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FACSIMILE TRANSMITTAL SHEET

TO: Docket Supervisor	FROM: Sarah Porter, Executive Director
COMPANY: Department of Water Resources	DATE: May 1, 2012
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RE: Pueblo del Sol Water Company: Designation of Adequate Water Supply
File No. 40-700705 & File No 53-700704

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

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April 30, 2012

Docket Supervisor
Department of Water Resources, Legal Division
3550 North Central Ave., 2nd Floor
Phoenix, AZ 85012

Attn: Thomas Buschatzke, Assistant Director, ADWR

Re: Objection to Designation of Adequate Water Supply for the Pueblo del Sol Water Company (File No. 40-700705) and Water Report (File No. 53-700704, The Oaks)

Dear Mr. Buschatzke:

Audubon Arizona ("Audubon"), as a significant landowner in the Upper San Pedro Basin, objects to ADWR's potential issuance of a Designation of Adequate Water Supply for the Pueblo del Sol Water Company (File No. 40-700705) and Water Report (File No. 53-700704, The Oaks). The basis for this objection is that research has shown that groundwater will not be legally or physically available for the next 100 years, as required by ARS §45-108. In addition, we agree with the justification and objections cited by the U.S. Bureau of Land Management in a letter to Mr. Buschatzke, dated March 16, 2012. In that letter, BLM notes that ADWR does not have the legal authority, under either federal or state law, to authorize the use of groundwater over which it does not have jurisdiction and which is not legally available as a water supply for the developer. Moreover, granting the designation would constitute a failure of ADWR's responsibility to future purchasers of properties affected by the designation and to future residents, who would be relying on the designation in purchasing or investing in the area.

Audubon, on behalf of National Audubon Society, through its ownership of property within the Appleton-Whittell Research Ranch located in the Upper San Pedro watershed, has been a member of the Upper San Pedro Partnership since 2000. Audubon's mission is "*To conserve and restore natural ecosystems, focusing on birds, other wildlife, and their habitats for the benefit of humanity and the earth's biological diversity.*" Thus, Audubon not only has the right, but the responsibility to lodge this objection due to the probable detriment that this development would have on the natural habitat that relies upon the San Pedro River and the resulting decline in quality of life for the human residents of the area from continued overdrafting of groundwater to which a designation would be a contributing factor.

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The San Pedro Riparian National Conservation Area (SPRNCA) was established by Pub. L. 100-696 in 1988. Section 102(d) of SPRNCA "reserves for the purpose of this reservation, a quantity of water sufficient to serve the purpose" of the area. However, continued groundwater pumping at the current level will destroy the critically important habitat contained within SPRNCA. That habitat is home to over 100 species of breeding birds and provides critical temporary habitat to 250 species of migrant and wintering birds. Indeed, *Birder's Digest* named it the premier bird watching site in the U.S. In 1995, the San Pedro River Basin was recognized as a Globally Important Bird area by the American Bird Conservancy, Partners in Flight and the National Audubon Society. It is the first such designation in the western hemisphere. Increased water use, which would be inevitable if this and other developments are approved, will hasten the destruction of habitat in the SPRNCA with a consequent adverse effect on birds and other wildlife.

The United States Supreme Court in ***Cappaert v. United States***, 426 U.S. 128 (1976), made several holdings of direct relevance to ADWR's authority to make the finding of an assured and adequate water supply.

- A reserved water right like that in the SPRNCA vests on the date of reservation and is superior to the rights of future appropriators. 426 U.S. at 137.

- Since the reservation-of-water-rights doctrine is based on the necessity of water for the purpose of the federal reservation, the United States protects the water from subsequent diversion (like that proposed here), "whether the diversion is of surface or ground water."[1] 426 U.S. at 143 (*emphasis supplied*). Thus, under federal law applicable to a reserved water right, whether the development's impact will be to underflow (surface water) or ground water, is irrelevant.

- These are federal water rights and as such are not dependent upon state law or state procedures. 426 U.S. at 145.

For ADWR to make the designation of assured and adequate water supply the developer would have to make a showing those sufficient supplies of water are "legally available for at least 100 years." The standard for legal availability is set forth in A.A.C. R12-15-718. That standard cannot be met under the holding in ***Cappaert*** in view of the superior federal claim to the water reserved for the SPRNCA.

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[1] We agree with BLM's argument that even if the location and impact on underflow of the proposed designation were relevant, it is premature to evaluate that impact and make the designation until the Gila River Adjudication has determined the appropriate model for and has identified underflow.

In addition, ADWR's own hydrologic analysis as well as the analyses performed by the Arizona Water Center and other experts document the severe overdrafting of groundwater that has been exacerbated by the addition of 8500 unregulated wells since 1990. Those studies found an annual groundwater deficit of more than 100,000 acre feet. Due, in part, to the actions of Fort Huachuca and others, the annual overdraft is currently stabilized at around 6,000 acre feet. While that is certainly an improvement, it is hardly the state of equilibrium envisioned by the creators of the SPRNCA when the federal reserve water right was created and contributing to a further degradation of availability of water to the SPRNCA by a designation and determination of adequacy is simply not acceptable.

In sum, in view of the continual problem of overdrafting and the assertion of the superior reserved water right to both the surface water and ground water by the BLM, ADWR cannot make either the findings of physically available or continuously available water supply required by A.A.C. R-12-15-716 and R12-15-717 for an adequate and assured water supply.

The continued viability of the SPRNCA to achieve the purposes for which it was created has reached a tipping point. ADWR has both a legal responsibility and responsibility to its human and wildlife constituents to reject the proposed designation and thereby contribute to the process of preserving the SPRNCA for the purpose for which it was created.

Roger Ferland

Roger Ferland
Chairman of the Board,
Audubon Arizona

Sarah Porter

Sarah Porter
Executive Director,
Audubon Arizona