Audubon ARIZONA

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DEPT OF WATER RESOURCES

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July 16, 2012

Thomas Buschatze
Docket Supervisor
Department of Water Resources, Legal Division
3550 N. Central Avenue
2nd Floor
Phoenix, AZ 85012

RE: Response to Issues Raised by Pueblo Del Sol Water Company in June 15, 2012 letter to ADWR; Designation of Adequate Water Supply (File No. 40-700705)

Dear Mr. Buschatze:

The undersigned, on behalf of Audubon Arizona and Audubon's affected local chapters (collectively "Audubon"), submits this response to the points raised by Pueblo Del Sol Water Company (the "Water Company") in a letter to ADWR of June 15, 2012 (the "Water Company Letter"). Audubon acknowledges that both the comments of the Water Company and this response have been filed after the close of the public comment period. However, Audubon believes that the issues now before the Department are so critical to the future of both the residents and natural habitat of the San Pedro River Basin that the administrative record of this proceeding should contain as much relevant data and analysis as possible. Thus, we request ADWR's consideration of both of these documents in its decision on the designation request. Moreover, events have transpired that provide an additional justification for keeping the record open. On June 7, 2012, the Special Master for the General Adjudication of All Rights to Use Water in the Gila River System and Source (Consolidated Civil No. W1-11-232) (the "General Adjudication") filed an "Order Requesting Comments on the Federal Reserved Water Rights Claim Report of ADWR." This Order solicits information directly relevant to this proceeding including "quantification of the reserved water rights claims of the United States." The Water Company asserts that such quantification is directly relevant to the determination of adequate water supply that is the purpose of this proceeding. *Id.,* Water Company Letter at p. 6. Thus, Audubon believes that, at a minimum, the administrative record of this proceeding should remain open until the information, data and positions requested by the Special Master have been submitted and can be considered by ADWR.

The two positions stated by the Water Company to which Audubon hereby responds are these:

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1. **IMPROPER OBJECTIONS**

The Water Company asserts that Audubon has no right to object to its request for a determination of adequate supply because Audubon is "not a resident" and "asserts the water right of another." Water Company Letter, Exhibit A. In support of this position, the Water Company cites the language of A.R.S. § 45-108.01(B). However, the cited language does not support the Water Company's claims. The statute allows objections to be filed by "residents and landowners." It does not require that an objector be both. Indeed, ADWR (including in the notice for this proceeding) has consistently interpreted the language to allow either category of entities to object. Moreover, there is absolutely no statutory or regulatory language that prohibits the public from insisting that a public water right, like the federally reserved water right at issue here, be considered in a determination that could directly and adversely affect that public water right.

In any case, Audubon is both a landowner and resident. Since 1980 it has been a condition of Audubon's management of the Appleton-Whittell Research Ranch that an Audubon employee reside on the ranch.

As a general matter, Audubon's interest in and commitment to the future of the San Pedro River Basin is of much longer duration and of significantly greater depth than the short term, purely economic interests asserted by the Water Company. Thus, the Water Company's objection to Audubon commenting on that future is entirely misplaced.

2. **PHYSICAL AND LEGAL AVAILABILITY OF WATER**

The Water Company, citing the Yavapai-Apache Nation case (227 Ariz. 499), correctly draws the distinction between a water rights adjudication and a proceeding to regulate water usage. However, having declared the distinction, the Water Company then completely ignores it in stating its position.

In a water rights adjudication like that ongoing for the Gila River, Cappaert (426 U.S. 128) requires that all parties to the adjudication including the United States, when it asserts a federal reserved water right which may conflict with the water rights asserted by others, demonstrate the basis for that assertion and not seek more water than necessary to achieve the purpose for the reservation.

However, in the case of a demonstration of adequacy under State law, and specifically under the language of A.R.S. § 45-108, the applicant, i.e., the Water Company, has the burden of showing that the authority to pump large quantities of groundwater will not impair or prevent the exercise of senior water rights like the federal reserved water rights created by Congress for the SPRNCA.

The Water Company argues that its determination of adequacy should be granted because "none of the objectors has demonstrated that granting of the Adequacy Application will interfere with SPRNCA's Federal reserved water right or that complete denial of the Adequacy Application is tailored to meet the minimal needs of any Federal reserved water right SPRNCA may hold." *Id.*, the Water Company Letter at p. 6. The Water Company also argues that the objectors have the burden of proving that denying its application is a remedy that is "carefully tailored not to exceed the minimal amounts necessary to fulfill the purpose of the reservation." *Id.* However, this interpretation of State law turns that law on its head. The Water Company, as a private entity applying for a determination, has the burden of demonstrating that the 3,000 acre feet per year it wants to pump for the next 100 years is legally available, i.e., it would not infringe on any existing water rights. In other words, the Arizona statutes and ADWR regulations require the Water Company, as the applicant, demonstrate that granting the adequacy determination will not interfere with the ability of the United States to preserve the reserved water rights necessary to achieve the purpose of the SPRNCA.

ADWR regulations demonstrate that the water company has the burden of proving that there is 100 years of legally available water. *See Phelps Dodge Corp. v. Arizona Dept. of Water Res.*, 211 Ariz. 146, 152, ¶ 25, 118 P.3d 1110, 1116 (Ariz. Ct. App. 2005) ("In cases in which the ADWR has consistently interpreted a statute related to water rights, we will afford that interpretation 'great weight in the absence of clear statutory guidance to the contrary.'") (quoting *Arizona Water Co. v. Arizona Dep't of Water Res.*, 208 Ariz. 147, 154, ¶ 30, 91 P.3d 990, 997 (2004)). ADWR regulations require it to "designate the applicant []as having an adequate water supply . . . *if the applicant demonstrates*" sufficient supplies of water are physically, continuously, *and legally available*. A.A.C. § R12-15-714(E) (emphasis added). In addition, ADWR's regulatory history supports the conclusion that the applicant has the burden to demonstrate that there is 100 years of legally available water. *See* Notices of Final Rulemaking for R12-15-714, Vol. 12, Issue 39, page 3478 (Sept. 29, 2006) ("applications for water adequacy determinations must prove . . . legal availability for at least 100 years").

Because it is the applicant that "must prove" that there is 100 years of legally available water in order to get its adequacy determination application approved, the water company must prove that it can pump an additional 3,000 acre feet per year without infringing on SPRNCA's water rights or the rights of any other senior holder. In other words, the process for determining whether there is 100 years of legally available water "involves an analysis of water rights that are already in place." *Yavapai-Apache Nation v. Fabritz-Whitney*, 227 Ariz. 499, 504 ¶18. If the Water Company's increased groundwater pumping infringes on the federal government's right now or in the future, the government can enjoin the Water Company's pumping. More importantly, ADWR cannot issue the determination of adequacy sought by the Water Company.

SPRNCA's federal reserve water right is for an amount of water necessary "to protect the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreations resources of the public lands surrounding the San Pedro River in

Cochise County." Arizona. Pub. L. 100-696 § 101(a). Therefore, in order to receive an adequate determination, the Water Company has the burden of proving that its increased groundwater pumping will not negatively impact the San Pedro River "riparian area" or the "resources of the public lands surrounding the San Pedro River" now or anytime within the next 100 years.* To meet that burden, the Water Company must do what it is demanding of the holders of the water right -- it must quantify the water right to ensure that it will be protected.

In sum, it is not the duty of the BLM in this proceeding, unlike the General Adjudication, to quantify its right in order to prove that the Water Company's pumping would infringe on the federal water right. Rather, the Water Company has the burden of quantifying the SPRNCA's right in order to show that its proposed increase in pumping would not infringe on that right. The Water Company has not demonstrated that its increased groundwater pumping will not infringe on the riparian area or the resources of the public lands surrounding the San Pedro River. Without that showing, ADWR must reject the Water Company's adequacy demonstration application because it does not demonstrate legal availability.

3. CONCLUSION

The Water Company is demonstrably wrong in both of its legal positions -- the objectors have a right to have their objections heard and the burden is on the Water Company to demonstrate that granting it the right to pump 3,000 acre-feet per year from an already badly overdrawn aquifer will not interfere with federal water rights for the SPRNCA. However, Audubon is concerned that in the course of declaring its legal position, the Water Company fails to acknowledge that there are critical and irreplaceable natural values and resources that are at issue in this proceeding. The SPRNCA is the number one birding area in the U.S. and is the permanent or temporary habitat for hundreds of species of birds and other animals including many species that are threatened or endangered. Indeed, for many in the public, the SPRNCA is a national treasure of incalculable value. For this reason, when the Water Company proposes an action that will put the SPRNCA and the wildlife it supports at risk, it has a heavy burden, both legally and morally, to justify asking ADWR to take that risk.

Roger Ferland
Chairman of the Board,
Audubon Arizona

Sarah Porter
Executive Director,
Audubon Arizona

* The Water Company's analysis confuses physical with legal availability. That distinction is made quite clear in ADWR's "Substantive Policy Statement" on physical availability. August 31, 2007. The models cited by the Water Company may or may not show physical availability and may or may not meet the requirements of the Substantive Policy Statement, but in pumping the physically "available" water the Water Company must demonstrate that it is not infringing on a federal reserved water right to the legally available water.