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REFER TO FILE NO. 1473-2

June 15, 2012

Mr. Andrew Craddock, Manager
Arizona Department of Water Resources
3550 N. Central Ave., Second Floor
Phoenix, Arizona 85012-2105

Re: Designation of Adequate Water Supply (File No. 40-700705, Pueblo Del Sol Water Company)/ Response to BLM

Dear Mr. Craddock:

Our office represents Pueblo Del Sol Water Company ("PDS") in its Designation of Adequate Water Supply Application number 40-700705 (the "Adequacy Application"). The Adequacy Application is supported by a three-dimensional numerical model developed for the Sierra Vista Subwatershed for the purpose of assessing the adequacy of future groundwater supplies in the vicinity. It updates a US Geological Survey model of the Lower San Pedro Watershed by Brown and Caldwell (BC, 2009: Pool and Dickinson, 2007), including improving the model's ability to evaluate effects of the City of Sierra Vista Water Reclamation Facility on water levels in the regional aquifer and augmentation of flows in the San Pedro River and adding current and committed demands on file with the Arizona Department of Water ("ADWR"). The model is the most comprehensive and scientifically supportable model for the area available. The model, together with the supporting data provided by PDS, demonstrates the availability of an adequate water supply as defined by applicable Arizona law and ADWR rules and regulations.

Based upon its review of the data presented by PDS, ADWR has published notice of its intent to issue PDS an adequacy designation. In response to the notice, ADWR has received a total of 22 objections/comments. Pursuant to ADWR's request, the following is a response to the various objections listed in your letter dated May 11, 2012, plus three untimely objections.

IMPROPER OBJECTIONS

When a statute specifies the time or criteria for filing an objection to an administrative action, objectors must comply with the statutory criteria. *Yavapai-Apache Nation v. Fabritz-*

Whitney, 227 Ariz. 499, 260 P.3d 299 (App. 2011) (upholding the legislature's limit on the pool of objectors in assured water supply designation proceedings to "residents").

A.R.S. §40-108.01(B) allows "residents and landowners within the groundwater basin"[1] (i.e., the upper San Pedro basin) to "file with the director"[2] objections to the Adequacy Application "within fifteen days after the last publication of notice" of the application. In this case, the last day to file objections with the director was May 10, 2012.

The same statute requires the objection to "state [the] name and mailing address of the objector and be signed by the objector, the objector's agent[3] or the objector's attorney. The grounds for objection are limited to whether the application meets the criteria for determining an adequate water supply set forth in section 45-108, subsection I."[4] Additionally, "[t]he objection shall clearly set forth reasons why the application does not meet the criteria."

To summarize, §45-108.01(B) limits the pool of objectors and objections to those meeting ALL of the following criteria[5]:

1. The objection was filed with the ADWR Director (i.e., received by the Director);
2. The objection was received within 15 days of the last publication of notice (i.e., received by the Director by May 10, 2012);
3. The objection was filed by residents and landowners within the groundwater basin (i.e., filed by residents and landowners within the upper San Pedro basin);

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[1] PDS reserves, and does not waive by this response, the issue of whether the statute requires an objector to be both a resident and a landowner of the upper San Pedro basin.

[2] A document is "filed with" the director on the date it is received by the Director. *See generally*, Rule 5 (h) A.R.C.P. (defining filing with the court); A.A.C. R2-19-108.E. (defining filing with the Office of Administrative Hearings). PDS is aware of three objections received by the Director after the filing deadline that are untimely and cannot be considered by the Department.

[3] "Agency" is a fiduciary relationship where a principal manifests assent to the agent's acting on the principal's behalf and under the principal's control and the agent consents to so act. *See*, *Ruesga v. Kindred Nursing Centers, LLC*, 215 Ariz. 589, 595-96, 161, P.3d 1253, 1259-60 (App. 2007).

[4] Section 45-108, subsection I provides:

For the purposes of this section, "adequate water supply" means both of the following:

1. Sufficient 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.
2. The financial capability has been demonstrated to construct the water facilities necessary to make the supply of water available for the proposed use, including a delivery system and any storage facilities or treatment works. The director may accept evidence of the construction assurances required by section 9-463.01, 11-823 or 32-2181 to satisfy this requirement.

[5] Whether or not expressly raised in this letter response, PDS reserves and does not waive the right to protest any objection where either the objector or the objection fails to satisfy all the requirements specified by A.R.S. § 45-108(B) and demands each objector be required to provide strict proof thereof.

4. The objection contains the name and mailing address of the objector (i.e., the name and mailing address of the residents and landowners within the upper San Pedro basin);
5. The objection is signed by the objector (i.e., residents and landowners of the upper San Pedro basin) or their agent or attorney;
6. The objection is limited to whether the application meets the criteria for determining an adequate water supply set forth in §45-108.I; **and**
7. The objection clearly sets forth reasons why the application does not meet the criteria set forth in §45-108.I.

The majority of the objections to the Adequacy Application fail to meet one or more of the foregoing criteria and must be summarily rejected and given no consideration by the ADWR. The persons/entities filing improper objections are listed on Exhibit A to this response.

The Sierra Club, Grand Canyon Chapter (the "Sierra Club") does not claim to be a resident and landowner, but instead contends that it "has standing to file an objection on behalf of its members who are residents and property owners within the upper San Pedro groundwater basin." Standing is a concept that applies to judicial proceedings, not to administrative proceedings where, as here, the legislature has expressly established the eligibility requirements for objectors, as well as the requirements of the objection.

In ascertaining and giving effect to the legislature's intent, court's first look to the language of the statute itself.[6] Each word, phrase, clause and sentence must be given meaning so that no part will be void, inert, redundant or trivial.[7] Nothing in the plain and unambiguous language of A.R.S. §45-108(B) authorizes groups purporting to represent unidentified members claimed to be residents and landowners of the upper San Pedro basin to file objections. Instead, the legislature has expressly limited the pool of objectors to residents and landowners of the upper San Pedro basin, and required the objection to specify their name and mailing address and to be signed by the objector, its "agent" or its "attorney." These express statutory limits on the pool of objectors are rendered superfluous if the Sierra Club is permitted to file an objection.[8] Therefore, the Sierra Club has been listed on Exhibit A as filing an improper objection. However, this response does address the substance of the Sierra Club' objection.

Several objectors have merely referenced the objection of the Bureau of Land Management without clearly setting forth the reasons the Adequacy Application fails to meet the criteria set forth

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[6] *Yavapai-Apache Nation v. Fabritz-Whitney*, 227 Ariz. 499, 504, ¶20, 260 P.3d 299, 304.

[7] *Id.*

[8] Moreover, the objection is premised on the reserved water right claim of the BLM, not those of its members. Arizona courts impose a "rigorous" standing requirement. *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 140, ¶ 6, 108 P.3d 917, 919 (2005). In general, a party establishes standing by showing a personal, palpable injury. *Bennett v. Napolitano,* 206 Ariz. 520, 524, ¶ 16, 81 P.3d 311, 315 (2003). Therefore, even if the standing criteria were evaluated, the Association has failed to show a particularized injury to its members that would warrant its participation in this administrative proceeding.

in §45-108.I.[9] PDS contends these objections do not satisfy the requirements of §45-108(B) and listed them on Exhibit A. However, this response addresses the substance of the BLM objection in any event.

PHYSICAL AND LEGAL AVAILABILITY

The remaining objectors[10] claim to be landowners (none claim to be residents) and assert water is not legally and, therefore, not physically available[11] to PDS for 100 years because, at some point, PDS's proposed use of groundwater may conflict with a senior Federal reserved water right created by Congress by the San Pedro Riparian National Conservation Area ("SPRNCA") Act. Pub. L. 100-696 (1988).

PDS is a public service company providing domestic water service within a certificated service area granted by the Arizona Corporation Commission within the upper San Pedro basin. PDS obtained its existing Certificate of Convenience and Necessity prior to the creation of SPRNCA. Under Arizona law, the CC&N creates a regulated monopoly under which PDS has the exclusive right and obligation to serve, subject to the regulation of the Arizona Corporation Commission. *James P. Paul Water Co. v. Ariz. Corp. Comm'n,* 137 Ariz. 426, 429, 671 P.2d 404, 407 (1983). PDS has an affirmative obligation to provide all its customers fair and non-discriminatory service. *Tonto Creek Estates Homeowners Ass'n v. Arizona Corp. Com'n*, 177 Ariz. 49, 58-9, 864 P.2d 1081, 1090-91 (App. 1993).

The objectors effectively seek an adjudication that SPRNCA's Federal reserved water right, if any, is superior to the state groundwater rights available to PDS and entitle BLM to enjoin PDS from serving any and all new subdivisions within its existing certificated area, thereby depriving PDS of an Adequacy Designation pursuant to A.R.S. §45-108.01. In other words, the objectors seek to use this administrative process to allocate water rights among PDS and SPRNCA.

The *Yavapai-Apache Nation* case recognizes "Arizona's water code provides separately for water rights adjudication, which is intended to allocate water rights, and for water usage management which is meant to regulate water usage." *Id.* at 227 Ariz. 503-04, ¶ 18. The later

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[9] PDS further reserves, and does not waive by this response, the issue of whether any objector, other than the United States or agency thereof, has a right to assert any Federal reserved water right claims associated with SPRNCA.

[10] Bureau of Land Management, received March 20, 2012; Audubon Arizona, received May 1, 2012; and Robin D. Silver, MD, received May 9, 2012.

[11] No objector specifically challenges or addresses the modeling and other data submitted on behalf of PDS in support of its Adequacy Application. The studies and reports referenced by objectors did not comprehensively and scientifically address the potential impacts of the use of water by PDS within its service area. Only the model and data submitted in support of the Adequacy Application focuses on and evaluates the potential impacts of PDS water use. Suffice it to say, that the data submitted by PDS clearly demonstrates the physical availability of groundwater of adequate quality to satisfy the water needs of the proposed use for at least 100 years without approaching ADWR's definitional maximum of drawdown for qualifying for an adequacy designation.

portion of the water code does not allocate water rights or establish priorities; but rather, involves an analysis of water rights that are already in place. *Id.*

The Adequacy Application relies on the availability of groundwater and effluent to meet PDS's projected demands for 100 years. Under Arizona law, the water withdrawn from under the ground's surface is presumed to be groundwater. *In re General Adjudication of All Rights to Use Water in Gila River System and Source*, 175 Ariz. 382, 392, 857 P.2d 1236, 1246 (1993) ("*Gila II*"). A.R.S. §45-453 expressly authorizes the withdrawal and use of groundwater outside of active management areas "for reasonable and beneficial use, except as provided in article 8.1 of this chapter." Article 8.1 addresses withdrawals of groundwater for transportation to active management areas and is not implicated by the PDS Application. Under Arizona law, tributary groundwater (i.e., groundwater that may ultimately reach a surface water source) can be pumped and put to reasonable use. *Gila II* at 175 Ariz. 390, 857 P.2d 1244 (1993).

BLM and other objectors, relying on *Cappert v. United States*, 426 U.S. 128 (1976), contend the unquantified and unadjudicated Federal reserved water right associated with SPRNCA supports "an enforcement action against junior water right holders and/or pumpers whose uses adversely affect the senior entitlement." However, the *Yavapai-Apache Nation* case holds such issues cannot be addressed in a proceeding seeking an adequacy designation. "When 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." *Id.* at 227 Ariz. 509, ¶ 16.

BLM admits that the Arizona Superior Court is adjudicating its State law-based and Federal reserved water rights in the ongoing Gila River general adjudication (In regard to the San Pedro Riparian National Conservation Area, Contested Case No. W1-11-232). The Arizona Supreme Court has recognized Federal reserved water rights must first be quantified in order to determine whether there is any entitlement to remedial relief. *In re General Adjudication of All Rights to Use Water in Gila River System and Source*, 195 Ariz. 411, 421, fn.12, 989 P.2d 739, 749 (1999) (*Gila III*) (rejecting the Tribes' request to immediately enjoin pumping that is depleting water beneath reservations). In Contested Case No. W1-11-232 the Special Master has ruled the BLM's state based certificate of water right (CWR No. 90103.0000) must be considered a water right available to the United States to serve the federal purposes of the SPRNCA. March 19, 2010 Order at 7.

Moreover, even the *Cappert* case relied on by the objectors does not support their request that the Adequacy Application be denied or indefinitely suspended. In fact, *Cappert*, like the *Yavapai-Apache Nation* case, recognizes this type of administrative proceedings is separate and apart from the adjudication of water rights. In *Cappert*, the Court concluded the administrative grant of water rights to the Capperts did not affect any Federal reserved water rights the United States may already have possessed. 426 U.S. at 146-47.

Importantly, none of the Courts in *Cappert* suggested all pumping by the Capperts could be prohibited or zero impact on the water pool within Devil's Hole was appropriate. Rather the United States Supreme Court affirmed injunctive relief tailored to minimal need by curtailing pumping from 8 specific wells and specific locations and permitting the level of the pool to drop "to the extent that the drop does not impair the scientific value of the pool as the natural habitat of the

species sought to be preserved." *Id.* at 426 US 141. Such tailored relief was based upon the specific evidence affirmatively demonstrating (i) the volumes pumped from the wells during the months of March to October directly caused drawdown of the pool within Devil's Hole; (ii) the lowered water level was threatening the survival of a unique species of fish; (iii) alternatives, such as use of an artificial shelf in Devil's Hole and transplanting the Devil Hole's pupfish elsewhere, had not been proven to be a successful alternative, (iv) pumpage could be regulated so as to produce stabilization of the water level in Devil's Hole at any desired position below its mean natural level and (v) irreparable harm would follow if the pumping were not enjoined. *US v. Cappaert*, 375 F.Supp. 456, 459-60 (D. Nev. 1974). In affirming the lower court's action, the US Supreme Court emphasized that "only that amount of water necessary to fulfill the purpose of the reservation [and] no more" was reserved. *Cappert* at 426 US 141.

Cappert demonstrates that when the United States does hold a Federal reserved right the United States still carries the burden of proof and must demonstrate the proposed enforcement is both (i) necessary to prevent irreparable harm and (ii) carefully tailored not to exceed the minimal amounts necessary to fulfill the purpose of the reservation. Moreover, the Arizona Supreme Court has held a "reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation." *In re General Adjudication of All Rights to Use Water in Gila River System and Source*, 195 Ariz. 411, 420, 989 P.2d 739, ¶ 31(1999) (*Gila III*). The Court further indicated that a federal reservation can invoke broader protection than provided under state law only if state law turns out to be inadequate to preserve the waters necessary to accomplish the purpose of the reservation. *Id.* at 195 Ariz. 421 ¶ 35. *Gila III* also recognizes that a Federal reserved water right must first be quantified in order to determine whether there is any entitlement to remedial relief. *Id.* at 195 Ariz. 421, fn. 12.

Thus, even if this were a proper forum to allocate and/or enforce water rights (which it is not), 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. Certainly the objectors have not justified singling out PDS for enforcement over the other 9,000 plus wells included in the PDS model.

CONCLUSION

A.R.S. §45-108.01(B) limits both the pool of objectors, as well as the basis for objecting to the Adequacy Application. Most, if not all, of the objections to the Adequacy Application fail to meet one or more of these statutory requirements and must be disregarded. No objector presented any evidence (i) specific to the current and projected withdrawals of groundwater by PDS within its service area, or (ii) refuting the model and other data submitted in support of the Adequacy Application. Arizona law provides PDS with an undisputed right to make reasonable use of groundwater. Objectors' assertions that an existing regional overdraft necessitates denying the pending Adequacy Application is unsupported by Arizona law applicable to reviews of adequacy delineation requests.

The Adequacy Application demonstrates PDS satisfies the criteria for the designation of Adequate Water Supply as defined by Arizona law (A.R.S. §45-108.I) as applied by ADWR (*see*

e.g., A.A.C. R12-15-701 through R12-15-730) even after considering all existing and future demands within the PDS service area and all current and committed demands within the model area.

The objectors' suggestion that the Adequacy Application must be denied or indefinitely delayed is based upon pure speculation as to: (i) the nature of an unquantified and unadjudicated SPRNCA related Federal reserved water right, (ii) the possibility that the United States will seek to enforce that right against PDS and (iii) the possibility that a court would, after considering factual data relating to the specific impacts of PDS pumping, totally prohibit PDS pumping within its service area. Such speculation is not supported by fact or law and does not constitute a valid basis to question the legal right of PDS to withdraw groundwater – a right specifically recognized by statute and case law.

Nothing in Arizona law or ADWR's rules permit ADWR to indefinitely suspend processing the Adequacy Application, at least without PDS consent. Allocation of water rights and enforcement thereof must be pursued through the general adjudication, not in this proceeding. Such enforcement, if ever pursued and justified by the United States, must ultimately be limited to that amount of water necessary to fulfill the purpose of the reservation, no more, and appropriately tailored to minimal need, curtailing pumping only to the extent necessary to preserve an adequate water level. . . *Gila III*, 195 Ariz. 422 ¶38. The objectors have made no demonstration that "minimal need" includes denial of the Adequacy Application.

The mere possibility that enforcement of a water rights claim (state or federal) could, at some time and in some manner, limit the use of water in the future does not and cannot render that water legally unavailable. Such an application of Arizona law would render almost every drop of groundwater in the state legally unavailable.

For the foregoing reasons, PDS respectfully requests ADWR reject the objections and grant its Adequacy Application.

Very truly yours,

William P. Sullivan
For the Firm

WPS/maw
Enclosure: Exhibit A (List of Improper Objections)
cc: Mr. Thomas Buschatzke, Assistant Director
Mr. Kenneth Slowinski, Chief Legal Counsel
Mr. Rick Coffman, Vice President

EXHIBIT A
LIST OF OBJECTORS

Received by ADWR	Objector's Name	Statutory Criteria Not Met
3/30/12	United States Bureau of Land Management – Arizona State Office	Not a resident
4/23/12	Joel Fago	Not clear whether resident and landowner; not based on 45-108I criteria and/or basis not clearly set forth
4/23/12	C.E. Nagle	Same as Fago
4/24/12	Glenn & Maudie Bailey	Not based on 45-108I criteria and/or basis not clearly set forth
4/26/12	Adrien Radke	Same as Fago
4/26/12	Marcia Radke	Same as Fago
4/26/12	William Radke	Same as Fago
4/30/12	Shannon Radke	Same as Fago
5/1/12	Audubon Arizona	Not a resident; asserts water right of another
5/8/12	Carol Kestler	Not clear whether a resident; basis of objection not clearly set forth; asserts water right of another
5/8/12	Gerald Noonan	Same as C. Kestler
5/8/12	Jiu Horton	Asserts water right of another
5/8/12	Patricia Gerrodette	Same as Horton
5/8/12	Richard Kestler	Same as C. Kestler
5/8/12	Robert Dahl	Neither a resident nor landowner; not based on 45-108I criteria and/or basis not clearly set forth
5/9/12	Robin Silver	Not clear whether a landowner; not solely based on 45-108I criteria; asserts water right of another
5/9/12	Huachuca Audubon Society	Neither landowner nor resident; not based on 45-108I criteria; asserts water right of another
5/9/12	Ron & Renell Stewart	Not based on 45-108I criteria
5/10/12	Sierra Club, Grand Canyon Chapter	Neither resident nor landowner; not based on 45-108I criteria; basis not clearly set forth; asserts water right of another
5/11/12	Hal & Jenny Clause	Untimely; not clear whether resident and landowner; not based on 45-108I criteria and/or basis not clearly stated
5/11/12	Peter J. & Lisabeth A. Sockness	Untimely; asserts water right of another
5/16/12	Maricopa Audubon Society	Untimely; neither a resident nor landowner; not based on 45-108I criteria; basis not clearly set forth; asserts water right of another