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To: [Sharon Scantlebury](#)
Cc: [Steve Wene](#); [Travys Harvey](#)
Subject: Fisi Farms - Comments
Date: Friday, July 17, 2015 9:21:40 AM
Attachments: [2015-07-17 - Fisi - Comments re Proposed San Simon Irrigation Non-Expansion Area.pdf](#)

Hi Sharon,

Attached for filing are the comments in the matter of the petition to form the San Simon Irrigation non-expansion area. If you should have any question, please give me a call. Thank you.

Donnelly Herbert
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7 **BEFORE THE ARIZONA DEPARTMENT OF WATER RESOURCES**

8
9
10 IN THE MATTER OF THE PETITION TO
11 FORM THE SAN SIMON IRRIGATION
12 NON-EXPANSION AREA

13
14 **COMMENTS RE PROPOSED SAN
15 SIMON IRRIGATION NON-
16 EXPANSION AREA**

17
18 Fistiki Farms, LLC (“Fistiki”) hereby files its comments on the proposed San
19 Simon Irrigation Non-Expansion Area (“INA”). For the reasons explained below,
20 Fistiki urges the Director of the Arizona Department of Water Resources (“ADWR” or
21 “Department”) to deny the petition to form the INA.

22 **Legal Standard**

23 Before ADWR can approve an application or petition, the Department must
24 make specific findings. *See Phelps Dodge Corp. v. Arizona Dep’t of Water Res.*, 211
25 Ariz. 146, 148, 118 P.3d 1110, 1112 (App. 2005). A.R.S. § 45-432(A) requires the
26 Director to find “there is insufficient groundwater to provide a reasonably safe supply
27 for irrigation of the cultivated lands in the area at the current rates of withdrawal.”

28 Accordingly, the record must establish with facts: (1) current pumping rates; (2) to what
extent such pumping would dewater the aquifer; and (3) the impact such dewatering

1 would have on the local agricultural economy.

2 **Current Pumping Rates Do Not Significantly Dewater the Sub-basin**

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4 First and foremost, the petitioners offered no evidence that would establish the
5 facts needed for ADWR to find that an INA should be formed. However, the ADWR
6 Study documented current pumping rates and the projected impact this level of
7 pumping would have on the aquifer during the next 100 years. ADWR estimates
8 current groundwater withdrawal is approximately 49,726 acre-feet per year. *See*
9 Technical Memorandum re Groundwater Flow Model of the San Simon Valley Sub-
10 basin, Ariz. Dept. of Water Resources, at p. 44 (June 17, 2015) (“ADWR Study”).

11
12 Based upon this withdrawal rate, ADWR projects that in 100 years water levels will be
13 as follows:
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15

	Bowie	San Simon	Portal	Rodeo
16 Minimum Depth to Water (Feet BLS)	149	144	292	266
17 Maximum Depth to Water (Feet BLS)	622	441	385	370
18 Average Depth Below Land Surface	388	316	339	297

19
20

21 These drawdowns will not materially impact the aquifers. At the projected pumping
22 rates, in 2115 ADWR estimates the perched aquifer (referred to as Layer 1 in the ADWR
23 Study) will range between 200 and 1,200 feet thick in most areas. *See* ADWR Study at
24 Figure 35. Furthermore, the deep basin aquifer (Layer 2) will be between 400 and 5,200
25 feet thick in most areas. *See id.* at Figure 36. Clearly, current pumping levels will not
26 drastically impact the amount of groundwater in the San Pedro Sub-basin.
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28

1 **No Evidence that Farming Would Be Unsustainable Under Projected Conditions**

2 After determining the amount of groundwater available, before establishing an
3
4 INA the Director of ADWR must determine that farming is unsustainable due to the
5 aquifer drawdown. Knowing there will still be water in the aquifer, determining whether
6 or not farming will be sustainable is an economic question. The Director's findings must
7
8 be based upon facts and not be either arbitrary or capricious. *See Rice v. Ariz. Dept. of*
9 *Economic Sec.*, 183 Ariz. 199, 201, 901 P.2d 1242, 1244 (App. 1995).

10 Answering this question would require a very complex analysis. The Director
11 must know the current and projected crops to be grown, the current and projected crop
12 yields, the current and projected revenues derived from such yields, the current and
13 projected power costs to withdraw the groundwater, and the current and projected capital
14 expenses of farming the area, and the current and projected operating expenses of
15 farming the area. Without such data, any decision by the Director would be arbitrary.
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18 Here, the record contains no such data. An economic analysis of the viability of
19 farming driven by lowering water tables would require an expert analysis. To our
20 knowledge, the petitioners presented no economic study to make this case. While
21 petitioners may arguable be allowed to rely on ADWR's expertise to determine aquifer
22 conditions, it cannot rely on ADWR to perform a study on the local agricultural economy
23 and its projected conditions in 2115. Rightfully, ADWR's staff has not attempted to
24 undertake this task. Establishing an INA without such data on the record would
25
26 constitute an arbitrary and capricious decision. Accordingly, the petition to form the INA
27
28 should be denied.

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2 **Petition Is Insufficient**

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4 Arizona has a strong public policy favoring citizen petitions. *Pioneer Trust Co.*
5 *v. Pima County*, 168 Ariz. 61, 66, 811 P.2d 22, 27 (1991). When it comes to the
6 purpose of the petition, however, the compliance requirements vary. When citizens
7 submit legislation to voters, such as an initiative, the petition must only substantially
8 comply with the law. *Kromko v. Superior Court*, 168 Ariz. 51, 58, 811, P.2d 12, 19
9 (1991). But when petitioners seek to change the law enacted by the legislature, then
10 petitioners must strictly comply with applicable constitutional and statutory provisions
11 because this is an extraordinary power that permits the minority to impose its will on
12 others. *Cottonwood Dev. v. Foothills Area Coalition*, 134 Ariz. 46, 48-49, 653 P.2d
13 694, 696-97 (1982). A.R.S. § 45-433 allows 25% of irrigators using groundwater
14 within a proposed INA to petition to form an INA. This statute does not explain the
15 petition process in detail; rather it refers to rules governing the circulation of petitions
16 and signatures.

17
18 On its face, there are several issues with the petition. First and foremost,
19 nowhere does the signatory establish that he or she was authorized to sign for the
20 landowner, which in most cases is a company or corporation. Second, the signatures
21 are not verified by an affidavit of circulator. These are fundamental flaws in the
22 petition that cannot overcome either a strict scrutiny, which applies here, or even a
23 substantial compliance analysis. Thus, the Director should find the petitions are not
24 valid and the issue of establishing an INA is moot.
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1 **Notice Fistiki Has Made Substantial Capital Investment**

2 Fistiki understands it is ADWR's position that it will accept and consider
3 applications to be recognized as a substantial capital investor only if an INA is
4 designated. To ensure it has standing in this proceeding, Fistiki hereby notifies the
5 Department that it has made substantial capital investments on its property.
6 Documentation of this investment will be presented when ADWR decides it will accept
7 such evidence.
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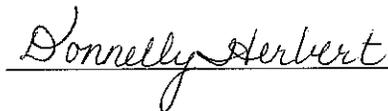
9
10 RESPECTFULLY SUBMITTED this 17th day of July, 2015.

11
12 **MOYES SELLERS & HENDRICKS LTD.**

13
14 
15 Steve Wene

16
17 Copy of the foregoing electronically
18 sent this 17th day of July, 2015 to:

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22 (602) 771-8472 (phone)
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24 Email: sscantlebury@azwater.gov

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