JANICE K. BREWER
Governor

SANDRA A. FABRITZ-WHITNEY
Director

ARIZONA DEPARTMENT OF WATER RESOURCES

3550 North Central Avenue, Second Floor
PHOENIX, ARIZONA 85012-2105

(602) 771-8500

July 23, 2012

VIA CERTIFIED MAIL

Addressees on the Attached List

RE: 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)

On June 23, 2011, Pueblo Del Sol Water Company (Pueblo Del Sol) submitted an application for a designation as having an adequate water supply. During the public notice period, the Department received multiple objections.

After considering the application, the objections, the response of Pueblo Del Sol, and further analysis by Department staff, the Department determined that the application satisfies all of the requirements for a designation as having an adequate water supply. See A.R.S. § 45-108; A.A.C. R12-15-701, *et seq*. This letter is the Decision of the Director of the Department of Water Resources (Department) to grant the application as shown in the enclosed Draft Decision and Order.

The Department's decision on the objections is explained below. Objections raised are numbered for ease of reference.

1. Objection: Groundwater pumping to meet Pueblo Del Sol's estimated water demand will adversely impact the streamflow of the San Pedro River.

Numerous objectors claim that the proposed groundwater pumping to meet the estimated water demand in Pueblo Del Sol's application will adversely impact the streamflow of the San Pedro River. Consequently, the objectors claim that Pueblo Del Sol's application should be denied. For the reasons stated below, the Department disagrees.

Under the adequate water supply statutes and rules, the Department must determine whether an applicant for an adequate water supply determination has sufficient water supplies that are physically, legally and continuously available to satisfy the proposed water demand and whether the applicant has the financial capability to construct the facilities necessary to make the water available for the proposed use. *See* A.R.S. § 45-108(I) and A.A.C. R12-15-701, *et seq*. The

Department does not have authority to consider potential impacts on a river or stream from proposed pumping of groundwater by the applicant. Accordingly, whether or not Pueblo Del Sol's proposed groundwater pumping will have adverse impacts on the San Pedro River is not an issue that the Department may consider as part of its review of the Pueblo Del Sol application.

2. Objection: Pueblo Del Sol's proposed groundwater pumping will interfere with the federal reserved rights claimed by the United States Bureau of Land Management for the San Pedro Riparian National Conservation Area.

Many objectors assert that Pueblo Del Sol's proposed groundwater pumping will interfere with the federal reserved rights that the United States Bureau of Land Management (BLM) is claiming for the San Pedro Riparian National Conservation Area (SPRNCA) in the Gila River Adjudication, and therefore the groundwater is not legally available. Some objectors argue that the Department should deny Pueblo Del Sol's application for this reason and others argue that the Department should not issue a decision on Pueblo Del Sol's application until the Gila River Adjudication is completed. The Department disagrees with the objectors' arguments.

The objectors cite to *Cappaert v. United States*, 426 U.S. 128 (1976) for the proposition that federal reserved rights are entitled to greater protection than state water rights, including protection from both surface water diversions and groundwater pumping. In *Cappaert*, the United States sought an injunction to limit groundwater pumping near Devil's Hole, a part of Death Valley National Monument, because the pumping was lowering the water level and threatening a unique species of fish. 426 U.S. at 135. The U.S. Supreme Court held "that the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater." *Id.* at 143. In upholding the injunction on groundwater pumping, the Court noted that the District Court did not curtail all pumping, but had narrowly tailored the injunction "to minimal need, curtailing pumping only to the extent necessary to preserve an adequate water level at Devil's Hole." *Id.* at 141.

Unlike the *Cappaert* case, the extent of any federal reserved right for SPRNCA is unknown, as is the impact the proposed pumping may have on such a right. Until the federal reserved right claims associated with SPRNCA have been finally adjudicated, it would be impossible to determine whether the proposed pumping would need to be curtailed to preserve SPRNCA, and if so, to what extent. The Supreme Court in *Cappaert* clearly stated that any limitations on pumping must be narrowly tailored to the minimal need of the reservation. Such a determination is impossible in the absence of an adjudication of the reservation itself.

Moreover, the Department's review of the Pueblo Del Sol application is an administrative process to determine whether the application satisfies the criteria for a designation of adequate water supply under the applicable statutes and rules, and does not involve a determination of water rights such as those claimed for SPRNCA. The existence and priority of water rights are determined through a general stream adjudication, which is a separate process in superior court. The importance of the distinction between the Department's administrative process and water rights determinations in the general stream adjudications was recognized by the Arizona Court of Appeals in *Yavapai-Apache Nation v. Fabritz-Whitney*, 227 Ariz. 499, 506, ¶¶ 34-35, 260 P.3d 299, 306 (App. 2011). In that case, the Arizona Court of Appeals held that "[w]hen the general

adjudication of water rights is already pending, and a party has been noticed as a claimant in the action, that general adjudication is the exclusive forum in which the noticed party may adjudicate the water rights at issue in the action." 227 Ariz. at 509, ¶49, 206 P.3d at 309. Consistent with that holding, the federal reserved water rights claimed for SPRNCA must be determined as part of the Gila River Adjudication and not as part of the Department's review of Pueblo Del Sol's application. The Department lacks statutory authority and subject matter jurisdiction to determine the federal reserved water rights claims for SPRNCA. *See* 227 Ariz. at 509, ¶51, 260 P.3d at 309.

The United States has requested that the Department withhold any decision on Pueblo Del Sol's Application pending the completion of the Gila River Adjudication. The Department has no authority to do so under the adequate water supply statutes and rules, which set forth specific criteria that the Department must consider in making its determination.

3. Objection: Pueblo Del Sol has failed to demonstrate physical availability of groundwater.

Some objectors argue that Pueblo Del Sol has failed to demonstrate physical availability[1] of groundwater due to existing groundwater mining in the area. The Department disagrees.

Adequate water supply applicants are required to demonstrate that a water supply will be physically, continuously and legally available for 100 years to meet the demands of the proposed use, and that the applicant has financial capability to make the water available for the proposed use. A.R.S. § 45-108(I). Under the criteria for physical availability of groundwater set forth in A.A.C. R12-15-716(B), the applicant must demonstrate that after 100 years of pumping, taking into account all existing and approved demands and the proposed demand, the depth-to-static water level will not exceed 1200 feet below land surface. Pueblo Del Sol has demonstrated that after 100 years, the depth-to-static water level will not exceed 650 feet below land surface. Pueblo Del Sol has therefore demonstrated that groundwater will be physically available for 100 years to meet the demand of the proposed use.

Appealable Agency Action

This Decision of the Director to grant Pueblo Del Sol's Application for a Designation as Having an Adequate Water Supply (No.40-700705.0000), as shown in the enclosed Draft Decision and Order, is an appealable agency action. The Addressees on the attached list are entitled to appeal this decision. In order to appeal this action, a written appeal must be filed within thirty (30) days from receipt of this letter. Enclosed is a summary of the appeal process and an appeal form. Pursuant to A.R.S. § 41-1092.03(B), the grounds for filing a notice of appeal by an objector are "limited to issues raised in that party's comments."

Please direct any questions concerning the appeal process to Nicole Klobas, Deputy Counsel, at 602-771-8472.

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[1] One objector suggests that Pueblo Del Sol has failed to demonstrate physical availability and continuous availability of the groundwater supply. Because the substance of that objection only discusses physical availability, the Department is treating the objection as an objection on the grounds of physical availability.

Sincerely,

Thomas Buschatzke
Assistant Director

Enc. Draft Decision and Order
Notice of Right to Appeal Agency Action
Notice of Appeal of Agency Action Form

LIST OF ADDRESSEES FOR DECISION LETTER DATED JULY 23, 2012
Re: Decision of the Director to Grant Pueblo Del Sol Water Company's Application for Designation of Having an Adequate Water Supply (No. 40-700705.0000)

Sent via Certified Mail:	Certified Mail, Return Receipt Number:
William P. Sullivan Curtis, Goodwin, Sullivan, Udall & Schwab, P.L.C. 501 East Thomas Road Phoenix, AZ 85012-3205	70042510000086603585
Pueblo del Sol Water Company Attn: Rick Coffman, Vice-President 4100 Canyon de Flores Sierra Vista, AZ 85650-5360	70042510000086603592
Julie Decker, Deputy State Director Resource Division Bureau of Land Management One North Central Avenue, Suite 800 Phoenix, AZ85004-4427	70042510000086603608
Joel Fago 10525 E. Cline Avenue Hereford, AZ 85615	70042510000086603615
C.E. Nagle 7630 S Rockwood Drive Hereford, AZ 85615	70042510000086603622
Glenn & Maudie Bailey 5036 S. San Carlos Avenue Sierra Vista, AZ 85650	70042510000086603639
Roger Ferland, Chairman Audubon Arizona Nina Mason Pulliam Rio Salado Audubon Center 3131 South Central Avenue Phoenix, AZ 85040	70042510000086603684
Sarah Porter, Executive Director Audubon Arizona Nina Mason Pulliam Rio Salado Audubon Center 3131 South Central Avenue Phoenix, AZ 85040	70042510000086603691
Carol Kestler 1311 E. Duke Drive Tucson, AZ 85719	70042510000086603707

Gerald Noonan 4707 Calle Albuquerque Sierra Vista, AZ 85635	70042510000086603714
Jiu Horton 3305 Eagle Ridge Sierra Vista, AZ 85650	70042510000086603721
Patricia Gerrodette 3327 Eagle Ridge Drive Sierra Vista, AZ 85650	70042510000086603738
Richard Kestler 1311 E. Duke Drive Tucson, AZ 85719	70042510000086603745
Robin Silver PO Box 1178 Flagstaff, AZ 86002	70042510000086603752
Ron & Renell Stewart 5264 S. Equestrian Avenue Sierra Vista, AZ 85635	70042510000086603776
Steve Pawlowski Water Sentinels Program Coordinator Sierra Club, Grand Canyon Chapter 202 E. McDowell Road, Ste. 277 Phoenix, AZ 85004	70042510000086603783

ARIZONA DEPARTMENT OF WATER RESOURCES

BEFORE THE DIRECTOR

IN THE MATTER OF THE APPLICATION OF PUEBLO DEL SOL WATER COMPANY FOR A DESIGNATION AS HAVING AN ADEQUATE WATER SUPPLY	**AWS No. -** **DECISION AND ORDER** **No. 40-700705.0000**

I. INTRODUCTION

On June 23, 2011, the Arizona Department of Water Resources ("Department") received an application from Pueblo Del Sol Water Company, an Arizona corporation ("Pueblo Del Sol") requesting that the Department designate Pueblo Del Sol as having an adequate water supply pursuant to A.R.S. § 45-108 *et seq.* and A.A.C. R12-15-701 *et seq.* On April 18, 2012 and April 25, 2012, the Department gave public notice of the application pursuant to A.R.S. § 45-108.01. Multiple objections to the application were filed with the Department.

After receiving Pueblo Del Sol's application for a designation of adequate water supply, the Department reviewed relevant information regarding the designation request, including the hydrologic study submitted with the application and the hydrologic information on file with the Department for the proposed source of supply. Based on that information, the Department makes the following Findings of Fact, Conclusions of Law and Order of Designation and Conditions of Designation:

II. FINDINGS OF FACT

A. General

1. Pueblo Del Sol is a private water company subject to the jurisdiction of the Arizona Corporation Commission ("ACC").
2. Pueblo Del Sol provides domestic water service within the boundaries of its certificate of convenience and necessity ("CC&N"), as approved by the ACC.
3. Pueblo Del Sol currently serves water through its distribution system to its customers.

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B. Water Demands

4. Pueblo Del Sol's current demand as of calendar year 2010 is 1,430.85 acre-feet per year ("current demand").

5. Pueblo Del Sol's committed demand as of calendar year 2010 is 137.19 acre-feet per year ("committed demand").

6. Pueblo Del Sol's projected demand in 2032 is 3,302.35 acre-feet per year ("2032 projected demand"). The 2032 projected demand does not include the current demand or the committed demand, but does include the demand at build-out of plats reasonably projected to be approved through calendar year 2032.

7. Pueblo Del Sol's annual estimated water demand in 2032, which is the sum of its current demand, committed demand, and 2032 projected demand, is 4,870.39 acre-feet per year ("2032 annual estimated water demand").

C. Groundwater: Physical, Continuous and Legal Availability

8. Pueblo Del Sol has the right to withdraw and deliver groundwater to its customers pursuant to A.R.S. § 45-453.

9. Pueblo Del Sol has demonstrated that after withdrawing 4,870.39 acre-feet per year of groundwater for 100 years, the depth-to-static water level within Pueblo Del Sol's service area is not expected to exceed 650 feet below land surface.

10. Pueblo Del Sol has demonstrated that it has wells of sufficient capacity to satisfy its 2032 annual estimated water demand of 4,870.39 acre-feet per year for at least 100 years.

D. Water Quality

11. Pueblo Del Sol is regulated by the Arizona Department of Environmental Quality ("ADEQ") as a public water system pursuant to A.R.S. § 49-351, *et seq.*

E. Financial Capability

12. Pueblo Del Sol has constructed the necessary delivery, storage and treatment works to satisfy its 2032 annual estimated water demand.

III. CONCLUSIONS OF LAW

Having reviewed the Findings of Fact, the Department makes the following Conclusions of Law:

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1. Pueblo Del Sol has demonstrated that 4,870.39 acre-feet per year of groundwater will be physically available, continuously available and legally available for at least 100 years. This volume is sufficient to meet its 2032 annual estimated water demand.

2. For purposes of A.A.C. R12-15-716(B)(3)(c)(ii), Pueblo Del Sol's annual estimated water demand to be met with groundwater is 4,870.39 acre-feet per year.

3. The water supply served by Pueblo Del Sol will be of adequate quality pursuant to A.A.C. R12-15-719.

4. Pueblo Del Sol has satisfied the financial capability criteria prescribed in A.A.C. R12-15-720.

5. Pueblo Del Sol has satisfied all the requirements for a designation of an adequate water supply.

IV. ORDER OF DESIGNATION AND CONDITIONS OF DESIGNATION

Having reviewed the Findings of Fact and Conclusions of Law, the Department hereby issues this Decision and Order designating Pueblo Del Sol as having an adequate water supply, subject to the following conditions:

1. The Director reserves the right under A.A.C. R12-15-715(C) to periodically review and modify the designation for good cause as conditions warrant.

2. Pursuant to A.A.C. R12-15-715, the Director may, at any time, revoke this designation if the findings of fact or the conclusions of law upon which the designation is based change or are invalid, or if an adequate water supply no longer exists.

3. The Director's determination that an adequate water supply exists for Pueblo Del Sol is based on an analysis of the water supplies pledged by Pueblo Del Sol. Nothing in this Decision and Order limits or reduces Pueblo Del Sol's legal authority to use any water supply in any year.

4. Pueblo Del Sol shall submit an application to modify this decision and order designating Pueblo Del Sol as having an adequate water supply to increase the term of the designation when the sum of Pueblo Del Sol's current demand, committed demand and two year projected demand exceeds 4,870.39 acre-feet per year, or by December 31, 2030, whichever is earlier.

5. Pursuant to A.A.C. R12-15-719, Pueblo Del Sol shall satisfy any state water quality requirements established for its proposed use after the date of this designation.

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6. Pueblo Del Sol shall annually provide to the Department the following information for the previous calendar year in the manner prescribed in A.A.C. R12-15-715:

a. An estimate of the demand of platted, undeveloped lots located in Pueblo Del Sol's service area.

b. An estimate of the projected demand at build-out for customers with which Pueblo Del Sol has entered into a notice of intent to serve agreement in the preceding calendar year.

c. A report regarding Pueblo Del Sol's compliance with water quality requirements.

d. The depth-to-static water level of all wells from which Pueblo Del Sol withdrew water during the previous calendar year.

e. The total quantity of water from any source withdrawn, diverted, or received by Pueblo Del Sol for its customers' residential and non-residential use during the previous calendar year.

f. Any other information requested by the Director to determine whether Pueblo Del Sol continues to meet all the requirements necessary to maintain this designation of adequate water supply.

IT IS HEREBY ORDERED THAT PUEBLO DEL SOL WATER COMPANY BE DESIGNATED AS HAVING AN ADEQUATE WATER SUPPLY UNTIL DECEMBER 31, 2032.

DATED this _____ day of_____, 201_.

_____
Sandra A. Fabritz-Whitney
Director
Arizona Department of Water Resources

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A copy of the foregoing
Decision and Order mailed
by certified mail this ____ day
of _____, 201_, to:

Mr. Rick Coffman, vice-president
Pueblo Del Sol Water Company
4100 Canyon de Flores
Sierra Vista, Arizona 85650

Certified Mail No.: _____

Sent by: _____

A copy of the foregoing sent by electronic mail this ____ day of _____, 2012 to:

Robin King
Arizona Department of Real Estate
rking@azre.gov

Linda Taunt
Arizona Department of Environmental Quality
taunt.linda@azdeq.gov

Steve Olea
Arizona Corporation Commission
solea@azcc.gov

Erin Young, R.G.
Fluid Solutions
eyoung@flusol.com

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ARIZONA DEPARTMENT OF WATER RESOURCES

NOTICE OF RIGHT TO APPEAL AGENCY ACTION

I. Right to Request Hearing

You have the right to request a hearing on the agency action described in the enclosed document. To request a hearing, you must file a notice of appeal with the Docket Supervisor, Arizona Department of Water Resources, 3550 North Central Avenue, Phoenix, Arizona 85012 within thirty (30) days from the date of your receipt of the enclosed document. A Notice of Appeal form is enclosed. Pursuant to A.R.S. § 41-1092.03(B), the grounds for appeal by a party who will be adversely affected by the agency action and who exercised a right provided by law to comment on the action is limited to the issues raised in the party's comments.

If you file a timely notice of appeal, a hearing will be scheduled and you will be given written notice of the time and place for the hearing at least thirty (30) days before the hearing date. The date scheduled for the hearing may be advanced or delayed on the agreement of the Department and the parties to the action or on a showing of good cause. **If no party files a notice of appeal within thirty days from the date of receipt of the enclosed letter, the agency action described in the letter will become final and will not be subject to judicial review.**

II. Right to Request Informal Settlement Conference

If you file a timely notice of appeal as described above, you will have the right to request an informal settlement conference. A request for an informal settlement conference must be in writing and must be filed with the Docket Supervisor, Arizona Department of Water Resources, 3550 North Central Avenue, Phoenix, Arizona 85012 not later than twenty (20) days before the hearing date. The enclosed Notice of Appeal form includes a place for you to request an informal settlement conference. If you file a timely request for an informal settlement conference, the Department will give you written notice of the time and place for the settlement conference. An informal settlement conference must be held within fifteen (15) days after the request is filed.

If an informal settlement conference is held, a person with the authority to act on behalf of the Department will represent the Department at the conference. The parties participating in the settlement conference will waive their right to object to the participation of the Department's representative in the final administrative decision. Statements, either written or oral, made by the appellant at the conference, including a written document, created or expressed solely for the purpose of settlement negotiations, are inadmissible in any subsequent administrative hearing.

III. Agency Contact Person

If you have any questions regarding the appeals process, or the process for requesting an informal settlement conference, please contact the Docket Supervisor at (602) 771-8472.

ARIZONA DEPARTMENT OF WATER RESOURCES
NOTICE OF APPEAL OF AGENCY ACTION

1. Party filing this notice of appeal:

   Name: _____
   Address: _____
   Phone No: (_____)_____ Email address: _____

2. The following action of the Department of Water Resources is being appealed:
   (Please attach a copy of the letter which advised you of the action.)

   _____
   _____
   _____
   _____

3. The following is a concise statement of the reason(s) for the appeal:
   (If you need additional space, please attach a separate page. Note: Pursuant to A.R.S. § 41-1092.03(B), the grounds for appeal by a party who will be adversely affected by an agency action and who exercised a right provided by law to comment on the action is limited to the issues raised in the party's comments.)

   _____
   _____
   _____
   _____
   _____
   _____

4. Pursuant to A.R.S. § 41-1092.06, the appealing party may request an informal settlement conference. Such a request must be made no later than 20 days before the hearing. If an informal settlement conference is requested, the conference will be held within 15 days after the request is received by the agency.

   The person filing this notice of appeal requests an informal settlement conference at this time (check one):

   Yes _____ No _____

   Note: A person who participates in an informal settlement conference waives the right to object to the participation of the Department's representative in the final administrative decision. A.R.S. § 41-1092.06(B).

5. _____ Date: _____
   Signature of filing party

   _____ _____
   Print or type name Include title if applicable

FILING OF FORM: A party who desires to file a notice of appeal must complete this form and file it with the Docket Supervisor, Arizona Department of Water Resources, 3550 North Central Avenue, Phoenix, Arizona 85012 within thirty (30) days after the date the party received notice of the appealable agency action.

Rev. 12/16/10