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9
10 **ARIZONA SUPERIOR COURT**
11 **MARICOPA COUNTY**

12 ROBIN SILVER, M.D.,)

13 Plaintiff,)

14 vs.)

15 SANDRA A. FABRITZ-WHITNEY, acting in)
16 her capacity as Director of the Arizona)
17 Department of Water Resources; ARIZONA)
18 DEPARTMENT OF WATER RESOURCES, an)
19 agency of the State of Arizona; PUEBLO DEL)
20 SOL WATER COMPANY, a subsidiary of)
21 Castle & Cooke Arizona, Inc.; UNITED)
22 STATES BUREAU OF LAND)
23 MANAGEMENT, a federal agency within the)
24 U.S. Department of Interior; and PATRICIA)
25 GERRODETTE,)

26 Defendants.)

Case No. _____

**COMPLAINT FOR JUDICIAL
REVIEW OF ADMINISTRATIVE
DECISION**

1 **Introduction**

2 1. Southeastern Arizona’s San Pedro River is the last free-flowing, undammed river
3 in the desert Southwest and a biological treasure chest. It is home to one of the most precious
4 and rare wetland ecosystems in the Southwestern United States, and serves as a critical refuge
5 for nearly half of all bird species in the United States at some point during their lives.
6 Recognizing the river’s rare beauty and critical riparian ecosystem for birds and other wildlife,
7 Congress in 1988 designated 36 miles of the river’s upper basin as the San Pedro Riparian
8 National Conservation Area, along with the water rights necessary to sustain the conservation
9 area.
10
11

12 2. Twenty-five years later, the river’s very existence is in peril. Decades of ever-
13 increasing groundwater pumping from the river’s groundwater basin is draining the aquifer
14 necessary to sustain the river and decreasing the river’s flows.
15

16 3. Each year, more groundwater is pumped out of the aquifer than is replaced
17 through recharge. If this trend continues, the aquifer will eventually no longer feed the river,
18 and the San Pedro River will run only during precipitation events.
19

20 4. Despite this dire situation, the Arizona Department of Water Resources (ADWR)
21 continues to approve even more groundwater pumping in the basin.
22

23 5. On April 11, 2013, ADWR issued a “designation of adequate water supply” for a
24 new Sierra Vista real estate venture named “Tribute.” Tribute would pump an additional 4,870
25 acre-feet of groundwater per year, increasing the total groundwater pumping in the groundwater
26 basin by 30 percent. The application to ADWR for approval of the pumping for Tribute was

1 submitted by Pueblo Del Sol Water Company, a subsidiary of real estate company Castle &
2 Cooke. Tribute is a proposed new master-planned community slated to contain 6,959 residential
3 units, offices, and commercial space spreading across 1,916 acres.
4

5 6. This groundwater, however, is not legally available. The groundwater that Pueblo
6 Del Sol proposes to pump is necessary to fulfill the federal reserved water right in the river.
7 These rights are held by the U.S. Bureau of Land Management for the San Pedro Riparian
8 National Conservation Area. The average remaining annual base flows in the Conservation
9 Area are already less than the amount of water comprising BLM's claimed water right, which
10 includes the groundwater necessary to sustain it. If the Tribute project goes forward, BLM
11 could legally enjoin this groundwater pumping because it would further infringe these reserved
12 water rights. Nevertheless, ADWR did not require Pueblo Del Sol to demonstrate the legal
13 availability of groundwater for the proposed Tribute development and did not consider BLM's
14 rights in its adequacy designation.
15
16

17 7. ADWR's decision to issue a designation of adequate water supply is arbitrary,
18 capricious, contrary to law, and an abuse of discretion.
19

20 Parties

21 8. Plaintiff Dr. Robin Silver is a native Arizonan, an Arizona resident and a
22 landowner within the upper San Pedro groundwater basin. The upper San Pedro groundwater
23 basin is the basin in which Pueblo Del Sol Water Company applied for a designation of
24 adequate water supply to serve the proposed Tribute development. Dr. Silver's 75-acre property
25 is situated along the upper San Pedro River in Cochise County, Arizona. Dr. Silver has owned
26

1 the property since 1993. If the upper San Pedro River's flows decline or disappear, Dr. Silver's
2 property will lose economic, aesthetic, and other value.

3
4 9. Defendant Sandra A. Fabritz-Whitney is the Director of the Arizona Department
5 of Water Resources (ADWR). Defendant Fabritz-Whitney is sued in her official capacity as
6 Director of ADWR. As Director, she is responsible for ensuring that ADWR's decisions are
7 undertaken in accordance with state and federal laws.

8
9 10. Defendant Arizona Department of Water Resources (ADWR) is the agency
10 responsible for administering and enforcing Arizona's groundwater and surface water laws.
11 ADWR administers Arizona's Assured and Adequate Water Supply programs pursuant to
12 A.R.S. §§ 45-101 et seq. ADWR is an agency of the state of Arizona, with its principal offices
13 in Maricopa County.

14
15 11. Defendant Pueblo Del Sol Water Company is the applicant for the designation of
16 adequate water supply for the proposed Tribute development. Pueblo Del Sol is wholly owned
17 by Castle & Cooke, the real estate developer planning to build the Tribute development.

18
19 12. Defendant United States Bureau of Land Management (BLM) manages the San
20 Pedro Riparian National Conservation Area (SPRNCA) in the upper San Pedro groundwater
21 basin. BLM possesses federal reserved water rights in the San Pedro River sufficient to fulfill
22 the purposes of the SPRNCA.

23
24 13. Defendant Patricia Gerrodette is a resident of Sierra Vista, Arizona, in the upper
25 San Pedro groundwater basin.
26

1 **Jurisdiction and Venue**

2 14. This Court has jurisdiction over this action pursuant to A.R.S. §§ 12-905(A), 41-
3 1092.08(H), 45-108.01(F), and 45-114(C). Pursuant to A.R.S. §§ 12-901 et seq, Dr. Silver
4 seeks review of the April 11, 2013 final decision by Defendants ADWR and Fabritz-Whitney to
5 grant Pueblo Del Sol Water Company’s application for Designation as Having an Adequate
6 Water Supply (No. 40-700705.00). As no party has filed a motion for rehearing or review, the
7 agency’s decision is final for purposes of judicial review. See A.R.S. §§ 45-114(C)(2); 41-
8 1092.09(A)(3).
9

10
11 15. The administrative hearing culminating in the April 11, 2013 decision was held in
12 Maricopa County.

13 16. Venue for this action is proper in Maricopa County pursuant to A.R.S. § 12-
14 905(B).
15

16 **Legal Background**

17 **ADWR’s Adequate Water Supply Program**

18 17. ADWR’s water adequacy program was originally created in 1973 as a consumer
19 protection statute. The goal of the statute was to protect buyers from unknowingly purchasing
20 homes without a secure source of water. The statute required subdivision developers to obtain a
21 determination from ADWR regarding the availability of water supplies prior to marketing lots.
22 If ADWR certified the water supply as “adequate,” a buyer gained assurance that their home
23 would have sufficient water. If ADWR deemed the water supply “inadequate,” the developer
24 was required to disclose such inadequacy to potential buyers.
25
26

1 18. However, the 1973 adequacy law contained loopholes that undermined the
2 purpose of the statute. Specifically, sellers could still offer homes with inadequate water so long
3 as they provided notice to the first buyer. The law did not require disclosure to subsequent
4 buyers, who could unknowingly purchase a home with insufficient water.
5

6 19. In 1980, the Arizona legislature passed the Groundwater Management Act (Act) in
7 recognition of the serious threat posed by unchecked groundwater pumping within the state.

8 A.R.S. §§ 45-401 et seq. As the Act recognized:

9
10 [I]n many basins and sub-basins withdrawal of groundwater is greatly in excess of
11 the safe annual yield and ... this is threatening to destroy the economy of certain
12 areas of this state and is threatening to do substantial injury to the general
13 economy and welfare of this state and its citizens.

14 A.R.S. § 45-401(A). The Act sought to “provide a framework for the comprehensive
15 management and regulation” of groundwater in Arizona. Id. § 45-401(B). The Act delineated
16 the groundwater basins within the state and created five “active management areas,” or
17 “AMAs.” See A.R.S. §§ 45-402(2) & (13), 45-403, 45-411. For those five AMAs, the Act
18 requires that developers seeking to pump groundwater meet specific requirements. These
19 requirements fell under a new program called the Assured Water Supply Program.

20 20. The 1980 Act did not change the 1973 water adequacy requirements for those
21 areas outside of an AMA, including the upper San Pedro groundwater basin. Areas outside of
22 AMAs remained subject to the 1973 water adequacy requirements.
23

24 21. However, in 2006, in recognition of the deficiencies in the 1973 water adequacy
25 program, ADWR announced the formation of a Statewide Water Advisory Group composed of
26 Arizona citizens, industry representatives, and government officials. The Statewide Advisory

1 Group was charged with reviewing the adequacy program and making recommendations to
2 enhance its effectiveness. In 2007 the Arizona legislature adopted the group's recommendations
3 and substantially amended the water adequacy statute. The amendments arose from the
4 lawmakers' desire to provide counties a greater ability to protect consumers, control growth, and
5 protect and conserve their water supply.
6

7 22. Under the amended adequacy program, counties gained the authority to require
8 subdivision developers to demonstrate an adequate water supply for a proposed subdivision to
9 ADWR before the developers could receive final plat approval. A.R.S. § 45-108(A). Pursuant
10 to this statutory authority, Cochise County passed a regulation in 2008 requiring all subdivision
11 developers to obtain a designation of adequate water supply from ADWR in order to receive plat
12 approval. Cochise County Subdivision Regulations § 408.03.
13

14 23. The 2007 water adequacy statute codified the term "adequate water supply" to
15 mean that sufficient groundwater, surface water or effluent of adequate quality will be
16 "continuously, legally and physically available" for the project for at least 100 years. A.R.S. §
17 45-108(I). A subdivision developer must demonstrate in its application to ADWR that an
18 adequate water supply for the proposed subdivision exists. Id. § 45-108(A). If, after reviewing
19 the developer's application, the ADWR director determines that an adequate water supply exists,
20 the director must approve the subdivision developer's application; if the director determines an
21 adequate water supply does not exist, the director must deny the application. Id. § 45-108.01(E).
22
23

24 24. ADWR promulgated regulations in 1995 to implement the Assured Water Supply
25 Program created in 1980. These regulations also apply to the Adequate Water Supply Program.
26

1 25. As in the statute, under these regulations the applicant for a designation of
2 adequate water supply bears the burden of demonstrating that the proposed water supply meets
3 all applicable criteria. A.A.C. R12-15-714(A)(5). If the applicant demonstrates all applicable
4 criteria, the ADWR director must designate the applicant as having an adequate water supply.
5 A.A.C. R12-15-714(E)(3).
6

7 26. According to A.A.C. R12-15-718(A), to demonstrate that the water supply is
8 “legally available,” the applicant must submit all of the information required by that section.
9 For private water company applicants like Pueblo Del Sol, this section requires that “the
10 applicant shall submit evidence that the applicant has a certificate of convenience and necessity
11 approved by the Arizona Corporation Commission. . . .” A.A.C. R12-15-718(C). A.A.C. R12-
12 15-718(C) contains no provision relating to whether water is legally available.
13

14 27. The Arizona Corporation Commission’s criteria for obtaining a certificate of
15 convenience and necessity (CC&N) also contain no provision relating to whether water is
16 legally available. Instead, the Arizona Corporation Commission considers factors such as the
17 company’s corporate information, facilities, financial stability, and ability to serve customers.
18 See A.R.S. § 40-282(B), A.A.C. R14-2-402. As a result, under ADWR’s regulations, the
19 criteria for determining whether a water supply is “legally available” for a subdivision do not
20 relate in any manner to the legal availability of the water supply.
21
22

Federal Reserved Water Rights

23
24 28. Historically, Arizona water law has adhered to the “legal fiction” that
25 groundwater and surface water are not hydrologically connected. See In re the General
26

1 Adjudication of All Rights to Use Water in the Gila River System and Source (“Gila II”), 175
2 Ariz. 382, 386 (Ariz. 1993) (despite scientific recognition of connection of groundwater and
3 surface water, Arizona “continues to adhere to a bifurcated system of water rights...”). As a
4 result, with some limited exceptions, under Arizona law the legal rights tied to groundwater
5 pumping are legally distinct from and unrelated to the legal rights of surface water owners.
6

7 29. Federal law provides for federal reserved surface water right holders to legally
8 protect their surface water flows from the impacts of groundwater pumping. Cappaert v. United
9 States, 426 U.S. 128, 138, 143 (1976) (“...the United States can protect its water from
10 subsequent diversion, whether the diversion is of surface or groundwater.”) The Arizona
11 Supreme Court has recognized Cappaert and acknowledged that “Arizona courts must afford
12 federal claimants the benefit, when state and federal law conflict, of federal substantive law.” In
13 re the General Adjudication of All Rights to Use Water in the Gila River System and Source
14 (“Gila III”), 195 Ariz. 411, 416-17 (Ariz. 1999).
15
16

17 30. As a result, the Arizona Supreme Court determined that federal reserved water
18 rights in Arizona may extend to groundwater if necessary to accomplish the purpose of the
19 federal reservation. Id. at 420. Therefore, the Court held that in Arizona, “once a federal
20 reservation establishes a reserved right to groundwater, it may invoke federal law to protect its
21 groundwater from subsequent diversion to the extent such protection is necessary to fulfill its
22 reserved right.” Id. at 422. Federal reserved water right holders in Arizona thus “enjoy greater
23 protection from groundwater pumping than do holders of state law rights.” Id. at 423. As a
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1 result, under both federal and state law, BLM’s federal reserved water rights are protected from
2 depletion due to groundwater pumping.

3 **Factual Background**

4 **The San Pedro River and San Pedro Riparian National Conservation Area**

5
6 31. The San Pedro River flows north from northern Mexico through southeastern
7 Arizona until its confluence with the Gila River. The San Pedro River is the last free-flowing,
8 undammed river in the desert Southwest. It is home to one of the most precious and rare
9 wetland ecosystems in the Southwestern United States.

10
11 32. The river and its surrounding cottonwood-willow forest support one of the most
12 important corridors for migratory songbirds in the United States. Of the approximately 900 bird
13 species of North America, nearly 45 percent use the San Pedro River at some point during their
14 lives. The San Pedro River is also a biological treasure chest – it is home to more than a
15 hundred species of mammals, reptiles, amphibians, fish, and insects, including species protected
16 by the federal Endangered Species Act.

17
18 33. In 1988, Congress recognized the importance of the San Pedro River and its
19 outstanding resources when it designated 36 miles of the river’s upper basin as the San Pedro
20 Riparian National Conservation Area (SPRNCA). 16 U.S.C. § 460xx. The SPRNCA is
21 managed by BLM. The purpose of the SPRNCA is “to protect the riparian area and the aquatic,
22 wildlife, archaeological, paleontological, scientific, cultural, educational, and recreational
23 resources of the public lands surrounding the San Pedro River.” Id.
24
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1 34. In the same legislation, Congress explicitly reserved federal water rights for the
2 SPRNCA in “a quantity of water sufficient to fulfill the purposes” of the SPRNCA. 16 U.S.C. §
3 460xx-1(d). These federal reserved water rights have a priority date of November 18, 1988. Id.
4

5 35. In order to determine the precise quantity of BLM’s federal reserved rights,
6 Congress directed the Secretary of the Interior to file a claim to quantify these rights for the
7 SPRNCA in the appropriate stream adjudication. Id. BLM first filed a statement of claim in
8 Arizona’s long-running stream adjudication for the Gila River (“In re The General Adjudication
9 of the Gila River System and Source”) in 1989. Since then, BLM has filed two amended claims
10 for federal water rights for the SPRNCA.
11

12 36. In 2009, the Special Master of the stream adjudication acknowledged BLM’s
13 federal reserved water right for the SPRNCA for the purposes articulated in its enabling
14 legislation, and found that BLM’s reserved right, with a priority date of November 18, 1988, “is
15 superior to the rights of future appropriators.”
16

17 37. In BLM’s Second and Third Amended Statement of Claim, BLM submitted total
18 streamflow claims for three streamflow gages on the San Pedro River. BLM’s claims total: (1)
19 15,900 acre-feet per year (AFY), including a minimum 2,900 AFY in median monthly base
20 flows, at the Palominas gage; (2) 28,000 AFY, including a minimum 11,150 AFY in median
21 monthly base flows, at the Charleston gage; and (3) 30,200 AFY, including a minimum 9,400
22 AFY in median monthly base flows, at Tombstone gage. The most recent estimate of base flow
23 at the Tombstone gage is 4,890 AFY, only slightly more than half of the federal right. BLM’s
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1 federal water rights also include rights to springs and to groundwater to support riparian
2 vegetation.

3 38. ADWR is a technical advisor to the Special Master in the stream adjudication. In
4 May 2012, ADWR issued a report assessing BLM's quantification of its claimed water rights.
5 ADWR agreed with BLM's methodology and quantification of the water right at the Palominas,
6 Charleston, and Tombstone gages. ADWR also noted that "[d]ecreasing trends in streamflow of
7 the San Pedro for the summer, spring and fall seasons suggest that current streamflow volumes
8 will more times than not, be less than the volumes listed in the Third Amended [Statement of
9 Claim]."

10
11
12 39. Although BLM has participated in the adjudication process for more than twenty
13 years, there has not yet been a final adjudication specifying the precise quantity of BLM's
14 federal reserved water rights for the SPRNCA. Moreover, the adjudication court has not set a
15 timeline for completion.
16

17 Groundwater Pumping Threatens the San Pedro River and the SPRNCA

18 40. Despite the designation of the SPRNCA and the federal reserved water rights
19 intended to sustain it, groundwater pumping in the Sierra Vista subwatershed threatens the
20 survival of the river, its associated habitats, and the species that depend on these habitats.
21

22 41. Groundwater pumping affects the river because there is a direct hydrologic
23 connection between the groundwater in the Sierra Vista subwatershed and the San Pedro's
24 flows. The aquifer in the Sierra Vista subwatershed provides the river's "base flows," or water
25 that seeps out of the river banks into the river from the aquifer. "Base flows" sustain the river
26

1 year-round, regardless of seasonal rainfall or snowmelt. The aquifer is recharged primarily by
2 precipitation that falls on the Huachuca Mountains to the west of the river.

3 42. Groundwater pumping in the Sierra Vista subwatershed intercepts water that
4 would otherwise sustain the San Pedro River’s base flows, springs, and vegetation. In addition,
5 groundwater pumping creates a “cone of depression” in the aquifer and lowers the water table.
6 A “cone of depression” is essentially a hole in the water table created by a single well or a
7 concentration of wells. If the water table continues to decline, and the “cone of depression”
8 reaches the river, the aquifer will no longer be able to replenish the San Pedro. Instead, the San
9 Pedro River will drain into the cone of depression back into the aquifer. If this occurs, the base
10 flows will dry up and the San Pedro River will only contain running water during rain or other
11 precipitation events.
12

13 43. Groundwater pumping is the sole source of water for the city of Sierra Vista and
14 surrounding areas. Over the last several decades, the rate of pumping in the Sierra Vista
15 subwatershed has far exceeded the rate of recharge of water to the aquifer, creating a
16 “groundwater deficit.”
17

18 44. Scientists have documented dramatic declines in the upper San Pedro River’s base
19 flows over the last 50 years. Formerly perennial stretches of the upper San Pedro River have
20 become intermittent. Reduced base flows have adversely affected the riparian and wetland
21 vegetation surrounding the San Pedro. The river’s base flows are now below the amount
22 necessary to fulfill the purposes of the SPRNCA.
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1 45. In 2003, in response to the growing threats to the San Pedro River from excessive
2 groundwater pumping in the Sierra Vista subwatershed, Congress recognized the Upper San
3 Pedro Partnership, a collection of Federal, State, and local governmental and nongovernmental
4 entities that sought “to establish a collaborative water use management program in the Sierra
5 Vista subwatershed, Arizona, to achieve the sustainable yield of the regional aquifer, so as to
6 protect the Upper San Pedro River, Arizona, and the San Pedro Riparian National Conservation
7 Area, Arizona.” Pub. L. 108-136, § 321(b). Congress tasked the Partnership with assisting the
8 Department of Interior in preparing reports for Congress regarding water management and
9 conservation measures, as well as annual targets, for meeting the end goal of “achieving and
10 maintaining the sustainable yield of the regional aquifer by and after September 30, 2011.” Id. §
11 321(c), (d).

12 46. This goal has not been met. The Partnership’s most recent 2010 report to
13 Congress (published in 2012) concluded that “[t]he overall situation in the regional aquifer of
14 the Sierra Vista Subwatershed today is not improving; rather, it continues to get worse...”
15 Although the report acknowledged that the rate of aquifer drawdown had slowed, pumping
16 nonetheless continued to increase the groundwater deficit in the aquifer. As the report
17 explained, “[u]ntil the aquifer begins to accrete storage (i.e., the annual water budget bottom line
18 becomes greater than 0) there will be no reduction in the cumulative deficit, and until additional
19 management measures are undertaken, it is unlikely that there will be further progress made
20 toward this goal.” The report estimated that the groundwater deficit increased to 6,100 AFY in
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1 2009. In total, groundwater pumping has removed hundreds of thousands of acre-feet from
2 storage since the first half of the 20th century.

3 The Tribute Project and ADWR's Adequacy Designation
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5 47. It is in this precarious context that this case arises. In 2011, Pueblo Del Sol Water
6 Company sought approval from ADWR to pump a massive volume of groundwater to supply
7 the proposed Tribute development, a new Sierra Vista master-planned community. If built,
8 Tribute is slated to contain 6,959 residential units, offices, and commercial space. Proposed by
9 real estate developer Castle & Cooke, Tribute would spread across 1,916 acres. This
10 constitutes "virtually all of the available development land" remaining in Sierra Vista, according
11 to Castle & Cooke's website. In its 2012 amended application, Pueblo Del Sol stated that it
12 expects to pump 4,870.39 AFY from the aquifer to supply Tribute.
13

14 48. 4,870 acre-feet is equivalent to about 30 percent of all groundwater pumping
15 currently occurring in the Sierra Vista subwatershed from all sources combined. Pumping an
16 additional 4,870 acre-feet of groundwater from the already depleted aquifer would worsen the
17 groundwater deficit, which, if unabated, will continue to reduce the San Pedro's base flows and
18 eventually cause the San Pedro River to go dry.
19

20 49. According to a U.S. Geological Survey model, within 50 years, 20-30 percent of
21 the water to be pumped by at least three of the five wells proposed by Pueblo Del Sol will come
22 from the San Pedro's base flows, associated springs, and riparian vegetation. These percentages
23 will increase with time. This evidence demonstrates that Pueblo Del Sol's proposed pumping
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1 will significantly affect the San Pedro River's flows within the next 50 years and that these
2 impacts will continue to increase afterward.

3
4 50. This pumping is not consistent with BLM's federal reserved water rights in the
5 SPRNCA or the purposes of the SPRNCA. The San Pedro River's average annual base flows
6 have already declined below the quantity the BLM and ADWR agreed is necessary to support
7 the purposes of the SPRNCA. Accordingly, no additional groundwater can be pumped from the
8 Sierra Vista subwatershed without infringing upon BLM's federal reserved water rights in the
9 SPRNCA.

10
11 51. In support of its application, Pueblo Del Sol submitted a Hydrological
12 Groundwater Model Report and other technical documents. None of these documents evaluated
13 or acknowledged BLM's federal reserved water rights in the SPRNCA. None of these
14 documents evaluated whether Tribute's proposed pumping would affect the SPRNCA or BLM's
15 federal reserved water rights in the SPRNCA. None of the documents evaluated whether
16 BLM's federal reserved water rights would affect the availability of groundwater for Tribute.

17
18 52. ADWR posted public notice of Pueblo Del Sol's application once each week for
19 two consecutive weeks in April 2012 as required by Arizona law. A.R.S. § 45-108.01(A).
20 Under this statute, any resident or landowner within the upper San Pedro groundwater basin has
21 the right to file an objection to the application within 15 days of the last posted notice. Id. § 45-
22 108.01(B).

23
24 53. Dr. Silver, BLM, and several other residents and landowners in the upper San
25 Pedro groundwater basin filed timely objections to the application.
26

1 54. Dr. Silver objected to the application in part because sufficient groundwater would
2 not be “legally available” for Tribute.

3 55. On July 23, 2012, ADWR issued a Draft Decision and Order granting Pueblo Del
4 Sol’s application for a designation of adequate water supply. In the Draft Decision and Order,
5 ADWR purportedly relied on its regulations to find that the agency had no authority to evaluate
6 the impact of Tribute’s proposed groundwater pumping on the SPRNCA or determine whether
7 BLM’s federal reserved water rights affect the legal availability of Tribute’s proposed water
8 supply.
9

10 56. Dr. Silver filed a timely notice of appeal of this decision on August 23, 2012
11 pursuant to A.R.S. §§ 45-114, 41-1092 et seq. BLM and Patricia Gerrodette also filed timely
12 appeals of the decision. All entities and individuals who submitted notices of administrative
13 appeal that were accepted by ADWR are named as parties herein.
14

15 57. On November 26-30, 2012, Administrative Law Judge (ALJ) Thomas Shedden in
16 the Office of Administrative Hearings held a hearing in Phoenix, Arizona. See In the Matter of
17 the Decision of the Director to Grant Pueblo Del Sol Water Company’s Application for
18 Designation as Having an Adequate Water Supply, No. 40-700705.0000.
19

20 58. Dr. Silver participated in the hearing, questioned witnesses, and submitted legal
21 briefs to the ALJ.
22

23 59. The ALJ considered the following four issues during the hearing:

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

- 1
- 2 (B) Whether ADWR erroneously refused to consider impacts of
- 3 the proposed pumping [on] the flow of the San Pedro River;
- 4 (C) Whether ADWR erroneously refused to consider impacts of
- 5 the proposed pumping on water rights of the Bureau of Land
- 6 Management, including federal reserved water rights for the
- 7 San Pedro Riparian National Conservation Area;
- 8 (D) Whether Pueblo Del Sol failed to demonstrate, and ADWR
- 9 erroneously determined, that the water proposed to be
- 10 pumped will be physically available for at least 100 years,
- 11 given evidence of declining groundwater levels and increased
- 12 pumping in the area.

13 60. During the hearing, the parties presented testimony, including expert testimony,

14 demonstrating that the water supply for Tribute is not legally available for 100 years. The

15 evidence introduced at the hearing demonstrated, among other things: (1) there is a direct

16 hydrologic connection between the groundwater proposed for pumping in the Sierra Vista

17 subwatershed and the San Pedro River's flows, such that increased groundwater pumping will

18 result in reduced flows in the river; (2) BLM possesses federal reserved water rights in the

19 SPRNCA, including the groundwater necessary to sustain them; (3) current average base flows

20 in the San Pedro River are already at levels below the amount BLM and ADWR agreed are the

21 minimum sufficient to fulfill the purposes of the SPRNCA; and (4) Tribute's proposed

22 groundwater pumping would further reduce the San Pedro's base flows, associated springs, and

23 riparian vegetation, thereby further infringing on BLM's federal reserved water right.

24 61. During the hearing and appeal process, ADWR acknowledged the agency did not

25 require Pueblo Del Sol to submit information relating to BLM's federal reserved water rights, or

26 evaluate BLM's federal reserved water rights in determining whether the groundwater supply

1 was “legally available” for the proposed Tribute development. ADWR also acknowledged it did
2 not evaluate any potential impacts to the San Pedro River or BLM’s water rights in the river.
3 ADWR asserted that it lacked authority to consider the existence of BLM’s federal reserved
4 water rights or the likely impacts to the San Pedro River under the applicable statutes and
5 regulations. ADWR acknowledged that based on its own regulation, A.A.C. R12-15-718(C),
6 the only criterion it used to evaluate the legal availability of Tribute’s water supply was whether
7 Pueblo Del Sol possessed a CC&N.
8

9
10 62. ADWR further acknowledged that under A.A.C. R12-15-718(C), the agency
11 would deem Tribute’s proposed groundwater supply “legally available” even if a court ordered
12 a halt to all pumping in the area based on BLM’s reserved water right.

13 63. ADWR also acknowledged that based on the same regulation, even if BLM’s
14 federal reserved right in the SPRNCA is fully adjudicated and quantified in the Gila River
15 General Stream Adjudication, because PDS has a CC&N, that adjudication would not change
16 ADWR’s determination of “legal availability.”
17

18 64. On March 12, 2013, the ALJ issued his Recommended Decision upholding
19 ADWR’s adequacy designation and dismissing the appeals.
20

21 65. The ALJ’s Recommended Decision found, among other things, that ADWR
22 “lacked authority to consider the pumping’s effects on the surface flows of the San Pedro River
23 or BLM’s federal reserved water rights in the river” in determining whether the water supply is
24 “legally available.” The ALJ also found that ADWR’s conclusion that water is “legally
25 available” for the proposed Tribute subdivision is proper because Pueblo Del Sol possessed a
26

1 CC&N. Pueblo Del Sol received the CC&N from the Arizona Corporation Commission in 1972
2 for the geographic area including the proposed Tribute development site.

3 66. On April 11, 2013, pursuant to A.R.S. § 41-1092.08(B), ADWR Director Fabritz-
4 Whitney accepted the ALJ's decision with some modifications. Director Fabritz-Whitney's
5 modifications did not affect the ALJ's ultimate conclusions. Director Fabritz-Whitney's
6 decision upheld the ALJ's conclusion that ADWR lacked authority to consider Tribute's
7 impacts on the San Pedro River or whether BLM's federal reserved water rights affected the
8 adequacy of Tribute's proposed water supply.
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11 67. Dr. Silver's filing of this Complaint for Judicial Review of Administrative
12 Decision is timely, pursuant to A.R.S. § 12-904.

13 68. Pursuant to A.R.S. §§ 12-904(B)(5), 12-909(A), Dr. Silver designates the
14 complete transcript of the hearing held on November 26-30, 2012, all exhibits introduced at the
15 hearing, as well as all decisions and pleadings filed in the matter, as the record on appeal.
16

17 **Claims for Relief**

18 **First Claim for Relief**

19 (Violation of A.R.S. §§ 45-108 and 12-910(E))

20 69. Each and every allegation set forth in this Complaint is incorporated herein by
21 reference.
22

23 70. In areas outside of an AMA, a developer of a proposed subdivision must
24 "demonstrate the adequacy of the water supply to meet the needs projected by the developer to
25 the director" of the ADWR. A.R.S. § 45-108(A). The ADWR Director must evaluate and
26

1 determine “whether there is an adequate water supply for the subdivision.” Id. § 45-108(B). An
2 “adequate water supply” is defined in part as meaning that “sufficient groundwater...will be
3 continuously, legally and physically available to satisfy the water needs of the proposed use for
4 at least one hundred years.” Id. § 45-108(I).

6 71. BLM possesses federal reserved water rights in the SPRNCA in a quantity
7 sufficient to support the purposes for which the SPRNCA was designated. Federal reserved
8 water rights extend to groundwater if necessary to accomplish the purpose of the federal
9 reservation.

11 72. Tribute’s proposed water supply is groundwater pumped from within the Sierra
12 Vista subwatershed. There is a direct hydrological connection between the groundwater
13 pumped in the Sierra Vista subwatershed and the San Pedro River, including the portion of the
14 river protected within the SPRNCA. Groundwater pumping within the Sierra Vista
15 subwatershed reduces the San Pedro River’s base flows, including the flows comprising BLM’s
16 federal reserved water rights in the SPRNCA. Tribute’s proposed groundwater pumping will
17 affect the San Pedro River and conflict with BLM’s federal reserved water rights within the
18 SPRNCA. Federal and state law prohibit groundwater pumping that conflicts with federal
19 reserved water rights. Indeed, groundwater pumping that interferes with a federal reserved
20 water right may be enjoined. The water supply for the proposed Tribute development is not
21 “legally available” within the meaning of A.R.S. § 45-108.

24 73. ADWR and the ADWR Director relied solely upon Pueblo Del Sol’s CC&N to
25 determine that Tribute’s water supply is “legally available.” Pueblo Del Sol cannot and did not
26

1 demonstrate that the proposed source of groundwater for Tribute will be legally available for the
2 next 100 years. ADWR and the ADWR Director granted Pueblo Del Sol’s application for a
3 designation of adequate water supply without first requiring Pueblo Del Sol to demonstrate that
4 BLM’s federal reserved water rights would not limit or otherwise compromise the legal
5 availability of the proposed groundwater supply for the next 100 years. ADWR and the ADWR
6 Director granted Pueblo Del Sol’s application for a designation of adequate water supply
7 without first evaluating whether BLM’s federal reserved water rights would limit or otherwise
8 compromise the legal availability of the proposed groundwater supply for the next 100 years.
9
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11 74. ADWR and the ADWR Director’s final decision to designate an adequate water
12 supply for the proposed Tribute development is not supported by substantial evidence, is
13 contrary to law, is arbitrary and capricious, and is an abuse of discretion under A.R.S. § 12-
14 910(E).
15

16 Second Claim for Relief

17 (A.A.C. R12-15-718 Violates A.R.S. §§ 45-108 and 12-910(E))

18 75. Each and every allegation set forth in this Complaint is incorporated herein by
19 reference.
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21 76. In areas outside of an AMA, a developer of a proposed subdivision must
22 “demonstrate the adequacy of the water supply to meet the needs projected by the developer to
23 the director” of the ADWR. A.R.S. § 45-108(A). The ADWR Director must evaluate and
24 determine “whether there is an adequate water supply for the subdivision.” A.R.S. § 45-108(B).
25 An “adequate water supply” is defined in part as meaning that “sufficient groundwater...will be
26

1 continuously, legally and physically available to satisfy the water needs of the proposed use for
2 at least one hundred years.” A.R.S. § 45-108(I).

3 77. Pursuant to A.A.C. R12-15-718(A), the ADWR Director “shall determine that an
4 applicant will have sufficient supplies of water that will be legally available for at least 100
5 years if the applicant submits all of the applicable information required by this Section.”

6 Pursuant to A.A.C. R12-15-718(C), for a private water company such as Pueblo Del Sol Water
7 Company, the “applicable information” consists of “evidence that the applicant has a certificate
8 of convenience and necessity approved by the Arizona Corporation Commission.” Nothing in
9 A.A.C R12-15-718(C) requires an applicant to submit evidence related to the legal availability
10 of the water supply.

11 78. Nothing in the criteria used by the Arizona Corporation Commission to issue
12 CC&Ns relates to whether water is legally available.

13 79. As a result, pursuant to A.A.C. R12-15-718(A) and (C), a private water company
14 developer such as Pueblo Del Sol may obtain a designation of adequate water supply from the
15 ADWR Director even though “sufficient groundwater” is not “legally. . . available to satisfy the
16 water needs of the proposed use for at least one hundred years,” in violation of A.R.S. § 45-
17 108(I).

18 80. The Arizona Corporation Commission issued a CC&N to Pueblo Del Sol Water
19 Company in 1972 for the geographic area including the proposed Tribute site.

20 81. ADWR and the ADWR Director relied solely upon Pueblo Del Sol’s CC&N to
21 determine that Tribute’s water supply is “legally available.”

1 substantial evidence, arbitrary and capricious, and an abuse of discretion under
2 A.R.S. § 12-910(E).

- 3
4 5. Award Plaintiff costs of litigation and reasonable attorney fees.
5 6. Provide Plaintiff such other relief as the Court deems just and proper.

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7 DATED this ___ day of May, 2013,

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