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August 14, 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**

Dear Doug:

This letter constitutes the initial comments by the Salt River Project on the Department's draft rules regarding the transportation of groundwater to an Active Management Area. Our comments are directed toward the June 18, 2008 draft of the rules that has been distributed to individuals and entities interested in this rulemaking proceeding. As discussed below, SRP has several concerns regarding the draft rules, most notably with respect to the provisions pertaining to determination of the annual transportation allotment for lands in the Big Chino sub-basin and the locations from which groundwater can be withdrawn for transportation.

A.R.S. §§ 45-555(A)-(D) requires that the Department determine the "annual transportation allotment" for each "farm" (defined as "an area of land in the sub-basin that is or was served by a common irrigation water distribution system") "or portion of a farm." The annual allotment for each farm or portion of a farm must be withdrawn only from "historically irrigated acres" ("HIA") within that farm. The draft rules, specifically R12-15-1409(B), are directly contrary to the underlying statutes in several respects. SRP requests that the Department modify the relevant provisions of the rules prior to adoption, in order to be consistent with the plain language and clear intent of the statutes.

## **I. Background and Statutory Authority**

Article 8.1 of Title 45 of the Arizona Revised Statutes addresses withdrawals of groundwater for transportation to an Active Management Area ("AMA") under the Groundwater Code. See A.R.S. §§ 45-551 to -559. The article generally prohibits the

withdrawal of groundwater from outside an AMA for purposes of transporting that water to an area inside an AMA. Id. § 45-551(B).

Section 45-555 contains a specific exception for the Big Chino sub-basin. That section provides, in pertinent part:

A. A city or town that owns land consisting of historically irrigated acres in the Big Chino sub-basin of the Verde River groundwater basin, as designated by order of the director dated June 21, 1984, or a city or town with the consent of the landowner, may withdraw from the land for transportation to an adjacent initial active management area an amount of groundwater determined pursuant to this section. The amount of groundwater that may be withdrawn from the land pursuant to this section shall not exceed:

1. In any year two times the annual transportation allotment for the land determined pursuant to subsection B of this section.

2. For any period of ten consecutive years computed in continuing progressive series beginning in the year transportation of groundwater from the land begins, ten times the annual transportation allotment for the land.

B. The director shall determine the annual transportation allotment as follows:

1. Determine each farm or portion of a farm owned or leased by the city or town in the sub-basin.

2. For each such farm or portion of a farm, determine the historically irrigated acres retired from irrigation. Multiply the sum of those historically irrigated acres by three acre-feet per acre.

C. In making the determination required by subsection B of this section, the director shall rely only on credible documentary evidence submitted by the city or town or otherwise obtained by the department.

D. For purposes of this section:

1. "Documentary evidence" means correspondence, contracts, other agreements, aerial photography, affidavits, receipts or official records.

2. “Farm” means an area of land in the sub-basin that is or was served by a common irrigation water distribution system.

3. “Historically irrigated acres” means acres of land overlying an aquifer that were irrigated with groundwater at any time between January 1, 1975 and January 1, 1990.

A.R.S. §§ 45-555(A)-(D).

Thus, the statute clearly requires that the Department must (1) first “[d]etermine each farm or portion of a farm owned or leased by the city or town in the sub-basin,” (2) then, “[f]or each such farm or portion of a farm,” 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 have been retired from irrigation; (3) and only then, “[m]ultiply the sum of those historically irrigated acres [i.e., the number of acres on each farm that were irrigated with groundwater between 1975 and 1990 and subsequently retired] by three acre-feet per acre.” Nothing in the statute authorizes the Department to aggregate the HIA acres in one “farm” together with those of any other “farm” for purposes of calculating the annual transportation allotment.

## **II. The Department’s Draft Rules and Summary of SRP’s Comments**

The Department’s draft rules take an approach that is contrary to the statute, for at least seven reasons. First, although the draft of R12-15-1405(B)(3) requires the applicant to provide the Department with information regarding “[t]he 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,” the draft rules do not require the applicant to provide any information that would enable the Department to verify which parcels are or were part of the same “farm,” i.e., whether they constitute “an area of land that is or was served by a common irrigation water distribution system.” See Draft Rule R12-15-1401(8).

Second, the Department’s proposed methodology for calculating the annual transportation allotment contains no mechanism for determining which lands are part of the same “farm” and, in fact, wholly ignores the statutory language relating to transportation of water from a “farm.” See Draft Rule 12-15-1405(C). The Department’s approach would merely aggregate all of the retired HIA lands owned or leased by the city or town in the sub-basin and would not take into account which lands were associated with which “farms.”

Third, draft R12-15-1409 states that “[a]n entity eligible to transport groundwater from the Big Chino sub-basin may withdraw the total amount of groundwater allowed

under R12-15-1408 from any HIA owned or leased by the entity in the sub-basin.” This provision is contrary to the language and intent of the statute requiring that the annual transportation allotment must be calculated for each “farm or portion of a farm.” In essence, the Department’s draft rules allow 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 a single well.

Fourth, the statutory definition of “historically irrigated acres” requires that such land must have been irrigated “with groundwater” between January 1, 1975 and January 1, 1990. See A.R.S. § 45-555(D)(3). The statute further provides that a city or town “may withdraw from the land for transportation to an adjacent active management area an amount of groundwater determined pursuant to this section.” Id. § 45-555(A). The Department’s proposed rules contain no process for determining whether the land was previously irrigated “with groundwater” (as opposed to appropriable water) or whether the water to be transported is groundwater. See Draft R12-15-1405(C). In fact, the draft rules do not even require the applicant to submit any information to show that groundwater was historically used on the farm or that the water to be transported is groundwater. See Draft R12-15-1404(A). The draft rules require only that the applicant provide “[a]n identification of the years between January 1, 1975 and January 1, 1990 that the lands were irrigated with groundwater, if known, . . . .” See Draft R12-15-1404(A)(7) (emphasis added). The Department’s failure to set up a process to determine whether the farm was or is being irrigated with groundwater or to even collect the information necessary to make that determination is inconsistent with the plain language of A.R.S. § 45-555.

Fifth, the draft rules limit who can apply for a determination that lands qualify as HIA. SRP requests that the rules be revised to allow individual landowners to apply for an HIA determination prior to those lands being sold or leased to a city or town.

Sixth, the draft rules provide that a city or town can commence transporting water from the Big Chino immediately after the Director determines the annual transportation allotment. Thus, one could contend that such transportation can begin even prior to the completion of any administrative or judicial appeal of the Director’s decision. The impacts of transportation on neighboring landowners or surface streams cannot be undone if it is later determined that the Director’s decision was incorrect. For this reason, that provision of the rule should be revised to specifically state that such transportation cannot begin until after a final, non-appealable decision on the transportation allotment has been rendered.

Seventh, the draft rules suggest that they will not apply to any HIA determinations made prior to their effective date. The Governor’s Regulatory Review Council (“GRRC”)

has found that HIA determinations can be made only pursuant to validly adopted rules. Thus, the Department should revisit any determinations made prior the effective date of the rules to see whether they are consistent with the rules as adopted, and the Department should provide all potentially affected parties with notice of such reconsideration and an opportunity to participate.

### III. SRP's Specific Comments on the Draft Rules

#### A. R12-15-1404 should require the city or town to provide information regarding the delineation of the "farm or portion of a farm," as defined in A.R.S. § 45-555(D)(2).

One flaw in the Department's draft rules relates to the fact that the rules do not even require the city or town to provide the information necessary to identify the "farm(s) or portion(s) of farm(s)" for which it seeks to withdraw and transport groundwater. A.R.S. § 45-555(D) specifically defines "farm," and one must assume that such a definition was intended to have some meaning.<sup>1</sup> SRP contends, as discussed below, that the importance of delineating each "farm" is that the annual transportation allotment must be calculated for each "farm or portion of a farm" and that the resulting amount of water can be withdrawn only from that "farm or portion of a farm."

The statute defines "farm" as "an area of land in the sub-basin that is or was served by a common irrigation water distribution system." See A.R.S. § 45-555(D). The Department's draft rules not only ignore the import of that definition, but they also fail to require the city or town to submit any information on which the delineation of a "farm" could be made.<sup>2</sup>

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<sup>1</sup> See, e.g., Corporation Comm'n v. Gem State Mut. Life Ass'n, 72 Ariz. 403, 405, 236 P.2d 730, 731 (1951) (in construing an act, the court should give effect to all portions thereof that are pertinent); State v. Johnson, 196 Ariz. 52, 54, 993 P.2d 453, 455 (App. 1998), review denied (April 12, 1999) (same); Hill v. Gila County, 56 Ariz. 317, 324, 107 P.2d 377, 380 (1940) (that construction of a statute should be favored which will render every word operative rather than a construction which makes some words idle or nugatory).

<sup>2</sup> In prior correspondence with SRP and again at the June 18, 2008 public workshop on these draft rules, the Department has indicated that its interpretation of the statute is based upon its review of drafts of prior bills from earlier legislative sessions that were not enacted. See, e.g., Letter from Sandra Fabritz-Whitney, ADWR, to David C. Roberts, SRP (May 18, 2007). The rules of statutory construction, however, do not support reliance upon language in prior, unsuccessful bills in construing the language of the bill that was ultimately enacted. See, e.g., City of Flagstaff v. Mangum, 164 Ariz. 395, 401, 793 P.2d 548, 554 (1990) (citing Allen v. Retirement Sys., 769 P.2d 1302, 1306 (Okla. 1988) (principle that legislative history and historical background of enacted statute provides guidance in ascertaining the intent of the

**B. R12-15-1405(C) should provide for the determination of an annual transportation allotment “for each farm or portion of a farm,” as required by A.R.S. § 45-555(B).**

Perhaps the most obvious and fundamental error in the Department’s draft rules is in the proposed implementation of the statutory process for determining the annual transportation allotment set forth in A.R.S. § 45-555(B). In preparing draft R12-15-1405(C), the Department has proposed a calculation that is inconsistent with the required statutory procedure.

Section 45-555(B) requires that the Department perform this calculation in three steps:

- (1) “Determine each farm or portion of a farm owned or leased by the city or town in the sub-basin”;
- (2) “For each such farm or portion of a farm, determine the historically irrigated acres retired from irrigation”; and
- (3) “Multiply the sum of those historically irrigated acres by three acre-feet per acre.”

A.R.S. § 45-555(B).

In no portion of this statutory process is the Department authorized to aggregate the HIA lands of one “farm” with those of another “farm.” The calculation is made for each “farm or portion of a farm.” This principle is clearly articulated by the fact that the first step is to “[d]etermine each farm or portion of a farm owned or leased by the city or town in the sub-basin.” *Id.* § 45-555(B)(1). It is further buttressed by the fact that the opening language of the second statutory step provides that the determination of HIA lands must be performed “[f]or each farm or portion of a farm.” *Id.* § 45-555(B)(2). The arithmetic operation that takes place in the third step involves multiplying the number of HIA acres determined for a single “farm or portion of a farm” by three acre-feet per acre. No provision of the statute authorizes the Department to add together the number of

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legislature has no application to proposed, but unenacted, legislation); *Carter v. California Dep’t of Veterans Affairs*, 44 Cal. Rptr. 3d 223, 38 Cal. 4th 914, 135 P.3d 637, 646 (2006) (“Unpassed bills, as evidences of legislative intent, have little value.”); *Graham v. Daimler Chrysler Corp.*, 21 Cal. Rptr. 3d 336, 346 n.5, 34 Cal. 4th 553, 572 n.5, 101 P.3d 140, 152 n.5 (2005) (same).

HIA acres or the transportation allotments for individual farms in order to derive an aggregated transportation allotment.

That is, however, exactly what draft R12-15-1405(C) would do. The Department's proposed calculation ignores the concept of a "farm" and instead merely aggregates, from the outset, all of the HIA lands owned or leased by that city or town within the sub-basin. What would result from the calculation under the draft rules would be a single transportation allotment for all HIA lands owned or leased by a city or town. It would not yield an individual transportation allotment for each "farm or portion of a farm," as required by the statute.

In order to be consistent with the clear statutory language of Section 45-555(B), draft R12-15-1405(C) should be revised to more closely reflect the required statutory calculation. The first step must be to make a determination of each "farm or portion of a farm" owned or leased by a city or town within the sub-basin. The second step must be to determine, for each such "farm or portion of a farm," the amount of HIA lands retired from irrigation. The third step must be to multiply the amount of HIA lands on a single "farm or portion of a farm" by three acre-feet. The statute does not authorize the Department to aggregate the individual transportation allotments for individual "farm(s) or portions(s) of farm(s)," and the rules should not provide for that, either.<sup>3</sup>

This flaw in the Department's draft rules becomes even more obvious when one compares the statutory provisions in A.R.S. § 45-552 (McMullen Valley) and 45-555 (Big Chino) with the language of the draft rules. As discussed above, the language of Section 45-555 requires that the annual transportation allotment for the Big Chino sub-basin must be calculated on a farm-by-farm basis. The resulting allotment represents the amount of groundwater that can be transported from a particular "farm or portion of a farm."

The language for McMullen Valley contained in A.R.S. § 45-552 is different, even though both statutes were enacted at the same time. Like the calculation for the Big Chino, the McMullen Valley statutory language sets forth a first step whereby the Department shall "[d]etermine each farm or portion of a farm" on the relevant land and a second step whereby the Department shall, "[f]or each such farm or portion of a farm, determine the historically irrigated acres." A.R.S. § 45-552(B)(1), (2). The language relating to the third step for McMullen Valley is significantly different, however. Section

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<sup>3</sup> Draft R12-15-1405(E) is another instance where the draft rules have impermissibly substituted the term "HIA Lands" for the statutory language of "each farm or portion of a farm." Any determination of additional HIA lands made after the initial calculation of the annual transportation allotment must take into account in which "farm or portion of a farm" such lands are located. R12-15-1405(E) should be revised consistent with SRP's comments relating to R12-15-1405(C).

45-552(B)(3) provides that, for McMullen Valley, the Department must “[m]ultiply the sum of those historically irrigation acres for all such farms or portions of farms by three acre-feet per acre.” (Emphasis added.) This last sentence for McMullen Valley provides for aggregation of the HIA lands for “all such farms or portions of farms.” No such language exists for the Big Chino in Section 45-555(B).

The Arizona Legislature enacted the procedures for determining the annual transportation allotment for the Big Chino and for McMullen Valley in the same session and in the same legislative act. For the Big Chino, the Legislature required that the Department determine the annual transportation allotment for “each farm or portion of a farm.” For McMullen Valley, the Legislature specifically added language requiring that the final step of the calculation aggregate the numbers for “all such farms or portions of farms.”

Although the statutory language for the Big Chino and McMullen Valley is inherently different in the most pertinent section, the Department has prepared draft rules that are virtually identical for both sub-basins. Compare Draft R12-15-1403(C) with Draft R12-15-1405(C). One must assume the Legislature knew what it intended when it enacted these two different provisions. It is not for the Department to ignore this legislative distinction in its adoption of rules.

- C. **R12-15-1409 should state that the annual transportation allotment “for each farm or portion of a farm” must be withdrawn from HIA land owned or leased by the city or town within that “farm or portion of a farm.”**

The Department’s error in setting forth the procedure for calculating the annual transportation allotment is carried forward to draft R12-15-1409, which relates to the location from which groundwater may be withdrawn for transportation. At least in part because the Department has wrongly provided that the annual transportation allotment for a city or town in the Big Chino is determined on an aggregated basis, draft R12-15-1409 provides that any groundwater from any HIA land within the sub-basin can be withdrawn from any HIA land owned or leased by the city or town in the sub-basin, regardless of whether such land was part of that same “farm or portion of a farm.”

Like the provisions relating to calculating the annual transportation allotment, the Department’s draft rules with respect to the locations from which groundwater can be withdrawn do not take into account the differences between the statutory language for the Big Chino and that for McMullen Valley. Draft R12-15-1409(A), which relates to McMullen Valley, and draft R12-15-1409(B), which relates to the Big Chino, are virtually identical. The draft rules fail to recognize that the statutory language for McMullen Valley provides for an aggregated annual transportation allotment, while the statutory

language for the Big Chino provides that such allotment is for “each farm or portion of a farm.”

The plain language of Section 45-555(B) provides that the annual transportation allotments in the Big Chino must be calculated for “each farm or portion of a farm.” Because the language in Section 45-555(A) is tied to the calculation of that allotment, the only reasonable interpretation of that language is that the groundwater must be withdrawn from the same “farm or portion of a farm.” Nothing in the statute authorizes the Department to aggregate the annual transportation allotments for individual farms in the Big Chino, and nothing authorizes the Department to allow a city or town to withdraw the combined total of the annual transportation allotments of all its farms in the sub-basin from a single point of withdrawal.

The Department’s draft R12-15-1409(B) would allow a city or town to aggregate the annual transportation allotments of all its farms in the Big Chino and to withdraw that entire combined amount from a single well. Such an interpretation, in addition to having no support in the statutory language, also could yield disastrous consequences. Assume, for example, that a city purchased one acre of HIA land on a farm near the headwaters of the Verde River (“Smith Farm”) and an additional 1,000 acres of HIA land on a different farm thirty miles away but within the sub-basin (“Jones Farm”). Under the proper construction of the statute, the annual transportation allotment of the Smith Farm would be 3 acre-feet, and the annual transportation of the Jones Farm would be 3,000 acre-feet. Thus, the city could withdraw three acre-feet per year from wells on the Smith Farm and 3,000 acre-feet per year from wells on the Jones Farm, or roughly the amount of water that Smith and Jones, respectively, each would have withdrawn and used on their retired lands if those lands had remained in agricultural production.

Under the Department’s draft rules, conversely, the city could withdraw all 3,003 acre-feet per year from a single well on its one-acre portion of the Smith Farm. Such a result not only would fail to approximate the historical distribution of pumping from when the farms were in production, but it also would drastically alter the impacts on surrounding landowners and the Verde River. The Department’s interpretation would, in effect, allow a city or town to transfer some form of “paper water right” from one parcel to another, perhaps tens of miles away. The clear intent of the Legislature, to the contrary, was to allow a city or town to physically withdraw groundwater from roughly the same locations as had historically taken place and to transport that groundwater from

the “farm” to the city or town.<sup>4</sup> That is why the Legislature required that the annual transportation allotment in the Big Chino be calculated for each “farm or portion of a farm.”

The Department’s interpretation makes the identity of the entity transporting the water the determining factor in the point of withdrawal analysis. For instance, if a city (“City”) owned only the Jones Farm in the example above and a different town (“Town”) owned only the Smith Farm, the City (even under the Department’s interpretation) would be required to pump all of the 3,000 acre-feet per year associated with the Smith Farm from wells located on the HIA lands on that farm. If the City then purchased the one acre on the Jones Farm, it could withdraw all 3,003 acre-feet per year from wells on the Jones Farm. Thus, the point of withdrawal would change, perhaps by multiple miles, based solely upon the change in ownership or lease. Nothing in the statute supports this result or the Department’s interpretation that would lead to it.

The Department’s flawed construction of the statute also potentially opens the door for gaming the system. If the Department goes forward with the rules as drafted, there is incentive for a single city or town to purchase or lease the HIA lands closest to the location of the greatest water demand in the area; to purchase or lease all other HIA lands (or to sublease them from a city or town that has already purchased or leased them); and to withdraw and transport the combined amount of groundwater from all those lands from wells on that single close parcel. The draft rules do not require the “entity eligible to transport groundwater” to be the entity that delivers that water to its customers; it is simply the entity that is allowed to transport that water to the AMA. This component of the rules, coupled with the Department’s flawed interpretation of the location from which the groundwater can be withdrawn, could result in an “agency” relationship among cities and towns whereby the combined transportation allotments of all eligible entities are aggregated into one allotment and withdrawn from a single location. Such a result would clearly be contrary to the intent of the Legislature.

The only way to avoid these potential results and to be consistent with the plain language of the statute and with legislative intent is to require that the transportation allotment for each farm be withdrawn from wells on that farm. Draft R12-15-1409(B) should be revised to read: “An entity eligible to transport groundwater from the Big Chino sub-basin may withdraw the amount of groundwater allowed for a farm or portion

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<sup>4</sup> See generally Farmers Investment Co. v. Bettwy, 113 Ariz. 520, 527, 558 P.2d 14, 21 (1976) (Under the common law rule, “[w]ater may not be pumped from one parcel and transported to another just because both overlie the common source of supply if the plaintiff’s lands or wells upon his lands thereby suffer injury or damage.”); see also Jarvis v. State Land Dep’t, 104 Ariz. 527, 456 P.2d 385 (1969), reh’g denied (July 15, 1969) (same); Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 173 (1953) (same).

of a farm under R12-15-1408 from any HIA land owned or leased by the entity in that farm or portion of a farm.”

- D. R12-15-1404 should require the applicant to provide information showing that the land was historically irrigated with groundwater and that the water to be transported is groundwater, and R12-15-1405 should provide for the Director’s determination of whether those two statutory requirements are satisfied.

The Department’s draft rules also ignore the fact that Arizona law distinguishes between “percolating” groundwater and appropriable underground “subflow.” The statutes upon which these draft rules are based apply only to percolating groundwater. To the extent that underground water constitutes subflow or is otherwise appropriable under A.R.S. § 45-141, it is subject to the prior appropriation doctrine and the protection of other persons with senior vested rights.

Section 45-555 applies only if (1) the farm was historically irrigated with groundwater and (2) the water to be withdrawn and transported in the future is groundwater. The draft rules ignore the distinction between groundwater and appropriable subflow, assume that all underground water is percolating groundwater, and do not even require the applicant to submit any information upon which the Department can base a decision on whether the water is percolating groundwater or appropriable subflow. Draft R12-15-1404(A)(7) requires, for example, that the applicant identify the specific lands that were irrigated with groundwater between 1975 and 1990 only “if known.” Presumably, if the applicant does not “know” whether the lands were irrigated with groundwater or appropriable subflow, he or she would have no obligation to submit any information whatsoever under the draft rules. Draft Rule 12-15-1404(A)(8) similarly states that the applicant must identify the wells that have been used to withdraw groundwater for the land only “if known.”

The draft rules also fail to provide for a determination by the Department as to whether groundwater was historically used to irrigate the lands and whether the water that would be transported under the statute would be groundwater as opposed to appropriable subflow. The rules should require the applicant to submit the information necessary to make those decisions and should state that the Department will not authorize the transportation unless and until it determines that (1) the water historically used to irrigate the farm was percolating groundwater and not appropriable subflow and (2) the water to be transported is percolating groundwater and not appropriable subflow.

- E. The rules should allow individual landowners to apply for a determination of whether their lands have been “historically irrigated” with groundwater.

The draft rules would not allow individual owners of land to apply for a determination of whether their lands are considered HIA. Draft R12-15-1404(A) provides that such applications can be made only by an “entity eligible to transport groundwater from the Big Chino sub-basin.” Draft R12-15-1401(7) defines “entity eligible to transport groundwater,” with respect to the Big Chino sub-basin, as “a city or town in the Prescott AMA.”

The underlying statute does not limit who can apply for such a determination. Section 45-555 defines “historically irrigated acres” but does not preclude owners of those acres from applying for a determination of such from the Department.

Owners of potential HIA lands in the Big Chino sub-basin that have not yet been sold or leased to cities or towns in the Prescott AMA have a significant interest in the determination of whether those lands are classified as HIA. Without such a determination, the landowner cannot negotiate on a level playing field with the city or town for the purchase or lease of the land. Furthermore, if the landowner is allowed to request an HIA determination and the Department rules against it, the landowner has a strong interest in being able to appeal that determination in order to protect the value of his or her property as HIA. Under the draft rules, only the city or town could appeal such an adverse determination, leaving the landowner at the mercy of the city or town.

SRP suggests that R12-15-1404 be revised to provide that either the landowner or the city or town seeking to transport the groundwater can apply for an HIA determination in the first instance. Such a revision would provide an appropriate mechanism for landowners to apply for such a determination and to appeal any adverse decision on that application.

F. **The rules should not allow groundwater to be transported until after a final, non-appealable decision has been rendered on the transportation allotment.**

Decisions of the Director are subject to administrative appeal before the Office of Administrative Hearings and subsequently to judicial appeal before the superior court and appellate courts. See generally A.R.S. § 45-114. The proceedings in such appeals often last for many months or even years.

The effects of groundwater pumping, although often not instantaneous, can occur over a relatively short period of time under certain conditions. Impacts of pumping and transportation on surrounding landowners or surface streams can be difficult, if not impossible, to reverse.

The Department's draft R12-14-1406(C) states that, except under certain limited circumstances, "[a]n entity eligible to transport groundwater from the Big Chino sub-basin and that owns or leases HIA Lands in the sub-basin may commence transporting groundwater from the sub-basin at any time after the director determines the annual transportation allotment for the HIA lands." In order to clarify that such transportation cannot begin until after any administrative or judicial appeal of the decision has been completed, that draft rule should be revised to say that such entity "may commence transporting groundwater from the sub-basin at any time after a final, non-appealable determination of the annual transportation allotment for the HIA lands is issued."

**G. Any prior HIA determinations should be revisited to examine whether they were made in a manner consistent with the required rules.**

The Department initially took the position that it was not required to adopt rules in order to make HIA determinations. Based upon that flawed premise, the Department made at least some HIA determinations prior to even attempting to enact rules on the subject. GRRC subsequently rejected the Department's position and found that the Department was required to engage in a formal rulemaking process.

With respect to those prior HIA determinations, the draft rules ignore GRRC's rulemaking mandate. Draft R12-15-401(10) defines "HIA Land" as land that has been determined to qualify as HIA pursuant to the rules "or in a final written decision issued by the director prior to the effective date of this rule."

This provision is in error. To the extent the Department has made prior HIA determinations, those determinations were never valid. The Department should revisit and reconsider the prior HIA applications based upon the rules as ultimately promulgated. For example, the Department must ensure that all landowners and other affected parties receive adequate notice and an opportunity to be heard on these determinations. In addition, the Department must apply all of the provisions of the rules, including addressing the question of whether the lands were irrigated with groundwater during the appropriate time period.

**IV. Summary and Requested Action**

SRP appreciates the Department's efforts in developing the draft rules and the opportunity to submit comments. Although the existing draft constitutes a good start on the rules, much remains left to be done. The draft rules, as they currently exist, do not comport with the express language and clear intent of the underlying statutes. The rules need to be revised to (1) require the city or town to submit information sufficient to delineate each "farm or portion of a farm" from which it seeks to transport groundwater; (2) provide that the determination of the annual transportation allotment for the Big

Chino sub-basin will be performed for “each farm or portion of a farm”; (3) state that 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”; (4) provide for the Department’s determination of whether the water historically used to irrigate the farm and the water proposed to be transported is percolating groundwater and not appropriable subflow; (5) allow individual landowners to apply for an HIA determination prior to the sale or lease of such lands to a city or town; (6) require that transportation of groundwater can commence only after a final, non-appealable decision on the transportation allotment; and (7) provide for the reconsideration of any HIA determinations that were made prior to the effective date of the rules.

If you have any questions regarding these comments or need any additional information, please call me.

Very truly yours,



David C. Roberts  
Manager  
Water Rights & Contracts

cc:

- John Sullivan, Salt River Project
- Sandy Barr, Grand Canyon Chapter-Sierra Club
- Tom Buschatzke, City of Phoenix
- Jean Calhoun, The Nature Conservancy
- Gregg Capps, City of Chandler
- Chris Coder, Camp Verde Yavapai-Apache Nation
- Tony Gioia, Town of Camp Verde
- Bob Hardy, City of Cottonwood
- Michelle Harrington, Center for Biological Diversity
- Eric Kamienski, City of Tempe
- Carole Klopatek, Fort McDowell Yavapai Nation
- Beth Miller, City of Scottsdale
- Jane Moore, Town of Jerome
- Kathy Rall, Town of Gilbert
- Vivian Saunders, Salt River Pima Maricopa Indian Community
- Robin Stinnet, City of Avondale
- Doug Von Gausig, Town of Clarkdale
- Ghina Yamout, City of Mesa