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Arizona Department of Water

RE: Petition to create an INA in the San Simon Basin

Greetings, my name is Timothy Gercke. I am a resident of the State of Arizona and hold property interests in both Cochise and Maricopa counties. My family has resided in Arizona since it became a State. I am writing to add my comments concerning the petition brought before the Commissioner to create an INA in the San Simon Basin. I am opposed to this creation not only as the owner of a registered USDA farm and duly recorded well in San Simon but because I feel the creation of an INA now is the wrong solution to the wrong problem at the wrong time. I wish to add my commentary and suggestions, to the corpus of the collective public feedback. That my comments might contribute and add value to seeking an equitable solution to this matter that can benefit everyone is my sole intent.

I am familiar with the long history of water rights and use in Arizona, which include then Governor Babbitt creating the Arizona Department of Water in 1980 and at that time empowered the Commissioner to create an INA. This empowerment to create an INA was, at the time, foremost a political gambit by the Governor to finesse the Federal Department of the Interior to release funding for, and to complete, the Central Arizona Project. And while an INA has been a useful tool implemented by the Commissioner in other AMA's within the State I feel that the petition before the Commissioner to create an INA in the San Simon basin is not the right strategy and is problematic.

Geological evidence supports the presence of water in the San Simon basin dating back approximately 2.5 million years according to the research of Lawrence C Thrasher of the US Department of Land Management, Safford, AZ. Those advancing immediacy for an implementation of an INA in the San Simon basin because of water scarcity, when considered in terms of the geological evidence is a bit reactionary. I'm not deprecating the legitimate concerns over water availability or usage in the basin but what is sorely missing from the problem solving equation is actual hard data collected over a long period of time on the actual water use in the San Simon and San Pedro basin. And with the Department of Water being a relatively new creation it would be unreasonable to expect it to have significant, long term water use data to inform the discussion. This lack of significant hard data has left the department with little recourse other than to rely upon modeling, albeit sophisticated are still but models. And while these models are useful, the model being advanced in support of the Water Departments assessment of the San Simon Basin water usage lacks long term hard data to support its premises. It certainly does not adequately support on its own merit or justify an INA.

I would posit that the central thesis driving the petition for an INA is not really about water depletion but rather about economics and corporate use and exclusivity. The courts in Arizona have ruled consistently that while property owner do not own the water beneath their land they do in fact own the right to access the water beneath their land from their land and use it accordingly. This is an inherent right of land ownership in Arizona which, among others, is one of the core point of contention voiced by those in opposition to this petition for an INA.

Cochise County and the San Simon basin has been historically, a rural, agriculture, ranching area since the late 19<sup>th</sup> century. Farmers and ranchers have been raising crops and livestock, drawing water from the San Simon basin and San Pedro basins for over 100 years. It could be easily argued that even in the peak years of agricultural and ranching production in this county during the mid-20<sup>th</sup> century that much of the land that would now be impacted by an INA was in fact used in active farming and irrigation without the benefit of modern agricultural science or best practice water management.

Modern pumps, valves, sprinklers, timing devices and best irrigation practice were simply not used then because the technology was not available and the science of best practice as it is understood today was unknown. It could be concluded that during this peak farming/ranching period that those farmers and ranchers probably used more water, inefficiently when compared to today's best practice. Nonetheless, in spite of those practices considered which the accepted norm for the time, (which we might deem today, as wasteful), those farmers and ranchers did not in fact run the basin dry, nor did their wells bleed out the system. The proof of this is the fact that there is still water in the San Simon basin today. There are certainly those far more knowledgeable than I in jurisprudence in these matters who undoubtedly would be consulted for recourse and options should the INA be imposed.

According to the USDA the majority of the potential farm, irrigable acres, in the San Simon Basin are currently not in production and are in a fallow state. The owners, farmers and ranchers of these lands, have made a conscious choice not to put their land into production. Best farming practice throughout the ages includes periodically resting the land. And the choice to fallow land should not be subject to penalties by the State if the landowner's sense of responsible land management is not to have acreage in production at any given time or for any period of time. Creating an INA at this time not only penalizes but effectively eliminates any farmer not currently producing or during the last 60 months from bringing back on line his or her farm into production. An INA now would have a long term negative economic impact on the county.

I believe, that real driving force behind the petition for an INA in the San Simon Basin is not about conservation or water scarcity at all but about controlling farming competition. I have no issue with those farmers who wish to raise trees or other crops using and requiring large amounts of water. But I do take issue that the petitioners which represent a minority of the farmers in the basin feel that they can demand an INA and do so with impunity at the expense of the majority of others farmers whom the courts have historically protected and upheld their right to use the water beneath their lands as they sees fit. This petition for the creation of an INA is a manipulation which if successful enacted will invite needless litigation. And the irony would be, that it would be the State of Arizona, not the citizens advancing the petition that would become the defendant.

I am reluctant to conclude that the petitioners who are advancing the request for an INA, when initially doing their due diligence before entering into these large scale tree farming collectives under estimated their projected water requirements to sustain their farming business. And now they calculate that an INA is necessary and is their best interest to insure their long term water needs. This does not make sense. I would argue that such a rationale for an INA at this time is not proactive in support of conservation, but is in actuality, a predatory business decision. And while I do not claim to be privy to their thinking, the petitioner's voiced concerns over sustainable and adequate water supply (in spite of geological history of water in the San Simon basin) is just not that convincing. There must be another motive. The only reasonable deduction for their petition for an INA at this time is to freeze out potential competition which is de facto restraint of trade. Granting their petition for the INA would constitute a restraint of trade, State imposed, and arguable be construed as a direct violation of the Sherman Anti-Trust Act, which prohibits the deliberate creation of monopolies through restraining trade.

By granting their petition and creating an INA and hence creating a monopoly for these few growers it would be the State of Arizona and its agency the Department of Water which would become subject to antitrust litigation, not the petitioners. There are certainly those far more knowledgeable than I in jurisprudence in these matters who undoubtedly would be consulted for options and recourse should the INA be imposed. But any litigation would put the State of Arizona and the Department of Water in the role of the defendant while simultaneously indemnifying and holding harmless those who brought forth the petition for creating the INA in the first place. That would be a true waste of resources.

We live in an era when the social discourse is filled with rhetoric about of water shortages throughout Southwest. Closer to home the drought conditions in California have many of those growers, especially of trees seeking to move their operation and business to other places including southern Arizona. Understandably this would create competition for Arizona growers and impact water consumption, creating anxiety and fueling scarcity fear. I would encourage the Commissioner to view this petition for an INA as foremost a manipulation to eliminate economic competition, not conserve water. Were INA's envisioned for this purpose? This petition is fueled by the perception of scarcity and by the fear of loss. Some might say even greed. But do these perception warrant the implantation of an INA which would have permanent, long term consequences to the majority? This petition to create an INA as a protective business strategy which serves only a few at the expense of the many is neither equitable nor is it just. And it is, in my view, an attempt to subvert the Commissioner's authority for commercial gain and would be misuse of power. Granting the petitioners request at this time is not the best water resource management strategy.

Unwarranted fear of loss also impacts those on both sides of this issue. Moving beyond visceral reaction I feel that the focus should be on what would an equitable and responsible strategy look like? What actions would foster confidence, minimize fear, responsibly manage the water resources and promote economic stability, growth while honoring historic right of land owner to water use? I personally don't feel that is helpful castigate others needlessly. This issue is not about some being right and many being wrong. We all need to move beyond this mentality couched in the fear of loss and find equitable solutions. So in the spirit of being proactive I am sharing some ideas that might be useful in creating a plan could warrant a consensus that would be equitable and considerate of everyone's needs and rights.

- 1) Not to approve the petition for an INA at this time.
  
- 2) Allow those land owners whose farms and ranches that are not currently in production/non-irrigating status, a grace period (say for 36-48 months) to re-engage in active farming or ranching. But as a caveat, the Department of water would establish a baseline of minimum standards requiring all farmers or ranchers that wish to reactivate their land and irrigate to modernize and/or upgrading all irrigation equipment, pumps, sprinklers and timing devices to afford best practice and conservation.
  
- 3) Empower the Commissioner to selectively deem any farm and or land not used for farming and or irrigated after the grace period to be placed in an INA that is parcel specific only.

- 4) Require that all new growers, Farming Corporation or DBA's coming into Arizona for the purpose of large tract farming of over 100 acres file documentation to support a sufficient 100 year water supply as is required for real estate developers. The Department of water can regulate, meter and collect data through this process. It would afford oversight, supervisor and protection to indigenous farmers currently operating in the community and allow the Water Department to better manage the overall water resources of the state and be revenue producing for the department.
- 5) And finally, the Department of Water should engage in scientifically constructed study, of real time water use for a minimum of 10 years before any subsequent decision or granting of an basin wide INA. Water has been in the Basin for over 2.5 million years and while the tables might shift it difficult to conclude it will vanish within 10 years that this study would take place.

### Conclusion

The Department of Water Resources and its Commissioner have become one of the key trusted servant of the people of Arizona. They enjoy an opportunity to demonstrate real leadership and deserve the support of the citizens. I would ask the Commissioner to take a step back, and consider this petition for an INA for what it is and consider what it is not. It is as an opportunity to take a longer view and craft an equitable strategy of water management that is proactive not reactive.

We seem to live in a culture that tempts all of us to prioritize self-serving -interests and hence to consider much disposable, including at times, each other. Thankfully most farmers are not inherently of this mindset. Responsibility to and for the land does not condone its exploitation. Most of the folks who live or have interests in agriculture in Cochise County have this consciousness of good stewardship. Everyone desires responsible resource management and I believe all want to do the right thing.

But I believe creating an INA in the San Simon basin at this time is not the right course of action and will only create a distraction with long term consequences at the expense of addressing and solving more pressing resource management needs. I urge the Commissioner to table this petition for an INA at this time but at the same time, present a plan and to take steps that continue to encourage a dialogue and consensus on what the right course of action actually looks like.

Respectfully submitted,

Timothy Gercke