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RECEIVED

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***Via Email nxflores@azwater.gov
and U.S. Mail***

Doug Dunham, Deputy Assistant Director
ARIZONA DEPARTMENT OF WATER RESOURCES
3550 N. Central Avenue
Phoenix, Arizona 85012

WATER MGMT

**Re: *Yavapai-Apache Nation's Comments to the Draft Rules on
Transportation of Groundwater to an Active Management Area (AMA)***

Dear Mr. Dunham:

This Firm has recently been retained by the Yavapai-Apache Nation (Nation) as its Special Counsel in water related matters. Through this letter, the Nation submits its comments to the Arizona Department of Water Resources' (ADWR) draft rules regarding the transportation of groundwater to an Active Management Area dated June 18, 2008 (Draft Rules).

We are aware that ADWR was accepting informal comments until August 15, 2008, on its Draft Rules, which would apply, *inter alia*, to the City of Prescott's transportation of groundwater from the Big Chino sub-basin of the Verde River basin. We are also aware that ADWR appears to have re-opened the comment period pursuant to a September 2, 2008, email from Ms. Nannette Flores to the AWS Stakeholders Group, which notified the stakeholders of a meeting that would be held on September 16, 2008, at Salome High School, to "explain and take comments on the new proposed rules for interbasin groundwater transportation in certain areas of the state." The Nation hereby submits its comments pursuant to this re-opening of the comment period.

The Yavapai-Apache Nation is a federally recognized Indian Tribe pursuant to Section 16 of the Indian Reorganization Act of 1934, 48 Stat. 984. The Nation depends upon the groundwater and surface waters of the Verde River basin to maintain the Nation in its permanent Tribal homeland. The Verde River runs directly through the Nation's Middle Verde Reservation in Camp Verde and its waters are the primary source of the Nation's domestic, irrigation, agricultural, commercial and industrial water supply.¹ In addition, the continued flow and health of the Verde River is crucial to the

¹ The Nation also has "ditch rights" from the Verde Ditch that serve the Nation's lands, pursuant to the *Hance v. Arnold* Decree, Superior Court of Yavapai County. The Verde Ditch water users, including the Nation, rely on the flows of the Verde River to serve the Verde Ditch.

cultural resources, habitat protection, and other requirements of the Nation. Indeed, it was for these reasons that the Nation's Reservation was originally established in 1871 along the Verde, with a boundary described as 10 miles on both sides of the Verde River for a 45-mile stretch of the River. These lands, which are within the aboriginal territory of the Yavapai and Apache people, were specifically selected by the United States to provide the Nation with continued access to a reliable source of water for the Reservation.

The Nation, and the United States on behalf of the Nation, have filed Statements of Claimant in *In Re the General Adjudication of All Rights to Use the Gila River System and Source* (Gila River Adjudication), for the aboriginal, federal reserved, and other water rights of the Nation.² These water rights are the present and perfected and vested property rights of the Nation and the United States as its trustee. See, e.g., *In Re The General Adjudication of All Rights to Use Water In the Gila River System and Source*, 201 Ariz. 307, 35 P.3d 68, 71-72 (2001) (citing *Winters v. United States*, 207 U.S. 564, 565-567 (1908)). Furthermore, the Nation's water rights have one of the earliest priority dates on the Verde River with a date of time immemorial.³

The Nation is concerned that the Draft Rules do not provide the required limitations on the transportation of groundwater to an AMA which are necessary to comport with the intent of Arizona's Groundwater Management Code and with A.R.S. § 45-555, which would allow the transportation of groundwater from the Big Chino sub-basin of the Verde River basin into the Prescott AMA under certain circumstances.

I. The Draft Rules Fail to Require Adequate Evidence To Determine What Parcels of Land Constitute a "Farm" and Would Permit the Aggregation of Historically Irrigated Acres in Violation of A.R.S. § 45-555

Significantly, the Draft Rules contain no method for determining with any reasonable certainty which lands would constitute a "farm" for purposes of complying with A.R.S. § 45-555. See Draft Rules 12-15-1405(C). Indeed, ADWR's Draft Rules would merely aggregate all of the Historically Irrigated Lands (HIA) from anywhere in the Big Chino sub-basin, and would not take into account which lands were associated with which farms. Pursuant to A.R.S. § 45-555(D)(2), a "farm" is "an area of land in the sub-basin that is or was served by a common irrigation water distribution system." The determination of which HIA lands constitute which farm is important, because the pumping of groundwater for transportation to an AMA is directly tied to each farm.

² See, e.g., Yavapai-Apache Nation's Statement of Claimant No. 39-50059.

³ The Nation's water rights are governed under federal (not state) law, and to the extent that Arizona's laws or Administrative Rules interfere with these senior rights, they must give way. See, e.g., *United State v. Superior Court*, 144 Ariz. 265, 697 P.2d 658, 670 (1985); see also *In Re The General Adjudication of All Rights to Use Water In the Gila River System and Source*, 195 Ariz. 411, 989 P.2d 739 (1999).

The Draft Rules would purport to allow the aggregation of groundwater from all HIA lands in the Big Chino sub-basin, regardless of the farm to which they were related. If this scheme were applied to implement the groundwater transportation provisions of A.R.S. § 45-555, it would eviscerate the very intent of the statute. If it truly were the intent of the legislature to permit the aggregation of pumping from all HIA lands in the Big Chino sub-basin, the legislature would have had no need to explicitly define the term "farm" as that area of land which "is or was served by a common irrigation water distribution system". *Id.* ADWR's Draft Rules simply do not comport with A.R.S. § 45-555, and should be modified to require explicit evidence demonstrating the relation of the HIA lands to specific farms and require that pumping be permitted only from those farms from which the HIA credits were obtained.⁴

In addition, by permitting the aggregation of HIA, the Draft Rules would allow Prescott to concentrate all of its groundwater pumping in one or a few wells, even though the HIA was determined based upon farms that are spread throughout the Big Chino sub-basin. As is well known to ADWR, pumping of this magnitude will create a significant cone of depression which would ultimately "dry up" neighboring wells, as well as impact the subflow of the Verde River.

II. The Draft Rules Fail to Require Adequate Evidence that the Water to be Pumped is Groundwater as Opposed to Subflow that is Subject to Prior Appropriation

Only **groundwater** is to be used in the calculation of HIA pursuant to A.R.S. § 45-555. However, the Draft Rules do not require the submission of any evidence to demonstrate that the water that would be used pursuant to a determination of HIA is, in fact, groundwater, and that it is not subject to the prior appropriation, aboriginal or federal reserved water rights of others, including those of the Nation. The Draft Rules should require this evidence to be submitted and evaluated by ADWR, and any water that is used for irrigation of HIA that is determined to comprise the headwaters of the Verde River and/or is determined to be subflow, must be precluded from the calculation of water available for transportation to the Prescott AMA, as this is the same water to which the Nation has a time immemorial water right.

The failure of ADWR to require evidence in the Draft Rules that the water to be pumped is actually groundwater, rather than surface water, would permit interference with the water rights of downstream surface water users on the Verde River, including the water rights of the Nation. The Draft Rules should be amended to include standards for a determination of whether or not the water that is used on HIA is actually groundwater.

⁴ The Nation generally agrees with the Salt River Project's discussion regarding the proper interpretation and application of A.R.S. § 45-555, as discussed in their comment letter submitted to ADWR on August 14, 2008.

III. The Draft Rules Violate the Public Policy of Arizona's Groundwater Management Code

The public policy of Arizona's Groundwater Management Code is declared as follows:

[I]n the interest of protecting and stabilizing the general economy and welfare of this state and its citizens it is necessary to conserve, protect and allocate the use of groundwater resources of the state and to provide a framework for the comprehensive management and regulation of the withdrawal, transportation, use, conservation and conveyance of rights to use the groundwater in this state.

See A.R.S. § 45-401(B) [emphasis added]. As discussed above, the Draft Rules do not comport with this declaration of public policy to manage the groundwater resources of the state for **all** Arizonans in a way that is stabilizing to the State's economy and welfare.⁵ The state and the totality of its citizens, including the many citizens living near the areas where Prescott would be pumping, and including the thousands who depend upon the Verde River for their livelihood, including the Nation, would be injured by the lack of requirements and restrictions in the Draft Rules that, if properly revised, could be made to comport with the public policy of the Groundwater Management Code and the intent of A.R.S. § 45-555. For these reasons, the Draft Rules should be revised prior to their adoption.

On behalf of the Nation, we request that all notices and communications regarding this issue be sent to our address listed above, and that we be added to the email list of interested stakeholders.

Yours Truly,

MONTGOMERY & INTERPRETER, PLC



Robyn L. Interpreter

⁵ The Draft Rules also fail to comply with ADWR's Tribal Government Policy issued April 18, 2006, which states that the Department "develops policies that promote conservation and **equitable** distribution of water." [emphasis added]. The Draft Rules would discriminately permit the inequitable distribution of groundwater and surface water to Prescott, while injuring thousands who rely upon those waters in the Verde River basin.

Cc: Thomas Beauty, Chairman of the Yavapai-Apache Nation
Robert Hunter, Attorney General for the Yavapai-Apache Nation