate with any potentially affected party in this matter. They have demonstrated an unwavering commitment to make the rulemaking process as transparent and inclusive as possible. The Department sets the standard in Arizona for how government should interact with the public.

Sincerely,



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Cc: Mayor Jack Wilson, City of Prescott
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