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ARIZONA SUPERIOR COURT
MARICOPA COUNTY

ROBIN SILVER, M.D.; UNITED STATES OF AMERICA U.S. DEPARTMENT OF INTERIOR, BUREAU OF LAND MANAGEMENT; PATRICIA GERRODETTE,

Plaintiffs,

vs.

SANDRA A. FABRITZ-WHITNEY; ARIZONA DEPARTMENT OF WATER RESOURCES; PUEBLO DEL SOL WATER COMPANY,

Defendants.

Case No. LC2013-000264-001 DT

(Consolidated with LC2013-00271-001 DT & LC2013-000272-001 DT)

PLAINTIFF-APPELLANT ROBIN SILVER'S OPENING BRIEF

ORAL ARGUMENT REQUESTED

(Assigned to the Honorable Crane McClennen)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

Pursuant to the Court's June 25, 2013 Minute Entry in this case, Plaintiff Dr. Robin Silver hereby submits his opening brief challenging the Arizona Department of Water Resources' April 11, 2013 "Decision and Order of the Director" to grant Pueblo Del Sol Water Company's application for Designation as Having an Adequate Water Supply (No. 40-700705.00).

STATEMENT OF THE CASE

I. Nature Of The Case

This case concerns the Arizona Department of Water Resources' (ADWR) failure to account for federal reserved water rights in its determination that Pueblo Del Sol's proposed groundwater supply for a new subdivision is "legally available." Plaintiff Dr. Robin Silver challenges ADWR's April 11, 2013 decision as arbitrary, capricious, and contrary to law pursuant to A.R.S. § 12-910(E) and requests that this court vacate ADWR's decision and remand the decision to the agency for reconsideration.

As described below, ADWR may only approve Pueblo Del Sol's proposed groundwater pumping if the company demonstrates that there is an "adequate" water supply, which means, among other things, that the groundwater is "legally available." See A.R.S. § 45-108(A) and (I). However, Pueblo Del Sol's proposed water supply is not legally available because the pumping likely conflicts with the U.S. Bureau of Land Management's (BLM) federal reserved water rights in the San Pedro Riparian National Conservation Area (SPRNCA). These rights were established in 1988, and they cannot be infringed upon by groundwater pumping commencing after that date.

Nonetheless, Pueblo Del Sol did not even attempt to demonstrate that its proposed water supply is legally available in light of BLM's rights. Nor did ADWR consider or analyze BLM's rights in determining that Pueblo Del Sol's proposed water supply is legally available. By failing to make the inquiry required by law, ADWR's decision renders the statutory requirement that water be "legally available" meaningless. Moreover, ADWR's decision fundamentally undermines the purposes of the statute: to put an end to a history of developers selling land and homes without adequate water, to protect consumers, and to conserve dwindling aquifers and resolve water conflicts before new homes are built.

In addition to violating the plain language of the statute, ADWR's decision violates the Arizona Supreme Court's mandate to avoid applying state laws in a manner that interferes with federal reserved water rights. See In re the General Adjudication of All Rights to Use Water in the Gila River System and Source (Gila III), 195 Ariz. 411, 419 (1999). ADWR's decision effectively permits groundwater pumping in the Sierra Vista subwatershed regardless of its impact on the SPRNCA. This outcome is unlawful.

Notably, interpreting A.R.S. § 45-108 consistently with its plain language, purpose, and Gila III does not require this Court to decide whether Pueblo Del Sol's water is legally available in light of BLM's water rights. Pueblo Del Sol and ADWR bear the burden of analyzing and determining in the first instance whether this new pumping is compatible with BLM's rights – and if so, how. A.R.S. §§ 45-108(A), (B), 45-108.01(E), 9-463.01(J); A.A.C. R12-15-714(A)(5), (E)(3). If Pueblo Del Sol and ADWR cannot meet this burden, ADWR must deem the water supply "inadequate."

While the Court need not decide this question, the voluminous evidence that is available indicates the groundwater Pueblo Del Sol proposes to pump is likely necessary to sustain the San Pedro River, its riparian habitats, and the San Pedro River National Conservation Area and, therefore, is not legally available. ADWR's primary rationale for ignoring this evidence and the governing legal standards is that one of its regulations, A.A.C. R12-15-718(C), purportedly limits the agency's consideration of legal availability of water to one criterion: the existence of a "certificate of convenience and necessity" from the Arizona Corporation Commission. Doc. #56, Att. 1, at 6 ¶ 36; id. at 8 ¶ 57.[1] But this certificate has nothing to do with legal rights to water supplies. As a result, ADWR's application of this regulation conflicts with A.R.S. § 45-108 and is unlawful.

ADWR's decision also concludes that the potential conflict between Pueblo Del Sol's proposed pumping and BLM's federal reserved water rights must be resolved by the Gila River General Stream Adjudication ("Gila River Adjudication") pending in the Maricopa County Superior Court, rather than through a water adequacy determination. Doc. #56, Att. 1, at 23 ¶ 22. However, ADWR's legal obligations do not depend upon the status of the Adjudication.

In short, ADWR's final decision approving Pueblo Del Sol's application for a designation of an adequate water supply, without investigating how BLM's federal reserved

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[1] All citations to "Doc. #" refer to documents as numbered in the Court's Certification of Record on Review, Record of Administrative Hearing, filed in LC-2013-000271-001 DT on June 24, 2013. The final decision, including ADWR's line edits, is found at Doc. #56, Attachment 1. All citations refer to a document's internal page numbers rather than the PDF page number, unless otherwise noted. Citations to "Tr." refer to the transcripts of the proceedings before the Office of Administrative Hearings, numbered as Documents 57-61 in the Court's Certification of Record on Review, Record of Administrative Hearing.

water rights affect the legal availability of the proposed water supply, is arbitrary, capricious, and contrary to law and should be vacated. See A.R.S. § 12-910(E). Similarly, ADWR's application of A.A.C. R12-15-718(C) in this case is arbitrary, capricious, and contrary to law and should be rejected.

II. Course Of The Proceedings

In 2011, Pueblo Del Sol Water Company submitted an Application for "Designation of Adequate Water Supply" seeking approval from ADWR to pump groundwater for the majority of the proposed Tribute Master Planned Community ("Tribute") within Sierra Vista, Arizona. Doc. #54, DWR-2.[2] Dr. Robin Silver, Tricia Gerrodette, and BLM each filed timely objections to the application pursuant to A.R.S. § 45-108.01(B). Doc. #54, DWR-11, 29, 31. This statute allows any resident or landowner within the relevant groundwater basin – here, the Upper San Pedro groundwater basin – to file an objection to such an application within 15 days of the last posted notice. A.R.S. § 45-108.01(B). Dr. Silver is a native Arizonan who has owned 75 acres along the San Pedro River and within the upper San Pedro groundwater basin since 1993. Doc. #54, DWR-31 at 1. This property is an inholding within the San Pedro Riparian National Conservation Area. The property's aesthetic and economic value – and Dr. Silver's aesthetic, spiritual, and economic interest – depend upon the maintenance of sufficient flows in the San Pedro River to support healthy riparian habitats. Id.

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[2] Citations to "Doc. #54" refer to the "Combined Exhibit List" of exhibits submitted during the Office of Administrative Hearings proceedings, as described in the Court's Certification of Record on Review, Record of Administrative Hearing. The individual exhibits from those proceedings are contained within the Court's record for this case, and also may be accessed online at https://portal.azoah.com/oedf/documents/12A-AWS001-DWR/Omnibus/Index.htm (last visited Sept. 10, 2013).

Dr. Silver, Ms. Gerrodette, and BLM objected to the Application in part because sufficient groundwater will not be "legally available" for Tribute in light of BLM's federal reserved water rights in the San Pedro Riparian National Conservation Area. Doc. #54, DWR-11, 29, 31. On July 23, 2012, ADWR rejected the arguments raised in the objections and issued a Draft Decision and Order granting Pueblo Del Sol's application. Doc. #54, DWR-63. Dr. Silver, Ms. Gerrodette and BLM filed timely notices of appeal pursuant to A.R.S. §§ 45-114, 41-1092 et seq. Doc. #54, DWR-64, 66, 67.

On November 26-30, 2012, Administrative Law Judge (ALJ) Thomas Shedden in the Office of Administrative Hearings (OAH) held a hearing in Phoenix, Arizona regarding ADWR's decision. In the Matter of the Decision of the Director to Grant Pueblo Del Sol Water Company's Application for Designation as Having an Adequate Water Supply, No. 40-700705.0000. Doc. #56, Att. 1, at 2 ¶ 4. All parties to this consolidated case appeared at the hearing. Id. at ¶¶ 5-9. The ALJ considered four issues:

(A) Whether Pueblo Del Sol failed to demonstrate, and ADWR erroneously determined, that the water proposed to be pumped will be continuously, legally and physically available to satisfy the proposed use for at least 100 years;

(B) Whether ADWR erroneously refused to consider impacts of the proposed pumping [on] the flow of the San Pedro River;

(C) Whether ADWR erroneously refused to consider impacts of the proposed pumping on water rights of the Bureau of Land Management, including federal reserved water rights for the San Pedro Riparian National Conservation Area;

(D) Whether Pueblo Del Sol failed to demonstrate, and ADWR erroneously determined, that the water proposed to be pumped will be physically available for at least 100 years,

> given evidence of declining groundwater levels and increased pumping in the area.

Doc. #56, Att. 1, at 7 ¶ 50.

On March 12, 2013, the ALJ issued his Recommended Decision. The ALJ answered all four questions in the negative and upheld ADWR's adequacy designation. Doc. #55. The ALJ agreed with ADWR that the agency lacked authority to consider the pumping's effects on the San Pedro River or BLM's federal reserved water rights. Doc. #55 at 23. The ALJ also concluded that water is "legally available" for Tribute because Pueblo Del Sol possesses a "certificate of convenience and necessity" from the Arizona Corporation Commission. Doc. #55 at 22-23.

III. Decision Of The Administrative Agency As To Which Judicial Review Is Requested

On April 11, 2013, pursuant to A.R.S. § 41-1092.08(B), ADWR Director Fabritz-Whitney accepted the ALJ's decision with some modifications not affecting the ALJ's ultimate conclusions. Doc. #56. The "Decision and Order of the Director" concludes that ADWR lacked authority to consider BLM's rights or effects on the San Pedro River in making the adequacy determination. Therefore, the final decision upheld ADWR's refusal to require Pueblo Del Sol to demonstrate that its water supplies would be legally available in light of those rights. Dr. Silver timely filed this action challenging the final decision. Robin Silver's Complaint for Judicial Review of Administrative Decision, filed May 15, 2013; see A.R.S. § 12-904. As no party filed a motion for rehearing or review, the agency's decision is final for purposes of judicial review. See A.R.S. §§ 45-114(C)(2), 41-1092.09(A)(3).

STATEMENT OF FACTS

I. The San Pedro River And San Pedro Riparian National Conservation Area

The San Pedro River flows north from northern Mexico through southeastern Arizona for about 130 miles until its confluence with the Gila River at Winkelman, Arizona. It is the last free-flowing, undammed river in the desert Southwest. See Ctr. for Biological Diversity v. Salazar, 804 F. Supp. 2d 987, 991 (D. Ariz. 2011). The river and its surrounding cottonwood-willow forest support one of the most important corridors for migratory songbirds in the United States, especially because so many other desert rivers in the Southwest have been degraded or destroyed. See 62 Fed. Reg. 665-01, 665 (Jan. 6, 1997) (noting that "up to 90 percent of the riparian habitat along Arizona's major desert watercourses has been lost, degraded, or altered"). Of the more than 800 bird species in North America, more than 45 percent use the San Pedro River at some point during their lives. Doc. #54, DWR-31, at PDF 17. The river is also a biological treasure chest – it is home to hundreds of species of mammals, reptiles, amphibians, fish, and insects, including species protected by the federal Endangered Species Act. Id.

In 1988, Congress recognized the importance of the San Pedro River and the habitat it provides and designated 36 miles of the river's upper basin as the San Pedro Riparian National Conservation Area. 16 U.S.C. § 460xx; see also Doc. #54, BLM-19, Figure 2-1 (map). Congress mandated that BLM manage the SPRNCA "to protect the riparian area and the aquatic, wildlife, archaeological, paleontological, scientific, cultural, educational, and recreational resources of the public lands surrounding the San Pedro River." 16 U.S.C. § 460xx(a).

In the same legislation, Congress explicitly reserved federal water rights in "a quantity of water sufficient to fulfill the purposes" of the SPRNCA. Id. § 460xx-1(d). A federal reserved water right is conferred on the United States when it reserves land for a federal purpose; the water right exists "to the extent needed to accomplish the purpose of the reservation." Gila III, 195 Ariz. at 417 (citing Cappaert v. United States, 426 U.S. 128, 138 (1976)). Federal law governs the nature and extent of federal reserved water rights. Cappaert, 426 U.S. at 145. These rights include not only surface water but also groundwater to the extent that groundwater "is necessary to accomplish the purpose of a federal reservation." Gila III, 195 Ariz. at 421-23; id. at 419 ("[t]he significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation."). This feature distinguishes federal reserved rights from state surface water rights, which, in Arizona, generally do not include the groundwater that supports them. Id. at 419-20. As a result, holders of federal reserved water rights enjoy greater protection than holders of state surface water rights "to the extent that greater protection may be necessary to maintain sufficient water to accomplish the purpose of a reservation." Id. at 423.

As part of that protection, the U.S. Supreme Court has held that groundwater pumping that begins after a federal reserved water right comes into existence cannot interfere with or defeat the purposes for which the federal reservation was created. Cappaert, 426 U.S. at 143; see also Gila III, 195 Ariz. at 417 (relying on Cappaert and holding that the federal reserved water right "vests on the date of the reservation and is superior to the rights of future

appropriators").[3] The federal reserved water rights for the SPRNCA have a priority date of November 18, 1988. 16 U.S.C. § 460xx-1(d); Doc. #56, Att. 1, at 3 ¶ 21 (noting creation of federal reserved water right and priority date). Accordingly, groundwater pumping that begins after this date that interferes with the purposes for which the SPRNCA was created is unlawful. See Doc. #56, Att. 1, at 21 ¶ 12 (Pueblo Del Sol may use groundwater "subject to federal reserved water rights").

Upon reserving water for the San Pedro Riparian National Conservation Area, Congress directed the Secretary of the Interior to file a claim for BLM's rights in Arizona's long-running Gila River Adjudication. 16 U.S.C. § 460xx-1(d); Doc. #54, BLM-19 at 1-1.[4] Although the precise quantity of BLM's water right has not yet been determined in the Adjudication, BLM and ADWR's filings demonstrate that both agencies have extensively researched, assessed, and documented the amount of water needed to fulfill the San Pedro Riparian National Conservation Area's purposes. For example, in BLM's most recent amended "statement of claim" filed on April 15, 2011, BLM documented its methodology and calculation of the amount of water required to maintain surface flows in the river and associated springs and other naturally

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[3] In Cappaert, the U.S. Supreme Court upheld an injunction prohibiting private groundwater pumping 2 ½ miles away from Devil's Hole, a deep pool in a limestone cavern in Death Valley National Monument. Cappaert, 426 U.S. at 131, 147. The Court upheld the injunction because the pumping, which began 16 years after Devil's Hole was protected by Congress, was lowering the pool in Devil's Hole and threatening the purposes for which it was protected, including sustaining the habitat of a rare desert fish. Id. at 133-34, 143 ("[T]he United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater").

[4] Federal reserved water rights are typically quantified in state adjudication proceedings. However, as noted above, the nature and extent of these rights are governed by federal law. Gila III, 195 Ariz. at 417 ("state courts must apply federal substantive law to measure federal rights in state adjudication") (citing Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571 (1983)).

occurring waters, as well as the minimum groundwater levels necessary to fulfill the purposes of the SPRNCA. See Doc. #54, BLM-19 at 1-4, 2-1 – 2-2; Tr. 484 (describing claimed rights in surface water, springs, and groundwater); Doc. #56, Att. 1, at 11-12 ¶¶ 81-86 (describing claims). In May 2012, ADWR, which serves as a technical advisor to the Special Master in the Adjudication, issued a report agreeing with BLM's calculation of streamflow claims at the three gages (Palominas, Charleston, and Tombstone) that measure surface flows in the San Pedro Riparian National Conservation Area. Doc. #54, BLM-19 at 3-8; see A.R.S. § 45-256(A) (describing ADWR's role).[5]

Similarly, BLM holds an existing and acknowledged state surface water right that the Special Master has concluded "partially, but not fully, fulfills the federal purposes of the San Pedro Riparian National Conservation Area to the extent water is required." Doc. #54, BLM-19 at 1-3; id. at 4-1 (describing BLM's certificate of water right (CWR) No. 33-90103, with a priority date of August 12, 1985, and detailing BLM's state rights to instream flows at Palominas and Charleston gages); Doc. #54, BLM-15 at PDF 4 (BLM has a perfected "right to the use of the waters flowing in the San Pedro River" in certain amounts for recreation and wildlife purposes). Accordingly, BLM's federal reserved water right must include more than these minimum flows.

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[5] The Special Master is appointed by the Arizona Superior Court to be the principal hearing officer of contested cases in river water rights adjudications. See A.R.S. § 45-255; http://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/_pdfs/RulesRev053105.pdf, at 10 (last visited Sept. 7, 2013). The final decision describes the Special Master's role and scheduled proceedings. Doc. #56, Att. 1, at 5 ¶¶ 28-30.

II. Groundwater Pumping In The Sierra Vista Subwatershed

The health of the San Pedro River and BLM's federal reserved water rights in the San Pedro Riparian National Conservation Area depend in large part on groundwater in the Sierra Vista subwatershed because the river and the aquifer are connected.[6] Groundwater in the subwatershed sustains the San Pedro's "base flows" – surface water that flows in the river year-round, even during the seasons with little or no rainfall – as well as the river's riparian vegetation and springs. See Doc. #56, Att. 1, at 9 ¶ 65; Doc. #54, BLM-19 at 3-3.

Groundwater pumping depletes these base flows, as well as the water that would otherwise feed the streamside vegetation and natural springs, in part because it removes water from the aquifer and lowers the aquifer's water levels. Doc. #54, BLM-26 at 2 (United States Geological Survey (USGS) report explaining how pumping lowers the water level in the aquifer, thereby diminishing the river's flows); Tr. 327-29 (Dr. Leenhouts discussing this report and noting that the same principles apply to Pueblo Del Sol's pumping).

Groundwater pumping also intercepts, or "captures," water that would otherwise provide the river's base flows and sustain riparian vegetation and springs. Doc. #54, BLM-26 at 1 (explaining how pumping captures water from streamflows and threatens riparian vegetation). "Capture" occurs because a well creates a "cone of depression" in the vicinity of a well, which can be visualized as a deep hole in the water table. Tr. 276-77. In essence, water that would otherwise flow underground to the river, where it would sustain surface flows and riparian

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[6] The upper San Pedro groundwater basin includes the Sierra Vista subwatershed. See http://www.azwater.gov/AzDWR/StatewidePlanning/WaterAtlas/SEArizona/Hydrology/UpperSanPedro.htm (last visited Sept. 7, 2013).

vegetation, instead falls into the hole and is pumped out of the aquifer through the well. See Doc. #54, BLM-26 at 1 (defining capture). Because the percentage of water that is captured by any well depends on its location and the features of a specific watershed, the USGS modeled the Sierra Vista subwatershed and created a "capture map" that illustrates the relative impact of thousands of hypothetical wells 50 years after the well starts pumping. Doc. #54, BLM-26 at 11, Fig. 4B (capture map of the basin); Tr. 337-38 (explaining capture map); see also Doc. #56, Att. 1, at 10 ¶ 72-73. As described below, this map can be used to project the relative percentage of water that Pueblo Del Sol's proposed wells will capture from the San Pedro and riparian vegetation.

Over the last several decades, the rate of groundwater pumping in the Sierra Vista subwatershed has far exceeded the rate of recharge of water to the aquifer, creating a "groundwater deficit" that was most recently estimated at 6,100 acre-feet per year. Doc. #54, BLM-29 at v, 3, 9; BLM-26 at 2. Because groundwater pumping in the Sierra Vista subwatershed is drawing down the aquifer and capturing water from the river that sustains the river's surface flows and riparian vegetation, the pumping has begun to dry up the San Pedro River and the riparian vegetation and springs which are protected by the SPRNCA and BLM's water rights. Although variations in precipitation cause some of the year-to-year changes to river flows, ADWR has acknowledged that seasonal pumping from wells near the river has caused "significant trends in total monthly streamflow" and has "decreased low flows" in the river in the spring and summer. Doc. #54, BLM-19 at 3-6. For example, a study of flows at the Charleston gage on the upper San Pedro River from 1913-1936 to 1983-2002 demonstrated that

total annual surface flows declined by 54%, summer flows declined by 70%, and winter flows declined by 20%. Id. Some stretches of the San Pedro that once flowed year-round are now dry for weeks or months at a time. See Gila III, 195 Ariz. at 420 (noting ADWR evidence of streams "in transition from perennial to intermittent within the San Pedro and Upper San Pedro watersheds").[7]

These declines threaten BLM's federal reserved water rights and the purpose for which the SPRNCA was created. The river's average base flows are already significantly lower than particular streamflow volumes BLM claimed – and ADWR approved – in the Gila River Adjudication as the minimum amount necessary to fulfill the purposes of the SPRNCA. Doc. #54, BLM-19 at 1-3, 3-8, 3-11; Tr. 496. Recent assessments of base flow at the Tombstone gage measured an average of 4,890 acre-feet of water per year, approximately half of the amount claimed by BLM. Doc. #54, BLM-29 at 3 (recent average base flows at Tombstone gage); BLM-19 at 3-8 (claiming 9,400 acre-feet per year at the Tombstone gage). Similarly, recent estimates of average base flows indicate that flows are approximately two-thirds of BLM's claim at the Charleston gage, and less than half of BLM's claim at the Palominas gage. Compare Doc. #54, BLM-19 at Table 3-5 with Table 4-1. As ADWR summarized in the Gila River Adjudication, "[d]ecreasing trends in streamflow of the San Pedro for the summer, spring

[7] Dr. Leenhouts highlighted the Santa Cruz River in his testimony as an example of a river that went dry and is no longer able to support its formerly lush riparian vegetation as a result of groundwater pumping. Tr. 317-18; Doc. #54, BLM-24 at 34 (USGS report describing drying up of Santa Cruz River, where groundwater pumping lowered the water table, eliminated or altered formerly perennial stream reaches, and was the "principle reason" for vegetation die-off and destruction of the riparian ecosystem). The San Pedro River could suffer the same fate without intervention; Dr. Leenhouts testified that the Santa Cruz River illustrates the same "fundamental hydrologic principles" that apply to the San Pedro River. Tr. 317.

and fall seasons suggest that current streamflow volumes will more times than not, be less than the volumes listed" in BLM's claim. Doc. #54, BLM-19 at 3-11. These numbers illustrate the severity of the existing threat to the San Pedro River, its riparian habitats, and BLM's federal reserved water rights. See Doc. #54, BLM-26 at 2 (reductions in aquifer and flow will threaten riparian ecosystem in the SPRNCA). They also indicate that legally, the San Pedro River may have no more water to spare.

III. Pueblo Del Sol's Application For A Designation Of Adequate Water Supply

Pueblo Del Sol applied for a designation of adequate water supply for Tribute in 2011. Doc. #54, DWR-2. Tribute may contain up to 6,959 residential units, as well as offices and commercial space. Doc. #56, Att. 1, at 3 ¶ 16. In its 2012 amended application, Pueblo Del Sol proposed to pump 4,870 acre-feet per year for Tribute. See Doc. #54, DWR-8 at 2; Doc. #56, Att. 1, at 5 ¶ 32.

In the context of the Sierra Vista subwatershed, 4,870 acre-feet per year is a huge amount of water. For example, 4,870 acre-feet per year is also: (1) a 30% increase in total groundwater pumping in the Sierra Vista subwatershed (Doc. #54, BLM-29 at 3); (2) 32% of the total amount of water naturally recharged through rain or snowmelt to the entire subwatershed each year (id.); and (3) 99% of the base flow of the entire San Pedro River at the Tombstone gage (id.).

Such large scale pumping could be the last straw for this imperiled river. Based on USGS modeling, four, and perhaps all five, of Pueblo Del Sol's proposed groundwater wells will, at the 50-year mark, be intercepting and depleting groundwater that would otherwise be reaching the San Pedro River and its surrounding vegetation. Compare Doc. #54, DWR-7D at

Figure 1 with Doc. #54, BLM-26 at 11; Tr. 341-42, 367, 399. Because a well captures more water the longer it is pumping, the amount of water Pueblo Del Sol's wells will capture from the San Pedro will be even higher in the latter half of the 100-year time period of the adequacy determination. Doc. #54, BLM-24 at 33; Tr. 350-52. If these drawdowns encroach upon BLM's federal reserved water rights – as the available evidence suggests they will – the groundwater Pueblo Del Sol proposes to pump is not legally available.

Nonetheless, ADWR approved Pueblo Del Sol's application without requiring Pueblo Del Sol to even acknowledge BLM's federal reserved rights, let alone demonstrate that Pueblo Del Sol's proposed water supply was legally available in light of these rights. Doc. #56, Att. 1, at 23-24; see also Tr. 772-74. Nor did ADWR consider or evaluate BLM's federal reserved water rights in making its adequacy determination. Doc. #56, Att. 1, at 23-24; see also Tr. 27, 52-53, 142, 151-52, 175.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Is the April 11, 2013 "Decision and Order of the Director" unlawful where the Arizona Department of Water Resources failed to require Pueblo Del Sol Water Company to demonstrate, and the Arizona Department of Water Resources failed to evaluate and determine, whether Pueblo Del Sol's proposed groundwater supply is legally available for 100 years in light of the U.S. Bureau of Land Management's federal reserved water rights in the San Pedro Riparian National Conservation Area?

2. Is the Arizona Department of Water Resources' application of A.A.C. R12-15-718(C) unlawful where the agency's sole criterion for determining legal availability is the existence of a Certificate of Convenience and Necessity issued by the Arizona Corporation Commission, which bears no relation to the legal availability of water?

STANDARD OF REVIEW

A party to the administrative proceedings may seek judicial review of ADWR's final groundwater adequacy determinations. A.R.S. §41-1092.08(H). When reviewing a final administrative decision, this Court:

> may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

A.R.S. § 12-910(E); Anderson v. Ariz. Game and Fish Dep't., 226 Ariz. 39, 40 (Ct. App. 2010). To determine whether an agency action is arbitrary and capricious, courts consider "whether the decision was based on a consideration of the relevant factors and whether there ha[d] been a clear error of judgment." Griffith Energy, L.L.C. v. Ariz. Dep't of Revenue, 210 Ariz. 132, 135 (Ct. App. 2005) (internal citations omitted).

ARGUMENT

I. ADWR's Final Decision Is Arbitrary, Capricious, And Contrary To Law

ADWR's failure to account for BLM's federal reserved water rights in the San Pedro Riparian National Conservation Area in determining that Pueblo Del Sol's proposed water supply is "legally available" violates the plain language and intent of A.R.S. § 45-108. This statute implements the common-sense requirement that subdivisions should only be built if they have legal access to a reliable water supply. Here, ADWR ignored that requirement and approved Pueblo Del Sol's proposed groundwater supply without requiring Pueblo Del Sol to demonstrate, and without evaluating and determining, whether Pueblo Del Sol is legally entitled

to tap that groundwater. ADWR failed to make this determination even though BLM has a superior legal claim to this water. Although the analysis must be completed by Pueblo Del Sol and ADWR in the first instance, had ADWR complied with the statute, there is voluminous data and evidence indicating that Pueblo Del Sol's water supplies are not legally available because the groundwater Pueblo Del Sol seeks to deplete is necessary to fulfill BLM's federal reserved water right in the SPRNCA. ADWR's decision is arbitrary and capricious and contrary to law. See A.R.S. § 12-910(E).

A. The Plain Meaning And Intent Of Arizona's Water Adequacy Statute Requires ADWR To Analyze Whether Pueblo Del Sol Has A Legal Right To Its Proposed Groundwater Supply

Arizona's water adequacy program is designed to ensure that homes in new subdivisions have a reliable water supply for at least 100 years. Thus, before building a new subdivision, a developer must apply for and obtain a designation of adequate water supply from ADWR. A.R.S. § 45-108(A).[8] In Cochise County, which includes Sierra Vista, a new subdivision will not be approved unless and until the developer obtains this designation. Cochise County Subdivision Regulations § 408.03(B); see A.R.S. §§ 11-823(A); 9-463.01(J) (authorizing counties to require a designation of water supply prior to plat approval); Doc. #56, Att. 1, at 3 ¶ 17.

An "adequate water supply" means, in part, that "[s]ufficient groundwater, surface water or effluent of adequate quality will be continuously, legally and physically available to satisfy the water needs of the proposed use for at least one hundred years." A.R.S. § 45-108(I)(1). The

[8] A subdivision is defined as land divided into six or more lots with at least one parcel (or lot) having an area of less than 36 acres. A.R.S. § 32-2101(56).

applicant (here, Pueblo Del Sol), bears the burden of demonstrating that its proposed water supply meets these criteria. A.R.S. § 45-108(A); A.A.C. R12-15-714(A)(5). ADWR, in turn, bears the burden of evaluating the application and determining whether it meets the criteria. A.R.S. §§ 45-108(B), 45-108.01(E); 9-463.01(J); A.A.C. R12-15-714(E)(3). At issue in this case is whether Pueblo Del Sol and ADWR have met their burdens to demonstrate that the proposed water supply is "legally available."

This court applies a de novo standard of review to ADWR's interpretation of A.R.S. § 45-108, which does not define "legally available." Dioguardi v. Superior Court, 184 Ariz. 414, 417 (Ct. App. 1995). "[C]ourts must remain the final authority on critical questions of statutory construction." Sharpe v. Ariz. Health Care Cost Containment Sys., 220 Ariz. 488, 494 (Ct. App. 2009) (quoting U.S. Parking Sys. v. City of Phoenix, 160 Ariz. 210, 211 (Ct. App. 1989)). Deference to agency interpretations of statutes that are "inconsistent with the legislature's intent" is not appropriate. Sanderson Lincoln Mercury, Inc. v. Ford Motor Co., 205 Ariz. 202, 205 (Ct. App. 2003) (citations omitted).

The "cornerstone" of statutory interpretation is "the rule that the best and most reliable index of a statute's meaning is its language and, when the language is clear and unequivocal, it is determinative of the statute's construction." Janson v. Christensen, 167 Ariz. 470, 471 (1991) (citation omitted); Sanderson, 205 Ariz. at 205 ("we look first to the language of the statute, and we presume that the legislature has said what it means") (citation omitted). Arizona courts interpret statutes to "give words their common, ordinary usage unless otherwise defined." Sharpe, 220 Ariz. at 497 (citing Dowling v. Stapley, 218 Ariz. 80, 84 (Ct. App. 2008); see also

A.R.S. § 1-213 ("Words and phrases shall be construed according to the common and approved use of the language.").

Here, the "common, ordinary usage" of "legally available" is straightforward: the water must be obtainable under applicable laws and the applicant must have legal rights to it. See Fogliano v. Brain ex rel. County of Maricopa, 229 Ariz. 12, 19 (Ariz. Ct. App. 2011) ("'Available' can mean either present and ready for use, or capable of being gotten, obtainable.") (citing American Heritage Dictionary 123 (4th ed. 2001)); Robson Ranch Mountains, L.L.C. v. Pinal County, 203 Ariz. 120, 128 (Ct. App. 2002) ("available" means "accessible, obtainable") (citing State v. Mitro, 700 So.2d 643, 646 (Fla. 1997) (citation omitted)).[9] Indeed, ADWR defines "legally available" nearly exactly this way in its public information materials: "[l]egal rights to the water must exist."[10] Accordingly, to fulfill this requirement, ADWR must ensure that an applicant for a designation of adequate water supply has the legal right to its proposed water supply for the next 100 years.

The ordinary meaning of "legally available" is consistent with the Arizona legislature's intent in passing this statute. See Maldonado v. Ariz. Dep't of Econ. Sec., 182 Ariz. 476, 478 (Ct. App. 1994) (an interpretation that would defeat the legislative purpose is to "be frowned upon and stricken down") (quoting Sw. Lumber Mills, Inc. v. Employment Sec. Comm'n, 66

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[9] See Merriam-Webster Online Dictionary, available at http://www.merriam-webster.com/dictionary/legal (last visited July 18, 2013) (defining "legal" as "conforming to or permitted by law or established rules;" defining "available" as "present or ready for immediate use," or "accessible, obtainable").

[10] ADWR Assured and Adequate Water Supply Programs Fact Sheet, at 2, available at http://www.azwater.gov/azdwr/WaterManagement/AAWS/documents/AzAssuredAdequateWaterFactSheet6-1-09.pdf (last visited Sept. 11, 2013).

Ariz. 1, 5 (1947)). The Arizona legislature first adopted a water adequacy statute in 1973 in order to protect home buyers from unknowingly purchasing homes that did not have a long-term, secure water supply.[11] However, the statute had too many loopholes to be effective. In 2006, the ADWR Director at the time, Herb Guenther, declared the program "dysfunctional" and testified that it "has never worked" and has resulted in "land sales that became a national embarrassment to Arizona" because the land was sold without water. See Testimony on SB 1575 before Arizona Senate Committee on Natural Resources and Rural Affairs (Feb. 14, 2007) ("SB 1575 Testimony").[12]

To address these and other shortcomings, the legislature amended the statute in 2007.[13] Most significantly, the amendments provided counties and municipalities with the authority to require a demonstration of adequate water supplies prior to plat approval, defined "adequate

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[11] ADWR, Water Adequacy Program Summary. See http://www.azwater.gov/azdwr/WaterManagement/AAWS/documents/WADSumm_000.pdf (last visited Aug. 9, 2013).

[12] Available at http://azleg.granicus.com/MediaPlayer.php?view_id=3&clip_id=380 (quotations begin at 2:08:05 and 2:10:10 on video) (last visited Sept. 11, 2013).

[13] The amendments reflected the recommendations of the "Statewide Water Advisory Group," or "SWAG," composed of 52 Arizona citizens, industry representatives, and government officials, formed by the governor to recommend changes to the water adequacy program. In 2007, the Arizona legislature adopted the SWAG recommendations with minor amendments. See SB 1575 Testimony at 2:05:40 (Senator describing SWAG conclusions); 2:36:21 (Senate committee voting to approve bill) (available at http://azleg.granicus.com/MediaPlayer.php?view_id=3&clip_id=380). Notably, the SWAG envisioned that the amendments would provide counties and ADWR with the authority to condition adequacy determinations on several factors, including impacts of the proposed groundwater withdrawals on "existing water uses," "vested water rights," and "stream flows." Statewide Water Resources Advisory Group, August 1, 2006, Water Supply Adequacy Requirements - Straw Proposal For Consideration, available at http://www.azwater.gov/AzDWR/StatewidePlanning/SWAG/documents/Straw_Proposals_SWAG_080406.pdf (last visited Sept. 9, 2013).

water supplies" to include the requirement that the supply be physically, legally, and continuously available for 100 years, and authorized adversely affected landowners, like Dr. Silver, to seek judicial review of adequacy determinations. These changes addressed the amendments' primary goals: to strengthen the original purpose of protecting consumers from buying homes without adequate water supplies, as well as to empower local governments to conserve dwindling water supplies and plan development in a way that would avoid creating future water conflicts. See SB 1575 Testimony at 2:10:34 (Director Guenther explaining need to close consumer protection loopholes in earlier statute); id. at 2:06:15 (Senator Arzberger, the bill's sponsor, explaining intent of bill to provide counties tools to manage growth and protect water supply); see also SB 1575 Testimony at 2:08:35 (Director Guenther commenting that allowing new development without sufficient water harms existing users and property owners); 2:11:50 (Director Guenther explaining that inability to ensure adequate water supply means that "you're just going to postpone it until somebody else has to deal with the crisis when your supply comes up short"). These purposes can only be fulfilled if "legally available" means what it says.

B. ADWR's Refusal To Account For BLM's Federal Reserved Water Rights Violates The Plain Meaning And Intent Of The Statute

In this case, the most significant legal constraint on Pueblo Del Sol's water supply is BLM's federal reserved water rights. ADWR's final decision recognizes that federal water rights present a legal limitation on Pueblo Del Sol's proposed water supply. "Pueblo Del Sol has a statutory right to make reasonable and beneficial use of groundwater, subject to federal reserved water rights." Doc. #56, Att. 1, at 21 ¶ 12 (citing In re General Adjudication of All

Rights to Use Water in Gila River System and Source, 198 Ariz. 330 (2000)) (emphasis added). Thus, the only way to determine if Pueblo Del Sol has the legal right to the proposed groundwater supply is to evaluate and account for BLM's water rights. ADWR refused to do so.

By refusing to evaluate this legal constraint, ADWR's decision renders the requirement that a water supply be "legally available" meaningless. Courts reject such interpretations. See Fogliano, 229 Ariz. at 19 ("When interpreting statutes, '[e]ach word, phrase, clause and sentence must be given meaning so that no part will be void, inert, redundant or trivial.") (internal citation omitted); State v. Short, 192 Ariz. 322, 324 (Ct. App. 1998) ("We are required to construe any statute before us so that all its words contribute to its meaning and none are rendered superfluous") (citation omitted); Ruiz v. Hull, 191 Ariz. 441, 450 (1998) (rejecting Attorney General's interpretation of constitutional amendment because it ignored its "express language" and amounted to a "remarkable job of plastic surgery on the face of the [Amendment]").

Faced with a similar situation and a similar statute, the Montana Supreme Court rejected a state agency's refusal to account for unadjudicated Indian reserved water rights when permitting new surface water diversions. Confederated Salish and Kootenai Tribes v. Clinch, 297 Mont. 448, 449, 455-57 (1999). Because the Montana Constitution requires protection of Indian reserved rights, the court held that the term "legally available" must mean that "there is water available, which, among other things, has not been federally reserved for Indian tribes." Id. at 457; Confederated Salish and Kootenai Tribes v. Stults, 312 Mont. 420, 429-31 (2002) (extending protection to groundwater, relying in part on Cappaert and Gila III). Here, too, because the Arizona Supreme Court recognized in Gila III that federal reserved water rights

must be protected, "legally available" must mean water that has not been federally reserved for the SPRNCA. Gila III, 195 Ariz. at 422.[14]

In 1993, ADWR did protect the SPRNCA's rights in line with this reasoning. Pursuant to an earlier version of A.R.S. § 45-108, ADWR deemed a water supply for a 185-lot subdivision – less than 3% the size of Tribute – "inadequate" because, among other things, the agency could not be certain that the water supply was "legally available" for the next 100 years in light of the SPRNCA's rights. Doc. #54, RS-20, at 1. The 1993 version of the statute, as now, required subdivision developers to "demonstrate" that their water supplies were adequate, but "adequate water supply" was not defined. See A.R.S. § 45-108 (1993).[15] Nonetheless, ADWR used a "legal availability" standard:

> Existing hydrological studies and data suggest that there is a hydraulic connection between the San Pedro River and the underlying aquifer in the Ft. Huachuca-Sierra Vista area. In addition, certain unresolved questions currently exist as to whether such pumpage of groundwater has violated or will violate the legal rights of other persons to the surface water of the San Pedro River. . . . The resolution of these questions will require judicial action, which may not become final for many years. Hence, while hydrological studies suggest that an adequate water supply is physically available to this subdivision, the possibility exists that it may not be legally available. Therefore, the Department must find the water supply to be inadequate.

Doc. #54, RS-20, at 1 (first emphasis added). ADWR's position in 1993 not only recognized

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[14] Notably, Arizona's constitution has a nearly identical provision to the one the Clinch court relied upon. Compare Ariz. Const., art. 17, § 2 ("All existing rights to the use of any of the waters in the state for all useful or beneficial purposes are hereby recognized and confirmed."); Mont. Const., art. 9, § 3(1) ("All existing rights to the use of any of the waters for any useful or beneficial purpose are hereby recognized and confirmed.").

[15] Under the 1993 statute, subdivision developers "shall submit plans for the water supply for the subdivision and demonstrate the adequacy thereof to meet the needs projected by the developer to the director. The [ADWR] director shall evaluate the plans and issue a report thereon." A.R.S. § 45-108 (1993).

that groundwater pumping could, as a factual matter, interfere with BLM's superior rights, but also recognized that an "inadequate" determination is required if there is insufficient information to make an adequacy determination. The current version of the statute, which added the requirement that the water be "legally available," requires the same result.

ADWR's 2013 decision also undermines the legislature's intent to empower local governments to manage development in a way that resolves water conflicts before development occurs and ensures that homeowners have a reliable water supply. If, as the data in the record demonstrates is likely, the pumping interferes or conflicts with BLM's federal reserved water rights, BLM could attempt to enjoin some or all of this pumping. See Gila III, 195 Ariz. at 422 (federal government "may invoke federal law to protect [a federal reservation's] groundwater from subsequent diversion to the extent such protection is necessary to fulfill its reserved right"). This result – a federal agency using its water right to enjoin state-approved, private party groundwater pumping – is exactly what occurred in Cappaert, 426 U.S. at 143.

In short, the plain language and intent of A.R.S. § 45-108(I) requires Pueblo Del Sol to demonstrate, and ADWR to evaluate and determine, that the company's proposed water supply is "legally available" notwithstanding the legal constraints imposed by BLM's superior legal rights for the SPRNCA before ADWR may issue a designation of adequate water supply. If they are unable to meet their burdens, an "inadequate" determination is required; however, ADWR is not entitled to refuse to require the analysis altogether.

C. ADWR's Interpretation Unlawfully Conflicts With Federal Law

Interpreting A.R.S. § 45-108(I) in accordance with its plain language and legislative intent is required for an additional reason: it is the only interpretation that fulfills the Arizona Supreme Court's mandate to avoid applying state law in a way that frustrates or impairs federal reserved water rights. Gila III, 195 Ariz. at 419. "It is apparent from the case law that we may not withhold application of the reserved rights doctrine purely out of deference to state law. Rather, we may not defer to state law where to do so would defeat federal water rights." Gila III, 195 Ariz. at 419; id. at 418 (federal reserved water rights doctrine is an "exception to Congress's deference to state water law") (citing United States v. New Mexico, 438 U.S. 696, 714 (1978); see also In re Application for Beneficial Water User Permit Nos. 66-459-76L, Ciotti; 64988-G76L, Starner, 278 Mont. 50, 61 (1996) (rejecting an agency interpretation of state statute in part because it failed to comply with the federal reserved water rights doctrine).

Here, state law and federal law can easily be harmonized. If A.R.S. § 45-108(I) is interpreted consistently with its plain language and legislative intent as described above, ADWR would issue a designation of adequate water supply for Pueblo Del Sol only if the company could demonstrate – and ADWR could determine – that the proposed pumping would not infringe on BLM's rights.

In contrast, ADWR's interpretation, whereby the agency refuses to consider BLM's federal reserved water rights in determining whether Pueblo Del Sol's water supply is legally available, has the opposite effect. Not only does it ignore statutory construction principles, it applies state law in a way that essentially nullifies BLM's federal reserved water rights. Absent

a perennial, flowing river sufficient to support the surrounding native riparian vegetation, the intended protection for the SPRNCA is meaningless. See Cappaert, 426 U.S. at 140 ("the protection contemplated [for the pool] is meaningful only if the water remains"). However, under ADWR's interpretation, the agency is authorized to continue to permit groundwater use in the Sierra Vista subwatershed whether or not it is interfering with BLM's rights by depleting the San Pedro River – presumably to the point that the river goes dry, the riparian habitats for hundreds of bird species disappears, and BLM's rights are destroyed. The Gila III court rejected such an outcome. 195 Ariz. at 420 ("We therefore cannot conclude that deference to Arizona's law – and to the opportunity it extends all landholders to pump as much groundwater as they can reasonably use – would adequately serve to protect federal rights.").

In short, interpreting A.R.S. § 45-108 in a manner consistent with its plain language and intent would also protect BLM's federal reserved water rights, as this court is required to do.

D. All Available Evidence Demonstrates That Pueblo Del Sol's Water Supplies Are Likely "Inadequate"

Had ADWR interpreted the water adequacy statute according to its plain meaning and purpose and consistently with federal law, the factual analysis and determination of whether Pueblo Del Sol's proposed water supplies are "legally available" would be a question for Pueblo Del Sol and ADWR to answer in the first instance. As noted above, the water adequacy statute unambiguously places the burden of demonstrating adequacy on the applicant – Pueblo Del Sol – and the burden of evaluating the data and making a determination on ADWR. See supra at 18; A.R.S. §§ 45-108(A), (B), 45-108.01(E); A.A.C. R12-15-714(A)(5), (E)(3). If, however, the data is insufficient to meet this burden, ADWR must designate the water supply "inadequate," as

it did in a similar situation in 1993. See supra at 23; Doc. #54, RS-20. For these reasons, this Court need not rule on whether Pueblo Del Sol's proposed water supplies are adequate. The Court need only decide whether the company and agency must evaluate that question in light of the impact to the San Pedro River and BLM's superior rights.

Nonetheless, had ADWR completed the required analysis, the agency would have had access to voluminous data and evidence to evaluate and determine whether the water Pueblo Del Sol proposes to pump is legally available, and this evidence paints a dire picture for the river and its ability to continue to fulfill the purposes for which the SPRNCA was created. See, e.g. Doc. #54, RS-16, RS-17 (recent studies of groundwater and surface water conditions in the Upper San Pedro River Basin, submitted in the OAH proceedings). For example, pumping has already substantially depleted the river's surface flows, such that the river's average flows at the three gages are now significantly lower than flow volumes BLM and ADWR have agreed are required to fulfill all of the SPRNCA's purposes. See supra at 13-14.

In addition, there is no evidence to suggest that it would have been impossible for Pueblo Del Sol or ADWR to measure the impact of the proposed pumping to the river. On the contrary, Pueblo Del Sol submitted a hydrologic model that was developed by the USGS (the same model used for the capture map), and updated by the firm of Brown & Caldwell, to demonstrate, among other things, that its proposed water supply is physically available. Tr. 871-74, 880-82, 985; Doc. #54, DWR-2D; Doc. #39 at 23-24. Nothing in the record suggests that modeling could not predict the impact of Pueblo Del Sol's proposed pumping on the San Pedro River.

Pueblo Del Sol and ADWR both tried to deflect this evidence by relying on recharge and conservation efforts that will purportedly alleviate the impacts to the San Pedro River. Doc. # 56, Att. 1, at 15 ¶¶ 107-111; 16 ¶ 116; 17 ¶ 123; 18 ¶135. Because neither Pueblo Del Sol nor ADWR did any analysis to demonstrate whether or how severe the impacts of the proposed pumping would be, these arguments have no record support. In any event, this Court need not weigh any evidence; the only issue before this Court is whether Pueblo Del Sol and ADWR must account for impacts to the San Pedro and BLM's water rights to comply with governing legal standards. Because Pueblo Del Sol and ADWR failed to do so, ADWR's "adequacy" designation is unlawful.

II. ADWR Unlawfully Applied Its Regulations In A Manner That Conflicts With A.R.S. § 45-108

ADWR's final decision primarily justifies the agency's refusal to follow the plain meaning and intent of A.R.S. § 45-108 by asserting that its regulations eliminate the agency's discretion to evaluate competing legal rights. Doc. #56, Att. 1, at 22-23 ¶ 20; see also Doc. #39 at 10; Tr. 154-55, 158-59, 182. ADWR relies on A.A.C. R12-15-718(C), which purportedly allows a private water company like Pueblo Del Sol to satisfy the "legal availability" requirement by submitting a "certificate of convenience and necessity" (CC&N) issued by the Arizona Corporation Commission. Pueblo Del Sol obtained the CC&N required under this regulation in 1972. See Doc. #56, Att. 1, at 2 ¶ 11; Doc. #54, DWR-3. However, because the CC&N has nothing to do with water availability, ADWR's application of this regulation in the Sierra Vista subwatershed is inconsistent with the words and intent of A.R.S. § 45-108 and is unlawful.

As an initial matter, "[i]t is fundamental that the [administrative agency] could not enact a regulation nor make an order that would conflict with the proper interpretation of the statute." Sharpe, 220 Ariz. at 495 (quoting McCarrell v. Lane, 76 Ariz. 67, 70 (1953)); Ferguson v. Ariz. Dep't of Econ. Sec., 122 Ariz. 290, 292 (Ct. App. 1979) (agency regulations "should not be inconsistent with or contrary to the provisions of a statute, particularly the statute it seeks to effectuate"). Thus, where "an agency rule conflicts with a statute, the rule must yield." Ariz. State Bd. of Regents v. Ariz. State Personnel Bd., 195 Ariz. 173, 175 (1999) (citations omitted); Sharpe, 220 Ariz. at 494 (where "the construction given by the agency is not consistent with the enabling legislation, the interpretation – whether expressed in regulations, policy, or otherwise – is invalid") (citations omitted).[16]

Here, ADWR's application of A.A.C. R12-15-718(C) conflicts with the water adequacy statute because CC&Ns have nothing to do with water availability or legal rights to water. A.R.S. § 40-282(B), A.A.C. R14-2-402. The Arizona Supreme Court has explained that the Arizona Corporation Commission, "in granting a certificate of convenience and necessity, has no jurisdiction to determine conflicting water rights, cannot purport to license the wrongful exportation of water, and cannot consider the issue of water rights that petitioners are now attempting to inject in the superior court action below." Gamet v. Glenn, 104 Ariz. 489, 491 (1969) (en banc). Instead, a CC&N is intended to ensure that a public services corporation seeking to build a utility or public service operation is viable and stable. See A.A.C. R14-2-402.

[16] Although courts typically defer to an agency's legal interpretations, this is only true "so long as [agencies] operate within their statutory character." Dioguardi, 184 Ariz. at 417. If an agency's interpretation is inconsistent with legislative intent, courts "do not defer to the agency." Sanderson, 205 Ariz. at 205.

Indeed, Pueblo Del Sol's CC&N is typical in that there is not a single mention of the company's water supply, let alone its legal right to that supply. See Doc. #54, DWR-3.

In short, under ADWR's interpretation, the agency's sole criterion for determining whether a subdivision's water supply is "legally available" bears no relation to the legal availability of water. Courts reject regulations, or agency applications of regulations, that lead to such an irrational result. See Sharpe, 220 Ariz. at 493 (rejecting policy as "absurd" because it disallowed medical coverage for dentures as not "medically necessary" even when patient could not chew food without them); see also Hosea v. City of Phoenix Fire Pension Bd., 224 Ariz. 245, 251 (Ct. App. 2010) (explaining that courts should interpret statutes in accordance with their clear and unambiguous language unless "impossible or absurd consequences would result") (quotation and citation omitted).

Further highlighting the conflict with the statute, ADWR's regulations implementing the "legal availability" requirement in the 2007 statute for other sources of water require a showing of legal right to a proposed water supply. For example, if the applicant proposes to use surface water other than Central Arizona Project (CAP) water or Colorado River water, the applicant must demonstrate he or she has the legal right to that water. A.A.C. R12-15-718(E); see also A.A.C. R-12-15-718(F), (G) (requiring proof of legal rights to CAP water and Colorado River water, respectively); A.A.C. R12-15-718(M) (requiring evidence that CAP water leased from an Indian community has an equal or higher priority than CAP municipal and industrial water and evidence that the Indian community has the authority to lease sufficient water for 100 years). Similarly, if the proposed water supply is effluent, "the applicant shall submit evidence that the

applicant or the proposed municipal provider has the legal right to use the effluent." A.A.C. R12-15-718(H). These definitions demonstrate that ADWR understood "legal availability" to mean that an applicant must demonstrate legal rights to the proposed water supply.[17] Nothing in the statute suggests that "legal availability" should mean something different for groundwater.

Accordingly, the Court should reject ADWR's application of A.A.C. R12-15-718(C) because it is contrary to the statute's plain language and leads to an absurd result. See Sharpe, 220 Ariz. at 497.

III. ADWR Erroneously Concluded That Only The Adjudication Court Can Consider Whether Pueblo Del Sol's Water Supply Is Adequate

ADWR's final decision also attempts to deflect ADWR's failure to account for BLM's right by reasoning the agency "does not have the authority to consider whether Pueblo Del Sol's right to use groundwater conflicts with BLM's federal reserved rights, which is an issue for resolution by the Gila River Adjudication Court." Doc. #56, Att. 1, at 24 ¶ 28. Relatedly,

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[17] Similarly, another ADWR regulation, A.A.C. R12-15-714(A), describes the materials an applicant must submit for a designation of adequate water supply and gives ADWR considerable leeway to consider anything the agency deems relevant. A.A.C. R12-15-714(A)(6) states that an applicant must submit, in addition to a list of specific items, "[a]ny other information that the Director determines is necessary to decide whether an adequate water supply exists for the municipal provider." The plain language of this regulatory provision provides ADWR with wide authority to require applicants to submit any other information the agency needs in order to make an adequacy determination. See Home Depot USA, Inc. v. Ariz. Dep't of Revenue, 230 Ariz. 498, 501 (Ct. App. 2012) (noting that courts "look to the plain language as the most reliable indicator" of the meaning of a regulation) (citations omitted). In light of the purposes of the water adequacy legislation to protect consumers and ensure a long-lasting, reliable water supply, see supra at 19-21, ADWR's authority under A.A.C. R12-15-714(A)(6) logically includes the ability to request information regarding unique circumstances relevant to the determination, such as the existence of federal reserved water rights that may limit the adequacy of the water supply. See Cooke v. Arizona Dep't of Econ. Sec., 302 P.3d 666, 669 (Ariz. Ct. App. 2013) (explaining that courts should interpret regulations "to further the statutory policy contained in its enabling legislation") (citations and quotations omitted).

ADWR's decision concludes that only the Adjudication Court can determine the "extent and relatively priority" of BLM's rights. Id. at 23 ¶ 22.

As an initial matter, the suggestion that the extent and relative priority of water rights must be first determined in the Gila River Adjudication is a red herring because agency officials testified that they would have ignored BLM's rights in the legal availability analysis even if they had been adjudicated. See Tr. 240-44 (ADWR testimony that agency has no authority to consider adjudicated federal reserved water rights in making adequacy determinations); Tr. 182 (ADWR would deem water legally available even if a court had enjoined pumping in the area). ADWR's admissions underscore the fact that the only issue in this case is whether the agency must account for BLM's federal reserved water rights, not the extent of those rights or the status of the Adjudication.

Moreover, ADWR's legal obligations do not depend upon the status of the Adjudication. There is no dispute that BLM holds federal reserved water rights in a quantity sufficient to fulfill the purposes of the SPRNCA. There is also no dispute that Pueblo Del Sol's pumping is "subject to" federal reserved water rights. Doc. #56, Att. 1, at 21 ¶ 12; see Cappaert, 426 U.S. at 143; Gila III, 195 Ariz. at 422. These rights exist regardless of the status of the Gila River Adjudication. See Cappaert, 426 U.S. at 145 ("[f]ederal water rights are not dependent upon state law or state procedures. . . ."). Indeed, the U.S. Supreme Court has repeatedly enforced federal reserved water rights in the face of conflicting private uses even though the federal rights had not been adjudicated or formally quantified in a state proceeding. See Cappaert, 426 U.S. at 141; Winters v. U.S., 207 U.S. 564 (1908). Accordingly, if ADWR insists that the

Adjudication must be complete in order to determine whether Pueblo Del Sol's proposed pumping conflicts with BLM's rights, ADWR must deem the proposed supply "inadequate" in order to protect those rights until then, just as the agency did in 1993. See Clinch, 297 Mont. at 455-57 (prohibiting new state surface water permits until Indian reserved rights are adjudicated); Stults, 312 Mont. at 429-31 (extending Clinch's holding to groundwater); Doc. #54, RS-20.

Here, the purpose of the SPRNCA is explicit, and there is voluminous evidence addressing the amount of water needed to fulfill that purpose. See supra at 7, 9-10. ADWR must evaluate this evidence in order to determine whether Pueblo Del Sol's water supply is "legally available." Any other result renders the plain language of the water adequacy statute meaningless, fundamentally undermines the statute's purpose, and conflicts with the Arizona Supreme Court's mandate that the state must protect federal reserved water rights, not ignore them. See supra at 16-26.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, ADWR's designation of adequate water supply for Pueblo Del Sol's proposed groundwater pumping for the Tribute subdivision is arbitrary, capricious, and contrary to law pursuant to A.R.S. § 12-910(E). Dr. Silver requests that this court vacate this decision and remand to the agency for reconsideration. In addition, ADWR's application of A.A.C. R12-15-718(C) is unlawful and should be rejected.

On remand, Pueblo Del Sol and ADWR must evaluate whether the company's proposed groundwater supply for Tribute is "legally available" in light of BLM's federal reserved water rights in the SPRNCA. To the extent that Pueblo Del Sol cannot demonstrate – and ADWR

cannot determine – that the proposed pumping can proceed without impairing BLM's federal reserved water rights in the SPRNCA, ADWR must deny the application for a designation of adequate water supply.

DATED this 11th day of September, 2013,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of September, 2013, a true and correct copy of the **PLAINTIFF-APPELLANT ROBIN SILVER'S OPENING BRIEF** was served via U.S. Mail and email to the following:

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