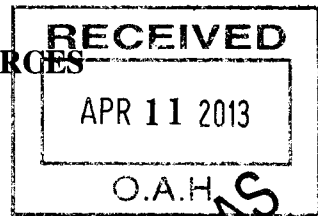


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ARIZONA DEPARTMENT OF WATER RESOURCES

BEFORE THE DIRECTOR



No. 12A-AWS001-DWR

In the Matter of the 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

DECISION AND ORDER OF  
THE DIRECTOR

Applicant: Pueblo Del Sol Water Company

Appellants: United States Department of the Interior,  
Bureau of Land Management  
Robin Silver, M.D.  
Patricia Gerrodette

I. INTRODUCTION

On June 23, 2011, Pueblo Del Sol Water Company ("Pueblo Del Sol") filed with the Arizona Department of Water Resources ("Department") an application to be designated as having an adequate water supply through calendar year 2032. The application was filed pursuant to A.R.S. § 45-108 and A.A.C. R12-15-714. Pueblo Del Sol revised its application on January 25, 2012. The revised application is referred to herein as the "Application."

On April 18, 2012 and April 25, 2012, the Department published notice of the Application in a newspaper of general circulation in the groundwater basin in which Pueblo Del Sol proposes to use water, as required by A.R.S. § 45-108.01(A). During the objection period provided by A.R.S. § 45-108.01(B), the Department received a number of written objections to the Application. Most of the objections stated that the Application should be denied either because Pueblo Del Sol's proposed pumping will adversely affect the San Pedro River or because the pumping will interfere with the federal reserved water rights claimed for the San Pedro Riparian National Conservation Area ("SPRNCA") by the United States Department of the Interior, Bureau of Land Management ("BLM").

1 On July 23, 2012, the Department issued a letter ("Decision Letter") to the Applicant and  
2 those persons who filed proper objections to the Application stating that after considering the  
3 Application, the objections, Pueblo Del Sol's response to the objections and further analysis by  
4 Department staff, the Department determined that the Application satisfies all of the requirements  
5 for a designation of adequate water supply. The Decision Letter stated that the letter was the  
6 decision of the Director of the Department ("Director") to grant the Application as shown in an  
7 enclosed Draft Decision and Order ("Draft Decision and Order"). Timely appeals of the decision  
8 were filed by BLM, Robin Silver, M.D., and Patricia Gerrodette (collectively "Appellants").

9 An administrative hearing on the appeals was held at the Office of Administrative Hearings  
10 in Phoenix, Arizona on November 26 through 30, 2012, before Administrative Law Judge Thomas  
11 Shedden ("ALJ"). On March 13, 2013, the ALJ transmitted to the Director the ALJ's written  
12 decision ("ALJ Decision"), pursuant to A.R.S. § 41-1092.08(A). In the ALJ Decision, the ALJ made  
13 certain Findings of Fact and Conclusions of Law, and concluded that the Appellants have not  
14 demonstrated that the Draft Decision and Order granting the Application was contrary to law or that  
15 it was issued in error, and, consequently, the Appellants' appeals should be dismissed and the Draft  
16 Decision and Order should be affirmed. The ALJ ordered the following: (1) that the Appellants'  
17 appeals are dismissed; and (2) that the Draft Decision and Order is affirmed.

18 This matter now comes before the Director for a decision. As provided in A.R.S. § 41-  
19 1092.08(B), the Director may accept, reject or modify the ALJ Decision.

## 20 **II. DIRECTOR'S DECISION**

21 After reviewing the ALJ Decision and the record in this matter, the Director has decided to  
22 accept the ALJ Decision, with certain modifications to the Findings of Fact and Conclusions of Law  
23 to more accurately reflect the record and the applicable law. Those modifications do not affect the  
24

1 ALJ's ultimate conclusion that the Appellants have not demonstrated that the Draft Decision and  
2 Order granting the Application was contrary to law or that it was issued in error, and that the  
3 Appellants' appeals should be dismissed and the Draft Decision and Order should be affirmed. A  
4 redlined version of the ALJ Decision showing the Director's modifications to the Findings of Fact  
5 and Conclusions of Law is attached hereto as Attachment 1. The following is a description of the  
6 modifications and the Director's reasons for the modifications:

7 **A. Findings of Fact**

8 1. Finding of Fact No. 11: Finding of Fact No. 11 is modified by changing the year in  
9 which Pueblo Del Sol was granted a Certificate of Convenience and Necessity ("CC&N") by the  
10 Arizona Corporation Commission from 1992 to 1972.

11 Reason for modification: The record shows that Pueblo Del Sol was granted a CC&N in  
12 1972. *See* testimony of Richard Coffman, Transcript November 29, 2012, Vol. 4, p. 637; Exhibit  
13 DWR-3.

14 2. Finding of Fact No. 18: Finding of Fact No. 18 is modified to read as follows:  
15 "Pueblo Del Sol will serve the majority of land within the Tribute development. A small portion of  
16 the development will be served by Liberty Water Company."

17 Reason for modification: Finding of Fact No. 18 in the ALJ Decision states that Pueblo Del  
18 Sol has provided Castle and Cooke the required written commitment of water service. This could be  
19 read to imply that Pueblo Del Sol will serve the entire Tribute development. However, the record  
20 shows that a small portion of the development will be served by Liberty Water Company. *See*  
21 Exhibit DWR-2D, p. 3. The purpose of this modification is to clarify how the development will be  
22 served.

1           3.     Finding of Fact No. 31: The second sentence in Finding of Fact No. 31 is modified to  
2 read as follows: “By letters dated September 22, 2011 and October 13, 2011, ADWR informed  
3 Fluid Solutions that the initial application was not complete.” The third sentence in Finding of Fact  
4 No. 31 is modified to read as follows: “On January 25, 2012, Fluid Solutions submitted to ADWR a  
5 revised application.”

6           Reason for modification: The second sentence in Finding of Fact No. 31 is modified for the  
7 purpose of adding a reference to the letter from the Department to Fluid Solutions dated September  
8 22, 2011, in which the Department informed Fluid Solutions that the application was not complete.  
9 See Exhibit DWR-4. The third sentence is modified to correct the date on which the revised  
10 application was submitted to the Department. The ALJ Decision states that the revised application  
11 was submitted to the Department on January 24, 2012, but the record shows that it was submitted on  
12 January 25, 2012. See Exhibit DWR-7.

13           4.     Finding of Fact No. 37: Finding of Fact No. 37 is modified to read as follows:  
14 “ADWR determined that Pueblo Del Sol has in place the infrastructure required to make the water  
15 available to its customers, including wells of sufficient capacity to satisfy its 2032 annual estimated  
16 water demand for 100 years, which demonstrates that the water will be continuously available.”

17           Reason for modification: This modification adds language to Finding of Fact No. 37 stating  
18 that the Department determined that Pueblo Del Sol has wells of sufficient capacity to satisfy its  
19 2032 annual estimated water demand for at least 100 years, which, in addition to having in place the  
20 infrastructure required to make the water available to customers, demonstrates that the water will be  
21 continuously available. See Exhibit DWR-63, Draft Decision and Order, p. 2, Finding of Fact No.  
22 10.

1           5.     Finding of Fact No. 40: Finding of Fact No. 40 is modified by adding the following  
2 sentence as the last sentence: “In their objections to the Application, Appellants did not contend that  
3 the water to be pumped by Pueblo Del Sol’s wells is surface water or appropriable subflow.”

4           Reason for modification: The purpose of this modification is to provide additional factual  
5 support for Conclusion of Law Nos. 19 and 27. See Exhibits DWR-11, DWR-29 and DWR-31.

6           6.     Finding of Fact No. 42: Finding of Fact No. 42 is modified by changing the date on  
7 which the Director issued the Draft Decision and Order from June 23, 2012 to July 23, 2012.

8           Reason for modification: The record shows that the Draft Decision and Order was issued on  
9 July 23, 2012. See Exhibit DWR-63.

10          7.     Finding of Fact No. 68: Finding of Fact No. 68 is modified to read as follows:  
11 “Water pumped from a well comes from two sources: water stored in the aquifer and capture.  
12 Capture is the sum of increases in recharge and decreases in discharge that are caused when  
13 withdrawals occur from an aquifer. In semi-arid systems such as the San Pedro, the largest portion  
14 of capture would be reductions in aquifer discharge to connected surface water resources, springs,  
15 riparian evapotranspiration and groundwater outflow.”

16          Reason for modification: The modified language more accurately describes Dr. Leenhouts’  
17 testimony regarding capture. See Transcript November 27, 2012, Vol. 2, p. 284; Transcript  
18 November 28, 2012, Vol. 3. pp. 382, 409, 411-412.

19          8.     Finding of Fact No. 69: Finding of Fact No. 69 is modified to read as follows:  
20 “Capture is not necessarily water taken from a river, but is water that would have discharged to the  
21 river, springs or the riparian vegetation along the river, or that would have left the basin through  
22 groundwater discharge.”

1        Reason for modification: The modified language is a more complete statement of Dr.  
2 Leenhouts' testimony regarding the sources of capture. *See* Transcript November 27, 2012, Vol. 2,  
3 pp. 284, 286.

4        9.        Finding of Fact No. 70: The last sentence in Finding of Fact No. 70 is modified to  
5 read as follows: "At some point, the source will be 100 percent capture, unless there is not enough  
6 capturable water for the full need of the well."

7        Reason for modification: Language was added at the end of the last sentence in Finding of  
8 Fact No. 70 to make the sentence a more complete statement of Dr. Leenhouts' testimony regarding  
9 the percentage of water from a well that eventually will be capture. *See* Transcript November 27,  
10 2012, Vol. 2, p. 286.

11        10.       Finding of Fact No. 71: Finding of Fact No. 71 is modified by adding the following  
12 sentence as the last sentence: "Other factors affecting capture include aquifer characteristics such as  
13 transmissivity and layering of geologic deposits."

14        Reason for modification: The added sentence makes Finding of Fact No. 71 a more complete  
15 description of Dr. Leenhouts' testimony regarding the factors that affect capture. *See* Transcript  
16 November 28, 2012, Vol. 3, p. 325-326, 339.

17        11.       Finding of Fact No. 74: The last sentence in Finding of Fact No. 74 is modified to  
18 read as follows: "Nevertheless, the capture map shows that the water pumped from a hypothetical  
19 well located in the general area of the proposed Pueblo Del Sol wells would be between 0 and 30  
20 percent capture after continuous pumping for 50 years, depending on the particular pumping  
21 location."

22        Reason for modification: The modified language more accurately states Dr. Leenhouts'  
23 testimony regarding the capture map. *See* Transcript November 28, 2012, Vol. 3, p. 343.

1           12.     Finding of Fact No. 77: Finding of Fact No. 77 is modified to read as follows: “The  
2 capture map shows only the relative effect of pumping, which is less water discharged naturally from  
3 the system, be it from the river, from the riparian vegetation, from springs or from groundwater  
4 underflow. The capture map does not show the impacts on groundwater levels at any location.”

5           Reason for modification: The modified language more accurately states Dr. Leenhouts’  
6 testimony regarding what the capture map shows. See Transcript November 28, 2012, Vol. 3, p.  
7 366, 384.

8           13.     Finding of Fact No. 81: Finding of Fact No. 81 is modified to read as follows:  
9 “BLM’s federal reserved rights claim for SPRNCA has three components: a surface water in-stream  
10 flow component; point sources such as ponds and small lakes, springs and seeps, wells and other  
11 naturally occurring waters; and a groundwater-level or groundwater-elevation component.”

12           Reason for modification: The modified language more accurately describes BLM’s federal  
13 reserved right claim for point sources. See Exhibit BLM-18, Attachment D.

14           14.     Finding of Fact No. 86: Finding of Fact No. 86 is modified to read as follows: “The  
15 BLM’s second amended SOC shows the claimed uses as: recreation; fish and wildlife; in-stream  
16 flows; administrative; domestic; fire suppression; maintenance of natural hydrological processes;  
17 and resource conservation protection and enhancement.”

18           Reason for modification: The modified language more accurately describes the claimed uses  
19 for resource conservation protection and enhancement. See Exhibit BLM-18.

20           15.     Finding of Fact No. 93: The first sentence in Finding of Fact No. 93 is modified to  
21 read as follows: “The June 16, 1993 letter relates to a request for a water report for Charleston  
22 Village, which was to be served water by the Bella Vista Water Co.”  
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1        Reason for modification: The ALJ Decision states that the June 16, 1993 letter relates to a  
2 request for a designation of adequate water supply for Charleston Village. However, the letter  
3 relates to a request for a water report for Charleston Village. See Exhibit RS-20. This modification  
4 corrects that error.

5        16.    Finding of Fact No. 94: The last sentence in Finding of Fact No. 94 is modified to  
6 read as follows: "He is also a resident of Sierra Vista and was a member of the Upper San Pedro  
7 Water District Organizing Board."

8        Reason for modification: This modification more accurately states the name of the board of  
9 which Mr. Coffman was a member. See Transcript November 29, 2012, Vol. 4, p. 634.

10       17.    Finding of Fact No. 96: The second sentence in Finding of Fact No. 96 is modified to  
11 read as follows: "Pueblo Del Sol's wells typically are operated about 40 to 50 percent of the time,  
12 and sometimes only 35 percent of the time, depending on the season." The following sentence is  
13 added at the end of Finding of Fact No. 96: "Additionally, it is extraordinarily rare for all of the  
14 wells to be pumping at the same time."

15       Reason for modification: The modified language more accurately describes Mr. Coffman's  
16 testimony regarding the operation of Pueblo Del Sol's wells. See Transcript November 29, 2012,  
17 Vol. 4, p. 642.

18       18.    Finding of Fact No. 100: The last sentence in Finding of Fact No. 100 is modified to  
19 read as follows: "Treated effluent from the new wastewater treatment plant will be used to recharge  
20 the aquifer, to irrigate land in public right-of-ways and parks within the Tribute development, and in  
21 lieu of existing groundwater pumping to water a golf course."



1        Reason for modification: The modified language more accurately states Mr. Coffman's  
2 testimony regarding how treated effluent from the new wastewater treatment plant will be used. *See*  
3 Transcript November 29, 2012, Vol. 4, p. 661.

4        19.    Finding of Fact No. 106: Finding of Fact No. 106 is modified by changing the date  
5 on which Fluid Solutions submitted to ADWR the revised Application from January 24, 2012 to  
6 January 25, 2012.

7        Reason for modification: The record shows that the revised application was submitted to the  
8 Department on January 25, 2012. *See* Exhibit DWR-7.

9        20.    Finding of Fact No. 107: The last sentence in Finding of Fact No. 107 is modified to  
10 read as follows: "Based on current data, about 75 percent of the water that will be withdrawn from  
11 the aquifer by the Applicant will be recharged."

12        Reason for modification: The modified language more accurately states Mr. Fain's  
13 testimony regarding the water that will be recharged. *See* Transcript November 29, 2012, Vol. 4, p.  
14 794.

15        21.    Finding of Fact No. 108: Finding of Fact No. 108 is modified to read as follows:  
16 "Sierra Vista intends to build three additional permanent wastewater reclamation or treatment  
17 facilities, one of which will serve Tribute and is known as the Tribute Facility." The following  
18 sentence is added at the end of Finding of Fact No. 108: "The three facilities will have a total  
19 treatment capacity of 4.7 MGD at build-out."

20        Reason for modification: The modified language more accurately states Mr. Fain's  
21 testimony regarding the wastewater treatment facilities that the City of Sierra Vista plans to  
22 construct. *See* Transcript November 29, 2012, Vol. 4, p. 751. *See also* Exhibit PDS-9, p. iii.  
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22. Finding of Fact No. 122: Finding of Fact No. 122 is modified to read as follows:

“The Pueblo Del Sol wells will be deep relative to the bed of the San Pedro River and there is a fine grained material layer between the wells and the river.”

*Reason for Modification:* The modified language adds a reference to “the bed of” the San Pedro River, which more accurately states Mr. Cain’s testimony. *See* Transcript November 29, 2012, Vol. 4, pp. 911-912.

23. Finding of Fact No. 123: Finding of Fact No. 123 is modified to read as follows:

“This fine grained material limits the interconnection between the coarse grained alluvial deposits in and around the San Pedro River and the deeper regional aquifer from which Pueblo Del Sol will pump.”

Reason for modification: The modified language more accurately states Mr. Cain's testimony. See Transcript November 30, 2012, Vol. 5, p. 943.

24. Finding of Fact No. 124: The last sentence in Finding of Fact No. 124 is modified to read as follows: “Mr. Cain has not seen anything to show that the Pueblo Del Sol pumping, combined with its proposed recharge operations, would either increase or decrease the flow in the San Pedro River.”

Reason for modification: The modified language more accurately states Mr. Cain's testimony. *See* Transcript November 30, 2012, Vol. 5, p. 1000.

25. Finding of Fact No. 125: Finding of Fact No. 125 is modified to read as follows: “The Pueblo Del Sol groundwater model shows that in 2111, the depth to groundwater in the area of the basin under the influence of Pueblo Del Sol’s pumping will not exceed 650 feet if Pueblo Del Sol’s projected demand and the current and committed demands are included.”

1        Reason for modification: The modified language more accurately states Mr. Cain's  
2 testimony regarding what is shown by the Pueblo Del Sol groundwater model. See Transcript  
3 November 30, 2012, Vol. 5, p. 916. See also Exhibit DWR-7D.

4        26.     Finding of Fact No. 129: Finding of Fact No. 129 is modified to read as follows:  
5 "To create the Pueblo Del Sol groundwater model, Brown and Caldwell updated the Sierra Vista  
6 model by increasing the run-time to 100 years, adding pumping information from ADWR's well  
7 registry, refining some of the geology and recharge conditions near the Sierra Vista recharge facility,  
8 improving the calibration locally by using additional information from the City of Sierra Vista, and  
9 removing the portion of the model that extends into Mexico."

10       Reason for modification: The modified language more accurately states Mr. Cain's  
11 testimony regarding the changes that were made to the Sierra Vista model in developing the  
12 groundwater model for Pueblo Del Sol. See Transcript November 30, 2012, Vol. 5, p. 873.

13       27.     Finding of Fact No. 130: The last sentence in Finding of Fact No. 130 is modified to  
14 read as follows: "To do so, Brown and Caldwell used rapid build-out assumptions, it added  
15 additional demands without removing other demand values, and it did not consider the recharge of  
16 Tribute's effluent or the use of the effluent to offset existing pumping."

17       Reason for modification: The modified language more accurately states Mr. Cain's  
18 testimony regarding the assumptions used in developing the groundwater model. See Transcript  
19 November 30, 2012, Vol. 5, p. 890.

20       28.     Finding of Fact No. 131: The last sentence in Finding of Fact No. 131 is modified to  
21 read as follows: "When the Pueblo Del Sol groundwater model is run without including Pueblo Del  
22 Sol's proposed pumping, the depth to groundwater in 2111 is approximately 550 feet below ground  
23 surface.<sup>13</sup>"

1        Reason for modification: The modified language more accurately states the results of Pueblo  
2 Del Sol's groundwater model. See Exhibit DWR-7D, p. 7.

3        29.    Footnote 13: Footnote 13 is modified by changing "Exhibit ADWR 2D, Figures 5, 6  
4 and 7" to "Exhibit DWR-7D, Figures 5, 6, 7 and 8."

5        Reason for modification: This modification corrects a citation error in footnote 13.

6        30.    Finding of Fact Nos. 139 through 143 (new): Finding of Fact Nos. 139 through 143,  
7 regarding the Upper San Pedro Water District ("USPWD"), are added. These Findings of Fact  
8 explain that in 2007, the Arizona legislature enacted legislation providing for the establishment of  
9 the UPSWD if approved at an election of eligible voters in the proposed district; that if the USPWD  
10 had been established, lands in the district would have consisted of a portion of the Upper San Pedro  
11 Groundwater Basin, including all lands within the City of Sierra Vista; that if the USPWD had been  
12 established, an applicant for an adequate water supply determination in the district would have been  
13 required to demonstrate that its proposed water use is consistent with the goal of the USPWD,  
14 including the goal of maintaining the aquifer and base flow conditions needed to sustain the Upper  
15 San Pedro River; and that the establishment of the USPWD was defeated at an election held in the  
16 proposed district on November 2, 2010.

17        Reason for modification: This modification adds facts relevant to the issue of whether the  
18 Director has statutory authority to consider the impacts of Pueblo Del Sol's proposed groundwater  
19 pumping on the flows of the San Pedro River when making a decision on Pueblo Del Sol's  
20 Application. These facts provide additional factual support for Conclusion of Law No. 26.

21        **B.        Conclusions of Law**

22        1.        Conclusion of Law No. 19: Conclusion of Law No. 19 is modified by adding the  
23 following sentence as the last sentence: "Additionally, because Appellants did not contend in their  
24

1 objections that Pueblo Del Sol's wells would be pumping surface water or appropriable subflow,  
2 Appellants are precluded from raising that issue on appeal. *See* A.R.S. § 41-1092.03(B)."

3 Reason for modification: Conclusion of Law No. 19 in the ALJ Decision states that the  
4 Appellants presented no substantial evidence to show that the water to be pumped by Pueblo Del Sol  
5 is either surface water or subflow and have not shown by clear and convincing evidence that the  
6 water is not groundwater. Conclusion of Law No. 19 further states that: "Consequently, the  
7 Administrative Law Judge concludes that Pueblo Del Sol's source water is groundwater."

8 This language could be read to imply that the Appellants had an opportunity at the  
9 administrative hearing to attempt to overcome the presumption that the water to be pumped by  
10 Pueblo Del Sol's wells is groundwater by presenting evidence demonstrating that the water is  
11 surface water or appropriable subflow, and that the ALJ would have been required to conclude that  
12 the source water is surface water or subflow if the Appellants had demonstrated that fact by clear  
13 and convincing evidence. However, the Appellants did not contend in their objections that the water  
14 to be pumped by Pueblo Del Sol is not groundwater. Consequently, pursuant to A.R.S. § 41-  
15 1092.03(B), the Appellants were precluded from raising that issue on appeal, including presenting  
16 evidence to demonstrate that the water to be pumped by Pueblo Del Sol is not groundwater. The  
17 language added by the Director makes this clarification.

18 2. Conclusion of Law Nos. 20 and 21: Conclusion of Law Nos. 20 and 21 are modified  
19 by changing "A.A.C. R12-15-717(C)" to "A.A.C. R12-15-718(C)."

20 Reason for modifications: These modifications correct citation errors in Conclusion of Law  
21 Nos. 20 and 21 in the ALJ Decision.

22 3. Conclusion of Law No. 25: Conclusion of Law No. 5 is modified by changing the  
23 citation of the *Gila IV* opinion to "*Gila IV* at 336, 9 P. 3d at 1075."

1        Reason for modifications: This modification corrects a citation error in Conclusion of Law  
2 No. 25 in the ALJ Decision.

3        4.        Conclusion of Law No. 26: The first sentence in Conclusion of Law No. 26 is  
4 modified to read as follows: “When an applicant requests a designation of adequate water supply  
5 based on groundwater, the applicable statutes and rules do not give ADWR authority to consider the  
6 impact on a river caused by pumping that groundwater.”

7        The following language is added between the first and last sentences in Conclusion of Law  
8 No. 26:

9        This conclusion is supported in this matter by the fact that in 2007, the Arizona legislature  
10 enacted legislation authorizing the establishment of the USPWD and requiring all applicants  
11 for an adequate water supply determination within the USPWD, including all applicants  
12 within the City of Sierra Vista, to demonstrate that their projected water use is consistent  
13 with the goal of maintaining the aquifer and base flow conditions needed to sustain the Upper  
14 San Pedro River. If the USPWD had been established, Pueblo Del Sol would have been  
15 required to demonstrate that its groundwater pumping would not adversely impact the San  
16 Pedro River. However, the establishment of the USPWD was defeated by a vote of eligible  
17 voters within the proposed district on November 2, 2010. Consequently, consideration of the  
18 impacts of Pueblo Del Sol’s groundwater pumping on the San Pedro River clearly would be  
19 inconsistent with legislative intent.

20        The last sentence in Conclusion of Law No. 26 is modified to read as follows: “The effect of  
21 pumping on a river would only be at issue if the well was pumping surface water from a river or the  
22 river’s subflow.

1        Reason for modification: The first sentence in Conclusion of Law No. 26 is modified for the  
2 purpose of adding a reference to the “applicable statutes.” The ALJ Decision refers only to the  
3 applicable rules. However, neither the applicable rules nor the applicable statutes give ADWR  
4 authority to consider the impact on a river caused by the pumping of groundwater when an applicant  
5 requests a designation of adequate water supply based on groundwater.

6        The language regarding the USPWD is added to Conclusion of Law No. 26 to provide an  
7 additional reason why the Department has no authority to consider the impacts of Pueblo Del Sol’s  
8 groundwater pumping on the San Pedro River in this matter. The Arizona legislature enacted  
9 legislation in 2007 authorizing the establishment of the USPWD and requiring an applicant for a  
10 designation of adequate water supply in the USPWD to demonstrate that its proposed groundwater  
11 pumping will not adversely impact the Upper San Pedro River. Consideration of the impacts of  
12 Pueblo Del Sol’s groundwater pumping on the river in the absence of the establishment of the USPD  
13 would be contrary to the legislature’s intent.

14        The modification of the last sentence in Conclusion of Law No. 26 is for purpose of  
15 clarifying that the phrase “water from a river” means surface water from a river.

16        5.        Conclusion of Law No. 27: Conclusion of Law No. 27 is modified by adding the  
17 following sentence after the first sentence: “Additionally, Appellants did not contend in their  
18 objections that Pueblo Del Sol would be pumping surface water from the San Pedro River or  
19 appropriable subflow of the San Pedro River.”

20        Reason for modification: This modification is made for the same reason as given for the  
21 modification of Conclusion of Law No. 19, *supra*.

**IT IS HEREBY ORDERED:**

3. That, subject to the rehearing and review provisions in A.R.S. § 41-1092.09, the Director shall sign and issue a Decision and Order designating Pueblo Del Sol as having an adequate water supply through calendar year 2032 in a form identical to the Draft Decision and Order, a copy of which is attached hereto as Attachment 2.

Sandra Fabritz-Whitney  
Director  
Arizona Department of Water Resources

A copy of the foregoing is sent by certified mail this 11<sup>th</sup> day of April, 2013 to:



1 William P. Sullivan  
CURTIS, GOODWIN, SULLIVAN,  
2 UDALL & SCHWAB, P.L.C.  
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# **ATTACHMENT 1**

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the 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

No. 12A-AWS001-DWR

ADMINISTRATIVE LAW JUDGE  
DECISION

**HEARING:** November 26, 27, 28, 29, and 30, 2012, with the record held open  
until March 1, 2013

**APPEARANCES:** Attorney William P. Sullivan for Applicant Pueblo Del Sol  
Water Company; Attorneys Janet L. Ronald and Nicole D. Klobas for the Arizona  
Department of Water Resources; Attorney John L. Gaudio for Appellant Bureau of Land  
Management; Appellant Robin Silver, M.D. on his own behalf; and Rule 38(d) Certified  
Limited Practice Student David McDevitt and Supervising Attorney Joseph M. Feller for  
Appellant Patricia Gerrodette

**ADMINISTRATIVE LAW JUDGE:** Thomas Shedden

**FINDINGS OF FACT**

1. On August 31, 2012, the Arizona Department of Water Resources  
("ADWR") issued a Notice of Hearing setting the above-captioned matter for hearing on  
October 16, 2012.

2. The Notice of Hearing provides that the "purpose of [the] hearing is to  
address the appeals received by [ADWR] concerning the Decision of [ADWR's] Director  
to grant Pueblo Del Sol Water Company's ["Pueblo Del Sol"] application [the  
"Application"] for designation as having an adequate water supply no." [4]0-  
700705.000[0]."

3. The Director's Decision at issue shows that Pueblo Del Sol has  
demonstrated that 4,870.39 acre-feet per year ("AFY") of groundwater will be physically,

continuously, and legally available for at least 100 years and that this volume of water is sufficient to meet Pueblo Del Sol's 2032 estimated water demand.

4. All parties agreed to continue the matter, and the hearing was conducted on November 26 through 30, 2012, at the Office of Administrative Hearings in Phoenix, Arizona.<sup>1</sup>

5. ADWR presented the testimony of Andrew Craddock, the manager of its recharge, and adequate and assured water supply programs.

6. Applicant Pueblo Del Sol presented the testimony of Richard Coffman, its vice president and general manager; Norman Fain III, P.E., of Fluid Solutions, which prepared the Application; and Robert Cain, a Supervising Hydrologist at Brown and Caldwell, which prepared a groundwater model used to support the Application.

7. Appellant Patricia Gerrodette presented her own testimony.

8. Appellant Bureau of Land Management ("BLM") presented the testimony of Bill Wells, a hydrologist who works in the BLM's Arizona office, and James Leenhouts, Ph.D., a hydrologist employed by the United States Geological Survey ("USGS").

9. Appellant Robin Silver, M.D., appeared and questioned other parties' witnesses, but he presented no independent witnesses.

#### Pueblo Del Sol and the Tribute Master Planned Community

10. Pueblo Del Sol is an Arizona corporation that was formed in 1972.

11. Pueblo Del Sol is a private water company that in ~~1992~~ 1972 was granted a Certificate of Convenience and Necessity ("CC&N") by the Arizona Corporation Commission.

12. Pueblo Del Sol's service area is not located in an Active Management Area.

13. Pueblo Del Sol's water is supplied 100 percent by wells.

14. Pueblo Del Sol's service area covers 4,807 acres, of which 2,880 acres are now developed. Pueblo Del Sol has about 3,500 service connections. Pueblo Del Sol's service area is located about 4.5 to 5 miles west of the San Pedro River.<sup>2</sup>

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<sup>1</sup> Venue for the Hearing was originally scheduled to be in Benson, Arizona, but all parties agreed to conduct the hearing in Phoenix.

1           15. The majority of Pueblo Del Sol's undeveloped service area is within the  
2 proposed Tribute Master Planned Community ("Tribute"), which is located in Sierra  
3 Vista, Cochise County, Arizona. Castle and Cooke, Arizona, Inc. ("Castle and Cooke")  
4 is Tribute's developer and it also owns Pueblo Del Sol.

5           16. Tribute's total area is about 1,916 acres, the majority of which will be  
6 served water by Pueblo Del Sol. Tribute is limited to a maximum of 6,959 residential  
7 units, but Castle and Cooke is not obligated to build that many units.

8           17. Cochise County will not approve the Tribute subdivision plat unless Castle  
9 and Cooke demonstrates that there will be an adequate water supply for Tribute. Such  
10 a demonstration may be made by obtaining either a water report from ADWR, or a  
11 written commitment of water service from a city, town, or private water company  
12 designated by ADWR as having an adequate water supply. Cochise County, Az.,  
13 Subdivision Regulations § 408.03; see A.R.S. § 11- 823(A).

14           18. Pueblo Del Sol ~~has provided Castle and Cooke the required written~~  
15 ~~commitment of water service~~ will serve the majority of land within the Tribute  
16 development. A small portion of the development will be served by Liberty Water  
17 Company.

18           The San Pedro Riparian National Conservation Area ("SPRNCA")

19           19. Through the Arizona-Idaho Conservation Act of 1988 (the "Act"), Congress  
20 established SPRNCA. Pub. L. No. 100-696 (1988).

21           20. SPRNCA's purpose is to protect the riparian area and the aquatic, wildlife,  
22 archeological, paleontological, scientific, cultural, educational, and recreational  
23 resources of the public lands surrounding the San Pedro River in Cochise County.  
24 SPRNCA consists of approximately 56,431 acres. *Id.*; see also Exhibit BLM 19, Figure  
25 2-1 (map).

26           21. Through the Act, Congress reserved a quantity of water sufficient to fulfill  
27 the purposes for which SPRNCA was established. The reserved water has a priority  
28 date as of date the Act became law, which was November 18, 1988. See Pub. L. No.  
29 100-696 (1988).

30           <sup>2</sup> Exhibit ADWR 2D, Figure 1 is a map showing the service area and other pertinent geographic features.

1           22.    The Act did not specify the quantity of water reserved, but Congress  
2 directed the Department of Interior's Secretary to file a claim for the quantification of  
3 such rights in the appropriate stream adjudication. *Id.*

4           The Gila River General Stream Adjudication and the SPRNCA Contested Case

5           23.    In 1989, the Secretary of Interior, through the BLM, filed a Statement of  
6 Claimant ("SOC") in the Gila River General Stream Adjudication<sup>3</sup> ("Gila River  
7 Adjudication") pending in Maricopa County Superior Court claiming federal reserved  
8 water rights for use within SPRNCA. BLM has subsequently filed three amended SOC's.

9           24.    Other parties to the Gila River Adjudication filed objections to BLM's SOC,  
10 and in 2006 the Gila River Adjudication's Special Master initiated a contested case<sup>4</sup> to  
11 address the BLM's SPRNCA claims and the related objections.<sup>5</sup>

12           25.    ADWR is the Gila River Adjudication Court's technical advisor. In that role,  
13 ADWR prepared a May 2012 "Report Concerning Federal Reserved Water Rights  
14 Claims for SPRNCA" ("SPRNCA Report"). Exhibit BLM 19.

15           26.    The SPRNCA Report was prepared at direction of the Special Master who  
16 ordered ADWR, among other things, to summarize BLM's federal reserved rights claims  
17 and state-based water rights and to evaluate the methods by which BLM quantified the  
18 reserved rights claims. *Id.*

19           27.    In a preliminary ruling, the Special Master found that BLM does have a  
20 federal reserved right to accomplish the purposes of the SPRNCA reservation. But he  
21 also found that BLM's state-based rights partially, but not fully, fulfill the federal  
22 purposes of the SPRNCA and that these water rights must be considered as available  
23 to serve the federal purposes of the SPRNCA. *Id.*

24  
25  
26 <sup>3</sup> *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, Civil Nos.  
27 W-1, W-2, W-3, and W-4 (Consolidated).

28 <sup>4</sup> "Contested case" means "(a) an individual case involving unresolved issues of law, fact, or both resulting  
29 from an objection filed to a Hydrographic Survey Report for a watershed .... The Clerk of the Court, on  
30 the instructions of the Master, prepares contested case files as subdivisions of the general stream  
adjudication of a river system." Rules for Proceedings Before the Special Master § 1.08  
(<http://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/pdfs/RulesRev053105.pdf>).

<sup>5</sup> *In re San Pedro Riparian National Conservation Area, Contested Case No. W1-11-232.*

1           28. The Special Master will conduct an evidentiary hearing in the SPRNCA  
2 contested case, but as of the hearing dates in this matter, neither the scope of the  
3 contested case nor a date for the evidentiary hearing had been set.

4           29. The Special Master will present his findings of fact and conclusions of law  
5 in a report prepared in accordance with Arizona Rule of Civil Procedure 53(g). Parties  
6 to the Gila River Adjudication will be allowed to file objections to that report. A.R.S. §  
7 45-257.

8           30. The Gila River Adjudication Court will resolve any objections to the Special  
9 Master's report and it must adopt, modify, reject, or resubmit to the Special Master that  
10 report. *Id.*; Az. R. Civ. P. 53(h). The Gila River Adjudication Court also may enter a  
11 partial decree regarding any federal reserved rights for SPRNCA. See A.R.S. § 45-257.

12                           Pueblo Del Sol's Application

13           31. On June 23, 2011, Fluid Solutions submitted to ADWR Pueblo Del Sol's  
14 initial application for a designation of adequate water supply. ~~In a~~ By letters dated  
15 September 22, 2011 and October 13, 2011, ADWR informed Fluid Solutions that the  
16 initial application was not complete. On January-24 25, 2012, Fluid Solutions submitted  
17 to ADWR a revised application.

18           32. In the Application, Pueblo Del Sol seeks a designation of adequate water  
19 supply through the year 2032, with a total annual demand of 4,870.39 AFY.

20           33. The Application shows that Pueblo Del Sol's current demand<sup>6</sup> as of 2010  
21 was 1,430.85 AFY, its committed demand<sup>7</sup> as of 2010 was 137.19 AFY, and its  
22 projected demand<sup>8</sup> for 2032 was 3,302.35 AFY.

23           34. The Application shows that groundwater is the source of the water.

24           35. With the Application, Pueblo Del Sol submitted a groundwater model  
25 prepared by Brown and Caldwell showing that the depth to static groundwater would not

26  
27 <sup>6</sup> "Current demand' means the 100-year water demand for existing uses within the service area of a  
28 designation applicant or designated provider, based on the annual report for the previous calendar year."  
29 A.A.C. R12-15-701(26).

30 <sup>7</sup> "Committed demand' means the 100-year water demand at build-out of all recorded lots that are not yet  
served water within the service area of a designation applicant or a designated provider." A.A.C. R12-15-  
701(24).

<sup>8</sup> "Projected demand' means the 100-year water demand at build-out, not including committed or current  
demand, of customers reasonably projected to be added and plats reasonably projected to be approved

1 exceed 650 feet after 100 years of pumping. ADWR accepted this groundwater model  
2 to show that the water will be physically available for 100 years.

3 36. Because Pueblo Del Sol has a CC&N with a service area that covers  
4 Tribute, ADWR found that Pueblo Del Sol had demonstrated that the water is legally  
5 available.

6 37. ADWR determined that Pueblo Del Sol has in place the infrastructure  
7 required to make the water available to its customers, including wells of sufficient  
8 capacity to satisfy its 2032 annual estimated water demand for 100 years, which  
9 demonstrates that the water will be continuously available.

10 38. ADWR determined that all other requirements of the adequate water  
11 supply program were met.

12 39. After ADWR determined that the Application was administratively  
13 complete it provided the required public notice informing residents and land owners in  
14 the Upper San Pedro Groundwater Basin that they could file objections.

15 40. All three Appellants filed objections to the Application. In their objections to  
16 the Application, Appellants did not contend that the water to be pumped by Pueblo Del  
17 Sol's wells is surface water or appropriable subflow

18 41. Appellants' objections were forwarded to Pueblo Del Sol and, on June 15,  
19 2012, Pueblo Del Sol filed with ADWR a response to these objections.

#### 20 The Director's Draft Decision and Order

21 42. On ~~June~~ July 23, 2012, ADWR's Director issued the Draft Decision and  
22 Order approving Pueblo Del Sol's Application. With that Draft Decision and Order,  
23 ADWR also issued a letter addressing the issues raised by the Appellants' objections.

24 43. The Draft Decision and Order shows that Pueblo Del Sol's current demand  
25 as of calendar year 2010 was 1,430.85 AFY.

26 44. The Draft Decision and Order shows that Pueblo Del Sol's committed  
27 demand as of calendar year 2010 was 137.19 AFY.

28 45. The Draft Decision and Order shows that Pueblo Del Sol's projected  
29 demand in 2032 is 3,302.35 AFY.

30 within the designated provider's service area and reasonably anticipated expansions of the designated  
provider's service area." A.A.C. R12-15-701(57).



1           46. The Draft Decision and Order shows that Pueblo Del Sol's estimated  
2 water demand in 2032 is 4,870.39 AFY.<sup>9</sup>

3           47. The Draft Decision and Order shows that Pueblo Del Sol's has  
4 demonstrated that 4,870.39 AFY of groundwater will be physically, continuously, and  
5 legally available for at least 100 years and that this volume of water is sufficient to meet  
6 Pueblo Del Sol 2032 estimated water demand.

7           48. The Draft Decision and Order shows that Pueblo Del Sol has satisfied all  
8 the requirements for a designation of adequate water supply.

9           49. Appellants requested a hearing, which led to this matter being conducted  
10 before the Office of Administrative Hearings, an independent state agency.

11                           The Issues for Hearing

12           50. The Notice of Hearing provides that Appellants raised the following issues  
13 on appeal:

- 14                   A. Whether Pueblo Del Sol failed to demonstrate, and ADWR  
15 erroneously determined, that the water proposed to be pumped will  
16 be continuously, legally and physically available to satisfy the  
17 proposed use for at least 100 years;  
18                   B. Whether ADWR erroneously refused to consider impacts of the  
19 proposed pumping [on] the flow of the San Pedro River;  
20                   C. Whether ADWR erroneously refused to consider impacts of the  
21 proposed pumping on water rights of the Bureau of Land  
22 Management, including federal reserved water rights for the San  
23 Pedro Riparian National Conservation Area;  
24                   D. Whether Pueblo Del Sol failed to demonstrate, and ADWR  
25 erroneously determined, that the water proposed to be pumped will  
26 be physically available for at least 100 years, given evidence of  
27 declining groundwater levels and increased pumping in the area.

28                           Mr. Craddock's Testimony

29           51. Mr. Craddock has been the manager of ADWR's recharge, and adequate  
30 and assured water supply programs since August 2011 and has worked for ADWR for  
about seven years. Mr. Craddock supervises a staff of seven.

<sup>9</sup> The estimated water demand in 2032 is the sum of the 2010 current demand, the 2010 committed demand, and the 2032 projected demand.

1           52. In reviewing adequate water supply applications, ADWR applies the rules  
2 for the type of water the applicant intends to use, which in Pueblo Del Sol's case is  
3 groundwater.

4           53. At ADWR, determining whether water is groundwater or surface water is a  
5 decision involving a hydrologist and ADWR's legal division.

6           54. The groundwater rules required Pueblo Del Sol to show that the water  
7 would be continuously, physically, and legally available for 100 years.

8           55. In reviewing the Application, ADWR considered the current demand, the  
9 committed demand, and the projected demand, all of which are defined in the Arizona  
10 Administrative Code or Rules.

11           56. Pueblo Del Sol demonstrated to ADWR that the water would be  
12 continuously available for 100 years by showing that it has in place the required pumps  
13 and related infrastructure necessary to make the water available to its customers.

14           57. Pueblo Del Sol demonstrated to ADWR that the water would be legally  
15 available for 100 years by showing that it has a CC&N to provide water in the area of  
16 the proposed Tribute subdivision.

17           58. The groundwater model prepared by Brown and Caldwell shows that after  
18 100 years of pumping the depth to static water level will not exceed 650 feet. Under the  
19 applicable rule, Pueblo Del Sol was required to show that the depth to static  
20 groundwater would not exceed 1,200 feet. Consequently, Pueblo Del Sol demonstrated  
21 to ADWR that the water would be physically available for 100 years.

22           59. In reviewing applications for designations of adequate water supply,  
23 ADWR does not consider the impact of the proposed pumping on streams. ADWR did  
24 not consider the impact of Pueblo Del Sol's proposed pumping on the San Pedro River  
25 because ADWR does not consider that to be a criterion under the adequate water  
26 supply program.

27           60. ADWR did not consider whether Pueblo Del Sol's proposed pumping  
28 would have any potential impact on SPRNCA or SPRNCA's federal reserved water  
29 rights.

30           61. Mr. Craddock was aware that BLM has filed federal reserved rights claims  
in the Gila River Adjudication. Mr. Craddock's opinion is that ADWR did not have the

1 authority to withhold a decision about the Application pending the outcome of those  
2 court proceedings.

3 62. One purpose of the assured and adequate water supply program is to  
4 inform real estate buyers of any potential water supply problems.

5 Dr. Leenhouts's Testimony

6 63. Dr. Leenhouts is a USGS supervisory hydrologist and the Associate  
7 Director of the Arizona Water Science Center located in Tucson, Arizona. He is familiar  
8 with science and hydrology based on his education and experience.

9 64. Dr. Leenhouts testified as to general principles of hydrology, including  
10 concepts known as "superposition" and "capture."

11 65. "Base flow" is water flowing in a river for which the source is groundwater-  
12 discharge from a regional aquifer. The amount of groundwater discharge to a river will  
13 depend on the gradient or slope of the water table and the aquifer's properties.

14 66. Pumping from a well can reduce the groundwater discharge to a river by  
15 changing the groundwater gradient.

16 67. The principle of superposition allows complex systems to be analyzed by  
17 looking at the individual parts. For example, rather than analyzing the effect of many  
18 wells collectively, one can analyze the effect of each well individually and then add  
19 these effects. Similarly, one could analyze the individual effects of groundwater  
20 recharge projects and add these to the individual effects of pumping from wells. The  
21 principle of superposition holds only for linear systems. Linear systems are ones in  
22 which a unit of stress results in a unit of response and the next unit of stress results in  
23 an equal unit of response.

24 68. Water pumped from a well comes from two sources: water stored in the  
25 aquifer and capture. ~~Capture is the change in recharge (to the aquifer) and the change~~  
26 ~~in discharge (generally to the stream). Sources of capture include springs, riparian~~  
27 ~~evapotranspiration, and groundwater discharge. Capture could also include induced or~~  
28 ~~additional recharge to a system, but Dr. Leenhouts's opinion is that this is unlikely to~~  
29 ~~occur in the San Pedro River basin.~~ Capture is the sum of increases in recharge and  
30 decreases in discharge that are caused when withdrawals occur from an aquifer. In  
semi-arid systems such as the San Pedro, the largest portion of capture would be

1 reductions in aquifer discharge to connected surface water resources, springs, riparian  
2 evapotranspiration and groundwater outflow.

3 69. Capture is not necessarily water taken from a river, but is water that would  
4 have discharged to the river, springs or the riparian vegetation along the river, or that  
5 would have left the basin through groundwater discharge.

6 70. Initially, water pumped from a well will be 100 percent from storage, but as  
7 the pumping continues, the amount of capture increases. At some point, the source will  
8 be 100 percent capture, unless there is not enough capturable water for the full need of  
9 the well.

10 71. Capture is influenced by many factors, but as general principles, wells  
11 closer to a river have a greater percentage of capture than wells farther from that river,  
12 and shallower wells have a greater percentage of capture than deeper wells. Other  
13 factors affecting capture include aquifer characteristics such as transmissivity and  
14 layering of geologic deposits.

15 72. The USGS used a groundwater model to compute the percentage of  
16 capture that would result from pumping a single hypothetical well for 50 years at  
17 thousands of different locations in the San Pedro River basin.

18 73. Exhibit BLM 26 is a report describing the modeling process, which at  
19 Figure 4B presents a map showing the results (the "capture map"). Dr. Leenhouts was  
20 one of the authors of this report.

21 74. The capture map is not intended to show the effect of the proposed  
22 Pueblo Del Sol wells, but is a general illustration intended to be used as a planning tool  
23 for resource managers and the general public. Nevertheless, the capture map shows  
24 that the water pumped from a hypothetical well located in the general area of the  
25 proposed Pueblo Del Sol wells would be about between 0 and 30 percent capture after  
26 continuous pumping for 50 years, depending on the particular pumping location.

27 75. Multiple sources for the captured water exist and the capture map does  
28 not show the particular source of the captured water.

29 76. The USGS groundwater model and resulting capture map do not include  
30 the effects of groundwater recharge from the Sierra Vista wastewater treatment plant or  
the effects of flood flows in the San Pedro River.

1           77. The capture map shows only the relative effect of pumping, which is less  
2 water going into the river discharged naturally from the system, be it from the river, from  
3 the riparian vegetation, from springs or from groundwater underflow, and it. The capture  
4 map does not show the impacts on groundwater levels at any location.

5           78. To assess the absolute flow at the San Pedro River or the groundwater  
6 level at any location, would require consideration of the wastewater recharge and the  
7 flood flows.

8                           Mr. Wells's Testimony

9           79. The BLM is a public land management agency that is part of the  
10 Department of Interior. The BLM manages about 12.5 million acres in Arizona.

11           80. Mr. Wells's duties for the BLM include providing advice about the BLM's  
12 water rights.

13           81. BLM's federal reserved rights claim for SPRNCA has three components: a  
14 surface water in-stream flow component; point sources such as ~~stock~~ ponds and small  
15 lakes, springs and seeps, wells and other naturally occurring waters; and a  
16 groundwater-level or groundwater-elevation component.

17           82. BLM's federal reserved rights claim for surface water flows includes both  
18 base flows and "un-impounded storm runoff" (i.e., flood flows) measured at three gages  
19 on the San Pedro River: Palominas, Charleston, and Tombstone. BLM has also made a  
20 claim for base flow and flood flow on the Babocomari River.

21           83. At the Palominas gage, BLM has claimed a federal reserved right of 2,900  
22 AFY in base flow and 13,000 AFY in flood flows. At the Charleston gage, BLM has  
23 claimed a federal reserved right of 11,150 AFY in base flow and 16,850 AFY in flood  
24 flows. At the Tombstone gage, BLM has claimed a federal reserved right of 9,400 AFY  
25 in base flow and 20,800 AFY in flood flows.

26           84. For the Babocomari River, BLM has claimed a federal reserved right of  
27 800 AFY in base flow and 1,215 AFY in flood flows.

28           85. Exhibit BLM 18, Attachment C, is a table of BLM's federal reserved right  
29 claims based on groundwater elevations at nine wells. For example, BLM has claimed  
30 sufficient water to ensure that the groundwater elevation at the Palominas Well # 5

1 does not drop below 4,248.1 feet.<sup>10</sup> In the Gila River Adjudication, BLM asserted that  
2 these claimed groundwater elevations are necessary to supply water to riparian  
3 vegetation.<sup>11</sup>

4 86. The BLM's second amended SOC shows the claimed uses as: recreation;  
5 fish and wildlife; in-stream flows; administrative; domestic; fire suppression;  
6 maintenance of natural hydrological processes; and resources; conservation;  
7 protection; and enhancement.

8 87. The BLM has a state-based water right to use water flowing in the San  
9 Pedro River for recreation and wildlife, including fish. This state-based right is for a  
10 maximum of 3,666 AFY at the Palominas gage and for 11,028 AFY at the Charleston  
11 gage, which are both in SPRNCA. BLM has pending two other state-based claims for  
12 water rights that, if granted, could be used at SPRNCA.

13 88. Mr. Wells's understanding of BLM's reserved rights claim is that it is for  
14 more purposes than BLM's state-based rights and claims. The reserved rights claim  
15 also covers a greater geographic area (it is not strictly an in-stream right or claim) and  
16 covers both groundwater and surface water, whereas the state-based right is for  
17 surface water only.

#### 18 Ms. Gerrodette's Testimony

19 89. Ms. Gerrodette acknowledged that she is not an expert in hydrology, but  
20 she testified that she is a passionately involved citizen who has been working for the  
21 last 17 years to protect the San Pedro River. During that time, she has attended  
22 innumerable meetings, attended groundwater conferences, and spoken to hydrologists.

23 90. Ms. Gerrodette has been active in the Upper San Pedro Partnership,  
24 which each year provides a "321 report" to Congress. Ms. Gerrodette's opinion is that  
25 there was a Congressional mandate under which the Partnership was required to  
26 balance the San Pedro River Basin water budget by 2011, but this was not achieved.

27  
28 <sup>10</sup> Datum: NAD83, NAVD88, GEOID03.

29 <sup>11</sup> The other eight wells and elevations are: Herford South monitoring well (4,143.9 feet); Herford North  
30 monitoring well (4,145.7 feet); Cottonwood monitoring well (4,070.7 feet); Lewis Springs monitoring well  
(4,040.9 feet); Moson Spring monitoring well (3,975.5 feet); Boquillas #2 monitoring well (3,881.05 feet);  
Boquillas #1 monitoring well (3,864.2 feet); and Summers monitoring well (3,719.3 feet).

1           91. Ms. Gerrodette asserts that despite ADWR's determination that a private  
2 water company with a CC&N meets the legally-available requirement, in the past  
3 ADWR has denied applications for designations of adequate water supply even when a  
4 private water company had a CC&N.

5           92. In support of her position, Ms. Gerrodette referred to Exhibit RS 20, a  
6 letter dated June 16, 1993, from ADWR to the Arizona Department of Real Estate.

7           93. The June 16, 1993 letter relates to a request for a ~~designation of adequate~~  
8 ~~water supply~~ water report for Charleston Village, which was to be served water by the  
9 Bella Vista Water Co. ADWR informed the Department of Real Estate that because of  
10 legal uncertainties that would require judicial action to resolve, there was a possibility  
11 that the requested water might not be legally available. Consequently, ADWR found the  
12 water supply to be inadequate.

13                           Mr. Coffman's Testimony

14           94. In addition to his role at Pueblo Del Sol, Mr. Coffman is a senior vice  
15 president of Castle and Cooke. He is also a resident of Sierra Vista and was a member  
16 of the ~~Governor's~~ Upper San Pedro Water District Organizing Board.

17           95. Castle and Cooke began the process to obtain a designation of adequate  
18 water supply in 2008. Excluding the cost of the land, Castle and Cooke has invested  
19 about \$7 million in the Tribute project over the last 10 years. Mr. Coffman  
20 acknowledged that this money was invested after SPRNCA was created.

21           96. Mr. Coffman's understanding is that Pueblo Del Sol has the obligation and  
22 the right to serve customers in its service area. Pueblo Del Sol's wells typically are  
23 operated about 40 to 50 percent of the time, and sometimes only 35 percent of the  
24 time, depending on the season. Additionally, it is extraordinarily rare for all of the wells  
25 to be pumping at the same time.

26           97. The Tribute area was annexed into Sierra Vista in 1999. Since that time,  
27 Castle and Cooke has worked with the city to include Tribute in Sierra Vista's master  
28 plan. There is now in place the Tribute Specific Plan, which is in effect the master plan  
29 for the community that sets out land uses, densities, and other information.  
30

1           98. The Tribute Specific Plan has water conservation measures including  
2 limiting outside watering and the size of lawns, requirements for water-saving devices in  
3 the homes, and options for rainwater harvesting.

4           99. Initially, wastewater from Tribute will be treated at Sierra Vista's existing  
5 wastewater treatment plant. Eventually Sierra Vista will build a new wastewater  
6 treatment plant and Tribute's wastewater will go to that new plant.

7           100. Treated effluent from the Sierra Vista wastewater treatment plant is  
8 recharged to the aquifer. Treated effluent from the new wastewater treatment plant will  
9 be used to recharge the aquifer, to irrigate land in public right-of-ways and parks within  
10 the Tribute development, and in lieu of existing groundwater pumping to water a golf  
11 course.

12           101. Sierra Vista is landlocked on three sides and Mr. Coffman's opinion is that  
13 Tribute constitutes a high percentage of the undeveloped land in Sierra Vista. He is  
14 also of the opinion that Tribute will serve the natural or normal growth that is predicted  
15 to occur in the Sierra Vista area over the next 30 to 40 years.

16           102. By "natural or normal growth" Mr. Coffman means that it will not be  
17 necessary to promote growth or to draw people to the area. His opinion is that people  
18 will come to the Sierra Vista area even if Tribute is not built, but in that case they would  
19 build on unregulated lots in the Hereford area, south of Sierra Vista.

#### 20                           Mr. Fain's Testimony

21           103. Mr. Fain is an Arizona registered Professional Engineer with experience  
22 operating a water utility and in hydraulic mining and water and wastewater engineering.  
23 In 1998, Mr. Fain was one of four cofounders of Fluid Solutions. In 2008, Castle and  
24 Cooke hired Fluid Solutions to prepare Pueblo Del Sol's Application.

25           104. Although Mr. Fain is not an attorney, he has an understanding of the  
26 nature of Arizona water law and his opinion is that Fluid Solutions and Pueblo Del Sol  
27 followed the applicable rules in preparing the Application.

28           105. After it was hired, Fluid Solutions met with ADWR to determine the most  
29 appropriate route for the project. Fluid Solutions' original application was found by  
30 ADWR to be insufficient because it used a two-dimensional groundwater model and  
because ADWR had questions about the water-demand figures.



1           106. On January-2425, 2012, Fluid Solutions submitted to ADWR the revised  
2 Application, which ADWR found demonstrated that there is an adequate water supply.

3           107. Mr. Fain's recollection was that Sierra Vista's existing wastewater  
4 treatment plant operates at about 3.17 million gallons per day ("MGD"), most of which is  
5 recharged to the aquifer. Based on current data, about 75 percent of the water that will  
6 be withdrawn from the aquifer-is-being by the Applicant will be recharged.

7           108. Sierra Vista intends to build-~~four~~ three additional permanent wastewater  
8 reclamation or treatment facilities, one of which will serve Tribute and is known as the  
9 Tribute Facility. The three facilities will have a total treatment capacity of 4.7 MGD at  
10 build-out.

11           109. The Tribute Facility will have a 2 MGD capacity and will be built in four  
12 phases of 0.5 MGD, with each phase being built when the prior phase reaches 80  
13 percent of capacity. The Tribute Facility will produce water suitable for recharge or  
14 reuse.

15           110. The existing Sierra Vista wastewater treatment plant's groundwater  
16 recharge was included in the Pueblo Del Sol groundwater model, but recharge from the  
17 proposed Tribute Facility was not.

18           111. The first 0.4 MGD from the planned Tribute Facility will be used to replace  
19 groundwater now being used at the golf course. This offset was not included in the  
20 groundwater model because it does not reflect the actual current usage.

21           112. Although Mr. Fain testified that questions about the groundwater model  
22 itself should be directed to Mr. Cain, he provided a description of the geology in the  
23 basin and the location of the proposed Pueblo Del Sol wells.<sup>12</sup>

24           113. The proposed Pueblo Del Sol wells are 4.5 miles to 6 miles from the San  
25 Pedro River and will draw water from a depth of over 600 feet below ground surface.

26           114. Water moves through soils with a high hydraulic conductivity more easily  
27 than those with lower hydraulic conductivities.

28           115. In the area of interest, the highest hydraulic conductivities are near the  
29 San Pedro River and the hydraulic conductivity goes down as one goes deeper in the

30 <sup>12</sup> Exhibit ADWR 2D, Figure 3 is a cross section of the proposed well site; Figures 3 through 8 show the groundwater model's layers.

1 aquifer, but then increases in the Pantano formation from which the proposed Pueblo  
2 Del Sol wells will draw water.

3 116. Mr. Fain's opinion is that the Pueblo Del Sol wells will be withdrawing  
4 groundwater and that there is no compelling evidence to show that the wells will impact  
5 the San Pedro River. In forming that opinion he considered that the wells are quite a  
6 distance from SPRNCA and the San Pedro River, and that there is quite a bit of  
7 recharge between the wells and the San Pedro River that creates a buffer zone that will  
8 mitigate any impact on the river. Mr. Fain acknowledged however that the groundwater  
9 model and related report did not analyze the impact of Pueblo Del Sol's proposed  
10 pumping on the San Pedro River, but rather only the impact on the aquifer.

11 117. Mr. Fain also acknowledged that he had not personally done any analysis  
12 of the impact of Pueblo Del Sol's proposed pumping on the San Pedro River, but was  
13 relying on the location and depth of the wells and the recharge that has occurred during  
14 the past 10 years.

15 118. Mr. Fain had not considered whether Pueblo Del Sol's proposed pumping  
16 would impact the BLM's claimed federal reserved rights.

17 Mr. Cain's Testimony

18 119. As a supervising hydrologist at Brown and Caldwell, Mr. Cain has worked  
19 on dozens of groundwater models and estimates that the number is more than 30 to 40.  
20 Many of these models were prepared for assured or adequate water supply  
21 applications. Mr. Cain is familiar with the applicable adequate water supply rules.

22 120. Mr. Cain led the team that prepared the groundwater model used to show  
23 that Pueblo Del Sol met the physically-available requirement. Exhibit ADWR 7D is a  
24 Brown and Caldwell Technical Memorandum providing details about the Pueblo Del Sol  
25 groundwater model.

26 121. The Sierra Vista hydrologic system is very complex, the materials are  
27 heterogeneous, and there is layering in the basin. Exhibit BLM 12 is a generalized  
28 hydrogeologic section of the San Pedro Basin showing the extent of the model layers.

29 122. The Pueblo Del Sol wells will be deep relative to the bed of the San Pedro  
30 River and there is a fine grained material layer between the wells and the river.

123. This fine grained material limits the interconnection between the coarse grained ~~Holocene alluvium at~~ alluvial deposits in and around the San Pedro River and the deeper regional aquifer from which Pueblo Del Sol will pump.

124. The Pueblo Del Sol groundwater model was developed to show the impact of Pueblo Del Sol's proposed pumping on the regional aquifer and it was not intended to show the impact on the San Pedro River. Mr. Cain has not seen anything to show that the Pueblo Del Sol pumping, ~~and related~~ combined with its proposed recharge operations, would either increase or decrease the flow in the San Pedro River.

125. The Pueblo Del Sol groundwater model shows that in 2111, ~~the depth to groundwater in the San Pedro Basin will be less than~~ area of the basin under the influence of Pueblo Del Sol's pumping will not exceed 650 feet if Pueblo Del Sol's projected demand and the current and committed demands are included.

126. Mr. Cain's opinion is that the Pueblo Del Sol groundwater model results show that there are sufficient resources to satisfy the applicable rule's 100-year physical-availability demonstration.

127. To create the Pueblo Del Sol groundwater model, Brown and Caldwell modified an existing model of the Upper San Pedro Basin that had been prepared by Brown and Caldwell to evaluate the impact on the San Pedro River of recharge from the existing Sierra Vista wastewater treatment plant.

128. Both the Pueblo Del Sol groundwater model and the Sierra Vista model are variations of the USGS model that was used by the USGS to create the capture map.

129. To create the Pueblo Del Sol groundwater model, Brown and Caldwell updated the Sierra Vista model by increasing the run-time to 100 years, adding pumping information from ADWR's well registry, refining some of the geology and recharge conditions near the Sierra Vista recharge facility, ~~and~~ improving the calibration ~~by incorporating new information about the geology locally by using additional information from the City of Sierra Vista, and removing the portion of the model that extends into Mexico.~~

130. Mr. Cain's approach is always to use more conservative values to allow for quicker regulatory approval of a model, which in Pueblo Del Sol's case, means using

1 higher pumping rates. To do so, Brown and Caldwell used rapid build-out assumptions,  
2 it added additional demands without removing other demand values, and it did not  
3 consider the ~~reuse or recharge of Tribute's effluent that will~~ or the use of the effluent to  
4 offset existing pumping.

5 131. There is a cluster of wells to the east of Pueblo Del Sol's proposed well  
6 sites that creates drawdown that occurs without Pueblo Del Sol's proposed pumping.  
7 When the Pueblo Del Sol groundwater model is run without including Pueblo Del Sol's  
8 proposed pumping, the ~~maximum~~ depth to groundwater in 2111 is greater than  
9 approximately 550 feet below ground surface.<sup>13</sup>

10 132. The Pueblo Del Sol groundwater model results show that Pueblo Del Sol's  
11 proposed pumping will cause additional drawdown over the drawdown that would occur  
12 without the proposed pumping. Mr. Cain's opinion is that the drawdown maps show that  
13 Pueblo Del Sol's pumping will not have a "huge" impact in the area of the pumping.

14 133. Groundwater recharge from the existing Sierra Vista wastewater treatment  
15 plant occurs to the north and east of Pueblo Del Sol's proposed well sites. Recharge  
16 from that treatment plant will offset pumping by Pueblo Del Sol and the currently  
17 existing pumping.

18 134. The Sierra Vista model was created to determine the impact on the San  
19 Pedro River of recharge from the Sierra Vista wastewater treatment plant.

20 135. According to Mr. Cain, the Sierra Vista model shows that the recharge will  
21 increase the flow in the San Pedro River and that seeps and springs may form. Mr.  
22 Cain also testified that there would be positive effects extending over a wide area,  
23 although these effects would be small in some areas.

24 136. The groundwater recharge affects the surface water in the San Pedro  
25 River because there is a connection between the two in the recharge area.

26 137. Mr. Cain agrees that capture and superposition are valid principles, but his  
27 opinion is that because hydrologic systems have non-linear inputs and these systems  
28 are not static, these principles are of limited value.

29  
30 <sup>13</sup> Exhibit ADWR 27D, Figures 5, 6, 7 and 78 are maps showing the groundwater model's drawdown and  
depth to groundwater results.

1           138. Mr. Cain's opinion is that a capture analysis is not particularly useful for  
2 adequate water supply calculations because the analysis: (1) does not show the  
3 groundwater levels as required by the applicable rule; (2) does not identify the source of  
4 the captured water (and there are many possible sources); and (3) only the relative  
5 change is shown, which does not account for the positive effect of the existing recharge  
6 to the aquifer.

7                               Upper San Pedro Water District

8           139. In 2007, the Arizona legislature enacted legislation authorizing the  
9 establishment of the Upper San Pedro Water District ("USPWD"), Laws 2007, Ch. 252;  
10 (A.R.S. § 48-6401, *et seq.*) (the legislation is referred to herein as the "USPWD  
11 legislation").

12           140. The USPWD legislation provides that if the USPWD is established, the  
13 lands in the district consist of the portion of the upper San Pedro groundwater basin  
14 delineated on a map that is dated April, 2007 and that is on file in the Arizona  
15 Department of Water Resources, including all lands in the corporate limits of the city of  
16 Sierra Vista. A.R.S. § 48-6403(A).

17           141. The USPWD legislation provides that if the USPWD is established, an  
18 applicant for an adequate water supply determination within the USPWD must  
19 demonstrate that its projected water use is consistent with the goal of the USPWD.  
20 A.R.S. § 45-108.04(2). One of the goals of the USPWD is to maintain the aquifer and  
21 base flow conditions needed to sustain the Upper San Pedro River. A.R.S. §§ 45-  
22 108.04(2), 48-6403(B).

23           142. The USPWD legislation provides that the USPWD shall be established if  
24 approved by a majority of the eligible voters voting on the question at an election held  
25 within the proposed district. A.R.S. § 48-6406.

26           143. An election on the question of whether to establish the USPWD was held  
27 within the proposed district on November 2, 2010. The majority of eligible voters voting  
28 on the question at the election voted "no." See Hearing Transcript, Vol. IV, pp. 634,  
29 670; [http://cochise.az.gov/ElectionResults/Cochise Election Results 11 02 10.htm](http://cochise.az.gov/ElectionResults/Cochise_Election_Results_11_02_10.htm).  
30 Consequently, the USPWD was never established.

## CONCLUSIONS OF LAW

1           1.     The burden of proof at an administrative hearing falls to the party asserting  
2 a claim, right, entitlement, or affirmative defense. Consequently, Appellants bear the  
3 burden to show that the Draft Decision and Order is in error. See A.A.C. R2-19-119(B).

4           2.     Under Arizona law, subflow and percolating groundwater are legally  
5 distinct types of underground water. Subflow is considered part of the stream (i.e.,  
6 surface water) and is subject to prior appropriation. Percolating groundwater is not  
7 appropriable and may be pumped by the overlying landowner, subject to the doctrine of  
8 reasonable use and the federal reserved water rights doctrine. *In re the General*  
9 *Adjudication of All Rights to Use Water in the Gila River System and Source*, 198 Ariz.  
10 330, 9 P.3d 1069 (2000) ("*Gila IV*").

11           3.     Underground waters are presumed to be percolating and, consequently, a  
12 well pumping underground water is presumed to be pumping groundwater. One who  
13 asserts that underground water is a part of a stream must prove that fact by clear and  
14 convincing evidence. *Id.* at 335, 9 P.3d at 1074. The standard of proof on all other  
15 issues in this matter is that of a preponderance of the evidence. A.A.C. R2-19-119(A).

16           4.     A preponderance of the evidence is "[t]he greater weight of the evidence,  
17 not necessarily established by the greater number of witnesses testifying to a fact but  
18 by evidence that has the most convincing force; superior evidentiary weight that, though  
19 not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to  
20 incline a fair and impartial mind to one side of the issue rather than the other." BLACK'S  
21 LAW DICTIONARY 1301 (9<sup>th</sup> ed. 2009).

22           5.     Clear and convincing evidence is "[e]vidence indicating that the thing to be  
23 proved is highly probable or reasonably certain." BLACK'S LAW DICTIONARY, 636 (9<sup>th</sup> ed.  
24 2009).

25           6.     The primary goal when construing statutes is to ascertain the legislature's  
26 intent. See e.g., *Guzman v. Guzman*, 175 Ariz. 183, 854 P.2d 1169 (App. 1993).

27           7.     Generally, the principles of construction that apply to statutes apply with  
28 equal force to administrative rules and regulations. See *Daimlerchrysler Servs. N.*  
29 *America v. Arizona Dep't of Revenue*, 210 Ariz. 297, 110 P.3d 1031 (App. 2005).

1           8.     ADWR's interpretation of the applicable statutes and regulations should be  
2 given considerable weight unless there is clear statutory guidance contrary to ADWR's  
3 interpretation. See *Arizona Water Co. v. Arizona Dep't of Water Resources*, 208 Ariz.  
4 147, 91 P.3d 990 (2004); *Arizona Municipal Water Users Association v. Arizona*  
5 *Department of Water Resources*, 181 Ariz. 136, 888 P.2d 1323 (App. 1994).

6           9.     ADWR is required to follow its rules and regulations and a failure to do so  
7 would be unlawful. *Arizona Municipal Water Users Association*, 181 Ariz. 136, 888 P.2d  
8 1323.

9           10.    The Director is required to review a designation of adequate water supply  
10 at least every 15 years to determine whether it should be modified or revoked. A.A.C.  
11 R12-15-715(C). The Director has authority to revoke a designation of adequate water  
12 supply if the water supply may become inadequate. A.R.S. § 45-108(I); see also A.A.C.  
13 R12-15-715(E); Exhibit ADWR 63.

14           11.    The adequate water supply "process does not allocate water rights or  
15 establish priorities; but rather, it involves an analysis of water rights that are already in  
16 place." *Yavapai-Apache Nation v. Fabritz-Whitney*, 227 Ariz. 499, 504, 260 P.3d 299,  
17 304 (App. 2011) (discussing assured water supply process).

18           12.    Pueblo Del Sol has a statutory right to make reasonable and beneficial  
19 use of groundwater, subject to federal reserved rights. A.R.S. § 45-453; *Gila IV*, 198  
20 Ariz. 330, 9 P.3d 1069.

21           13.    The BLM has federal reserved water rights sufficient to fulfill the purpose  
22 for which SPRNCA was established. Arizona-Idaho Conservation Act of 1988, Pub. L.  
23 No. 100-696 (1988); see also *Cappeart v. United States*, 426 U.S. 128 (1976).

24           14.    The BLM's federal reserved rights will be quantified in the Gila River  
25 Adjudication. See Pub. L. No. 100-696 (1988). The BLM's rights will be limited to "only  
26 that amount of water necessary to fulfill the purposes of the reservation, no more."  
27 *Cappeart* at 141.

28           15.    Quantification of water rights and the determination of relative priorities  
29 can only be accomplished in a single proceeding where all claims are before the court.  
30 *United States v. Superior Court*, 144 Ariz. 265, 697 P.2d 658 (1985).

16. The Gila River Adjudication Court has exclusive jurisdiction to adjudicate conflicting claims and water rights. *Yavapai-Apache Nation*, 227 Ariz. 499, 260 P.3d 299.

Issue A. Whether Pueblo Del Sol failed to demonstrate, and ADWR erroneously determined, that the water proposed to be pumped will be continuously, legally, and physically available to satisfy the proposed use for at least 100 years.

### Continuous Availability

17. Pueblo Del Sol has demonstrated that it has the wells necessary to serve the proposed water use. Consequently, the preponderance of the evidence shows that Pueblo Del Sol has met the requirement to show that the water will be continuously available. A.A.C. R12-15-717(B).

### Physical Availability

18. Pueblo Del Sol has demonstrated that the maximum depth to static water after 100 years of pumping will be less than 650 feet below ground surface. The applicable rule requires a showing that the depth to static water will not exceed 1,200 feet below ground surface. Consequently, the preponderance of the evidence shows that Pueblo Del Sol has met the requirement to show that the water will be physically available. A.A.C. R12-15-716(B).

### Legal Availability

19. Because Pueblo Del Sol's water will be pumped from underground, that water is presumed to be groundwater. Appellants presented no substantial evidence to show that the water is either surface water or subflow and have not shown by clear and convincing evidence that the water is not groundwater. Consequently, the Administrative Law Judge concludes that Pueblo Del Sol's source of water is groundwater. See *Gila IV*, 198 Ariz. 330, 9 P.3d 1069. Additionally, because Appellants did not contend in their objections that Pueblo Del Sol's wells would be pumping surface water or appropriable subflow, Appellants are precluded from raising that issue on appeal. See A.R.S. § 41-1092.03(B).

20. Pueblo Del Sol is a private water company with a CC&N covering the proposed Tribute subdivision, which subdivision is not located in an Active Management



1 Area. Consequently, ADWR appropriately determined that Pueblo Del Sol met the  
2 requirement to show that the water will be legally available. A.A.C. R12-15-7178(C).

3 21. Appellants argue that under A.R.S. § 45-108(I), ADWR may not rely solely  
4 on A.A.C. R12-15-7178(C), but must also consider the relevant case law regarding  
5 federal reserved water rights. Appellants' argument is not persuasive.

6 22. In essence, Appellants request ADWR to determine that BLM's  
7 unquantified federal reserved rights are superior to Pueblo Del Sol's existing right to  
8 use groundwater. But only the Gila River Adjudication Court, and not ADWR, has the  
9 authority to determine the extent and relative priority of BLM's federal reserved rights.  
10 *Yavapai-Apache Nation*, 227 Ariz. 499, 260 P.3d 299.<sup>14</sup>

11 23. The preponderance of the evidence shows that Pueblo Del Sol has met  
12 the requirement to show that the water will be legally available.

13 Issue B. Whether ADWR erroneously refused to consider impacts of the proposed  
14 pumping on the flow of the San Pedro River.

15 24. ADWR determined that it did not have authority to consider whether  
16 Pueblo Del Sol's proposed groundwater pumping would impact the San Pedro River.

17 25. Arizona law recognizes that the pumping of groundwater typically will  
18 affect any stream to which the aquifer is in hydraulic connection. In *Gila IV*, the Court  
19 acknowledged that "given enough time, with certain exceptions, all extractions from a  
20 tributary aquifer will cause a more-or-less corresponding depletion from stream flow  
21 volume." *Gila IV* at 375 336, 9 P.3d at 1075 (citation omitted).

22 26. When an applicant requests a designation of adequate water supply  
23 based on groundwater, the applicable statutes and rules do not give ADWR authority to  
24 consider the impact on a river caused by pumping that groundwater. This conclusion is  
25 supported in this matter by the fact that in 2007, the Arizona legislature enacted  
26 legislation authorizing the establishment of the USPWD and requiring all applicants for

27  
28 <sup>14</sup> Moreover, BLM "need not wait until administrative review concludes before challenging" Pueblo Del  
29 Sol's right to pump groundwater. *Yavapai-Apache Nation* at 309, 260 P.3d at 509; see also  
30 <http://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/whatsNew.asp>  
(showing that there are Applications for Injunctive Relief pending in the Gila River Adjudication). Ms.  
Gerrodette argues that the federal courts also have authority to enjoin Pueblo Del Sol's proposed  
pumping.

1 an adequate water supply determination within the USPWD, including all applicants  
2 within the city of Sierra Vista, to demonstrate that their projected water use is consistent  
3 with the goal of maintaining the aquifer and base flow conditions needed to sustain the  
4 Upper San Pedro River. If the USPWD had been established, Pueblo Del Sol would  
5 have been required to demonstrate that its groundwater pumping would not adversely  
6 impact the San Pedro River. However, the establishment of the USPWD was defeated  
7 by a vote of eligible voters within the proposed district on November 2, 2010.  
8 Consequently, consideration of the impacts of Pueblo Del Sol's groundwater pumping  
9 on the San Pedro River clearly would be inconsistent with legislative intent. The effect  
10 of pumping on a river would only be at issue if the well was pumping surface water from  
11 a river or the river's subflow.

12 27. In this matter, Appellants have not demonstrated by clear and convincing  
13 evidence that the water is not groundwater. Additionally, Appellants did not contend in  
14 their objections that Pueblo Del Sol would be pumping surface water from the San  
15 Pedro River or appropriable subflow of the San Pedro River. Consequently, ADWR did  
16 not err in its determination that it was not authorized to consider the impact of Pueblo  
17 Del Sol's proposed pumping on the San Pedro River.

18 Issue C. Whether ADWR erroneously refused to consider impacts of the proposed  
19 pumping on water rights of the BLM, including federal reserved water rights  
20 for the SPRNCA.

21 28. As discussed above, ADWR does not have the authority to consider  
22 whether Pueblo Del Sol's right to use groundwater conflicts with BLM's federal reserved  
23 rights, which is an issue for resolution by the Gila River Adjudication Court.

24 29. Similarly, any conflict between Pueblo Del Sol's right to use groundwater  
25 and BLM's state-based water rights must be resolved by the Gila River Adjudication  
26 Court.

27 30. Consequently, ADWR did not err in its determination that it was not  
28 authorized to consider the impact of Pueblo Del Sol's proposed pumping on the BLM's  
29 existing state-based water rights or the BLM's federal reserved water rights for  
30 SPRNCA.

1 Issue D. Whether Pueblo Del Sol failed to demonstrate, and ADWR erroneously  
2 determined, that the water proposed to be pumped will be physically available for at  
3 least 100 years, given evidence of declining groundwater levels and increased  
4 pumping in the area.<sup>15</sup>

5 31. As discussed above, Pueblo Del Sol demonstrated that the water would  
6 be physically available by showing that the maximum depth to static water after 100  
7 years of pumping will be less than 1,200 feet below ground surface.

8 32. The preponderance of the evidence shows that when Brown and Caldwell  
9 created the Pueblo Del Sol groundwater model, it took into account the existing water  
10 uses in the area and that Brown and Caldwell used ADWR's Wells 55 database to get  
11 up-to-date pumping data.

12 33. Appellants presented no substantial evidence to show that the Pueblo Del  
13 Sol groundwater model did not include the current groundwater levels or that the model  
14 was in any other way deficient.

15 34. The preponderance of the evidence shows that Pueblo Del Sol has met  
16 the requirement to show that the water will be physically available. A.A.C. R12-15-  
17 716(B).

18 Conclusion

19 35. Appellants have not demonstrated that ADWR's Director's June 23, 2012,  
20 Draft Decision and Order granting Pueblo Del Sol's Application for Designation as  
21 Having an Adequate Water Supply was contrary to law or that it was issued in error.  
22 Consequently, Appellants' appeals should be dismissed and ADWR's Director's Draft  
23 Decision should be affirmed.

24 ORDER

25 **IT IS ORDERED** that Appellants' appeals are dismissed;

26 **IT IS FURTHER ORDERED** that ADWR's Director's Draft Decision is affirmed.

27 *In the event of certification of the Administrative Law Judge Decision by the Director of*  
28 *the Office of Administrative Hearings, the effective date of the Order is five days after*  
29 *the date of that certification.*

30 Done this day, March 12, 2013.

<sup>15</sup> This issue is essentially duplicative of a portion of Issue A.

/s/ Thomas Shedden  
Thomas Shedden  
Administrative Law Judge

Transmitted electronically to:

Sandra Fabritz-Whitney, Director  
Department of Water Resources

# **ATTACHMENT 2**

**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.

**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 plots 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:

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. R12-15-716(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.



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

- 3 a. An estimate of the demand of platted, undeveloped lots located in Pueblo Del Sol's  
4 service area.
- 5 b. An estimate of the projected demand at build-out for customers with which Pueblo Del  
6 Sol has entered into a notice of intent to serve agreement in the preceding calendar  
7 year.
- 8 c. A report regarding Pueblo Del Sol's compliance with water quality requirements.
- 9 d. The depth-to-static water level of all wells from which Pueblo Del Sol withdrew water  
10 during the previous calendar year.
- 11 e. The total quantity of water from any source withdrawn, diverted, or received by Pueblo  
12 Del Sol for its customers' residential and non-residential use during the previous  
13 calendar year.
- 14 f. Any other information requested by the Director to determine whether Pueblo Del Sol  
15 continues to meet all the requirements necessary to maintain this designation of  
16 adequate water supply.

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

19 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 201\_\_.

20 \_\_\_\_\_  
21 Sandra A. Fabritz-Whitney  
22 Director  
23 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

DRAFT