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RECEIVED
AUG 27 2012
LEGAL
DEPT OF WATER RESOURCES

August 24, 2012

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

RE: Decision to Grant Designation of Adequate Water Supply, Pueblo del Sol Water Company (DWR No. 40-700705.0000)

Dear Madam or Sir:

I am writing to appeal your designation of adequate water supply for Pueblo del Sol Water Company, issued July 23. I telephoned ADWR on August 21, and was told that I have until August 27 to file this appeal, since I received my letter from you on July 26.

My grounds for appeal are that the criteria for determining an adequate water supply, set forth in Arizona Revised Statutes §45-108 and the Arizona Administrative Code, R12-15-701 et seq., are unlikely to be met in a legal fashion. I don't disagree with your point #1, regarding lack of responsibility to protect flows in the San Pedro River. Nor do I disagree with your point #3, as there is quite an adequate supply of water for human needs under the current definition of adequacy in state law.

But your point #2 is quite illogical and contradictory. You say you must decide under state law, and you say you can't decide until adjudication is settled, but then you decide without waiting for adjudication. You say you have no authority under state statutes and yet that is exactly the authority you do have – to decide if the water will be legally available for 100 years.

You also claim "it would be impossible to determine whether the proposed pumping would need to be curtailed to preserve SPRNCA". It is not impossible to determine future groundwater levels via modeling, as that is exactly what has been done as part of the PDS application. It is also possible to determine from the modeling projections that the future groundwater levels (in just 20 years, not 100) will be below, very near, or only slightly above river elevations levels. These levels will very clearly impinge on the federal water rights needed to sustain the SPRNCA.

Finally, in your draft Decision and Order, under III. Conclusions of Law, (1), based on Findings of Fact, you state that PDS has demonstrated legal availability for at least 100 years. I find no such demonstration or proof in the Findings of Fact section. I challenge your conclusion.

The enclosed photocopy of Figure 2-8 from the ADWR 1992 Hydrographic Survey Report shows a cone of depression from 1985-1990 well readings. In June 2009, ADWR published a map of the same area with well level readings taken in November/December 2006. The report is titled ADWR Water Level Change Map Series No. 3. It is quite a bit more detailed than the 1992 map but shows an alarming spread in areal extent of a 4100 foot water-level elevation contour, especially to the south. You also state that the "deepest part of the cone of depression is bounded by the 4100 foot water-level contour". The river's elevation between Hereford and Fairbank is only in the range of 4100 to 3860 feet above mean sea level.

In May 2011, the Upper San Pedro Partnership Technical Committee received and discussed a report from Dr. Laurel Lacher. That report is titled "Simulated Effects of Historic and Anticipated Groundwater Development in the Upper San Pedro Basin, 1902-2100". The report is available as a pdf link on the USPP website. The modeling results clearly show the continued drawdown of the aquifer and the continued threat to flows in the San Pedro River and Babocómari River, a significant tributary to the San Pedro. The cone of depression has already impacted the Babocómari. Although the cone has not at this point in time impacted the San Pedro directly, it is clearly modeled to do so.

Although we can't know the exact water table levels and quantities of flow that will be awarded to BLM for SPRNCA, we can be certain they will win something. It seems to me it would be very foolish to award adequacy when it is obvious that legal adequacy cannot last for 100 years.

It would be legally and fiscally irresponsible for ADWR to continue its approval for designation of adequate water supply. Families rely on the ADWR adequacy determination when they purchase homes. If subsequent legal action determines that the water is not available for them, making their homes uninhabitable, then how would the state escape liability for damages? I urge ADWR to retract their approval.

Sincerely yours,

Patricia Gerrodette

Patricia Gerrodette

ARIZONA DEPARTMENT OF WATER RESOURCES
NOTICE OF APPEAL OF AGENCY ACTION

1. Party filing this notice of appeal:

Name: Patricia Gerrodette
Address: 3327 Eagle Ridge Dr Sierra Vista AZ 85650
Phone No: (520) 378 4937 Email address: tricia g2@cox.net

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.)

Decision to grant designation of adequate water supply (No. 40-780705.0000)

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.)

See attached

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 X

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. Patricia Gerrodette Date: August 24, 2012
Signature of filing party

Patricia Gerrodette _____
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

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

June 98

Sustaining Endangered Riparian Migratory Bird Habitat on the Upper San Pedro

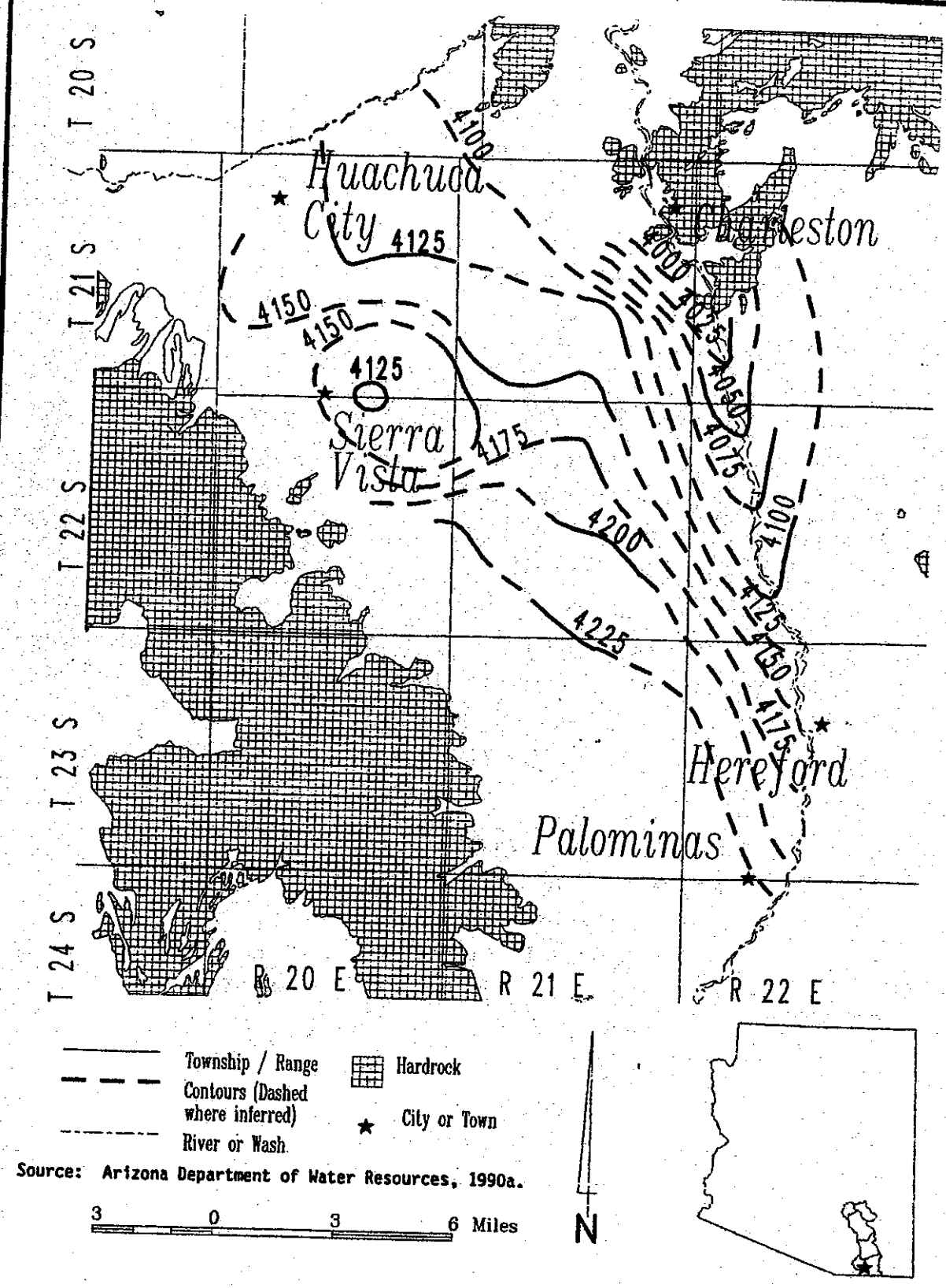


Figure 2-8. Current groundwater surface elevations in the vicinity of Sierra Vista - Fort Huachuca (December-January, 1985-90).

WATER-LEVEL ELEVATION

Water-level elevations in wells in the Upper San Pedro basin range from about 3300 to about 5000 feet above mean sea level (amsl) in November/December 2006. DTW below land surface ranged from less than zero near the San Pedro River (42 flowing wells) to about 730 feet near the Winchester Mountains.

A cone of depression has developed in the vicinity of Sierra Vista and Fort Huachuca at Township 21 south, Range 20 east, Section 33. This cone of depression has been previously reported (Rascona and Warnell, 1973; Konieczki, 1980; Barnes, 1997; Barnes and Putnam, 2003). The deepest part of the cone of depression is bounded by the 4100 foot water-level contour.

SELECTED REFERENCES

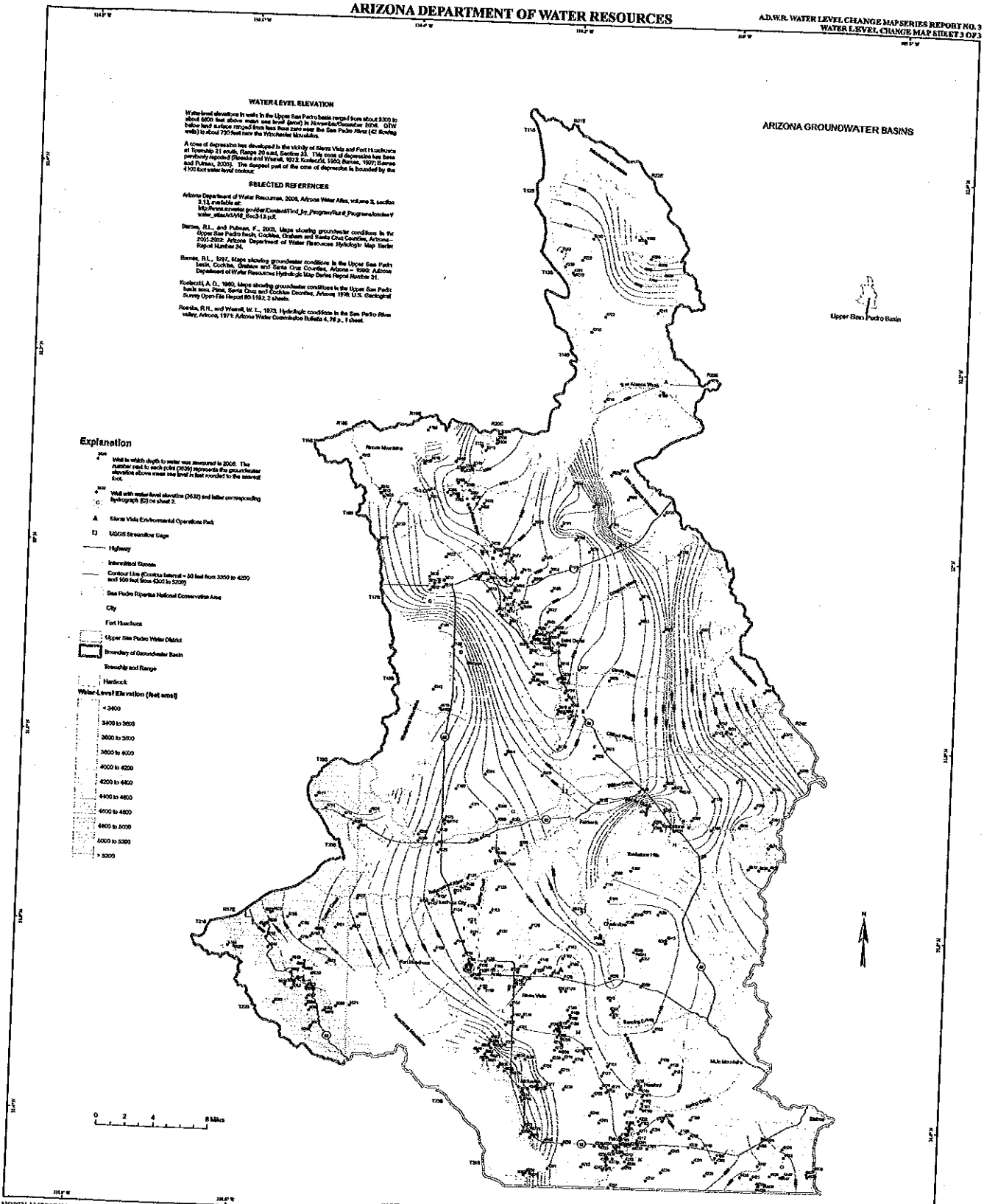
Arizona Department of Water Resources, 2006, Arizona Water Atlas, volume 3, section 3.13, available at: http://www.azwater.gov/AzDWR/ContentTool_by_Program/Rural_Programs/docs/water_atlas/AWA_Sec3-13.pdf.

Barnes, R.L., and Putnam, F., 2003, Maps showing groundwater conditions in the Upper San Pedro basin, Cochise, Graham and Santa Cruz Counties, Arizona – 2001-2002: Arizona Department of Water Resources Hydrologic Map Series Report Number 34.

Barnes, R.L., 1997, Maps showing groundwater conditions in the Upper San Pedro basin, Cochise, Graham and Santa Cruz Counties, Arizona – 1996: Arizona Department of Water Resources Hydrologic Map Series Report Number 31.

Konieczki, A. D., 1980, Maps showing groundwater conditions in the Upper San Pedro basin area, Pima, Santa Cruz and Cochise Counties, Arizona 1978: U.S. Geological Survey Open-File Report 80-1192, 2 sheets.

Rascona, R.H., and Warnell, W. L., 1973, Hydrologic conditions in the San Pedro River valley, Arizona, 1971: Arizona Water Commission Bulletin 4, 78 p., 1 sheet.



NORTH AMERICAN DATUM 1983 HARN

WATER-LEVEL ELEVATION, 2006

WATER-LEVEL CONDITIONS IN THE UPPER SAN PEDRO BASIN, ARIZONA, 2006

By
David Schmerge, Frank Corkhill, and Stephen Flora
June 2009

ARIZONA DEPARTMENT OF WATER RESOURCES
HYDROLOGY DIVISION

For data go to:
arvista.azwater.gov/gwsi/waterresourcedata.aspx

For more information or copies contact:
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