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9 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
10 **IN AND FOR THE COUNTY OF MARICOPA**

11 IN RE THE GENERAL ADJUDICATION  
12 OF ALL RIGHTS TO USE WATER IN  
13 THE GILA RIVER SYSTEM AND  
14 SOURCE

15 W-1 (Salt)  
16 W-2 (Verde)  
17 W-3 (Upper Gila)  
18 W-4 (San Pedro)  
(Consolidated)

Contested Case No. W1-11-3107

**ARIZONA DEPARTMENT OF  
WATER RESOURCES'  
SUPPLEMENTAL LEGAL  
AUTHORITY**

Special Master Susan Ward Harris

19 **CONTESTED CASE NAME:** *In re Paul L. Sale Invest. Co.*

20 **HSR INVOLVED:** San Pedro River Watershed Hydrographic Survey Report

21 **DESCRIPTIVE SUMMARY:** The Arizona Department of Water Resources (“ADWR”) hereby submits supplemental legal authority in this matter.

22 **NUMBER OF PAGES:** Three and 32-page attachment

23 **DATE OF FILING:** June 28, 2022  
24  
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1 On May 16, 2022, the Salt River Project Agricultural Improvement and Power  
2 District (“District”) and the Salt River Valley Water Users’ Association (collectively  
3 “SRP”) filed a “Motion to Determine Jurisdiction and Proper Forum for Post-Abstract  
4 Severance and Transfer and Change-in Use Applications” (“Motion”). On June 10, 2022,  
5 ADWR filed its response in opposition to the relief requested in Salt River Project’s  
6 Motion (“Response”).

7 SRP’s Motion mentioned the procedural posture of a matter concerning a pending  
8 severance and transfer and change in use application filed by the District with ADWR.  
9 Motion at 8, n. 6. ADWR’s Response provided additional information regarding the  
10 procedural posture of that case, noting that it is before the Office of Administrative  
11 Hearings (“OAH”). Response at 13, n. 20.

12 In SRP’s Reply in support of its Motion filed June 22, 2022, SRP cites the specific  
13 case in which the matter is pending before OAH, SRP’s Application for Attorneys’ Fees  
14 and Expert Witness Fees, case law, and the District’s legal position in the case. Reply at  
15 8, ll. 15-16, n. 9. ADWR hereby provides a copy of the “Decision and Order of the  
16 Director” (Attachment A) filed September 29, 2021, remanding the matter to OAH for  
17 further proceedings. The remand is mentioned in SRP’s Reply. *Id.* at ll. 18-19.

18 **DATED** this 28th day of June, 2022.

19 ARIZONA DEPARTMENT OF WATER  
20 RESOURCES

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Kimberly R. Parks, Deputy Counsel

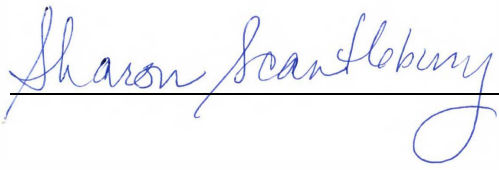
1 **ORIGINAL** of the foregoing Supplemental Legal  
2 Authority sent by hand-delivery on June 28, 2022, to:

3 Clerk of the Maricopa Superior Court  
4 Attn: Water Case  
5 601 W. Jackson Street  
6 Phoenix, Arizona 85003

7 **COPY** of the foregoing Supplemental Legal  
8 Authority sent by hand-delivery on June 28, 2022, to:

9 Special Master Susan Ward Harris  
10 Maricopa County Superior Court  
11 Central Superior Court Building  
12 201 West Jefferson Street, Suite 3A  
13 Phoenix, AZ 85003-2205

14 **COPIES** of the foregoing Supplemental Legal  
15 Authority sent by first-class mail on June 28, 2022 to  
16 all parties on the Superior Court-approved mailing list for  
17 Contested Case No. W1-11-3107.

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# **ATTACHMENT A**

**ARIZONA DEPARTMENT OF WATER RESOURCES**

**BEFORE THE DIRECTOR**

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In the Matter of the Decision of Director to Deny Amended Application to Partially Sever and Transfer Salt River Project Agricultural Improvement and Power District's Statement of Claim of Right No. 36-105209

Docket No. 20A-SW002-DWR

**DECISION AND ORDER OF THE DIRECTOR**

The Director of the Arizona Department of Water Resources (“ADWR”) received the Administrative Law Judge Decision dated August 30, 2021 (“ALJ Decision”), granting a motion for summary judgment filed by the Salt River Project Agricultural Improvement and Power District (“SRP”). A copy of the ALJ Decision is attached hereto as **Exhibit A**. The Director rejects the ALJ Decision and remands the matter to the Office of Administrative Hearings (“OAH”) for further proceedings for the reasons set forth herein. Because this Decision and Order does not terminate proceedings before ADWR, it is not subject to immediate judicial review, pursuant to A.R.S. § 12–902. *Arizona Physicians IPA, Inc. v. W. Arizona Reg’l Med. Ctr.*, 228 Ariz. 112, 114, ¶ 11, 263 P.3d 661, 663 (App. 2011).

**I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND**

**A. SRP Application and Objections**

1. On September 30, 2005, SRP filed an application (“Application”) to sever and transfer rights to use surface water claimed in its Statement of Claim of Right No. 36-105209 (“Claim”) pursuant to A.R.S. § 45-172. [JSF ¶ 6.]<sup>1</sup>

2. SRP’s Claim is for the right to divert and beneficially use water from Aravaipa Creek, a tributary to the San Pedro River, for irrigation of 107.8 acres of land known as Black Farm Preserve (“Black Farm”). [JSF ¶¶ 1-2.] SRP sought to transfer the

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<sup>1</sup> References to “JSF” are to the Joint Statement of Stipulated Facts filed by the parties to this proceeding before OAH on April 20, 2021.

1           3.       Claim from irrigation use to an instream flow use for the benefit of wildlife.  
2 [JSF ¶ 8.] Specifically, SRP sought to sever and transfer part of its Claim to establish and  
3 maintain suitable riparian habitat for the southwestern willow flycatcher and the yellow-  
4 billed cuckoo. [JSF ¶ 8.]

5           4.       The Application originally proposed to sever and transfer 1,692.5 acre-feet  
6 per annum (“AFA”), [JSF ¶ 8], and indicated that the claimed right would be used in the  
7 streambed of Aravaipa Creek, to include both streambed adjacent to Black Farm and  
8 streambed north of but not adjacent to Black Farm. [Attachment 4 to initial Application.]  
9 SRP amended its Application twice, once by letter dated November 29, 2006, stating that  
10 part of the water right would remain with the land, and again by letter dated May 13, 2011,  
11 amending the proposed place of use to include only the reach of Aravaipa Creek that runs  
12 through the northern portion of the Black Farm property. [JSF ¶ 14.] Through these  
13 amendments, SRP also reduced the quantity of water to be severed and transferred to  
14 1,419.7 AFA. [JSF ¶¶ 13-17.]

15           5.       By letter to SRP dated October 29, 2010, ADWR noted that “During a recent  
16 field trip with SRP, [ADWR] observed that Aravaipa Creek is ephemeral at the proposed  
17 new place of use, and understands that it has been ephemeral for several years.” ADWR  
18 requested that SRP explain how the “flow” of Aravaipa Creek, “which is currently non-  
19 existent” would be augmented for the benefit of wildlife. [ADWR October 29, 2010 Letter  
20 to SRP (Proposed ADWR Exhibit 11) at 1; JSF ¶ 18.]

21           6.       SRP responded by letter dated May 13, 2011, stating that “By eliminating  
22 the diversion of water from Aravaipa Creek, or more recently from its subflow, for the  
23 irrigation of more than 90 acres of land [ ] through the severance and transfer, hydrologic  
24 conditions within the subflow zone will likely improve over time, which in turn is expected  
25 to support the establishment and maintenance of riparian vegetation.” [JSF ¶ 18.]

26           7.       SRP claimed through its Application, as amended, that the decrease in  
pumping of water for irrigation purposes will improve hydrologic conditions within the

1 subflow zone and enhance stream flow at the proposed place of use, thereby supporting the  
2 growth of riparian vegetation that could be used beneficially for the specified wildlife  
3 purposes. SRP claimed that the decrease in pumping would temporally extend the presence  
4 of surface water or moist soils at the site during the breeding season and thus would add to  
5 the attractiveness of the Black Farm reach of Aravaipa Creek to southwestern willow  
6 flycatchers. [JSF ¶ 44.]

7 8. In its letter of May 13, 2011, SRP also stated, “The District has recently  
8 installed several wells within the saturated alluvium of Aravaipa Creek at the Black Farm  
9 Preserve. These wells will be used to monitor water levels in the alluvial aquifer and  
10 measure the long-term response to discontinued pumping.” [SRP Letter of May 13, 2011  
(Proposed ADWR Exhibit 13) at 1.]

11 9. Notably, SRP did not indicate in any of its application materials an intent to  
12 “make a call on” upstream junior appropriators to achieve its proposed use.

13 10. In 2013, ADWR provided public notice in the Casa Grande Dispatch of the  
14 Application, as amended, pursuant to A.R.S. § 45-172(A)(7). The last date of publication  
15 was January 31, 2013, which commenced a 30-day objection period. [JSF ¶ 51.]

16 11. St. David Irrigation District, C-Spear Ranch, Aravaipa Farms, Bayless &  
17 Berkalew and ASARCO LLC filed objections during the 30-day objection period. By  
18 letters dated March 30, 2015 (ASARCO LLC), May 9, 2017 (Aravaipa Farms) and April  
19 20, 2018 (St. David Irrigation District, C-Spear, LLC and Bayless & Berkalew Company)  
20 all of the objections were withdrawn. [JSF ¶ 52.]

21 12. In support of its application, SRP provided to ADWR a Management Plan  
22 for Black Farm (October 2004, updated May 2019) (“Management Plan”). The  
23 Management Plan contained an Implementation Matrix dated October 2008 which  
24 indicated that SRP had completed a planned cessation of irrigation at Black Farm by March  
25 2007. [Management Plan at B-5 (Proposed ADWR Exhibit 45).]

1           13. In the Management Plan, with respect to its monitoring strategy for  
2 groundwater levels at Black Farm, SRP stated:

3           Although water table depth and surface water flows are listed as factors in  
4 measuring management success, collection of these data will not influence future  
5 management decisions or actions, beyond SRP's action to sever and transfer water  
6 rights to instream flows for wildlife purposes. Therefore, success will be achieved  
7 by completing this action along with capping and abandonment of the irrigation  
8 well.

9           Beyond that, future changes in groundwater levels and surface flows will be dictated  
10 primarily by factors that are not within SRP's control such as climatic variations,  
11 weather patterns, watershed activities and adjacent land uses.

12 [Management Plan (Proposed ADWR Exhibit 45) at 18.]

13           14. On March 24, 2010 and on January 7, 2019, the Department conducted site  
14 visits to Black Farm. Despite the fact that the District reported that irrigation stopped in  
15 March of 2007, Department staff did not observe any noticeable riparian vegetation present  
16 along the proposed place of use during the site visits. [Initial Decision of the Director to  
17 Deny Amended Application (Proposed ADWR Exhibit 47A) at ¶ 55.]

18           **B. ADWR's Initial Decision and OAH Proceedings**

19           15. On August 3, 2020, ADWR issued an initial decision and order denying  
20 SRP's Application ("Initial Decision"). Among its Conclusions of Law, ADWR stated that,  
21 "Pursuant to A.R.S. § 45-172(A)(2), the Director has the authority to define and limit the  
22 amount of water to be diverted or used subsequent to the sever and transfer." [Initial  
23 Decision at 12.] The Initial Decision also determined that SRP failed to prove that it could  
24 put the water to its proposed beneficial use for the following reasons:

25           a. The District's requested beneficial use of wildlife requires dense riparian  
26 vegetation. The reach of Araviapa [sic] Creek where the District seeks an instream  
flow water right is ephemeral and does not provide sufficient water flow to support  
riparian vegetation for the beneficial use of wildlife.



1 b. The District has not provided a method for directly measuring the quantity of  
2 water being put to the proposed beneficial use of wildlife, which is the basis,  
measure and limit to the use of surface water.

3 c. The District has failed to show how the decrease in pumping of water from [the  
4 Irrigation Well] has an effect on the hydrologic conditions within the subflow zone.

5 [Initial Decision at 13.] The Initial Decision denied the Application, stating that “the  
6 quantity of surface water SRP proposes to sever and transfer for purposes of wildlife cannot  
7 be put to beneficial use, which is the basis, measure and limit to the use of surface water  
8 under A.R.S. § 45-[141](B)<sup>2</sup>.” [Initial Decision at 14.]

9 16. By letter received by ADWR on September 2, 2020, SRP submitted its  
10 Notice of Appeal of the Director’s Initial Decision. In it, SRP identified twelve points as  
11 grounds for its appeal. Because SRP’s first enumerated ground is highly relevant to this  
Decision and Order, it is set forth here in full:

12  
13 1. The Director improperly and incorrectly based his decision on criteria not  
14 set forth in the statute when he found that, in reviewing the Application, he was  
15 authorized and required to determine whether the quantity of water that SRP seeks  
16 to put to the wildlife use can be put to beneficial use for that purpose. [Decision, at  
17 14]

18 Neither A.R.S. § 45-172 nor A.R.S. § 45-156 requires the Director to  
19 determine whether sufficient flow exists at the location of the proposed use of water  
20 in order to effectuate a beneficial use, and it does not authorize the Director to deny  
21 an S&T or change in purpose of use application on that basis. A.R.S. § 45-172  
22 “identifies the only grounds on which ADWR can deny a properly filed application  
23 to sever and transfer a water right.” *Department of Water Resources v. McClennen*,  
24 238 Ariz. 371, 372, ¶ 2, 360 P.3d 1023, 1024 (App. 2015). “ADWR’s authority to  
deny a properly filed application for the severance and transfer of water rights is  
defined by the ‘limitations and conditions’ set forth in § 45-172(A).” *Id.* at 375, ¶  
22, 360 P.3d at 1027. The Arizona Department of Water Resources (“ADWR”) has  
not promulgated any rules or guidance documents establishing any other criteria for

25 \_\_\_\_\_  
26 <sup>2</sup> In the Initial Decision, ADWR mistakenly referred to A.R.S. § 45-141(B) as A.R.S. § 45-142(B).  
There is no section 45-142(B) in Arizona Revised Statutes.

1 S&T applications. A.R.S. § 45-156 sets forth no criteria on which the Director can  
2 deny an application for a change in purpose of use of a water right, and ADWR has  
promulgated no rules or guidance documents establishing any such criteria.

3 A.R.S. § 41-1030(B) “prohibits ADWR from basing a licensing decision ‘in  
4 whole or in part on a licensing requirement or condition that is not specifically  
5 authorized by statute.” *McClennen*, 238 Ariz. at 374 ¶ 15, 360 P.3d at 1026. The  
6 Director had no authority under A.R.S. § 45-172 or A.R.S. § 45-156 to deny the  
Application on the bases stated in the Decision.

7 [Attachment C to SRP’s Notice of Appeal (Proposed ADWR Exhibit 49), at 1-2.]

8 17. In its Notice of Appeal, SRP also challenged the determination in the Initial  
9 Decision that the quantity of water that SRP seeks to put to wildlife use cannot be put to  
10 beneficial use for that purpose. [Attachment C of SRP’s Notice of Appeal (Proposed  
11 ADWR Exhibit 49), at 2.]

12 18. Additionally, in its Notice of Appeal, SRP stated, “Once administration and  
13 enforcement of water rights on Aravaipa Creek commences, SRP’s senior priority date will  
14 give it legal authority to make a call on upstream users and require them to refrain from  
15 diverting or withdrawing water unless and until SRP’s right for Black Farm is satisfied.”  
16 [Attachment C to SRP’s Notice of Appeal (Proposed ADWR Exhibit 49) at 2.]

17 19. SRP also alleged that the Director improperly and incorrectly found that SRP  
18 failed to provide a method for directly measuring the quantity of water to be put to  
19 beneficial use for wildlife, stating in part, “With respect to the present Application, the  
20 wildlife use at the new location in and adjacent to the creek channel has not yet fully  
21 occurred because ADWR has not yet granted the Application and SRP has not yet had the  
22 opportunity to enforce its senior instream flow right against upstream junior users.”  
[Attachment C to SRP’s Notice of Appeal at 5.]

23 20. On March 29, 2021, ADWR filed and served on SRP a Notice of Hearing.  
24 The first issue noticed by ADWR was “Whether the Director properly considered the  
25 proposed beneficial use in evaluating the Application and whether the Director properly  
26 determined that the District failed to demonstrate that the quantity of water the District

1 seeks to put to wildlife use cannot be put to beneficial use for that purpose at the proposed  
2 place of use.” [Notice of Hearing at 3.]<sup>3</sup>

3 21. On April 26, 2021, SRP filed at OAH a Motion for Summary Judgment, or  
4 in the Alternative, *Motion In Limine* to Exclude Evidence or Argument Re Matters  
5 Extrinsic to A.R.S. § 45-172(A) (“Motion for Summary Judgment” or “Motion”). In that  
6 Motion, SRP argued that ADWR erred in relying on A.R.S. § 45-141(B) as a basis for its  
7 decision, and, relying on *Ariz. Dep’t of Water Resources v. McClennen*, 238 Ariz. 371, 360  
8 P.3d 1023 (2015) (“*McClennen*”), SRP argued that ADWR is not authorized under A.R.S.  
9 § 45-172 to consider whether SRP could achieve its proposed use.

### 10 C. ALJ Decision

11 On August 30, 2021, the ALJ issued a decision granting SRP’s Motion for Summary  
12 Judgment and vacating the matter from OAH’s calendar (“ALJ Decision”). The ALJ did  
13 not make enumerated Findings of Facts or Conclusions of Law, but determined that  
14 “‘beneficial use’ is not a proper basis for the denial of an application to sever and transfer.”  
15 [ALJ Decision at 7.] The ALJ stated that the Arizona Legislature included “beneficial use”  
16 as a requirement for an appropriation of water right in A.R.S. § 45-141(B) and A.R.S. §  
17 45-151(A) and (B), but did not include “beneficial use” as a requirement for severances  
18 and transfers in A.R.S. § 45-172(A). [ALJ Decision at 6.] The ALJ reasoned that, under  
19 *McClennen*, ADWR could not rely on criterial outside of A.R.S. 45-172(A) to deny an  
20 application to sever and transfer. [ALJ Decision at 6-7.]

## 21 II. DECISION OF THE DIRECTOR

### 22 A. Reason for Decision

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24  
25 <sup>3</sup> In that Notice, ADWR mistakenly referenced A.R.S. § 45-153 as one of the statutory authorities  
26 for the hearing, rather than A.R.S. § 45-172. SRP pointed out this error, and ADWR issued a  
Revised Notice of Hearing on April 15, 2021, to correct the mistake.

1           1. *A.R.S. 45-172(A) requires applicants to demonstrate that they can achieve one of*  
2           *the proposed uses identified in the initial paragraph of that subsection.*

3           The doctrine of beneficial use is fundamental to the law applicable to surface water  
4           in Arizona. *See Clough v. Wing*, 2 Ariz. 371, 17 P. 453 (Ariz. Terr. Ct. 1888) (“A person  
5           has no right to water he does not use for some beneficial purpose.”); *Arizona Public Service*  
6           *Co. v. Long*, 160 Ariz. 429, 436, 773 P.2d 988, 995 (1989) (“In Arizona, being a desert  
7           state, water is a precious commodity. One does not own water in Arizona. One only has  
8           the right to put it to beneficial use.”). SRP does not appear to argue that a water right, after  
9           it is severed and transferred, is not subject to the doctrine of beneficial use, nor can it.  
10          A.R.S. § 45-141(B) makes clear that beneficial use is the basis, measure and limit to all use  
11          of surface water. Additionally, A.R.S. §§ 45-188 and 45-189, which provide that a water  
12          right may revert to the state due to failure to “beneficially [use]” the water for a period of  
13          time, make clear that water rights claims are subject to the requirement of beneficial use  
14          after they are severed and transferred.<sup>4</sup>

15          Instead, SRP argues that the Director lacks authority to assess whether an applicant  
16          can or will beneficially use its water right for its intended purpose after it is severed and  
17          transferred because, SRP argues, there is no “beneficial use” criterion contained in A.R.S.  
18          § 45-172(A). [Motion for Summary Judgment at 3.] This is incorrect.

19          As an initial matter, while the term “beneficial use” does not appear in A.R.S. § 45-  
20          172, the initial paragraph of A.R.S. § 45-172(A) sets forth specific “uses” for which a  
21          severance and transfer may be granted, and the various uses listed in that paragraph are, in  
22          fact, beneficial uses. *See* A.R.S. § 45-151(A) (listing various “uses” for which  
23          unappropriated water may be appropriated) in conjunction with § 45-151(B) (making clear

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24          <sup>4</sup>More specifically, A.R.S. § 45-189(E)(7)(b), by recognizing a particular instance involving a  
25          severed and transferred right to be “sufficient cause for nonuse,” makes clear that water rights that  
26          have been severed and transferred are otherwise subject to the provisions of A.R.S. § 45-189. SRP  
                appears to concede that water rights are subject to these provisions after a severance and transfer.  
                [*See* SRP Reply in Support of Motion for Summary Judgment at 16.]

1 that the uses enumerated § 45-151(A) are considered beneficial uses); § 45-152.01(C)  
2 (discussing appropriations for purposes of “recreation or wildlife, including fish” in  
3 conjunction with § 45-152.01(A) (making clear that those uses are “beneficial uses”); *see*  
4 *also* A.R.S. § 45-181(1) (defining “beneficial use” for purpose of Chapter 1, Article 7 of  
5 Title 45 as including “use for domestic, municipal, recreation, wildlife, including fish,  
6 agricultural, mining, stockwatering and power purposes”). SRP, in its Notice of Appeal,  
7 acknowledged that the wildlife use for which it seeks a severance and transfer is a  
8 “recognized beneficial use of appropriable water.” [Attachment C to SRP’s Notice of  
9 Appeal at 1.]

10 It is not uncommon in Chapter 1 of Title 45, A.R.S., that where particular provisions  
11 are made applicable to only certain types of beneficial uses or distinguish between various  
12 types of beneficial uses, the Legislature refers to “use(s)” and not “beneficial use(s).” *See,*  
13 *e.g.,* A.R.S. § 45-157 (delineating the relative values of each type of “use”; A.R.S. § 45-  
14 173(A) (referring to underground storage merely as a “use”); A.R.S. § 45-189(E)(7)  
15 (referring to irrigation as “irrigation use” when distinguishing it from other types of  
16 beneficial uses). The Legislature refers to “beneficial use” or “beneficial uses” when  
17 describing allowable uses in the collective. A.R.S. § 45-172 limits who may sever and  
18 transfer rights for certain uses (*i.e.,* instream flow uses). Therefore, the statute refers to the  
19 specific allowable uses as “uses” for particular purposes rather than the collective term  
20 “beneficial use(s)”.

21 However, regardless of whether A.R.S. § 45-172(A) refers to them as “beneficial  
22 uses” or simply “uses,” an applicant must demonstrate that it can and will put the water to  
23 one of the specific uses described therein, including demonstrating that there is sufficient  
24 water available to achieve the proposed use. This is because the requirement that a  
25 severance and transfer may only be granted for certain uses necessarily and inherently  
26 requires that Director determine that the applicant can, in fact, achieve the proposed use.  
And Arizona courts, in the context of forfeiture, have indicated that sustained absence of

1 fish, wildlife, or recreational activity from the relevant water source constitutes failure to  
2 “use” an instream flow right. *Phelps Dodge Corp. v. Arizona Dept. of Water Res.*, 211 Ariz.  
3 146, 151, ¶ 20, 118 P.3d 1110, 1115 (App. 2005). That a severance and transfer may only  
4 be granted for certain uses also inherently requires that the proposed use serve as the basis,  
5 measure, and limit to the use of water authorized by the severance and transfer.

6 Alternatively, regardless of whether A.R.S. § 45-172(A) refers to them as  
7 “beneficial uses” or simply “uses,” ADWR has authority to consider A.R.S. § 45-141(B)  
8 for purposes of determining the basis, measure and limit of an applicant’s proposed use.  
9 This is not a grafting of a new criteria into A.R.S. § 45-172. The “use” criterion is expressly  
10 mentioned in A.R.S. § 45-172(A), and A.R.S. § 45-141(B) clarifies that beneficial use is  
11 the basis, measure and limit to a “use.” ADWR may look to other statutes for purposes of  
12 interpreting or analyzing criteria contained in A.R.S. § 45-172(A). To hold otherwise  
13 would lead to absurd results. ADWR would be prevented from considering, for instance,  
14 any other statutory provisions in determining whether a water right has been lawfully  
15 perfected under the laws of the territory or the State of Arizona or whether the right has  
16 been forfeited or abandoned, as required by A.R.S. § 45-172(A)(3). That could not have  
17 been the intent of the Legislature.

18 SRP’s position that ADWR cannot consider whether an applicant can and will  
19 beneficially use water for the applicant’s stated purpose would lead to absurd results. *See*  
20 *City of Phoenix v. Superior Court*, 139 Ariz. 175, 178, 677 P.2d 1283, 1286 (1984) (court  
21 should interpret a statute so as to give it a fair and sensible meaning); *Collins v. State*, 166  
22 Ariz. 409, 415, 803 P.2d 130, 136 (App.1990) (court interprets statutes to accomplish  
23 legislative purpose and to avoid an absurd result). The beneficial use doctrine is designed  
24 to “promote the beneficial use of water and to eliminate waste of this precious resource.”  
25 *See Long*, 160 Ariz. at 438, 773 P.2d at 997. In the proceeding before OAH, ADWR’s  
26 attorneys provided examples of the types of problems that could arise if ADWR could not  
consider whether an applicant could put the water to a beneficial use, including an example

1 in which an applicant might seek to sever and transfer large quantities of water rights to  
2 irrigate a very small parcel of land, or in which an applicant might seek to transfer water  
3 for the benefit of an endangered fish where no such fish lives in the stream, resulting in  
4 waste. [ADWR Response to SRP’s Motion for Summary Judgment at 19.] SRP argued that  
5 “market forces” would prevent this from happening, stating “no party would seek to sever  
6 and transfer its 5,000 acre-foot water right from 300 acres to only one acre.” [SRP Reply  
7 in Support of Motion for Summary Judgment (“SRP Reply”) at 15.] However, it is not  
8 beyond the realm of possibility, for instance, that an owner of land selling the land to a  
9 non-irrigation user would attempt to retain water rights by severing and transferring those  
10 rights to another, smaller parcel, for later use or sale. SRP’s position would mean that  
11 ADWR could not deny the application, even though the applicant could not beneficially  
12 use the entire amount of the right sought to be transferred for the proposed irrigation use.

13 SRP also argued that these types of outcomes would not occur because, if an  
14 applicant were seeking to transfer a water right for a wasteful purpose, interested parties  
15 would object. [SRP Reply at 15.] However, this begs the question: if an applicant is not  
16 required to provide information to ADWR about its ability to beneficially use the water for  
17 its proposed use in making its application because ADWR is not authorized to consider  
18 that criterion, how are interested persons to assess whether the proposal would be wasteful?  
19 And if ADWR lacks authority to deny an application based on waste (or inability to achieve  
20 proposed use), how could it consider those types of objections? SRP’s position, if affirmed,  
21 would subvert the goals of A.R.S. § 45-172(A) to protect other interested parties.

22 Finally, SRP argued that Arizona statutes have a separate process in place to deal  
23 with the failure to beneficially use water after a severance and transfer through forfeiture  
24 provisions. [Reply in Support of Motion for Summary Judgment at 16.] It is unreasonable  
25 to suggest that the Legislature intended ADWR to grant an application to sever and transfer  
26 where the applicant cannot demonstrate that it can achieve its proposed use, when the right  
would be subject to forfeiture or abandonment five years later due to nonuse of the right.

1           2. *ADWR has authority under A.R.S. § 45-172(A)(2) to analyze whether an applicant*  
2           *can achieve its proposed use.*

3           ADWR additionally has authority under A.R.S. § 45-172(A)(2) to analyze whether  
4 an applicant can achieve its proposed use. Section 45-172(A)(2) requires the Director to  
5 consider whether vested or existing rights to the use of water will be affected, infringed  
6 upon or interfered with, and whether water diverted or used after the transfer will exceed  
7 the vested rights existing at the time of the severance and transfer. As is discussed more  
8 fully below, ADWR did not have cause prior to the issuance of its Initial Decision to find  
9 a violation of A.R.S. § 45-172(A)(2), based on representations by SRP in its Application  
10 materials. However, SRP has submitted a new proposal, which may now implicate this  
11 provision. ADWR has authority under A.R.S. § 45-172(A)(2) to analyze whether an  
12 applicant can achieve its proposed use, so as to ensure that the applicant will not interfere  
13 with other water users' vested rights, and to define and limit the amount of water to be  
14 diverted or used accordingly. If an applicant were permitted to sever and transfer a water  
15 right without consideration of how it will achieve its proposed use, ADWR could not  
16 determine whether the applicant's proposed use would require interference with other  
17 water user's rights in order to achieve the use.

18           3. *The Director's Decision is in accordance with the holding of McClennen.*

19           Contrary to arguments made by SRP in its Motion for Summary Judgment,  
20 ADWR's consideration of whether SRP can achieve its proposed use is not inconsistent  
21 with the holding in *McClennen*, which was stated thusly by the Arizona Supreme Court:  
22 "We hold that § 45-172 identifies the only grounds on which ADWR can deny a properly  
23 filed application to sever and transfer a water right." 238 Ariz. 371 at ¶ 2.<sup>5</sup> The requirement

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24 <sup>5</sup> This was one of two holdings expressed in the case; the other, having to do with who qualifies as  
25 "interested persons" entitled to object to a proposed severance and transfer, Ariz. at 372, ¶ 2, is not  
26 relevant to this matter.



1 in the initial paragraph of A.R.S. § 45-172(A) that a party can sever and transfer water  
2 rights only for particular uses provides ADWR with authority to consider whether SRP  
3 can, in fact, achieve its proposed use.

4 In support of its Motion for Summary Judgment, SRP argued that the *McClennen*  
5 decision restricts ADWR’s review to the seven enumerated “limitations and conditions”  
6 set forth in A.R.S. § 45-172(A)(1)-(7). [See, e.g., Motion for Summary Judgment at 2.] The  
7 Arizona Supreme Court’s opinion in *McClennen*, does in fact contain a statement that  
8 “ADWR’s authority to deny a properly filed application for the severance and transfer of  
9 water rights is defined by the “limitations and conditions” set forth in § 45-172(A).”  
10 *McClennen*, 238 Ariz. at 375, ¶ 22. However, this statement, which is narrower than the  
11 Court’s stated holding, was not essential to the decision, and is therefore dicta. See, e.g.,  
12 *Clark Equip. Co. v. Arizona Prop. & Cas. Ins. Guar. Fund*, 189 Ariz. 433, 442, 943 P.2d  
13 793, 802 (App. 1997) (noting that language in a decision not essential to the resolution of  
14 the case is dicta); *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 81, 638 P.2d  
15 1324, 1327 (1981) (a court’s statement on a question not necessarily involved in the case  
is without force of adjudication and not controlling as precedent).

16 The *McClennen* case concerned an argument by Mohave County that the Director  
17 was required to consider whether a proposed severance and transfer would increase tax  
18 burdens in the county, negatively affect “an already strained water supply,” and otherwise  
19 be against the public interest, 238 Ariz. at 373, ¶ 5, though such criteria are in no way  
20 identified in A.R.S. § 45-172(A). The Arizona Supreme Court correctly determined that  
21 ADWR could not base a decision on an application filed pursuant to A.R.S. § 45-172 on  
22 criteria derived wholly from other statutes, such as in the statute concerning applications  
23 for initial appropriations, A.R.S. § 45-153(A). See, 238 Ariz. at 375, ¶ 20.

24 The Director does not believe that the Arizona Supreme Court intended to foreclose  
25 ADWR from considering criteria or limitations set forth in the initial paragraph of A.R.S.  
26 § 45-172(A). Such a restriction would lead to untenable results. For instance, the initial

1 paragraph specifies that any right may be severed and transferred “with the consent and  
2 approval of the owner of such right.” Surely, the Supreme Court did not intend that ADWR  
3 could grant a severance and transfer application without the consent and approval of the  
4 owner of the right. Similarly, if ADWR could not consider whether the criteria in the initial  
5 paragraph of A.R.S. § 45-172(A) were satisfied, it could not deny an application by a  
6 private entity to sever and transfer a water right for a use for recreation or wildlife, even  
7 though the initial paragraph clearly provides that only the state or its political subdivisions  
8 may qualify for such a severance and transfer.

9 The *McClennen* decision also cannot mean that ADWR is forbidden to consider any  
10 other statutory provision outside of A.R.S. § 45-172(A) in *interpreting* or *analyzing* criteria  
11 set forth in A.R.S. § 45-172(A). As explained above, this would also lead to untenable  
12 results.

13 Finally, even if the Supreme Court meant to limit ADWR’s review to the seven  
14 enumerated “limitations and conditions” set forth in A.R.S. § 45-172(A), and prevent  
15 ADWR from considering criteria in the initial paragraph of that subsection, ADWR has  
16 authority under A.R.S. § 45-172(A)(2) to analyze whether an applicant can achieve its  
17 proposed use, as explained above.

#### 18 4. *Judicial estoppel is inapplicable.*

19 Finally, SRP raised a claim that ADWR should be judicially estopped from arguing  
20 that it has authority to consider whether SRP can achieve its proposed wildlife use based  
21 on arguments ADWR made to the Arizona Supreme Court in connection with the  
22 *McClennen* decision. [SRP’s Motion for Summary Judgment at 13-16.] The ALJ did not  
23 reach this issue in her decision.

24 Judicial estoppel *may* be applied where a party changes factual positions from a  
25 prior judicial proceeding involving the same parties and the same question where the party  
26 was successful. *See State v. Towery*, 186 Ariz. 168, 182, 920 P.2d 290, 304 (1996); *Flood  
Control Dist. of Maricopa County v. Paloma Inv. Ltd. P’ship*, 230 Ariz. 29, 41, ¶ 35, 279

1 P.3d 1191, 1203 (App. 2012).<sup>6</sup> Judicial estoppel is wholly inapplicable, first and foremost,  
2 because the Director’s Decision is not inconsistent with the stated holding of *McClennen*  
3 that “§ 45-172 identifies the only grounds on which ADWR can deny a properly filed  
4 application to sever and transfer a water right.” However, even if the Decision were  
5 inconsistent with *McClennen*, judicial estoppel still would not apply.  
6 ADWR certainly has not changed any factual positions relevant to the *McClennen* case.<sup>7</sup>  
7 Additionally, the question involved in *McClennen* was whether the Director was required  
8 to consider whether a proposed severance and transfer would increase tax burdens in the  
9 county, negatively affect “an already strained water supply,” and otherwise be against the  
10 public interest in considering whether to grant a permit under A.R.S. § 45-172. That is not  
11 the question presented here. Finally, SRP was not a party to the *McClennen* case.<sup>8</sup>

12 5. *The ALJ erred in determining that SRP’s Motion for Summary Judgment should be*  
13 *granted on the ground that “the appropriate reason was not stated in the [Initial]*  
14 *Decision.”*

15 The ALJ’s Decision contains a statement that the grant of SRP’s Motion for

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16 <sup>6</sup> To the extent that the case cited to by SRP, *Mecham v. City of Glendale*, 15 Ariz. App. 402, 404,  
17 489 P.2d 65, 67 (App. 1971), permitted a claim of judicial estoppel where the parties were not the  
18 same, that case is contrary to the statement of the requirements for judicial estoppel in later cases,  
19 including a case decided by the Arizona Supreme Court, *State v. Towery*, 186 Ariz. 168, 182, 920  
20 P.2d 290, 304 (1996), and therefore should be considered to be overruled.

21 <sup>7</sup> SRP disagrees that the doctrine of judicial estoppel applies only to changes in factual positions,  
22 citing to *Russell v. Rolfs*, 893 F.2d 1033 (9th Cir. 1990). That precedent is not binding on Arizona  
23 courts, but it involved an initial representation in federal court that a prisoner had an “adequate and  
24 available” remedy available in state court and a subsequent argument that state court that the  
25 prisoner’s claims were barred. That question, whether a prisoner had an available remedy in state  
26 court, was a mixed question of fact and law. No factual inconsistencies are at issue in this case.

<sup>8</sup> SRP claims to be a “party” to the *McClennen* litigation because it filed an amicus brief in that  
case. Amici are not parties to litigation. *See, e.g., Town of Chino Valley v. City of Prescott*, 131  
Ariz. 78, 84, 638 P.2d 1324, 1330 (1981) (refusing to consider arguments by amici to the extent  
that they extend or enlarge issues beyond those raised by parties).

1 Summary Judgment “is not to say that [ADWR] may not have had an appropriate reason  
2 under the statute to deny the Application, but merely that the appropriate reason was not  
3 stated in the [Initial] Decision.” [ALJ Decision at 7.] The Director does not agree that this  
4 was a valid basis for granting SRP’s Motion for Summary Judgment. First, ADWR’s stated  
5 reasons were appropriate, as explained above. ADWR’s Initial Decision contained an  
6 express legal conclusion that “Pursuant to A.R.S. § 45-172(A)(2), the Director has the  
7 authority to define and limit the amount of water to be diverted or used subsequent to the  
8 sever and transfer” [Initial Decision at 12.] ADWR’s Initial Decision makes clear the  
9 factual basis for the denial – that SRP had not demonstrated that sufficient water would be  
10 available to achieve its proposed beneficial use. The question of whether ADWR has  
11 authority under A.R.S. § 45-172(A) to deny SRP’s Application due to SRP’s inability to  
12 make this demonstration was fully briefed and argued by the parties before OAH.  
13 Therefore, there was no basis to grant SRP’s Motion on this ground. *See Matter of*  
14 *Wickman*, 138 Ariz. 337, 340, 674 P.2d 891, 894 (App. 1983). (“Pleadings before  
15 administrative agencies are liberally construed and there may be no subsequent challenge  
16 of an issue which was actually litigated if there has been reasonable notice and an  
opportunity to cure surprise.”)

17       Additionally, to the extent that other grounds for denial of SRP’s Application exist  
18 that were not raised in ADWR’s Initial Decision, those grounds may be relied upon by the  
19 Director in reaching a final administrative decision if they are litigated during the hearing  
20 process. *See id.; Berenter v. Gallinger*, 173 Ariz. 75, 83, 839 P.2d 1120, 1128 (App. 1992)  
21 (“The question for [a] court on a claim of error for discrepancies between the administrative  
22 complaint and the agency findings is not the adequacy of the pleadings but the fairness of  
23 the entire proceeding.”); *see also Shaffer v. Arizona State Liquor Bd.*, 197 Ariz. 405, 408,  
24 ¶ 14, 4 P.3d 460, 463 (App. 2000) (noting that the purpose of administrative proceedings  
25 is to allow agencies to make factual records, to apply their expertise, and to correct their  
26 own errors.)

1           This is true regardless of what information was available to ADWR at the time it  
2 reached its Initial Decision, but would be particularly applicable where an applicant  
3 presents new claims and/or evidence for the first time in its Notice of Appeal or during  
4 OAH proceedings. In this case, after the Director reached the Initial Decision, SRP  
5 indicated that it intended to achieve its proposed use by “calling on” junior upstream  
6 appropriators, and indicated an intent to introduce at the hearing evidence of modeling that  
7 removed future pumping by other water users. In a Motion in Limine to Exclude New  
8 Expert Evidence, filed on April 26, 2021 (“Motion in Limine”), ADWR’s attorneys raised  
9 claims of prejudice that would result to it if SRP’s new evidence were admitted at hearing  
10 and concerns related to the public noticing requirement of A.R.S. § 45-172(A)(7) resulting  
11 from the introduction of SRP’s new proposal after the close of the public notice period set  
12 forth therein.<sup>9</sup> The ALJ did not rule on ADWR’s Motion in Limine, presumably because it  
13 granted SRP’s Motion for Summary Judgment on separate grounds.

14           In addition to arguments made in its Motion in Limine, ADWR argued in its  
15 Response to SRP’s Motion for Summary Judgment that SRP’s proposal would violate the  
16 prohibition in A.R.S. § 45-172(A)(2) that “[v]ested or existing rights to the use of water  
17 shall not be affected, infringed upon nor interfered with ...” [ADWR Response at 13.] SRP  
18 noted in its briefing in connection with its Motion for Summary Judgment that ADWR  
19 determined in its Initial Decision that SRP’s proposed severance and transfer would not  
20 interfere with vested or existing rights. [See SRP’s Reply in Support of Motion for  
21 Summary Judgment at 14.] However, that determination was based on SRP’s  
22 representations in its application materials that it would achieve its proposed instream flow  
23 use through the halting of irrigation at Black Farm. SRP did not disclose its intent to enjoin  
24 other water users but instead represented that it would achieve its proposed instream flow  
25 use by capping and abandoning the Irrigation Well at Black Farm, and “[b]eyond that,

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26 <sup>9</sup> ADWR discussed the concern regarding the public noticing of SRP’s application in its Reply in support of its Motion in Limine, filed on June 18, 2021.

1 future changes in groundwater levels and surface flows will be dictated primarily by factors  
2 that are not within SRP's control....”

3 The ALJ should be given the opportunity to make a determination on ADWR's  
4 Motion in Limine in the first instance, and the Director does not herein make any  
5 determination with respect to that Motion. However, to the extent that SRP is permitted to  
6 introduce its proposal to enjoin other water users and accompanying evidence, the Director  
7 may base its final administrative decision with respect to SRP's proposal on additional  
8 criteria in A.R.S. § 45-172, including A.R.S. § 45-172(A)(2), as revealed to be applicable  
9 during the proceedings before OAH.

10 **B. Decision**

11 FINDINGS OF FACT

12 The ALJ did not enter enumerated findings of fact, presumably because the ALJ  
13 granted SRP's motion for summary judgment and did not conduct an evidentiary hearing  
14 in this matter.<sup>10</sup> For purposes of this Decision and Order, the Director adopts Paragraphs  
15 1-20 of Section I of this Decision and Order as the Director's Findings of Fact.

16 CONCLUSIONS OF LAW

17 1. ADWR's consideration of whether SRP can achieve its proposed use does not  
18 contradict the relevant holding in *McClennen*, which was stated thusly by the Arizona  
19 Supreme Court: “We hold that § 45-172 identifies the only grounds on which ADWR can  
20 deny a properly filed application to sever and transfer a water right.” 238 Ariz. 371 at ¶ 2.

21 2. The initial paragraph of A.R.S. § 45-172(A) provides that a water right may only be  
22 severed and transferred for certain specific uses set forth therein.

23  
24 \_\_\_\_\_  
25 <sup>10</sup> It is unclear whether the ALJ has authority to grant a motion for summary judgment without  
26 conducting a hearing when the administrative agency does not consent to dismissal. However,  
because the Director rejects the ALJ's grant of summary judgment on other grounds, the issue is  
moot.

1       3. The uses described in the initial paragraph of A.R.S. § 45-172(A) are beneficial  
2 uses. Regardless of whether A.R.S. § 45-172(A) refers to “beneficial uses” or simply  
3 “uses,” the requirement that a severance and transfer may only be granted for certain uses  
4 necessarily and inherently requires that the Director determine that the applicant can, in  
5 fact, achieve the proposed use.

6       4. That a severance and transfer may only be granted for certain uses also inherently  
7 requires that the proposed use serve as the basis, measure, and limit to the use of water  
8 authorized by the severance and transfer.

9       5. An applicant seeking to sever and transfer a water right pursuant to A.R.S. § 45-  
10 172(A) bears the burden to demonstrate that it can and will put the water to one of the  
11 specific uses described therein, including demonstrating that there is sufficient water  
12 available to achieve the proposed use.

13       6. Alternatively, though ADWR may not deny an application to sever and transfer a  
14 water right based on criteria not contained in A.R.S. § 45-172(A), ADWR may look to  
15 other statutes for purposes of interpreting or analyzing criteria contained in A.R.S. § 45-  
16 172(A). Because the initial paragraph of A.R.S. § 45-172(A) requires that a water right be  
17 severed and transferred for a particular “use,” ADWR has authority to consider A.R.S. §  
18 45-141(B) for purposes of determining the basis, measure, and limit of those uses.

19       7. Additionally, Section 45-172(A)(2) requires the Director to consider whether vested  
20 or existing rights to the use of water will be affected, infringed upon or interfered with, and  
21 whether water diverted or used after the transfer will exceed the vested rights existing at  
22 the time of the severance and transfer. If an applicant were permitted to sever and transfer  
23 a water right without consideration of how it will achieve its proposed use, ADWR could  
24 not determine whether the applicant’s proposed use would require interference with other  
25 water user’s rights in order to achieve the use. Therefore, ADWR additionally has authority  
26 under A.R.S. § 45-172(A)(2) to analyze whether an applicant can achieve its proposed use.

1       8. Judicial estoppel may be applied where a party changes factual positions from a  
2 prior judicial proceeding involving the same parties and the same issues, where the party  
3 to be estopped was successful. *See State v. Towery*, 186 Ariz. 168, 182, 920 P.2d 290, 304  
4 (1996); *Flood Control Dist. of Maricopa County v. Paloma Inv. Ltd. P’ship*, 230 Ariz. 29,  
5 41, ¶ 35, 279 P.3d 1191, 1203 (App. 2012).

6       9. Judicial estoppel is inapplicable here because the Director’s Decision is not  
7 inconsistent with the stated holding of *McClennen* that “§ 45-172 identifies the only  
8 grounds on which ADWR can deny a properly filed application to sever and transfer a  
9 water right.”

10       10. Judicial estoppel is also inapplicable because ADWR has not changed any factual  
11 positions from any prior judicial proceeding.

12       11. Additionally, the question involved in *McClennen* was whether the Director was  
13 required to consider whether a proposed severance and transfer would increase tax burdens  
14 in the county, negatively affect “an already strained water supply,” and otherwise be  
15 against the public interest in considering whether to grant a permit under A.R.S. § 45-172.  
16 That is not the question presented in this case.

17       12. Judicial estoppel is also inapplicable because SRP was not a party to the *McClennen*  
18 case. To the extent that *Mecham v. City of Glendale*, 15 Ariz. App. 402, 404, 489 P.2d 65,  
19 67 (App. 1971), permitted a claim of judicial estoppel where the parties were not the same,  
20 that case is contrary to the statement of the requirements for judicial estoppel in a later case  
21 decided by the Arizona Supreme Court, *State v. Towery*, 186 Ariz. 168, 182, 920 P.2d 290,  
22 304 (1996), and therefore should be considered to be overruled.

23       13. The ALJ improperly granted SRP’s Motion for Summary Judgment on the ground  
24 “the appropriate reason [for denying SRP’s Application] was not stated in the [Initial]  
25 Decision.”

26       14. ADWR’s stated reasons were appropriate, as set forth above.



1 15. “Pleadings before administrative agencies are liberally construed and there may be  
2 no subsequent challenge of an issue which was actually litigated if there has been  
3 reasonable notice and an opportunity to cure surprise.” *Matter of Wickman*, 138 Ariz. 337,  
4 340, 674 P.2d 891, 894 (App. 1983)

5 16. ADWR’s Initial Decision contained an express legal conclusion that “Pursuant to  
6 A.R.S. § 45-172(A)(2), the Director has the authority to define and limit the amount of  
7 water to be diverted or used subsequent to the sever and transfer.” [Initial Decision at 12.]

8 17. ADWR’s Initial Decision makes clear the factual basis for the denial – that SRP had  
9 not demonstrated that sufficient water would be available to achieve its proposed beneficial  
10 use.

11 18. The question of whether ADWR has authority under A.R.S. § 45-172(A) to deny  
12 SRP’s Application due to SRP’s inability to make this demonstration was fully briefed and  
13 argued by the parties before OAH.

14 19. To the extent that other grounds for denial of SRP’s Application exist that were not  
15 raised in ADWR’s Initial Decision, those grounds may be relied upon by the Director in  
16 reaching a final administrative decision if they are litigated during the hearing process. *See*  
17 *id.*; *Berenter v. Gallinger*, 173 Ariz. 75, 83, 839 P.2d 1120, 1128 (App. 1992) (“The  
18 question for [a] court on a claim of error for discrepancies between the administrative  
19 complaint and the agency findings is not the adequacy of the pleadings but the fairness of  
20 the entire proceeding.”); *see also Shaffer v. Arizona State Liquor Bd.*, 197 Ariz. 405, 408,  
21 ¶ 14, 4 P.3d 460, 463 (App. 2000) (noting that the purpose of administrative proceedings  
22 is to allow agencies to make factual records, to apply their expertise, and to correct their  
23 own errors.)

### 23 **III. CONCLUSION**

24 Because the Director determines that ADWR has authority under A.R.S. § 45-  
25 172(A) to consider whether there will be sufficient water available after the proposed  
26 severance and transfer for SRP to achieve its proposed wildlife use, the Director remands

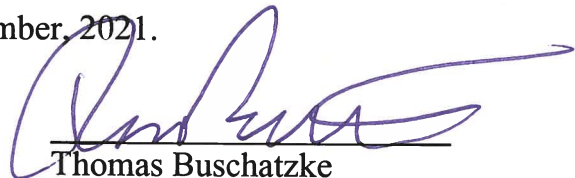
1 this matter back to OAH as set forth more fully in its ORDER below.

2 **IV. ORDER**

3 **IT IS HEREBY ORDERED:**

- 4 1. That the ALJ's Decision is rejected on the grounds set forth above.  
5 2. That this matter be remanded to OAH to resolve any outstanding motions,  
6 including ADWR's Motion in Limine, and conduct an evidentiary hearing on disputes  
7 thereafter remaining.

8 DATED this 29<sup>th</sup> day of September, 2021.

9 

10 Thomas Buschatzke  
11 Director  
12 Arizona Department of Water Resources

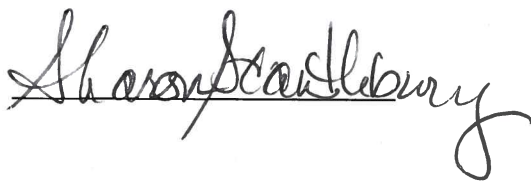
13 COPY of the forgoing electronically  
14 filed with the Office of Administrative  
Hearings on September 29, 2021.

15 COPY of the foregoing e-mailed  
16 on September 29, 2021 to:

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# **EXHIBIT A**

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2  
3 In the Matter of the Decision of Director to  
4 Deny Amended Application to Partially  
5 Sever and Transfer Salt River Project  
6 Agricultural Improvement and Power  
7 District's Statement of Claim of Right No.  
8 36-105209

No. 20A-SW002-DWR

**ADMINISTRATIVE LAW JUDGE  
DECISION**

9 Pending before the Office of Administrative Hearings is Salt River Project's (SRP)  
10 Motion for Summary Judgment or Motion *in Limine* to Exclude Evidence or Argument RE  
11 Matters Extrinsic to A.R.S. § 45-172(A) (Motion for Summary Judgment).

12 In the Motion for Summary Judgment, SRP argued that, pursuant to Arizona  
13 Supreme Court's precedent, the authority of Arizona Department of Water Resources  
14 (ADWR or the Department) "to deny a properly filed application for the severance and  
15 transfer of water rights is defined by the 'limitations and conditions' set forth in § 45-  
16 172(A)."<sup>1</sup> SRP argued that ADWR exceeded its authority when it denied the application  
17 to sever and transfer existing water rights because A.R.S. § 45-172(A) does not include  
18 ADWR's stated grounds for the denial that "the quantity of surface water [SRP] proposed  
19 to sever and transfer for the purposes of wildlife cannot be put to beneficial use, which is  
20 the measure and limit to the use of surface water under A.R.S. § 45-142(B) [sic]." SRP  
21 asserted that because "beneficial use" is not included in A.R.S. § 45-172(A), ADWR could  
22 not invoke "beneficial use" to justify the denial.

23 In its response to the Motion for Summary Judgment, ADWR argued that there  
24 were genuine issues of material fact at issue in this matter and that "SRP did not sustain  
25 its burden of proving that the quantity of water proposed to be severed and transferred  
26 would be put to beneficial use at the new place of use, which . . . is required by [A.R.S. §]  
27 45-172(A)."<sup>2</sup>

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29  
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<sup>1</sup> *Ariz. Dep't of Water Resources v. McClennen*, 238 Ariz. 371, 375, 360 P.3d 1023, 1027 (2015).

<sup>2</sup> ADWR's Response to SRP's Motion for Summary Judgment at p. 16.

1 **Background**

2 On or about January 7, 2003, SRP acquired property known as the Black Farm  
3 Preserve (Black Farm). On or about May 20, 2004, SRP filed Statement of Claim of Right  
4 No. 36-105209 (Statement of Claim) with the Department. Under the Statement of Claim,  
5 SRP claimed a right to divert and beneficially use up to 1,692.5 acre-feet per annum  
6 (AFA) of appropriable water from Aravaipa Creek, a tributary to the San Pedro River,  
7 within the San Pedro River Watershed for the irrigation of 107.80 acres of land.

8 The priority dates of first beneficial use claimed in the Statement of Claim were  
9 December 28, 1865, for the irrigation of 101.20 acres of land and January 1, 1969, for the  
10 irrigation of 6.60 acres of land.

11 The water rights asserted in the Statement of Claim were not appurtenant to lands  
12 within the exterior boundaries of any irrigation district, agricultural improvement district,  
13 or users' association for purposes of A.R.S. § 45-172(A)(4).

14 On or about September 30, 2005, SRP filed an application (Application) with the  
15 Department to sever and transfer the Statement of Claim pursuant to A.R.S. § 45-172.

16 In compliance with A.R.S. § 45-172(A)(5), SRP provided evidence that on May 5,  
17 2005, the governing body of the San Carlos Irrigation and Drainage District consented to  
18 the Application. SRP complied with the requirements of A.R.S. § 45-172(A)(5).

19 The Application sought to sever and transfer 1,692.5 AFA from irrigation use to an  
20 instream flow use on Aravaipa Creek. SRP stated it would stop pumping water from the  
21 Well, to use the water for an instream flow use within the reach of Aravaipa Creek flowing  
22 through the Black Farm Preserve for the beneficial use of wildlife; specifically, for the  
23 Southwestern Willow Flycatcher and the Yellow-Billed Cuckoo.

24 Under A.R.S. § 45-172(A), a water right may be severed and transferred to the  
25 State or its political subdivision for wildlife purposes. SRP is a political subdivision of the  
26 State; therefore, the Application fell within the scope of A.R.S. § 45-172(A).

27 The proposed place of use for the 1,692.5 AFA of water to be severed and  
28 transferred in the Application is the reach of Aravaipa Creek that flows through the  
29 northern portion of the Black Farm Preserve.

1 The Application proposed monthly distributions of the 1,692.5 AFA of water to be  
2 severed and transferred. The monthly distributions were based on evapotranspiration  
3 maps in Reference Evapotranspiration Estimates for Arizona, Technical Bulletin 266,  
4 Muluneh Yitayew (Technical Bulletin 266).

5 On or about August 30, 2006, the Department deemed the Application  
6 administratively complete.

7 By letters dated November 29, 2006 (First Amendment) and May 13, 2011  
8 (Second Amendment), SRP amended the Application.

9 The First Amendment amended the Application to reflect a partial severance and  
10 transfer. The First Amendment indicated that the water right for 6.6 irrigated acres would  
11 stay with the land to which it was appurtenant. SRP reduced the quantity of water, and  
12 associated irrigated acres, to be severed and transferred from 1,692.5 AFA for the  
13 irrigation of 107.80 acres, to 1,588.8 AFA for the irrigation of 101.2 acres.

14 The Second Amendment amended the proposed place of use listed in the  
15 Application to include only the reach of Aravaipa Creek that runs through the northern  
16 portion of the Black Farm Preserve property. The Second Amendment included a  
17 reduction in historically irrigated land from 101.2 acres to 90.43 acres due to acres lost to  
18 flooding. SRP reduced the quantity of water to be severed and transferred from 1,588.8  
19 AFA to 1,419.7 AFA.

20 The Second Amendment proposed monthly distributions of the 1,419.7 AFA of  
21 water to be severed and transferred. The monthly distributions were based on Technical  
22 Bulletin 266 and are as follows: January 39.8 AF, February 55.4 AF, March 82.3 AF, April  
23 127.8 AF, May 180.3 AF, June 222.9 AF, July 207.3 AF, August 167.5 AF, September  
24 146.2 AF, October 95.1 AF, November 61.0 AF and December 34.1 AF.

25 In response to the Department's October 29, 2010 request for additional  
26 information, including an explanation as to how the flow of Aravaipa Creek will be  
27 augmented for the benefit for wildlife, SRP stated, among other things: "By eliminating  
28 the diversion of water from Aravaipa Creek, or more recently from its subflow, for the  
29 irrigation of more than 90 acres of land [ ] through the severance and transfer, hydrologic  
30

1 conditions within the subflow zone will likely improve over time, which in turn is expected  
2 to support the establishment and maintenance of riparian vegetation.”

3 In 2013, ADWR provided public notice of SRP’s amended application pursuant to  
4 A.R.S. § 45-172(A)(7). Several objections were filed, and ADWR stayed further action  
5 on the Second Amended Application at SRP’s request. By 2018, each of the objections  
6 had been withdrawn by agreement, subject to certain conditions.

7 In 2019, SRP provided surface flow and groundwater level data to ADWR in  
8 support of its Second Amended Application.

9 On August 3, 2020, the Director issued the Decision and Order (Decision) denying  
10 the Application, as amended, because SRP did not sustain its burden of proving water  
11 could be put to beneficial use for wildlife purposes after the transfer of its claimed water  
12 right to the new place of use.

13 In the Decision, the Director found that the quantity of water claimed in the  
14 Application, as amended, did not exceed SRP’s vested rights at the time of the severance  
15 and transfer pursuant to A.R.S. § 45-172(A)(2). The Director also determined that the  
16 priority date for the water rights asserted in the Statement of Claim is December 28, 1865.  
17 The Director further found that the water rights asserted in the Statement of Claim were  
18 lawfully perfected under the laws of the Territory of Arizona as required in A.R.S. § 45-  
19 172(A)(3) and the proposed severance and transfer of Claim No. 36-105209 did not  
20 interfere with vested or existing rights under A.R.S. § 45-172(A)(2).

21 In 2020, SRP filed a Notice of Appeal, and in 2021 filed its Motion for Summary  
22 Judgment contending the Director lacked authority to deny SRP’s Second Amended  
23 Application on beneficial use grounds.

24 **Statutes**

25 A.R.S. § 45-141(B) provides that “[b]eneficial use shall be the basis, measure and  
26 limit to the use of water.”

27 A.R.S. § 45-151 provides, in pertinent part, as follows:

28 A. Any person, the state of Arizona or a political subdivision thereof may  
29 appropriate unappropriated water for domestic, municipal, irrigation, stock  
30 watering, water power, recreation, wildlife, including fish, nonrecoverable  
water storage pursuant to section 45-833.01 or mining uses, for his personal



1 use or for delivery to consumers. The person, the state of Arizona or a  
2 political subdivision thereof first appropriating the water shall have the better  
3 right.

4 B. To effect the beneficial use, the person, the state of Arizona or a political  
5 subdivision thereof appropriating the water may construct and maintain  
6 reservoirs, storage facilities pursuant to chapter 3.1 of this title, dams,  
7 canals, ditches, flumes and other necessary waterways.

8 A.R.S. § 45-172 provides, in pertinent part, as follows:

9 A. A water right may be severed from the land to which it is appurtenant or  
10 from the site of its use if for other than irrigation purposes and with the  
11 consent and approval of the owner of such right may be transferred for use  
12 for irrigation of agricultural lands or for municipal, stock watering, power and  
13 mining purposes and to the state or its political subdivisions for use for  
14 recreation and wildlife purposes, including fish, without losing priority  
15 theretofore established, subject to the following limitations and conditions:

16 1. Except as otherwise provided in this section no such severance or  
17 transfer shall be made unless approved by the director, and the approval of  
18 the director shall prescribe the conditions of the approval.

19 2. Vested or existing rights to the use of water shall not be affected, infringed  
20 upon nor interfered with, and in no event shall the water diverted or used  
21 after the transfer of such rights exceed the vested rights existing at the time  
22 of such severance and transfer, and the director shall by order so define  
23 and limit the amount of water to be diverted or used annually subsequent to  
24 such transfer.

25 **Arizona Department of Water Resources v. McClennen**

26 The Arizona Supreme Court decision in *McClennen* is particularly applicable to the  
27 instant matter. As the Department argued to the Court and the Court concluded, A.R.S.  
28 § 45-172 “identifies the only ground on which ADWR can deny a properly filed application  
29 to sever and transfer a water right.”

30 In its analysis, the Court considered numerous arguments like those presented by  
the Department here. In *McClennen*, Mohave County, as an interested person, filed an  
objection to the proposed severance and transfer.

Mohave County argued that the Department had authority under A.R.S. § 45-  
153(A) to deny applications for appropriation of water if, among other things, the proposed  
use would be “against the interests and welfare of the public.” Mohave County urged that

1 the Department was similarly authorized to deny an application for severance and transfer  
2 if the proposed use would be against the interest and welfare of the public.

3 The Court concluded that A.R.S. § 45-153(A) was not applicable because it applied  
4 to initial appropriations of water, which were not at issue. “That the legislature directed  
5 ADWR to consider the public interest in § 45-153(A) but omitted any such directive in §  
6 45-172 itself suggests that the latter statute more narrowly defines ADWR’s authority in  
7 reviewing applications for severance and transfer.”<sup>3</sup>

8 Similarly, the Department in the instant matter argued that because A.R.S. § 45-  
9 141(B) and A.R.S. § 45-151(A) and (B) limits water usage to “beneficial use” and  
10 maintained that there is no water right without beneficial use in Arizona, any application  
11 under A.R.S. § 45-172 must establish a beneficial use for the proposed severance and  
12 transfer.

13 As in *McClennan*, it is notable that the Arizona legislature included “beneficial use”  
14 as a requirement for an appropriation of a water right in A.R.S. § 45-141(B) and A.R.S. §  
15 45-151(A) and (B), but did not include “beneficial use” as a requirement for severances  
16 and transfers in A.R.S. § 45-172(A). Further, A.R.S. § 45-172(A) did not explicitly include  
17 in any of the subsections a requirement that the severance and transfer must be for a  
18 beneficial use. To paraphrase the Court in *McClennan*, that the legislature directed the  
19 Department to consider the beneficial use in A.R.S. § 45-141(B) and A.R.S. § 45-151(A)  
20 and (B) but omitted any such directive in § 45-172 itself suggests that the latter statute  
21 more narrowly defines the Department’s authority in reviewing applications for severance  
22 and transfer.

23 In *McClennan*, Mohave County also noted that A.R.S. § 45-172(A) states that a  
24 water right “may be severed . . . and . . . transferred” and argued that the use of “may”  
25 suggested that the Department had discretion to deny a severance and transfer  
26 application for reasons other than those identified in A.R.S. § 45-172(A). The Court in  
27 *McClennan* concluded that “[w]hen read in context however, ‘may’ is more plausibly  
28 understood as referring to the ability to sever and transfer the right . . . rather than defining

29 <sup>3</sup> *Ariz. Dep’t of Water Resources v. McClennen*, 238 Ariz. at ¶20.

1 ADWR's authority in reviewing applications."<sup>4</sup> The Court also noted that "[t]o interpret  
2 'may' as affording ADWR broad discretion to deny or condition applications for reasons  
3 other than those set forth in § 45-172(A) would effectively ignore the limiting language  
4 that appears in the same sentence."<sup>5</sup>

5 In the instant matter, the Department asserted that, because A.R.S. § 45-172(A)(1)  
6 and (2) requires that the Director approve of a severance and transfer and the approval  
7 must "prescribe the conditions of the approval" and "define and limit the amount of water  
8 to be diverted or used annually subsequent to such transfer," the Director may limit the  
9 amount of water to be diverted and condition the approval on the water being used for  
10 beneficial uses.

11 Just as the Court considered the argument in *McClennan*, accepting the  
12 Department's argument that the Director is empowered to unilaterally prescribe the  
13 conditions of the approval would effectively gut the rest of the requirements of A.R.S. §  
14 45-172.

15 **Conclusion**

16 While there may be some genuine issues of certain facts involved in the global  
17 matter, the relevant inquiry to address the Motion for Summary Judgment is whether the  
18 Decision issued by the Department was in conformity with the statute applicable to  
19 applications to sever and transfer. To that end, the only question is the basis of the  
20 Decision.

21 There is no dispute that the Decision was based on SRP's failure to establish  
22 "beneficial use" in connection with its Application, as amended. However, as set forth  
23 above, "beneficial use" is not a proper basis for the denial of an application to sever and  
24 transfer.

25 This is not to say that the Department may not have had an appropriate reason  
26 under the statute to deny the Application, but merely that the appropriate reason was not  
27 stated in the Decision. Accordingly,

28 \_\_\_\_\_  
29 <sup>4</sup> *Id.* at ¶17.

30 <sup>5</sup> *Id.* at ¶18.

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**IT IS RECOMMENDED** granting the Motion for Summary Judgment and vacating the matter from the calendar of the Office of Administrative Hearings.

**IT IS FURTHER RECOMMENDED** denying all other pending motions as moot at this time including those portions of the Motion for Summary Judgment not involving the analysis set forth above, *i.e.*, an order that the Department reverse its denial and approve the Application, as amended; an order for attorneys' fees; and an order limited the evidence to be presented at the hearing in this matter.

**IT IS ORDERED** remanding this matter to the Department for further action.

Done this day, August 30, 2021.

/s/ Tammy L. Eigenheer  
Administrative Law Judge

Transmitted electronically to:

Thomas Buschatzke , Director  
Department of Water Resources