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**INTRODUCTION**

The issue on appeal is the Arizona Department of Water Resources’ (“ADWR” or the “Department”) Draft Decision and Order affirming in part, and denying in part, the City of Prescott’s application to modify its designation of assured water supply.

Prescott is authorized to import from the Big Chino Sub-basin into the Prescott Active Management Area up to 14,000 acre feet of water per year (“AFY”). See A.R.S. § 45-555(E). Prescott requested that 9,575.7 AFY of imported groundwater be added to its existing assured water supply designation. The assured water supply requirements are found at A.R.S. § 45-576 and A.A.C. R12-15-701 *et seq.* Water that does not meet the requirements to be imported under A.R.S. § 45-555(E), necessarily will not meet the assured water supply requirements. Prescott was required to show that any water it is authorized to import also meets the assured water supply requirements.

Prescott requested approval for: (1) 7,127 AFY to replace its Central Arizona Project (“CAP”) allocation; (2) 500 AFY to replace the Yavapai-Prescott Indian Tribe’s (the “Tribe”) CAP allocation; (3) 950.7 AFY for Type 2 water rights held in trust to secure Prescott’s obligations to the Tribe; (4) 231 AFY for water that Prescott will

1 deliver to the Tribe; (5) 643 AFY, which is the amount that the Tribe may divert from  
2 Granite Creek; and (6) a request for 124 AFY that Prescott has since withdrawn.

3 ADWR received Objections, to which Prescott responded. After considering the  
4 Objections filed by residents of the Prescott Active Management Area and Prescott's  
5 responses, ADWR determined that Prescott was entitled to import a total of 8,067.4  
6 AFY, and that all of that water meets the assured water supply requirements.

7 Prescott and others filed Notices of Appeal. The Office of Administrative  
8 Hearings conducted an evidentiary hearing in which ADWR, Prescott, and 16  
9 Appellants participated. The electronic case file, including all exhibits, can be accessed  
10 at <https://portal.azoah.com/oedf/documents/08A-AWS001-DWR/>.

11 The Administrative Law Judge ("ALJ") recommends that ADWR's determination  
12 be modified by increasing to 8,567.4 AFY the amount of water that meets the assured  
13 water supply requirements. This additional 500 AFY is replacement water for the  
14 Tribe's CAP allocation that the ALJ finds was improperly excluded by ADWR.

### 15 **FINDINGS OF FACT**

#### 16 **PROCEDURAL BACKGROUND**

17 1. On January 2, 2009, ADWR issued a Notice of Hearing setting this matter for  
18 hearing by the Office of Administrative Hearings ("OAH"), an independent state agency.

19 2. The matter involves appeals of ADWR's November 12, 2008 Draft Decision and  
20 Order that modifies the City of Prescott's designation of assured water supply. See  
21 Exhibits ADWR 132 (Decision Letter) and 132A (Draft Decision and Order).

22 3. The Notice of Hearing provided that there were "over 25 issues on appeal,  
23 which can be grouped generally into ... 10 categories..." The Notice then provided 10  
24 issue statements that were intended to encompass all issues on appeal:

25 Issue 1 – Whether the water proposed to be imported into the Prescott  
26 Active Management Area pursuant to A.R.S. § 45-555(E) will be  
27 physically, legally and continuously available for 100 years;

28 Issue 2 – Whether the proposed transportation of water by the City of  
29 Prescott complies with the requirements of A.R.S. § 45-555(E);  
30

1 Issue 3 – Whether the City of Prescott demonstrated the financial  
2 capability to construct the water facilities required to transport water  
3 pursuant to A.R.S. § 45-555(E);

4 Issue 4 – Whether the Decision and Order properly calculates the  
5 quantity of water proposed to be transported pursuant to A.R.S. § 45-  
6 555(E) for assured water supply purposes;

7 Issue 5 – Whether the Decision and Order properly calculates  
8 projected effluent long-term storage credits;

9 Issue 6 – Whether the Decision and Order properly recites the City of  
10 Prescott’s contractual obligation to deliver water to the Chino Valley  
11 Irrigation District [“CVID”];

12 Issue 7 – Whether the Decision and Order should be clarified  
13 regarding the recovery of surface water;

14 Issue 8 – Whether the Decision and Order should be bifurcated;

15 Issue 9 – Whether the Decision and Order is required to consider the  
16 purported impacts on the Verde River by the proposed transportation of  
17 water pursuant to A.R.S. § 45-555(E); and

18 Issue 10 – Whether the Decision and Order is required to consider the  
19 constitutionality of A.R.S. § 45-555(E).

20 4. The hearing was conducted in Prescott, Arizona and held on February 9, 10  
21 and 11, April 13, 14 and 15, and June 15 and 16, 2009.

22 5. In addition to ADWR and Appellant Prescott, 16 other Appellants participated in  
23 the hearing. These 16 Appellants presented their cases as two groups commonly  
24 referred to as: (1) the “CBD Appellants” or “the Center;”<sup>1</sup> and (2) the “Beverly  
25 Appellants” or the “BAK Appellants.”<sup>2</sup> The CBD Appellants joined in all the Beverly  
26 Appellants’ arguments and made several additional arguments of their own.

27 Collectively, these two groups are referred to as the “Appellants.”

28 \_\_\_\_\_  
29 <sup>1</sup> Appellants Center for Biological Diversity, Sierra Club-Grand Canyon Chapter, Doris Cellarius, Audrey Clark,  
30 Edith A. Dillon, Thomas L. Fleischner, Santiago F. Galvis, Leslie K. Hoy, Harry M. Hollack, Charles A. Johnson,  
Jo Ann Johnson, Joanne Oellers, and Chris Rigby

<sup>2</sup> Appellants Gary Beverly, Tom Atkins, and Anthony J. Krzysik

1 6. During the hearing, ADWR agreed to changes proposed by Prescott that  
2 resolve Issue 5. Prescott withdrew its appeals concerning Issues 7 and 8.

3 7. In August, Prescott and ADWR filed a stipulation resolving Issue 6. See  
4 “Arizona Department of Water Resources and City of Prescott Stipulation on Prescott  
5 Issues Concerning Effluent and CVID Obligations” filed August 14, 2009 (with redline  
6 version of Draft Decision and Order). None of the other Appellants filed any objection to  
7 the redlined Draft Decision and Order.

8 8. In an Order dated January 29, 2009, the ALJ granted ADWR’s “Motion to  
9 Dismiss Constitutional Issues Raised by Appellants.” Consequently, no evidence was  
10 taken on Issue 10 regarding the constitutionality of A.R.S. § 45-555(E).

11 9. Issues 1, 2, 3, 4, and 9 are all related to Prescott’s request to amend its assured  
12 water supply designation by adding groundwater to be imported from the Big Chino  
13 Sub-basin.

14 **PRESCOTT’S APPLICATION**

15 10. Prescott is located in an Active Management Area (“AMA”).<sup>3</sup> Consequently,  
16 Prescott must show that it has a 100-year assured water supply (“AWS”) before it can  
17 subdivide land for development.

18 11. Prescott is eligible for a Designation of AWS (“DAWS”) to show that it has a  
19 100-year AWS. See A.R.S. § 45-576.

20 12. Prescott has a DAWS that was last modified in 2005 (the “2005 DAWS”). See  
21 Exhibit ADWR 145. The 2005 DAWS designates Prescott as having an assured water  
22 supply through 2014.

23 13. On October 11, 2007, Prescott filed the current application for modification of its  
24 DAWS (“Application”). Prescott requested that its DAWS be amended by: (1) adding  
25 groundwater to be imported from the Big Chino Sub-basin pursuant to A.R.S. § 45-  
26 555(E); and (2) increasing the amount of effluent. During its review of the Application,  
27 ADWR requested additional information that was provided by Prescott. See Exhibits  
28 ADWR 1 (Application cover letter), ADWR 2 (Application), ADWR 2A through ADWR

29 \_\_\_\_\_  
30 <sup>3</sup> The exhibits contain numerous maps and diagrams. See e.g., Exhibit ADWR 133 at pp. 12 – 27 (maps and diagrams).

1 2M (attachments); see also Exhibits ADWR 3 through ADWR 172 (the remainder of  
2 ADWR's administrative record).

3 14. Prescott is authorized to withdraw and transport a maximum of 14,000 AFY from  
4 the Big Chino Sub-basin to the Prescott AMA.<sup>4</sup> See A.R.S. § 45-555(E). Prescott owns  
5 land, commonly referred to as the Big Chino Water Ranch, in the Big Chino Valley.  
6 Prescott has started building the infrastructure required to pump groundwater from the  
7 Big Chino Water Ranch and transport it through a pipeline to its service area.

8 15. In its Application, Prescott requested that 9,575.7<sup>5</sup> AFY of Big Chino  
9 groundwater be added to its DAWS. During the hearing, Prescott withdrew part of its  
10 request and now requests 9,451.7 AFY. Appellants assert that Prescott is likely not  
11 entitled to any Big Chino groundwater and, at most, Prescott is entitled to 2,400.26  
12 AFY.

13 16. In 2004, Prescott entered an intergovernmental agreement ("IGA") with the  
14 Town of Prescott Valley under which Prescott Valley will pay for 45.9% of the project  
15 and will receive the same percentage of water. The Draft Decision and Order shows  
16 that beginning in 2027, Prescott Valley will receive 3,597 AFY.

17 17. Prescott Valley is not within Prescott's service area. The Draft Decision and  
18 Order shows that the water for Prescott Valley is a projected demand for Prescott,  
19 which means that Prescott cannot use this 3,597 AFY for its own growth. Before  
20 Prescott Valley will be allowed to subdivide using this water, it must apply for and  
21 receive its own AWS approval.

22 18. Prescott's Application is the first one that ADWR has received in which the  
23 applicant is requesting approval for water from outside an AMA to be transported into  
24 an AMA.

## 25 **ADWR's PROCESSING OF THE APPLICATION**

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<sup>4</sup> An acre foot is 43,560 cubic feet, which is the volume of water that would cover 1 acre to the depth of 1 foot and  
29 is approximately 325,851 gallons.

30 <sup>5</sup> The Application shows that Prescott is requesting 957,060 acre feet over 100 years. But Prescott made 6 separate  
requests that total 9,575.7 AFY.

1 19. As required by statute, ADWR provided public notice that the Application was  
2 pending and provided the residents of the Prescott AMA an opportunity to object to the  
3 Application.

4 20. ADWR received 52 Objections, of which 42 were determined to be from  
5 residents of the Prescott AMA. Based on A.R.S. § 45-578(B), ADWR did not consider  
6 the substance of Objections filed by non-residents; however, many of the Objections  
7 from non-residents were duplicative of valid Objections.

8 21. ADWR provided the Objections to Prescott and Prescott filed Responses. See  
9 Exhibit ADWR 105 (Prescott's Response to Objections) and at p. 27 (table  
10 summarizing the Objections).

11 22. ADWR determined that Prescott met all the requirements for an AWS and  
12 issued the Decision Letter and the Draft Decision and Order. ADWR did not, however,  
13 approve the entire volume of water for which Prescott requested an amended DAWS.  
14 ADWR's Assistant Director of Water Management, Ms. Sandy Fabritz-Whitney, signed  
15 the Decision Letter on behalf of ADWR.

16 23. The Decision Letter provides ADWR's responses to the valid Objections. The  
17 Draft Decision and Order will remain a Draft until all appeals of the Decision and Order  
18 are final.

19 24. In the Draft Decision and Order, ADWR designated Prescott as having an AWS  
20 of 16,161.08 AFY through 2021,<sup>6</sup> which does not include any groundwater imported  
21 from the Big Chino. See Exhibit ADWR 132A at p. 7.

22 25. In the Draft Decision and Order, ADWR designated Prescott as having an AWS  
23 of 24,496.06 AFY<sup>7</sup> through 2027, which includes 8,067.4 AFY of groundwater from the  
24 Big Chino. See Exhibit ADWR132A at pp. 5 and 8, and at Attachment C.

25 26. The Draft Decision and Order conditions the approval of the 8,067.4 AFY of Big  
26 Chino groundwater on a requirement that, on or before December 31, 2019, Prescott  
27 submit to ADWR an approval of construction ("AOC") for the pipeline required to  
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29 \_\_\_\_\_  
30 <sup>6</sup> Based on the stipulation between Prescott and ADWR, this is changed to 16,507.44 AFY in 2023.

<sup>7</sup> Based on the stipulation between Prescott and ADWR, this is changed to 24,574.84 AFY.

1 transport the water. The Arizona Department of Environmental Quality (“ADEQ”) is  
2 responsible for issuing the AOC. See Exhibit ADWR132A at p. 6.

3 27. Ms. Fabritz-Whitney’s opinion is that ADWR followed the rules in processing  
4 Prescott’s Application and that the Application met the applicable law and rules, both  
5 literally and in spirit. Ms. Fabritz-Whitney testified that she was required to sign the  
6 Decision Letter because Prescott meets the applicable requirements.

7 28. Ms. Fabritz-Whitney relied on the advice and opinions of people from ADWR’s  
8 legal and hydrology divisions and the Office of Assured Water Supply.<sup>8</sup> With respect to  
9 the hydrology, Ms. Fabritz-Whitney relied exclusively on the hydrology division and  
10 testified that she does not have the expertise to make any independent findings related  
11 to hydrology.

12 29. Mr. Frank Corkhill, ADWR’s Chief Hydrologist, testified as to the hydrology  
13 division’s conclusion that Prescott demonstrated that it meets the required physical  
14 availability demonstration. See A.A.C R12-15-716.

### 15 **THE 2006 REVISION OF THE AWS RULES**

16 30. The AWS rules were adopted in 1995 and were revised in a process that began  
17 in 2005 and ended in 2006. Over the course of 18 months ADWR held public meetings  
18 and it received and responded to written comments from the regulated community. Ms.  
19 Fabritz-Whitney testified that no one was excluded from this process.

20 31. The Governor’s Regulatory Review Council approved the changes to the AWS  
21 rules.

22 32. The rules were revised in an effort to increase efficiency and to make the rules  
23 easier to read. Ms. Fabritz-Whitney’s opinion is that there were no substantive changes  
24 made to the AWS rules in 2005-06.

25 33. During the 2005-06 rule-making process, no stakeholder raised the issue of  
26 climate change or asked ADWR to change the rules to add a requirement that climate  
27 change be considered as part of the AWS process.

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29 \_\_\_\_\_  
30 <sup>8</sup> ADWR asserts that attorney-client privilege exists for any legal conclusions not expressed in the Decision Letter or Draft Decision and Order.

34. During the 2005-06 rule-making process, no stakeholder requested any changes to the rules relating to a city's ability to show that it has the financial capability to complete a project.

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1 **DIRECTOR GUENTHER'S REPORTED CONCERNS**

2 35. Reports show that ADWR's Director, Herb Guenther, has publically expressed  
3 concerns about the long-term effects of Prescott's proposed pumping from the Big  
4 Chino. See e.g., Exhibits ADWR 78N and ADWR 78L.

5 36. Ms. Fabritz-Whitney was aware of these reports about Director Guenther's  
6 opinion and she testified that she had heard Director Guenther say that he does not  
7 believe that pumping from the Big Chino is a long-term solution for Prescott.

8 37. Ms. Fabritz-Whitney did not consider Director Guenther's opinions during her  
9 review of the Application because her job duties require that her decision be based on  
10 the laws and rules.

11 38. As part of ADWR's process for the hearing in this matter, a "wall" was put in  
12 place, with Director Guenther and staff on one side, and Ms. Fabritz-Whitney and the  
13 staff members who are working on the hearing on the other side. Ms. Fabritz-Whitney's  
14 recollection was that the wall went up the day she signed the Decision Letter.

15 **OTHER WORK ON THE BIG CHINO BY ADWR**

16 39. As part of ADWR's work independent of Prescott's Application, ADWR staff  
17 members have had discussions about Yavapai County and the Big Chino area. Exhibit  
18 BAK 684 is a memorandum dated April 16, 2008 that summarizes some of ADWR's  
19 opinions about the Big Chino based on discussions within ADWR.<sup>9</sup>

20 40. The memorandum provided several options for dealing with water issues in the  
21 region; creation of an AMA in the Big Chino was the recommended option.

22 41. Ms. Fabritz-Whitney testified that if a Big Chino AMA is created, Prescott's  
23 rights to pump from the Big Chino Sub-basin will be factored in. Consequently, if a Big  
24 Chino AMA is created after the Draft Decision and Order became final, the new AMA  
25 would not affect Prescott's amended DAWS.

26 42. Ms. Fabritz-Whitney believed that ADWR had other meetings related to the Big  
27 Chino and may have produced other documents about issues in the region. Work  
28 stopped because ADWR's workload did not allow for further consideration of the

29 \_\_\_\_\_  
30 <sup>9</sup> BAK 684's author appears to be unknown and the author's name is not on the record in the instant matter. There does not appear to be any dispute that the memo represents the opinions of ADWR's staff.

1 matter, in part because resources had to be devoted to the Application and the related  
2 hearing process.

3 43. The “wall” prohibits Ms. Fabritz-Whitney and Mr. Corkhill from discussing the  
4 issues with Director Guenther, which also limited ADWR’s ability to further consider the  
5 matter.

6 **THE BIG CHINO SUB-BASIN**

7 44. The Big Chino Sub-basin is in the Verde River watershed, which is itself a part  
8 of the Gila River watershed. The Gila River General Stream Adjudication (“GSA”),  
9 which is pending in superior court, is a proceeding under which the nature, extent, and  
10 relative priority of surface-water rights and federal-reserved-water rights in the  
11 watershed will be determined.

12 45. The Big Chino Sub-basin is about 35 miles north of Prescott and is made up of  
13 Williamson Valley and Big Chino Valley. It is about 20 miles from the southern end of  
14 the Big Chino Water Ranch to the Verde River Springs that are considered to be the  
15 headwaters of the Verde River.<sup>10</sup>

16 46. The Big Chino Water Ranch is adjacent to the Big Chino Wash, which runs  
17 through the Big Chino Valley. The groundwater table is below the Wash’s bottom at all  
18 locations, meaning that the Big Chino Wash is ephemeral. Ephemeral washes and  
19 streams flow only in response to precipitation.

20 47. Prescott’s consultant, Southwest Ground-water Consultants (“Southwest”),  
21 under the direction of William Greenslade, P.E., R.G., prepared a report entitled  
22 “Hydrology Report, Big Chino Water Ranch” that includes information related to a  
23 groundwater model prepared by Southwest. Southwest prepared two supplements to  
24 that report in response to ADWR’s requests for more information and changes to  
25 Southwest’s groundwater model. All three were submitted to ADWR in support of the  
26 Application, and are referred to collectively as “Southwest’s Report”.  
27  
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29 <sup>10</sup> At various times these were referred to as the Verde River Springs, the headwater Springs, the Verde River  
30 headwater Springs, or just the Springs. There is different set of springs, Del Rio Springs that was also the subject  
of some testimony.

1 48. Southwest considers the aquifer as consisting of 3 parts: the upper Big Chino,  
2 the Williamson Valley, and a southern area near the Town of Paulden.

3 49. The upper Big Chino groundwater basin is a graben (*i.e.*, a down fault); on the  
4 east is Big Chino fault and on the west is an unnamed fault. The basin is filled with  
5 alluvium and the bottom is limestone or carbonate.

6 50. There are 5 major lithologic units in the aquifer beneath the Big Chino Water  
7 Ranch area: clay and sandy clay; moderately cemented sand; basalt; alluvium; and  
8 carbonate (surmised). The alluvium and basalt portions of the Big Chino Aquifer are  
9 considered by Southwest to be the major aquifer in the Big Chino Sub-basin.

10 51. Based on pumping tests in the upper Big Chino Aquifer, Southwest estimates  
11 that the transmissivity is between 6,500 and 345,000 gallons per day per foot.

12 52. The depth to water near the Big Chino Wash is about 50 feet below ground  
13 surface ("bgs"); in other areas of the Big Chino Water Ranch, the depth is about 105  
14 feet bgs. The total basin depth ranges from about 1,600 feet to about 1,200 feet.

15 53. The static water level in the area of the Big Chino Water Ranch is about 4,506  
16 feet above mean sea level; the Verde River Springs are at about 4,230 feet above  
17 mean sea level.

18 54. Southwest calculated that there is about 6.8 million acre feet ("MAF") of  
19 groundwater in the upper Big Chino Aquifer. Although Southwest did not do any  
20 calculations on the rest of the Big Chino Sub-basin, Mr. Greenslade estimated that  
21 there is about 13.6 MAF in the rest of the Sub-basin.

22 55. South of the Big Chino Water Ranch (near the southern boundary of  
23 Southwest's model) there is an area sometimes referred to as "the narrows" that causes  
24 a restriction in groundwater flow. The narrows is formed in part by a fine-grained playa  
25 that has low permeability, meaning that water flows through it slowly. The playa  
26 extends from about 100 feet bgs to about 1,500 to 1,700 feet bgs. There is a  
27 groundwater mound at the narrows that extends back to the Big Chino Water Ranch.  
28 See Exhibit Prescott 509 at pp. 4 – 5.  
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1 56. Southwest's Report shows that most of the groundwater from the upper Big  
2 Chino Sub-basin must either move southwestward in the basin fill (around the playa) or  
3 move down into the limestone beneath the playa.

4 57. Exhibit ADWR 133 at Figure 7 is a groundwater elevation contour map;  
5 groundwater flow is perpendicular to the contour lines.

6 58. Since about 1940, between 500 and 2,500 acres of land near the Big Chino  
7 Water Ranch have been irrigated. Mr. John Munderloh, Prescott's witness, estimated  
8 that there were about 6,500 AFY pumped to supply this irrigated land.

9 59. The Big Chino Water Ranch includes about 1,100 acres of historically irrigated  
10 land that Prescott plans to retire from agriculture, which would eliminate about 3,000  
11 AFY of existing pumping. Some of the water pumped for agriculture would have  
12 recharged to the basin, whereas none of the water transported to Prescott will.

### 13 **THE VERDE RIVER**

14 60. The Verde River Springs are a series of 3 or 4 springs within about a mile of  
15 each other, located about 2 to 3 river-miles downstream from Sullivan Lake. Sullivan  
16 Lake is river-mile 0.

17 61. Perennial flow in the Verde River starts about where Granite Creek enters the  
18 River, which is about ½-mile upstream of the Verde River Springs.

19 62. There is no gage at the Verde River Springs, so flow rates must be estimated. A  
20 United States Geologic Survey ("USGS") report by Ms. Laurie Wirt estimated the flow  
21 to be about 20 cubic feet per second ("cfs"). See Exhibit BAK 336 (Wirt 2000).

22 63. The first gage on the Verde River is the Paulden gage, located at the divide  
23 between the Big Chino Sub-basin and the Verde River Watershed Sub-basin.<sup>11</sup> See  
24 Exhibit ADWR 133 at p. 17 (figure showing gage locations). The Paulden gage is at  
25 river-mile 10.

26 64. Baseflow in the Verde River increases moving downstream from the Verde  
27 River Springs. The average baseflow at the Paulden gage is about 17,900 AFY, at the  
28 Camp Verde gage it is about 144,000 AFY, and at Tangle Creek it is estimated at about  
29 188,000 AFY. Sources of the increased baseflow between the first two gages include:  
30

1 the springs at Mormon Pocket and Sycamore Creek; under flow to river; Oak Creek;  
2 Wet Beaver Creek; and Clear Creek.

3 65. Southwest's Report shows that the baseflow at the Verde River Springs  
4 includes water from the Big Chino Sub-basin, the Little Chino Aquifer, and the  
5 carbonate or limestone aquifers. Other reports show that there is also inflow from the  
6 Big Black Mesa.

7 66. There is strong agreement among the experts that groundwater from the Big  
8 Chino Sub-basin discharges to the Verde River Springs. Estimates are that from 50 to  
9 86% of the Verde River Springs originates in the Big Chino Sub-basin, with 80 to 86%  
10 being a commonly accepted value.<sup>12</sup>

### 11 **THE YAVAPAI-PRESCOTT INDIAN TRIBE SETTLEMENT**

12 67. In 1994, Prescott, the Yavapai-Prescott Indian Tribe (the "Tribe"), the State of  
13 Arizona, the United States, and CVID entered into the Yavapai-Prescott Indian Tribe  
14 Water Rights Settlement Agreement that was subsequently approved through federal  
15 legislation. See Exhibits Prescott 502 (the "Settlement Agreement") and Prescott 504  
16 (the federal legislation). Prescott and the Tribe also entered a related Water Services  
17 Agreement. See Exhibit Prescott 503.

18 68. Under these agreements: (1) Prescott agreed to provide the Tribe water in  
19 perpetuity with no upper limit on the volume; (2) Prescott agreed to provide the Tribe  
20 with first priority to 550 AFY (*i.e.*, this 550 AFY is senior to Prescott's own uses); (3)

---

21 <sup>11</sup> The Paulden gage is not located near the town of Paulden.

22 <sup>12</sup> Two USGS Open File Reports ("OFR") prepared by Ms. Wirt (with various other authors) appear to be the  
23 primary basis for the 80 to 86% figure. See Exhibits BAK 336 (Wirt 2000 USGS OFR 99-0378) and BAK 360  
(Wirt 2005 USG OFR 2004-1411).

24 In OFR 2004-1411, Ms. Wirt used an inverse-chemistry model to estimate the percentage of the Verde  
25 River Spring flow that comes from various aquifers. Mr. Ed McGavock, Prescott's witness, provided persuasive,  
26 un rebutted testimony that Ms. Wirt's model has several flaws, including using samples that had anomalously high  
27 values of silicon and sampling only one of the Verde River Springs. Mr. McGavock also criticized the model  
28 because the value for the contribution from Little Chino Sub-basin was assigned, not calculated. In Mr.  
29 McGavock's opinion, this flaw is compounded by the fact that the Little Chino Sub-basin is silicon rich. Despite  
30 Mr. McGavock's criticisms of Ms. Wirt's model, he agrees that about 50% of the flow at the Verde River Springs  
could come from the Big Chino Sub-basin.

Mr. McGavock testified as to his belief that Ms. Wirt used data selectively to reach a desired outcome. Ms.  
Wirt has passed away and is unable to defend her integrity. Mr. Hjalmar Hjalmarson, who worked with Ms. Wirt,  
testified as to his opinion that Ms. Wirt would not engage in such behavior. The ALJ makes no findings as to why

1 Prescott agreed to treat and return the Tribe's effluent; and (4) Prescott acknowledged  
2 that the Tribe also has a right to 643 AFY from Granite Creek.

3 69. As security for its performance under the Water Services Agreement, Prescott  
4 agreed to hold in trust 3,169 acre feet of Type 2 Grandfathered Groundwater Rights. If  
5 Prescott breaches certain of its obligations to the Tribe, at the Tribe's option, the Type  
6 2 rights must be conveyed to the Tribe. See Exhibit Prescott 503 at pp. 30 – 31.

7 70. Prescott now provides the Tribe with 226 AFY, but that is expected to rise to  
8 231 AFY by 2027. Prescott treats the Tribe's effluent, but the Tribe is not exercising its  
9 right to have the treated effluent returned to it.

10 71. As part of the Settlement Agreement and related federal legislation, Prescott  
11 and the Tribe sold their CAP allocations of 7,127 AFY and 500 AFY, respectively, to  
12 the City of Scottsdale.

13 72. The Settlement Agreement and federal legislation limit the Tribe's use of the  
14 money it received from the sale of its CAP allocation to defraying costs associated with  
15 the Water Services Agreement or to developing water related infrastructure on the  
16 Reservation.

17 73. The Settlement Agreement and federal legislation provide that Prescott's CAP-  
18 replacement water cannot be inconsistent with the Prescott AMA goals or the  
19 preservation of the riparian habitat, biota and flows of the Verde River.

20 74. Prescott received about \$3.4 million from the sale of its CAP water (after  
21 expenses, operations and maintenance were deducted). The Settlement Agreement  
22 and federal legislation limit Prescott's use of this \$3.4 million to defraying expenses  
23 associated with the investigation, acquisition, or development of alternate sources of  
24 water to replace the relinquished CAP water.

25 75. This \$3.4 million was administered by the Federal Bureau of Reclamation, the  
26 State, and by Prescott. In 2008 the Bureau of Reclamation conducted an audit and  
27 determined that the money had been properly spent.

28 **PRESCOTT'S PURCHASE FROM THE CVID**

29  
30 the model may have deficiencies, and concludes only that Mr. McGavock has raised a valid issue related to the  
reliability of the model.

1 76. Prescott paid CVID about \$21 million to purchase Watson Lake, Willow Lake,  
2 and surface water rights from Granite Creek. See Exhibit 505 (the IGA).

3 77. Watson Lake and Willow Lake have a combined maximum storage of 10,580  
4 acre feet. The maximum allowable surface water diversion from Granite Creek is  
5 4,826.26 AFY.

6 78. In conjunction with Prescott's 2005 DAWS, ADWR determined that the median  
7 flow of Granite Creek is 2,034 AFY. ADWR determined that the Tribe was entitled to  
8 643 AFY of the flow, which leaves Prescott with 1,391 AFY that ADWR included in the  
9 2005 DAWS.

10 79. While processing the Application, ADWR requested that Prescott provide more  
11 information about how the \$3.4 million from the sale of its CAP water was spent.

12 80. Prescott deposited the \$3.4 million into its existing alternative water fund, which  
13 is a sub-fund of its water enterprise fund. The primary source of revenue for the  
14 alternative water fund is a monthly fee on Prescott's water customers.

15 81. Money from the alternative water fund was used to make the purchase from  
16 CVID. Mr. Mark Woodfill, Prescott's chief financial officer, testified that Prescott did not  
17 determine the original source of money when expenditures were made from the  
18 alternative water fund because all the money in that fund was being used for the same  
19 purpose.

20 82. ADWR followed a "last in – first out" approach under which it considered the  
21 first money spent after the \$3.4 million was deposited was from the \$3.4 million (*i.e.*, the  
22 first money spent was considered to be from the sale of the CAP water).

23 83. Using the "last in – first out" accounting method as requested by ADWR, Mr.  
24 Woodfill determined that the CAP money (plus accrued interest) paid for 17.35% of  
25 Prescott's purchase from CVID. See Exhibit ADWR 27 at p. 3.

26 **COMPLIANCE WITH A.R.S. § 45-555(E)**

27 84. Arizona law generally prohibits groundwater that is withdrawn from outside an  
28 AMA to be transported into an AMA. See A.R.S. § 45-551.

29 85. This prohibition does not apply to the withdrawal and transportation by Prescott  
30 of up to 14,000 AFY of groundwater from the Big Chino Sub-basin if the groundwater is

1 withdrawn and transported either: (1) in exchange for or replacement or substitution of  
2 supplies of water from the CAP allocated to Indian tribes, cities, towns or private water  
3 companies in the Prescott AMA; or (2) for the purpose of directly or indirectly facilitating  
4 the settlement of the water rights claims of the Tribe. See A.R.S. § 45-555(E).

5 86. Based on A.R.S. § 45-555(E), Prescott's Application requested that 9,575.7  
6 AFY of groundwater to be imported from the Big Chino Sub-basin be added to its  
7 DAWS.

8 87. Under subsection (E)(1) Prescott requested:

- 9 a. 7,127 AFY – to replace the CAP allocation it sold to Scottsdale; and
- 10 b. 500 AFY – to replace the CAP allocation the Tribe sold to Scottsdale.

11 88. Under subsection (E)(2), Prescott requested:

- 12 a. 950.7 AFY – to replace Prescott's Type 2 water rights that Prescott  
13 pledged as security to the Tribe;
- 14 b. 231 AFY – the volume of water that Prescott anticipates will be delivered  
15 to the Tribe in 2027;
- 16 c. 643 AFY – the volume of the Tribe's right to surface water flow from  
17 Granite Creek; and
- 18 d. 124 AFY – the volume of effluent produced by the current delivery of 226  
19 AFY to the Tribe. Prescott has now withdrawn its request for this 124  
20 AFY.

21 Prescott asserts that the CAP water also qualifies under this subsection (E)(2) because  
22 the CAP relinquishments were part of the Settlement Agreement.

23 89. In its Draft Decision and Order, ADWR determined that Prescott is allowed to  
24 import 6,885.7 AFY under subsection (E)(1) and 1,181.7 AFY under subsection (E)(2).  
25 See Exhibits ADWR 132 and 132A at Attachment C.

26 90. Appellants assert that Prescott is likely entitled to no replacement water and, at  
27 most, Prescott it is entitled only to 2,300.74 AFY.

28 **A.R.S. § 45-555(E)(1) CAP Water**

29 Prescott's CAP Allocation – 7,127 AFY

1 91. ADWR determined that Prescott is entitled to transport groundwater from the  
2 Big Chino Sub-basin to replace its CAP allocation only to the extent that Prescott has  
3 not already replaced that CAP water.

4 92. ADWR considers only water that Prescott can use for AWS purposes to be  
5 replacement water because 100% of the CAP water would have met the AWS  
6 requirements.

7 93. In the 2005 DAWS, ADWR determined that 1,391 AFY of the Granite Creek  
8 water met the AWS requirements.

9 94. Because the CAP-sale proceeds purchased only 17.35% of the Granite Creek  
10 water, ADWR determined that Prescott replaced 241.3 AFY of its CAP allocation with  
11 Granite Creek surface water (17.35% of 1,391).

12 95. Deducting 241.3 AFY from 7,127 AFY leaves 6,885.7 AFY, which is the volume  
13 of groundwater that ADWR found Prescott is allowed to import under subsection (E)(1)  
14 as a replacement for its CAP allocation.

15 96. Prescott agrees that, under ADWR's method, the \$3.4 million did pay for  
16 17.35% of the CVID purchase. But Prescott argues that, as a matter of law, there are  
17 no exclusions or offsets in A.R.S. § 45-555(E)(1) and the water it bought from CVID  
18 should not count as replacement water.

19 97. Prescott presents no accounting method to show how the \$3.4 million was  
20 spent. There is no substantial evidence showing that the \$3.4 million was actually used  
21 to pay for anything other than CAP replacement water.

22 98. Mr. Craig Sommers is the president of ERO Resources and is an economist,  
23 scientist and consultant in land, water and environmental issues.

24 99. On behalf of the Beverly Appellants, Mr. Sommers testified as to his opinion that  
25 all the water Prescott bought from CVID should count as replacement water because  
26 Prescott used money from the CAP sale in that purchase.

27 100. Mr. Sommers is also of the opinion that the water that Prescott Valley will be  
28 receiving is not eligible for replacement purposes. According to Mr. Sommers, because  
29 this is water that Prescott is obligated to send to Prescott Valley under the 2004 IGA, it  
30 is not replacing Prescott's CAP water.

1 101. A more reasonable interpretation of the facts is that Prescott is replacing its  
2 CAP water and is providing 45.9% of that replacement water to Prescott Valley in  
3 exchange for Prescott Valley's financial participation in the project.

4 The Tribe's CAP Allocation – 500 AFY

5 102. In its Draft Decision and Order, ADWR found that Prescott was not entitled to  
6 replace the Tribe's 500 AFY because the statute allows replacement for the "CAP  
7 supply of an entity listed in [subsection (E)(1)] and there is no agreement between  
8 Prescott and the Tribe for Prescott to replace the Tribe's CAP allocation in the AMA."  
9 See Exhibit ADWR 132 at page 11.

10 103. Prescott asserts that under a plain reading of subsection (E)(1) it is entitled to  
11 replace any CAP allocation that has been relinquished and that ADWR's denial is  
12 based on a limitation that is not present in the statute.

13 104. Prescott asserts that the Tribe's 500 AFY of CAP water is now lost to the  
14 Prescott AMA and that Prescott undertook to send "wet" water to the Tribe in lieu of  
15 "paper" water based on the understanding that Prescott was entitled to replace the 500  
16 acre feet. Prescott asserts that the testimony of Mr. James Holt and Mr. Robert Ogo  
17 supports its position.

18 105. Mr. Holt is Prescott's water resources manager. His testimony was limited to an  
19 opinion that Prescott is entitled to replace the Tribe's CAP water.

20 106. Mr. Ogo is vice-president of the Yavapai-Prescott Indian Tribe and has been for  
21 15 years. Mr. Ogo was the Tribe's representative during the negotiations that led to the  
22 Settlement Agreement.

23 107. Mr. Ogo testified that there was an understanding that Prescott would be able to  
24 replace the Tribe's CAP water and that the Tribe would receive "wet" water from  
25 Prescott to replace its "paper" CAP water. But Mr. Ogo's testimony on this point is not  
26 persuasive because the testimony was not sufficient to establish that there was an  
27 understanding that Prescott would get water to replace the Tribe's CAP water, as  
28 opposed to an understanding that the Tribe would get "wet" water.

29 108. Mr. Sommers' opinion is that the Tribe's CAP water was not replaced because  
30 the Tribe spent its sale-proceeds to build infrastructure. This opinion does not speak to

1 the question of whether the statute allows Prescott to replace the Tribe's CAP water  
2 now. This interpretation also adds a limitation that is not present in the statute.

3 109. As another basis on which it is entitled to replace the Tribe's CAP allocation,  
4 Prescott asserts that it lost the chance to lease the CAP water from the Tribe. ADWR  
5 does not agree because there was no evidence that Prescott actually intended to lease  
6 the CAP water from the Tribe.

7 **A.R.S. § 45-555(E)(2) Water to Facilitate Settlement of the Tribe's Claims**

8 Type 2 Extinguishment Credits – 950.7 AFY

9 110. To secure its obligations under the Settlement Agreement, Prescott pledged its  
10 3,169 AFY Type 2 rights that it now holds in trust. ADWR determined that in doing so,  
11 Prescott lost the right to extinguishment credits that would have qualified as part of  
12 Prescott's DAWS.

13 111. If Prescott had extinguished the Type 2 rights in 1995, Prescott would have  
14 received 950.7 AFY for 100 years for AWS purposes. See A.A.C. R12-15-726(B)(1)  
15 and Exhibit ADWR 132A at Attachment C (formula for conversion).

16 112. ADWR also determined that Prescott's pledge facilitated the Settlement  
17 Agreement and that Prescott could import 950.7 AFY under A.R.S. § 45-555(E)(2).

18 113. Mr. Sommers testified that because the Type 2 rights are not extinguished,  
19 Prescott can still use these rights.

20 114. Mr. Sommers' opinion is that Prescott should receive credit only for the actual  
21 deliveries it makes to the Tribe and not the maximum delivery obligation.

22 115. Mr. Sommers' opinion is that ADWR "double counted" this water based on his  
23 view that during any shortage, the Type 2 water will be delivered in place of the 231  
24 AFY. But this opinion does not account for the fact that the Type 2 rights are pledged to  
25 secure all of Prescott's obligations to the Tribe, which, in addition to providing the Tribe  
26 with first priority, include providing minimum flow rates and pressures.

27 Prescott's Water Service to the Tribe – 231 AFY

28 116. Under the Water Services Agreement, Prescott agreed, among other things (1)  
29 to provide water to the Tribe in perpetuity, and (2) that the Tribe would have first priority  
30 to 550 AFY.

1 117. ADWR determined that these commitments facilitated the settlement, even  
2 though there was an existing agreement between Prescott and the Tribe.

3 118. The anticipated delivery obligation for 2027 is 231 AFY, which is the volume  
4 ADWR determined meets subsection (E)(2).

5 119. Mr. Sommers' opinion is that there were not enough new obligations to  
6 conclude that these delivery obligations actually did facilitate settlement, so these  
7 obligations do not qualify under A.R.S. § 45-555(E)(2).

8 120. Mr. Ogo testified that the Settlement Agreement provided the Tribe with  
9 important benefits, including securing "wet" water in exchange for "paper" water and  
10 receiving first priority to water. Mr. Ogo negotiated the settlement for the Tribe and,  
11 consequently, his opinion carries more weight on this point than does Mr. Sommers'  
12 opinion.

13 Water from Granite Creek – 643 AFY

14 121. The Settlement Agreement provides the Tribe with a right to 643 AFY from  
15 Granite Creek, but ADWR determined that this 643 AFY came from CVID, not Prescott.  
16 Consequently, ADWR determined that this 643 AFY does not meet the requirements of  
17 A.R.S. § 45-555(E)(2).

18 122. Prescott asserts that its recognition (in the Settlement Agreement) of the Tribe's  
19 643 AFY right facilitated the settlement and does qualify for replacement under  
20 subsection (E)(2).

21 CAP Water under 45-555(E)(2)

22 123. Prescott asserts that the CAP relinquishments facilitated the settlement and,  
23 consequently, that the CAP relinquishments also qualify under subsection (E)(2).

24 **CALCULATIONS FOR AWS PURPOSES**

25 124. In its Draft Decision and Order, ADWR determined that Prescott is entitled to  
26 import from the Big Chino Sub-basin 8,067.4 AFY year. ADWR concluded that the  
27 entire 8,067.4 AFY meets the assured water supply rules.

28 125. As the facts set forth below show, Prescott has demonstrated that this 8,067.4  
29 AFY meets the requirements of the AWS rules.

1 126. Appellants assert that the 3,597 AFY that Prescott will deliver to Prescott Valley  
2 does not qualify under the assured water supply rules. But as discussed in the  
3 Conclusions of Law, ADWR's determination that this water should be included in the  
4 Draft Decision and Order was not in error.

5 127. Because ADWR determined that Prescott is not entitled to import water for the  
6 241.3 AFY of Prescott's CAP allocation that has already been replaced, ADWR did not  
7 include this volume in the Draft Decision and Order.

8 128. Because ADWR determined that Prescott is not entitled to import water based  
9 on Tribe's right to 643 AFY from Granite Creek, ADWR did not include this volume in  
10 the Draft Decision and Order.

11 129. ADWR determined Prescott's request to import the 500 AFY to replace the  
12 Tribe's CAP allocation does not meet the AWS requirements. The evidence shows that  
13 ADWR's conclusion was based solely on ADWR's determination that Prescott is not  
14 entitled to import the water under A.R.S. § 45-555(E). As set forth in the Conclusions of  
15 Law, however, this 500 AFY does meet the requirements of A.R.S. § 45-555(E).

16 130. The preponderance of the evidence shows that this 500 AFY also meets the  
17 AWS requirements.

#### 18 **SOUTHWEST'S GROUNDWATER MODEL**

19 131. Prescott hired Southwest in about 2003 at which time Southwest did a study of  
20 the CV Ranch land, which is now more commonly called Chino Grande Ranch.<sup>13</sup>

21 132. Southwest prepared a groundwater model of the CV Ranch using the using the  
22 USGS's MODFLOW program. The model Southwest developed for the CV Ranch also  
23 included the land on which the Big Chino Water Ranch is located. When Prescott  
24 bought the Big Chino Water Ranch, Southwest modified the model to move the  
25 pumping location to the Big Chino Water Ranch.

26 133. Southwest spent about 1 year working on the model for CV Ranch and then  
27 additional time to modify the model for use at Big Chino Water Ranch; Southwest ran  
28 the model multiples of 10 times, but less than 100 times.

29 \_\_\_\_\_  
30 <sup>13</sup> Chino Grande was also formerly referred to as CVCF Ranch; Chino Grande Ranch is now a proposed  
subdivision located near the Big Chino Water Ranch.

1 134. Southwest's objective in creating the model was to determine what the  
2 maximum depth to groundwater would be after 100 years of pumping by Prescott at Big  
3 Chino Water Ranch, which is required to show compliance with the physical availability  
4 rule.

5 135. The model area is a rectangle about 11.5 by 19.3 miles, with the southern  
6 boundary about 15 or 16 miles north of the Verde River Springs. See Exhibit 2J, Figure  
7 2-1 (map). Southwest chose the model area based on how "the basin works" and the  
8 model's objective of demonstrating compliance with the physical availability rule.

9 136. In choosing the model area, Southwest considered 3 main factors: (1) there  
10 were significant amounts of water-level data available for the area; (2) the area was  
11 sufficient to calculate the 100-year depth-to-groundwater because the model covers the  
12 entire alluvial aquifer and the model's boundary extends beyond the proposed well-field  
13 (6 miles to the south and 10 miles to the north); and (3) the cost and time to model a  
14 larger area were not necessary.

15 137. Southwest considered a larger area, but they lacked reliable data that could be  
16 used to test a model covering a larger area. Mr. Greenslade's opinion is that there is  
17 not enough data existing for the land between the southern boundary of Southwest's  
18 model and the Verde River to allow for an accurate numerical model to be constructed  
19 of that area.

20 138. Southwest compiled available data and drilled three borings that were used to  
21 define the extent of the playa. Southwest also had borings drilled on the Big Chino  
22 Water Ranch and, based on Prescott's direction, installed monitoring wells down-  
23 gradient from the proposed well field. All this information was used to define the  
24 hydrogeologic conditions. According to Mr. Greenslade, Prescott had the monitoring  
25 wells installed because it is concerned about what may happen in the future and has  
26 instituted a monitoring process that involves the public and Salt River Project ("SRP").

27 139. Southwest calibrated its model to known data (e.g., water levels), which resulted  
28 in the model showing that the groundwater recharge was about 13,363 AFY. This is  
29 about 2,000 AFY less than Southwest had estimated in its conceptual model.  
30

1 140. After the model was calibrated, Southwest used it to calculate the impact of  
2 pumping at 17,768 AFY for 100 years. This value (17,768) is intended to represent  
3 Prescott's maximum allowable pumping from the Big Chino Sub-basin, which includes  
4 Prescott's maximum allowable pumping of 14,000 AFY under A.R.S. § 45-555(E) plus 3  
5 acre feet per acre for irrigated land.

6 141. Southwest calculated that if 17,768 AFY was pumped from Big Chino Water  
7 Ranch for 100 years, the maximum drawdown would yield a depth to static water of 309  
8 feet bgs.<sup>14</sup>

9 142. Mr. Greenslade's opinion is that if the pumping were reduced to 8,067.4 AFY for  
10 100 years (*i.e.*, the rate that ADWR approved), the drawdown would be reduced almost  
11 in direct proportion.

12 143. ADWR requested that Southwest include in the model the pumping expected to  
13 occur at the Chino Grande Ranch. Based on Chino Grande's Adequate Water Supply  
14 submission to ADWR, Southwest used 18,500 AFY and ran the model with a total  
15 pumping of 36,268 AFY.<sup>15</sup>

16 144. After 100 years of pumping at 36,268 AFY, the maximum drawdown is 383 bgs.  
17 This predicted drawdown is shown by contour lines on Exhibit ADWR 23A at Figure 10.  
18 The contour lines are lines of equal drawdown. The southernmost contour line is 50  
19 feet, which means that the model shows that there will be 50 feet of drawdown along  
20 that line after 100 years of pumping at 36,268 AFY.

21 145. Southwest determined that the maximum depth to static groundwater after 100  
22 years of pumping at 36,268 AFY would be 519 feet.

23 146. Southwest concluded that: (1) Big Chino Water Ranch is over the thickest part  
24 of the upper Big Chino Aquifer; (2) the thickness of that aquifer ranges from 1,200 to  
25 1,600 feet, with water at 105 feet bgs, which means the average saturated thickness is  
26 1,295 feet; (3) there are an estimated 6.8 MAF of water in storage in the principal  
27 aquifer; (4) the calibrated model shows that the recharge is 13,363 AFY; (5) if Prescott  
28 pumped 17,768 AFY for 100 years, the depth to groundwater would be 309 feet; and

29 \_\_\_\_\_  
30 <sup>14</sup> The depth to static water level is the drawdown caused by pumping plus the original depth to water.

<sup>15</sup> The actual pumping volume used may have been slightly higher to account for existing agricultural uses.

1 (6) adding the proposed pumping by Chino Grande results in a depth to groundwater of  
2 519 feet after 100 years of pumping.

3 147. The model also shows that, as a result of this pumping, the volume of water  
4 crossing the model's southern boundary (and moving toward the Verde River) will  
5 decrease. But, because the model does not include the Verde River, the model can  
6 make no direct predictions about the effect pumping on the River.

7 148. Mr. Greenslade's opinion is that Southwest's model's results would not be  
8 affected by including in the model the outflow from the Big Chino to the Verde River  
9 because the distance is so great, much of the water will initially be withdrawn from  
10 storage, and the drawdown at the model's boundary is small in comparison the  
11 maximum drawdown.

12 149. A cone of depression ("COD") is the change in head surrounding a well as a  
13 result of pumping from that well. CODs tend to decrease logarithmically and flatten out  
14 at the edges.

15 150. The COD for pumping at 36,268 AFY for 100 years extends beyond the model  
16 boundary. Mr. Greenslade estimates that this COD would extend 4,000 feet beyond the  
17 model boundary, which would be about 15 to 16 miles from the Verde River Springs.

18 151. Mr. Greenslade made his estimate by drawing a line from the model cell with the  
19 maximum drawdown to the last cell and extending the line logarithmically until a result  
20 of zero for all practical purposes was reached.

21 152. Mr. Greenslade's opinion is that it is not likely that the COD would reach the  
22 Verde River and he added that it was not possible based on the model result.

### 23 **JON FORD'S GROUNDWATER MODEL**

24 153. Mr. Jon Ford is a vice-president of Leonard Rice Engineers. Mr. Ford is a  
25 registered professional geologic engineer in Arizona.

26 154. At the request of the Beverly Appellants' attorneys, Mr. Ford prepared a  
27 groundwater model using the MODFLOW program. Mr. Ford's model was prepared to  
28 determine (1) the impact on the Verde River from the aggregate of Prescott's proposed  
29 pumping and other pumping from the northern part of the Big Chino Valley; and (2)  
30 whether the drawdown from that pumping would result in a depth to groundwater of

1 more than 1,000 feet. Mr. Ford's model includes all of the Big Chino Valley except a  
2 small portion in the northwest corner. See Exhibit BAK 698 (memorandum describing  
3 model results).

4 155. Mr. Ford used projected water-demands prepared by Mr. Ed Harvey and other  
5 information to determine the volume of pumping. Mr. Ford used a pumping value of  
6 12,070 AFY in 2010, with values increasing to 50,870 AFY in 2060 and remaining at  
7 that value until 2110. See Exhibit BAK 698 at p. 4.

8 156. Mr. Ford's model shows that after 100 years of pumping, the average depth to  
9 groundwater would be between 700 and 800 feet.

10 157. Mr. Ford's model shows that after 100 years of pumping, the flow at Verde River  
11 would decline by 11 to 15 cfs.

12 158. Mr. Ford's model results were not provided to ADWR before the Draft Decision  
13 and Order was issued.

14 159. Mr. Corkhill and Mr. Greenslade each provided credible testimony that the  
15 Beverly Appellants did not provide all the information necessary to properly evaluate  
16 Mr. Ford's model.

17 160. Information required to evaluate Mr. Ford's model that has not been provided to  
18 ADWR includes: (1) the model input files to show how the model was constructed; (2)  
19 boundary conditions; (3) hydrologic parameters and their distribution; (4) the model's  
20 statistics with respect to its performance; (5) an error analysis; and (6) data sets to  
21 review the inputs and verify the outputs. Without this information, Mr. Ford's model  
22 cannot be tested to see if the model can replicate existing conditions. A model must be  
23 able to replicate existing conditions in order reliably to predict future conditions.

24 161. Mr. Corkhill testified that:

- 25 a. It appeared that Mr. Ford assumed a constant head at the Verde River  
26 Springs, which is not appropriate;
- 27 b. Mr. Ford did not consider the sub-irrigation at Williamson Valley, which, in  
28 Mr. Corkhill's opinion, is important and could change the model's results;
- 29 c. The Beverly Appellants have provided only a general description of Mr.  
30 Ford's model; and

- d. Because the Beverly Appellants did not provide enough information to allow Mr. Corkhill to properly evaluate Mr. Ford's model, Mr. Corkhill was required to make assumptions about the model.

162. Mr. Greenslade testified that that he questioned the validity of Mr. Ford's model and the model's ability to predict future impacts because:

- a. Mr. Ford used transmissivity values that do not agree with values that have been calculated from pump-tests and other known data;
- b. Mr. Ford's model shows that the flow at the Verde River Springs has been as high as 26 cubic feet per second, whereas Ms. Wirt's USGS report shows a value of 20 cfs. This discrepancy could affect the calibration of the model; and
- c. Mr. Ford's model shows that the flow at the Verde River Springs has consistently decreased over time. Mr. Greenslade compared that to the record for the Paulden gage, which shows increasing flow from 1964, when the gage was installed, to about 1993 when the flow starts to decrease. Mr. Greenslade's opinion is that Mr. Ford's model is not calibrated to the Verde River.

163. Mr. Ford's model shows three CODs after 100 years of pumping. See Exhibit BAK 698 at Figure 7. Both Mr. Corkhill and Mr. Greenslade raised questions about these CODs.

164. Mr. Greenslade found one COD to be too far north of the Big Chino Water Ranch to accurately reflect Prescott's pumping. Mr. Greenslade saw this as a problem but, because the Beverly Appellants had not provided the distribution of pumping used by Mr. Ford, Mr. Greenslade did not have adequate information to resolve the problem.

165. A "second COD," about 600 feet deep, is located near the edge of the playa and is between the Big Chino Water Ranch and the Verde River Springs. See Exhibit BAK 698 at Figure 7.

166. Mr. Corkhill and Mr. Greenslade were each of the opinion that this second COD would have a greater effect on the flow at the Verde River Springs than Prescott's proposed pumping.

1 167. Mr. Ford testified that this second COD was caused by the intersection of two  
2 faults. Mr. Greenslade and Mr. Corkhill questioned Mr. Ford's conclusion in this regard.

3 168. Mr. Greenslade checked USGS and Bureau of Reclamation maps and cannot  
4 find any two such faults. According to Mr. Greenslade, if the faults exist now, then there  
5 would be a COD in that area now. Mr. Corkhill testified that in a model showing future  
6 impacts, a COD such as the second COD had to be caused by pumping.

7 169. Mr. Corkhill reviewed information in ADWR's files that was prepared by Leonard  
8 Rice Engineers for an Adequate Water Supply determination in 2007. The second  
9 COD does not appear in the 2007 analysis.

10 170. Mr. Ford provided rebuttal testimony that addressed some of the points raised  
11 by Mr. Corkhill and Mr. Greenslade. But this rebuttal testimony is insufficient to make  
12 up for the lack of information required for ADWR to properly evaluate Mr. Ford's model.

13 171. Even if Mr. Ford's model is determined to be reliable and accurate, it would not  
14 show the impact on the Verde River by Prescott's pumping because the model used a  
15 maximum value of 50,870 AFY, which is more than Prescott's legally allowed maximum.  
16 Mr. Ford's model does, however, provide confirmation that Prescott's proposed  
17 pumping will not cause the static water level to drop below 1,000 feet bgs.

18 172. Because the Beverly Appellant's have not provided enough information to allow  
19 ADWR to properly evaluate Mr. Ford's model and because there are potential  
20 deficiencies in that model, Mr. Ford's model is accorded no appreciable weight.

21 **PHYSICAL AVAILABILITY OF THE WATER**

22 173. Prescott was required to show that: (1) its wells are likely to be constructed; (2)  
23 that after pumping for 100 years the depth to static groundwater will not be more than  
24 1,000 feet; and (3) that it is not requesting to withdraw more water than allowed by  
25 statute. See A.A.C. R12-15-716.

26 174. Prescott demonstrated that the required wells are likely to be constructed as  
27 part of its demonstration that the water will be continuously available. The statutory  
28 volume-limitation is found in A.R.S. § 45-555(E).

29 175. Mr. Corkhill gave credible testimony that Southwest provided ADWR with a  
30 complete model report that included all the information required for ADWR to evaluate

1 the model and that Southwest's model was sufficient to meet its intended purpose of  
2 showing the depth to static groundwater after 100 years of pumping.

3 176. Southwest's groundwater model shows that if Prescott pumped 17,768 AFY for  
4 100 years, the maximum depth to static groundwater would be 309 feet.

5 177. ADWR's hydrology division evaluated Southwest's model results and concluded  
6 that after 100 years of pumping at 17,768 AFY, the maximum depth to static  
7 groundwater would be 309 feet. See Exhibit ADWR 133; testimony of Mr. Corkhill.

8 178. Southwest's groundwater model shows that if the proposed pumping of Chino  
9 Grande (18,500 AFY) is added to the 17,768 AFY attributed to Prescott, the maximum  
10 depth to static groundwater after 100 years of pumping would be 519 feet.

11 179. ADWR's hydrology division evaluated Southwest's model results and concluded  
12 that after 100 years of pumping at the combined rate (17,768 plus 18,500 AFY) the  
13 maximum depth to static groundwater would be 519 feet. See Exhibit ADWR 133;  
14 testimony of Mr. Corkhill.

15 180. ADWR's hydrology division concluded that Prescott met the required physical  
16 availability demonstration.

17 181. There was no evidence adduced to show that Southwest's depth-to-static-  
18 groundwater calculations are incorrect.

19 182. The preponderance of the evidence shows that if Prescott pumps 17,768 AFY  
20 for 100 years, the maximum depth to static groundwater will be less than 1,000 feet.

21 **CONTINUOUS AVAILABILITY OF THE WATER**

22 183. A.A.C. R12-15-717 provides, in pertinent part, that: (A) if an applicant submits  
23 sufficient evidence that adequate delivery, storage, and treatment works will be in place  
24 in a timely manner to make the water available to the applicant for 100 years; and (B) if  
25 the applicant demonstrates that wells of a sufficient capacity will be constructed in a  
26 timely manner to serve the proposed uses on a continuous basis for 100 years, then  
27 ADWR's Director shall determine that an applicant will have sufficient supplies of water  
28 that will be continuously available for 100 years.

29 184. ADWR concluded that Prescott's Capital Improvement Plan ("CIP") includes  
30 funding for construction of wells of sufficient capacity to withdraw more than 8,067.4

1 AFY of groundwater from the Big Chino Sub-basin. The Application shows that the  
2 system will have a maximum flow capacity of 19,437 AFY. See Exhibit ADWR 2D.

3 185. ADWR concluded that the groundwater from the Big Chino Sub-basin will be  
4 continuously available when a pipeline to transport the groundwater has been  
5 constructed and ADEQ has issued the AOC pursuant to the requirements of A.A.C.  
6 R18-5-507.

7 186. In its Draft Decision and Order, ADWR determined that Prescott demonstrated  
8 that 8,067.4 AFY of groundwater from Big Chino will be continuously available when  
9 ADEQ issues the AOC.

10 187. Appellants couch arguments that Prescott may be required to stop pumping as  
11 arguments that Prescott cannot show that it meets the continuous availability  
12 requirements. Because these arguments do not fall under a literal reading of A.A.C.  
13 R12-15-717, these arguments are considered elsewhere in this Decision.

14 188. The preponderance of the evidence shows that when ADEQ issues the AOC,  
15 the groundwater to be imported will be continuously available for 100 years.

#### 16 **LEGAL AVAILABILITY**

17 189. Under A.A.C. R12-15-718, an applicant must demonstrate that the water will be  
18 legally available for 100 years. A.A.C. R12-15-718 does not have a provision for  
19 groundwater imported into an AMA.

20 190. The Appellants argue that, because A.A.C. R12-15-718 does not include  
21 groundwater imported from outside an AMA, Prescott cannot meet the rule.

22 191. Ms. Fabritz-Whitney testified that A.A.C. R12-15-718 is not intended to be an all  
23 encompassing list and that the Department may consider sources of water other than  
24 those listed. Ms. Fabritz-Whitney also testified A.R.S. § 45-555(E) provides legal  
25 authority showing that Prescott may use the imported the water as part of its DAWS.

26 192. As discussed below in the Conclusions of Law, the Appellants' argument is not  
27 persuasive.

28 193. Appellants couch arguments that Prescott may be required to stop pumping as  
29 arguments that Prescott cannot show that it meets the legal availability requirements.  
30

1 Because these arguments do not fall under a literal reading of A.A.C. R12-15-718,  
2 these arguments are considered elsewhere in this Decision.

### 3 **PRESCOTT'S FINANCIAL CAPABILITY**

4 194. If a city has adopted a five-year CIP that provides for the construction, or the  
5 commencement of construction, of adequate delivery, storage, and treatment works in a  
6 timely manner, and has submitted a certification by the applicant's chief financial officer  
7 that finances are available to implement that portion of the five-year plan, then ADWR's  
8 Director shall determine that the city has the financial capability to construct the  
9 required infrastructure. See A.A.C. R12-15-720.

10 195. Prescott has adopted a Water Enterprise CIP for fiscal years 2010 through  
11 2014 that includes \$142.6 million for the construction of the infrastructure required to  
12 transport the groundwater from the Big Chino Sub-basin to Prescott.

13 196. Mr. Woodfill, Prescott's chief financial officer, certified that Prescott has the  
14 finances available to implement that part of the Water Enterprise CIP. See Exhibit  
15 ADWR 28 (certification, CIP, and letter from RBC Capital Markets).

16 197. On direct examination, Mr. Woodfill testified that his professional opinion is that  
17 Prescott can finance the project. In his rebuttal testimony, Mr. Woodfill again testified  
18 that in his opinion Prescott can finance the project.

19 198. The estimated total cost for the Big Chino project is \$150 million. When the  
20 certification was prepared, Prescott's Water Enterprise had an ability to issue about  
21 \$225 million in bonds and, Prescott can also use other city bonds if required.

22 199. In determining the bonding capacity, Prescott relied on its bond advisor, Ms.  
23 Shawn Dralle of RBC Capital Markets ("RBC"). Mr. Woodfill's opinion is that Ms. Dralle  
24 is a leader in the area of municipal bonds. Mr. Woodfill did independent analysis in that  
25 he is familiar with the markets and he checks bond rates daily.

26 200. The Water Enterprise CIP does not include information on how the costs will be  
27 paid but there is more detail in Prescott's budget.

28 201. Prescott's existing water users will pay for 20% of the project and the remaining  
29 80% will be paid for by new users and impact fees.

1 202. Mr. Ed Harvey is a principal in Harvey Economics, a firm that specializes in  
2 resource economics, which includes analyzing financing and funding for natural  
3 resource projects.

4 203. Mr. Harvey testified as to his opinion that because the CIP submitted by  
5 Prescott did not include information on the source of funding, the CIP did not have any  
6 meaning or force. Although the information from RBC was intended to provide that  
7 information, Mr. Harvey opined that RBC's work was deficient and not based on  
8 standard assumptions.

9 204. According to Mr. Harvey: (1) the 5% interest rate used was too low because  
10 Prescott's bond rating has been downgraded to single A; (2) it was an error to use the  
11 same interest rate for each series of bonds; and (3) the long-term bonds would not be  
12 attractive to investors. Consequently, Mr. Harvey also concludes that the debt service  
13 ratio of 1.3 shown by RBC would not be met, making the bonds difficult to sell.

14 205. Mr. Woodfill testified in response to Mr. Harvey's criticisms. According to Mr.  
15 Woodfill, RBC deliberately set the debt service ratio to 1.3, which is often considered to  
16 be the industry standard, to determine the maximum bonding capability. The point was  
17 to show that Prescott could raise more money than is required to fund the Big Chino  
18 project.

19 206. With respect to the interest rate used, Mr. Woodfill testified that: (1) Prescott's  
20 bond rating has not been downgraded to single A; (2) the 5% interest rate was a  
21 blended rate intended to represent an average for all bonds that might be issued; and  
22 (3) 5% was very conservative when the CIP was prepared; (4) as of the date of his  
23 rebuttal testimony (April 15, 2009), it was "still a good number;" and (5) that Prescott  
24 could issue bonds at that rate.

25 207. Mr. Woodfill's opinion is that investors who buy long-term bonds are interested  
26 in those bonds for the same reasons that Mr. Harvey believes these bonds are  
27 unattractive.

28 208. Mr. Woodfill's opinion is the bond-capacity analysis from RBC was prepared  
29 using standard assumptions.

30 **THE PURPORTED EFFECTS ON THE VERDE RIVER**

1 209. The Appellants assert that ADWR was required to consider the effects on the  
2 Verde River from Prescott's proposed pumping.

3 210. Based on the Decision Letter, it appears that ADWR considered Appellants'  
4 arguments (as set forth in the Objections) and determined there was no legal basis and  
5 insufficient evidence to require those effects to be considered in the Draft Decision and  
6 Order.

7 211. The testimony of Ms. Fabritz-Whitney and Mr. Corkhill raises some doubt as to  
8 how much consideration ADWR gave to the substance of the Objections related to the  
9 purported effects. Nevertheless, Appellants have not presented sufficient evidence to  
10 show that ADWR erred by failing to include consideration of these purported effects in  
11 the Draft Decision and Order.

12 **Call by a Senior Water-Rights Holder**

13 212. Under Arizona law, surface water and percolating groundwater are legally  
14 distinct types of underground water. Subflow is considered part of the stream (*i.e.*, it is  
15 treated as surface water legally) and is subject to prior appropriation. Percolating  
16 groundwater is not appropriable, but may be subject to call under the federal reserved  
17 water rights doctrine.

18 213. Underground waters are presumed to be percolating and, one who asserts that  
19 underground water is a part of a stream's subflow must prove that fact by clear and  
20 convincing evidence.

21 214. Appellants assert that Prescott may be required to stop or limit its pumping  
22 because the water to be pumped may be subject to call either by holders of senior  
23 surface water rights or by the Fort McDowell Yavapai Nation and the Yavapai-Apache  
24 Nation under the federal reserved rights doctrine.

25 215. Appellants rely on several lines of evidence in support of their contention:

- 26 a. The agreement among experts that there is a hydraulic connection
- 27 between the Big Chino Sub-basin and the Verde River Springs;
- 28 b. John Ford's model;
- 29 c. Studies conducted by the Bureau of Reclamation for a proposed
- 30 settlement of the Fort McDowell Yavapai Nation claims;

- d. A theory that pumping from the Big Chino in 1964 (to fill artificial lakes at a subdivision called Holiday Lakes Estates) caused the flow in the Verde River to drop; and
- e. Evidence that there is saturated floodplain Holocene alluvium in the Big Chino Sub-basin and Verde River basin.

216. The evidence does show that there is a hydraulic connection between the Big Chino Sub-basin and the Verde River. But there is not sufficient evidence to show that Prescott's pumping will impact the Verde River within the next 100 years. And, even if Prescott's pumping does impact the Verde River in the next 100 years, as a matter of law that does not show that the water in the Big Chino is subflow.

217. To the extent that Mr. Ford's model could be given any appreciable weight, that model is not sufficient to show that Prescott will be pumping subflow, rather than percolating groundwater. Moreover, because Mr. Ford's model includes pumping in excess of the 8,067.4 AFY that ADWR approved, Mr. Ford's model is not sufficient to show whether or not Prescott's pumping will affect the Verde River during the next 100 years.

218. Mr. Munderloh testified that there may be no impact on the Verde River due to the water mounding at the narrows. In support of this assertion, Mr. Munderloh noted that there has not been a large drawdown or COD created in the Chino Valley despite the history of agricultural pumping.

219. The evidence presented is not sufficient to show that pumping at Holiday Lakes Estates actually did cause the Verde River flow to drop. Moreover, the USGS water report for 1964 does not show that there was any large-scale pumping at Holiday Lakes Estates in 1964, which provides reason to question whether the pumping occurred in that year.

220. The studies by the Bureau of Reclamation are not sufficient to show that Prescott will pump subflow or what the effect on the River will be, because those studies were based on pumping from a location substantially closer to the Verde River than the Big Chino Water Ranch. Moreover, those studies concluded that there was not

1 enough information to determine how much of the Verde River flow originates in the Big  
2 Chino. See Exhibits BAK 320 through 324.

3 221. Under the federal reserved rights doctrine, the water being pumped could be  
4 subject to call whether it is subflow or percolating groundwater. But Appellants present  
5 no substantial evidence that such a call will occur.

6 222. Appellants assert that the COD may extend into the “subflow zone” of the Verde  
7 River or the Big Chino Wash, which, in Appellants’ view, might also require Prescott to  
8 stop or reduce its pumping. But Mr. Greenslade testified that the COD will not reach  
9 the Verde River and, although it is not disputed that Southwest’s model can make no  
10 direct predictions related to the Verde River, no one testified that Mr. Greenslade’s  
11 method or calculation were in error.

12 223. Subflow is not a scientific or hydrologic term, but rather a legal one and it is the  
13 judiciary that is responsible for defining the limits of the subflow zone. Because there is  
14 no subflow zone mapped for the Verde River watershed, Appellants’ assertion is  
15 inherently speculative.

16 224. Even if the GSA Court eventually finds that the COD does extend into any  
17 subflow zone that is mapped, that determination would serve only to give the GSA  
18 Court jurisdiction over Prescott’s wells and that would not necessarily require Prescott  
19 to stop pumping.

## 20 **Endangered Species Act**

21 225. The Verde River is habitat for a number of species that are listed as threatened  
22 or endangered or are candidates for such listing. Because these include fish and  
23 species dependent on the riparian habitat, reduced flow in the Verde River would have  
24 an adverse impact on these species. Reduced flows would also have an adverse  
25 impact on efforts to restore native species to the Verde River.

26 226. Current conditions in the Verde River watershed, including the presence of non-  
27 native species, water diversions, and land management practices, have already caused  
28 reductions in the amount of habitat and the numbers of many of these threatened or  
29 endangered species. In some cases, these reductions have been to the point that some  
30 native fish have not been seen in the Verde River for years.

1 227. Appellants assert that Prescott's proposed pumping will have an adverse effect  
2 on the endangered or threatened species that will result in Prescott being forced to  
3 curtail that pumping. But Appellants provide no substantial evidence to show that this  
4 assertion is more than speculation.

5 228. Appellants rely on Jon Ford's model to show that there will be reduced flow in  
6 the Verde River but, as discussed above, that model can be accorded no appreciable  
7 weight.

8 229. Even if Prescott's pumping has an impact on the Verde River, there is no  
9 certainty that Prescott would be required to limit its pumping. Before that could happen,  
10 a court would need to determine that there has been a violation of the ESA that can be  
11 attributed to Prescott.<sup>16</sup> Because there are numerous other water-users much closer to  
12 the Verde River, those users, and not Prescott, might be the ones that are determined  
13 to be responsible for any future ESA violation. And, even if Prescott was found to be in  
14 violation, it might be eligible to undertake mitigation efforts and would not necessarily  
15 be required to stop its pumping.

16 **Alleged Violation of the Yavapai-Prescott Indian Tribe Settlement Act**

17 230. The CBD Appellants assert that Prescott's pumping will violate the terms of the  
18 Settlement Agreement and federal legislation because, according to the CBD  
19 Appellants, Prescott's pumping will have an adverse impact on the Verde River and  
20 riparian habitat.

21 231. This assertion is premised on essentially the same facts on which Appellants  
22 base their argument that there will be a violation of the ESA or that the pumping will  
23 deplete the flow of the Verde River. But as set out above, the assertion that there will  
24 be a violation of the ESA is speculation and there is no substantial evidence to show  
25 that Prescott's approved pumping of 8,067.4 AFY actually will reduce the flow of the  
26 Verde River in the next 100 years.

27 **CLIMATE CHANGE**

28 232. Appellants assert that ADWR should consider the effects of climate change in  
29 its evaluation of the Application.  
30

1 233. Dennis P. Lettenmaier, Ph.D., is a civil engineer licensed by the State of  
2 Washington and a professor at the University of Washington. Dr. Lettenmaier testified  
3 that large-scale models of the Colorado River Basin show that Colorado River flow may  
4 be reduced by 6 to 11% over the next 100 years due to climate change.

5 234. Dr. Lettenmaier could not provide any specific information about the Salt River  
6 and Verde River watersheds or the Big Chino Sub-basin, but he testified that the  
7 assumption is that the Salt and Verde are roughly equivalent to the entire Colorado  
8 River Basin.

9 235. Dr. Lettenmaier acknowledged that he had not done any studies specifically  
10 related to the Big Chino wash.

11 236. Dr. Lettenmaier acknowledged that he had not studied the hydrogeology,  
12 terrain, or vegetation in the Big Chino, which are all factors that should be considered  
13 in an evaluation of the recharge to a groundwater basin.

14 237. Mr. Corkhill testified that he is familiar with the basic principles of, and general  
15 activities related to, climate change.

16 238. Mr. Corkhill reviewed the Objections related to climate change and he heard Dr.  
17 Lettenmaier testify. Mr. Corkhill's opinion is that it is not possible to quantify the impacts  
18 on the Verde River baseflow due to climate change.

### 19 **OTHER PUMPING IN THE BIG CHINO SUB-BASIN**

20 239. Appellants assert that because other land owners in the Big Chino are also  
21 allowed to pump groundwater, Prescott cannot show that the water will actually be  
22 physically or continuously available.

23 240. It is not disputed that under the current law, others are allowed to pump  
24 groundwater from the Big Chino. But Ms. Fabritz-Whitney testified that, under the rules,  
25 ADWR is not allowed to consider potential future water demands or pumping that may  
26 compete with Prescott for access to the water in the Big Chino Sub-basin. ADWR does,  
27 however, consider future water demands from assured and adequate water supply  
28 determinations it has issued, which is why ADWR had Southwest include in its model  
29 the projected pumping by Chino Grande Ranch.

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30 <sup>16</sup> Appellants argue that ADWR can make this determination, which ADWR and Prescott dispute.

1 241. The AWS rules are not intended to be a 100% guarantee that there will be  
2 water available in 100 years. Rather, the intent is to make a determination of  
3 reasonable likelihood that the water will be available based on the information available  
4 at the time an application is processed.

5 242. Mr. Harvey prepared a projection of population growth and related water-  
6 demand for an area he termed the Big Chino Water Demand Area. This information  
7 was used by Mr. Ford in his groundwater model. But Mr. Ford's model does not show  
8 that the cumulative pumping using these demands actually will result in there being  
9 insufficient groundwater for Prescott to deliver to the Prescott AMA the volume of water  
10 approved in the Draft Decision and Order.

### 11 **THE WITNESSES AT HEARING**

#### 12 **Ms. Fabritz-Whitney**

13 243. Ms. Fabritz-Whitney has been ADWR's Assistant Director of Water  
14 Management since 2005. Ms. Fabritz-Whitney's duties include overseeing the State's  
15 AMAs, which includes the assured and adequate water supply programs. Before she  
16 became the Assistant Director, Ms. Fabritz-Whitney's duties included reviewing all  
17 applications for DAWS.

18 244. ADWR treated Prescott's Application in the same manner that it has treated  
19 applications for an assured water supply in other parts of the State.

20 245. ADWR has a duty periodically to review existing DAWS. ADWR has the  
21 authority to require a municipality to modify its designation and ADWR may also revoke  
22 a designation. See A.A.C. R12-15-711. The Draft Decision and Order requires Prescott  
23 to provide ADWR with annual reports that are consistent with the requirements of  
24 A.A.C. R12-15-711(A).

25 246. If conditions show that Prescott's DAWS is no longer valid, ADWR would allow  
26 Prescott to find a new water supply. If no new supply was approved, ADWR would  
27 revoke the DAWS.

28 247. If Prescott's DAWS was revoked, Prescott would not be able to rely on the  
29 DAWS for future growth, but Prescott would still be able to supply existing homes with  
30 water.

1 248. Although Prescott was required to show that the proposed pumping will not  
2 cause the static water level to drop below 1000 feet bgs, Prescott will not be prohibited  
3 from pumping if the water table actually does fall below that level in the future.

4 249. Based on Arizona law, the Office of Assured Water Supply presumes that wells  
5 are pumping groundwater. The hydrology division concluded that Prescott was not  
6 pumping subflow and Ms. Fabritz-Whitney relied on that determination. If the hydrology  
7 division was to determine that the water to be pumped was subflow or surface water,  
8 the Office of Assured Water Supply would consider that information.

9 250. Based on the legal presumption that water to be pumped is groundwater,  
10 ADWR did not consider that, in the future, the GSA Court might determine that the  
11 water is subject to a call. But if the GSA Court rules that the water is surface water,  
12 ADWR has authority to require Prescott to modify the DAWS.

13 **Mr. Frank Corkhill**

14 251. Mr. Corkhill has been ADWR's Chief Hydrologist for about 18 months at time of  
15 testimony in April. Mr. Corkhill oversees the hydrology division.

16 252. Mr. Corkhill has been employed by ADWR for 22 years where his prior work  
17 includes developing groundwater models, including a version of the Prescott AMA  
18 groundwater model, and supervising the technical support section.

19 253. Mr. Corkhill was responsible for ADWR's final determination that Prescott  
20 demonstrated it meets the physical availability rule. See Exhibit ADWR 133 (Mr.  
21 Corkhill's memorandum dated November 12, 2008); see *also* Exhibit ADWR 25  
22 ("Hydrology Checklist" showing that on July 18, 2008, the hydrology division  
23 determined that Prescott had demonstrated that the groundwater would be physically  
24 available).

25 254. Mr. Corkhill testified that he had not heard any new information or evidence that  
26 would cause him to change the findings in Exhibit ADWR 133.

27 255. Mr. Corkhill's conclusions were limited to the physical availability demonstration  
28 and he did not consider whether the water would be legally or continuously available.

29 256. In making his determination, Mr. Corkhill reviewed ADWR file information, the  
30 Application, the studies submitted in support of the Application, reviews of the

1 Application by ADWR's groundwater modeling and assured water supply hydrology  
2 sections, and the Objections relating to hydrology.

3 257. Mr. Corkhill testified about Southwest's decision to use a general head  
4 boundary ("GHB") at the southern boundary of its model. Groundwater modeling  
5 requires making compromises involving boundary locations and how boundary  
6 conditions are to be simulated. Southwest chose the GHB based on physical conditions  
7 and existing pumping in the model area.

8 258. A sensitivity analysis is a process to examine how a model responds to various  
9 inputs and addresses uncertainty in the data (*i.e.*, if an input value is wrong, what will  
10 be the effect on the model's response). Southwest provided the results of a sensitivity  
11 analysis in Table 4 – 6 of its Report. See Exhibit ADWR 2I.

12 259. Based on all of the hydrologic information submitted by Southwest, including the  
13 sensitivity analysis, Mr. Corkhill determined that the GHB in the Southwest model was  
14 sufficient to meet the model's intended purpose, which was to demonstrate the physical  
15 availability of the water.

16 260. During the Application process, ADWR informed Southwest that its model might  
17 be "better constrained" if the discharge to the Verde River Springs was included. See  
18 Exhibit BAK 675. Southwest did not accept that suggestion and Mr. Corkhill could  
19 provide no additional information about the issue.

20 261. Some of the Objectors asserted that Prescott will be pumping subflow of the  
21 Verde River. Mr. Corkhill's opinion is that the Objectors did not provide evidence that  
22 the water to be pumped is subflow.

23 262. Mr. Corkhill's opinion is that the water to be pumped is groundwater that is  
24 derived from the basin fill aquifer.

25 263. Mr. Corkhill agrees that the Big Chino Sub-basin is one source of the Verde  
26 River. Mr. Corkhill acknowledged that the Wirt 2000 Report showing that the Big Chino  
27 supplies 80% of the Verde River Springs is conceptually right. His opinion is that this is  
28 a good ballpark figure. See Exhibit BAK 336.

29 264. Although the Wirt 2000 Report was filed with the Objections, Mr. Corkhill did not  
30 review it because he did not consider it to be relevant under the rules.

1 265. Mr. Corkhill's opinion is that Prescott's pumping from the Big Chino Sub-basin  
2 at some time will impact the flow of the Verde River unless there is mitigation, and that  
3 the CODs will capture groundwater that would have otherwise discharged at the Verde  
4 River Springs.

5 266. Mr. Corkhill does not know what the magnitude of the impact on the Verde River  
6 from Prescott's pumping will be or when it will occur. Estimates of when such an impact  
7 might occur range from years to centuries, but ADWR was presented with no credible  
8 data that addressed the issue in a scientific manner.

9 267. Mr. Corkhill's opinion is that the Wirt 2000 Report cannot serve as a basis to  
10 make predictions about the impact on the Verde River from pumping in the Big Chino  
11 Sub-basin. A numerical groundwater model is generally the best way to make such a  
12 prediction.

13 268. Mr. Corkhill is not aware of any existing numerical groundwater model that  
14 would allow an evaluation of the impact on the Verde River from Prescott's pumping.

15 269. The USGS is working on a regional groundwater flow model that will give  
16 general information about the effect on the Verde River Springs from pumping at the  
17 Big Chino Water Ranch. But Mr. Corkhill's opinion is that the USGS model will not  
18 provide enough detail and a "nested model" with finer resolution, within the USGS  
19 model, will be required to predict the impact.

20 270. Mr. Corkhill testified that ADWR did not look at the impacts of Prescott's  
21 pumping on the Verde River because ADWR is not required to do so under the AWS  
22 rules.

23 **James H. Holt**

24 271. Mr. Holt was called by Prescott. Mr. Holt is Prescott's water resources manager;  
25 previously he worked for ADWR holding a number of positions, including Director of the  
26 Prescott AMA.

27 272. Mr. Holt testified about: Prescott's 2005 DAWS; the Application; the Settlement  
28 Agreement; Prescott's purchase from CVID; Prescott's investigations in the Big Chino;  
29 and the IGA with Prescott Valley. Mr. Holt's opinion is that the 1991 Groundwater  
30

1 Transportation Act included provisions that were intended to, and did, encourage  
2 Prescott and the Tribe to settle the Tribe's claims.

3 **Robert Ogo**

4 273. Mr. Ogo was called by Prescott. Mr. Ogo has been vice-president of the Tribe for  
5 15 years. Mr. Ogo is also employed by the tribe as the facilities manager.

6 274. Mr. Ogo was the Tribe's representative during the negotiations that led to the  
7 Settlement Agreement. Mr. Ogo testified as to the benefits the Tribe received in that  
8 Settlement.

9 **Herbert Dishlip, P.E.**

10 275. Mr. Dishlip was called by Prescott. Mr. Dishlip is the principal in Herb Dishlip  
11 Consulting. Mr. Dishlip was employed by ADWR from 1981 to 2003, during which time  
12 he held a number of positions including Director of the Pinal AMA.

13 276. Mr. Dishlip testified about the Application; the application for the 2005 DAWS; his  
14 review of hydrology studies of the Big Chino Water Ranch; and his involvement in the  
15 promulgation of statutes and rules while he was employed at ADWR.

16 **Mark Woodfill, CPA**

17 277. Mr. Woodfill was called by Prescott. Mr. Woodfill has worked for Prescott for 22  
18 years, during which time all of his duties were related to financial issues. For the last 8  
19 years, Mr. Woodfill has been Prescott's finance director where he oversees all aspects  
20 of the budget and the 5-year planning process.

21 **William Greenslade, P.E., R.G.**

22 278. Mr. Greenslade was called by Prescott. Mr. Greenslade is a principal in  
23 Southwest; he is both an Arizona registered professional engineer and registered  
24 geologist.

25 279. Mr. Greenslade testified about Southwest's MODFLOW model; Southwest's  
26 Report; and his opinions regarding deficiencies in Jon Ford's model.

27 **John Munderloh**

28 280. Mr. Munderloh was called by Prescott. Mr. Munderloh is Prescott Valley's water  
29 resources manager; previously he worked for ADWR and Yavapai County's water  
30

1 advisory committee. Mr. Munderloh managed ADWR's adjudication section that advises  
2 the GSA Court on technical issues including subflow.

3 281. Mr. Munderloh testified as to his opinions that Big Chino Wash is ephemeral and  
4 so will not have a subflow zone, and that groundwater mounding at the playa will  
5 restrict the effect of pumping on the Verde River Springs. Mr. Munderloh also testified  
6 about pumping that has occurred in the Chino Valley since the 1940's.

7 **Ed Harvey, MBA**

8 282. Mr. Harvey is a principal in Harvey Economics, a firm he started in 2002.

9 283. Mr. Harvey was called by the Beverly Appellants to testify about his population  
10 and water demand projections that were used by Mr. Ford.

11 284. The CBD Appellants called Mr. Harvey to testify about Prescott's CIP and ability  
12 to finance the project.

13 **Dennis P. Lettenmaier, Ph.D.**

14 285. Dr. Lettenmaier was called by the Beverly Appellants. Dr. Lettenmaier testified  
15 about large-scale climate-change models of the Colorado River Basin.

16 **Abe Springer, Ph.D.**

17 286. Dr. Springer was called by the Beverly Appellants. Dr. Springer holds a Ph.D. in  
18 hydrogeology, is a professor at Northern Arizona University, and is the NAU  
19 coordinator for the Arizona Water Institute.

20 287. Dr. Springer testified as to the geology and hydrology of the Big Chino Sub-  
21 basin; the effects of pumping in the Little Chino Sub-basin; and his opinion that  
22 pumping in the Big Chino will have an effect on the Verde River.

23 **Thomas Atkins**

24 288. Mr. Atkins is a resident of Prescott and one of the Beverly Appellants. Mr. Atkins  
25 teaches high school science and has a master degree in science education.

26 289. Mr. Atkins objects to Prescott's Application because he is concerned about the  
27 impact on the Verde River and the financial impact on Prescott's existing residents.

28 **Jon R. Ford, P.E.**

29 290. Mr. Ford was called by the Beverly Appellants. Mr. Ford has been employed at  
30 Leonard Rice Engineers since 1986.

1 291. Mr. Ford's professional worked is focused on evaluating the impact of pumping,  
2 water resources, and developing water for municipalities. Mr. Ford's experience  
3 includes working subflow and other issues in the GSA.

4 292. Mr. Ford testified about the groundwater model he prepared. Mr. Ford also  
5 testified that there is Holocene alluvium along the Verde River and the Big Chino  
6 Wash.

7 **Gregg Ten Eyck, P.E.**

8 293. Mr. Ten Eyck was called by the Beverly Appellants. Mr. Ten Eyck is a surface  
9 water hydrologist employed Leonard Rice Engineers.

10 294. Mr. Ten Eyck testified about Verde River stream-gage data and as to his opinion  
11 that the Verde River is over appropriated.

12 295. Mr. Ten Eyck also testified about the reduction in flow that would result from  
13 Prescott's pumping, but he acknowledged that this testimony was based on the values  
14 generated by Mr. Ford's model, and that he did not have sufficient knowledge to verify  
15 that Mr. Ford's model was accurate.

16 **Jerome Stefferud**

17 296. Mr. Stefferud was called by the Beverly Appellants. Mr. Stefferud is an  
18 independent fisheries biologist. Mr. Stefferud testified as to the status and needs of fish  
19 in the Verde River and as to the expected impacts of reduced river flows on those fish  
20 and other aquatic species.

21 **Brenda Smith**

22 297. Ms. Smith was called by the Beverly Appellants. Ms. Smith is an Assistant Field  
23 Supervisor for the U.S. Fish and Wildlife Service ("FWS").

24 298. Ms. Smith testified about FWS's Objection and concerns about Prescott's  
25 proposed pumping; the significance of the Upper Verde River watershed with respect to  
26 conservation and recovery of threatened and endangered species and their habitat;  
27 and the expected impacts of reduced flows on these species.

28 **Charles Paradzick**

1 299. Mr. Paradzick was called by the Beverly Appellants. Mr. Paradzick is a Senior  
2 Ecologist for SRP and the Administrator of the Habitat Conservation Plans at the  
3 Horseshoe and Bartlett Reservoirs.

4 300. Mr. Paradzick testified about the environmental impacts that reduced flows could  
5 have on the riparian ecosystem in and around the Verde River.

6 **Anthony J. Krzysik Ph.D.**

7 301. Dr. Krzysik is a resident of Prescott and is one of the Beverly Appellants. Dr.  
8 Krzysik holds a Ph.D. in ecology and biology.

9 302. Dr. Krzysik testified that he objects to the Application because his opinion is that  
10 the pumping will negatively impact the ecology of the Verde River; Prescott has not  
11 proposed either mitigation or a habitat conservation plan; and as a resident of Prescott,  
12 he is concerned about the financial burden of the project.

13 **Craig Sommers**

14 303. Mr. Sommers was called by the Beverly Appellants. Mr. Sommers has been a  
15 consultant to SRP for over 20 years during which time he has been active in the GSA.

16 304. Mr. Sommers testified about SRP's water rights and facilities in the Verde River  
17 watershed; the CAP allocations; the Bureau of Reclamation's work related to settling  
18 the Fort McDowell Nation's claims; and CVID's sale to Prescott. Mr. Sommers  
19 represented CVID during the sale to Prescott.

20 **Gary Beverly, Ph.D.**

21 305. Dr. Beverly is one of the Beverly Appellants. He is a resident of, and farms in,  
22 Chino Valley. Dr. Beverly holds a Ph.D. in Physical Chemistry.

23 306. Dr. Beverly is concerned that Prescott's pumping will be detrimental to his ability  
24 to pump water for his farm and to the ecology of the Verde River.

25 307. Dr. Beverly testified about the ecology of the Verde River and the field trips he  
26 leads along the river for bird watching and other activities.

27 **Ed McGavock**

28 308. Mr. McGavock was called by Prescott as a rebuttal witness. Mr. McGavock is a  
29 hydrologist employed by Errol Montgomery and Associates. He was formerly employed  
30 by the USGS.

1 309. Mr. McGavock testified about what he perceived to be deficiencies in the USGS's  
2 OFR 2004-1411 (*i.e.*, Ms. Wirt's 2005 Report). Mr. McGavock also testified that the  
3 USGS's water report for 1964 does not show that there was large scale pumping at  
4 Holiday Lakes Estates, which was the year that such pumping is alleged to have  
5 caused the flow in the Verde River to drop.

6 **Hjalmar W. Hjalmarson. P.E.**

7 310. Mr. Hjalmarson was called by the Beverly Appellants as a rebuttal witness. Mr.  
8 Hjalmarson worked for the USGS and was a co-worker of Ms. Wirt's.

9 311. Mr. Hjalmarson responded to criticisms of Ms. Wirt and testified about reports he  
10 wrote and the pumping at Holiday Lakes Estates.

11 **CONCLUSIONS OF LAW**

12 **PROCEDURAL MATTERS**

13 1. The burden of proof at an administrative hearing falls to the party asserting a  
14 claim, right, entitlement, or affirmative defense. Consequently, Prescott and Appellants  
15 bear the burden to show that the Draft Decision and Order is in error. See A.A.C. R2-  
16 19-119; *see also* A.R.S. § 41-1092.07(G)(2).

17 2. One who asserts that underground water is a part of a stream's subflow must  
18 prove that fact by clear and convincing evidence. *In Re The General Adjudication Of All*  
19 *Rights To Use Water In The Gila River System And Source*, 198 Ariz. 330; 9 P.3d 1069  
20 (2000) ("*Gila IV*"). The standard of proof on all other issues is that of a preponderance  
21 of the evidence. See A.A.C. R2-19-119.

22 3. A preponderance of the evidence is:

23 The greater weight of the evidence, not necessarily established by the  
24 greater number of witnesses testifying to a fact but by evidence that  
25 has the most convincing force; superior evidentiary weight that, though  
26 not sufficient to free the mind wholly from all reasonable doubt, is still  
27 sufficient to incline a fair and impartial mind to one side of the issue  
rather than the other.

28 BLACK'S LAW DICTIONARY at p. 1220 (8<sup>th</sup> ed. 2004).

1 4. Clear and convincing evidence is “[e]vidence indicating that the thing to be  
2 proved is highly probable or reasonably certain.” BLACK’S LAW DICTIONARY at p. 596 (8<sup>th</sup>  
3 ed. 2004).

4 5. The matter is an appealable agency action. The hearing was set pursuant to  
5 A.R.S. § 45-578 and is subject to the requirements of A.R.S. Title 41, Chapter 6, Article  
6 10. See A.R.S. § 45-114(A) and (B).

7 6. ADWR and Prescott argue that the ALJ should have excluded all evidence that  
8 was not submitted to ADWR before the Draft Decision and Order was issued, but they  
9 do not provide any persuasive legal authority in support of their argument. A.R.S. § 41-  
10 1092.03(B) limits the hearing to consideration of the issues that were raised in the  
11 Objections; had the legislature intended that new evidence should also be excluded it  
12 would have included such a limitation in the statute.

13 7. Under A.R.S. § 41-1092.07(D) all parties have a right to present evidence and  
14 legal argument on all relevant issues and, with few exceptions, all relevant evidence is  
15 admissible.

16 8. ADWR and Prescott objected to certain evidence at hearing, arguing that this  
17 evidence went to issues that are beyond the scope of ADWR’s authority under the  
18 statutes and rules. The ALJ accepted the evidence subject to potential weighting  
19 limitations. Because the evidence ADWR and Prescott sought to exclude relates to  
20 matters that ADWR addressed in its Decision Letter, it is relevant and was properly  
21 admitted.

22 9. All the witnesses presented credible testimony. The weight of each witness’s  
23 testimony on any issue is, however, affected by each witness’s factual knowledge and  
24 particular expertise. Some testimony called for opinions that are properly considered  
25 legal conclusions; with the exception of ADWR’s interpretation of the relevant statutes  
26 and rules, such opinions can be given no appreciable weight.

### 27 **STATUTORY CONSTRUCTION**

28 10. The primary goal when construing statutes is to ascertain the legislature’s  
29 intent. Statutory provisions must be considered in the context of the entire statute and  
30 consideration must be given to all of the statute's provisions to determine the legislative

1 intent manifested by the entire act. Statutes are to be interpreted so that no clause,  
2 sentence, or word is rendered superfluous or void. See *Guzman v. Guzman*, 175 Ariz.  
3 183, 854 P.2d 1169 (App. 1993).

4 11. Statutes are to be liberally construed in an effort to effect their objects and to  
5 promote justice. A.R.S. § 1-211(B). Statutes should be construed to reach a  
6 reasonable result. See *State v. McFall*, 103 Ariz. 234, 439 P.2d 805 (1968). A tribunal  
7 may not expand or extend a statute to include matters not falling within its expressed  
8 provisions. See *Phoenix v. Donofrio*, 99 Ariz. 130, 407 P.2d 91 (1965).

9 12. ADWR's interpretation of the Arizona Groundwater Code should be given  
10 considerable weight unless there is clear statutory guidance contrary to ADWR's  
11 interpretation. See *Arizona Water Co. v. Arizona Department of Water Resources*, 208  
12 Ariz. 147, 91 P.3d 990 (2004).

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

#### 16 **APPLICABLE WATER LAW**

17 14. A.R.S. § 45-576(J) sets out the statutory requirements for a DAWS:

18 For the purposes of this section, "assured water supply" means all of  
19 the following:

20 1. Sufficient groundwater, surface water or effluent of adequate quality  
21 will be continuously available to satisfy the water needs of the  
22 proposed use for at least one hundred years....

23 2. The projected groundwater use is consistent with the management  
24 plan and achievement of the management goal for the active  
25 management area.

26 3. The financial capability has been demonstrated to construct the  
27 water facilities necessary to make the supply of water available for the  
28 proposed use, including a delivery system and any storage facilities or  
29 treatment works. The director may accept evidence of the construction  
30 assurances required by section 9-463.01, 11-806.01 or 32-2181 to  
satisfy this requirement.

15. A.A.C. R12-15-710, Designation of Assured Water Supply, provides:

1 A. A municipal provider applying for a designation of assured water  
2 supply shall submit an application on a form prescribed by the Director  
with the fee required by R12-15-730 and provide the following:

- 3 1. The applicant's current demand;
- 4 2. The applicant's committed demand;
- 5 3. The applicant's projected demand for the proposed term of the  
6 designation;
- 7 4. The proposed term of the designation, which shall not be less than  
8 two years;
- 9 5. Evidence that the criteria in subsection (E) of this Section are met;  
and
- 10 6. Any other information that the Director determines is necessary to  
11 decide whether an assured water supply exists for the municipal  
12 provider.

13 B. An application for a designation shall be signed by:

- 14 1. If the applicant is a city or town, the city or town manager or a  
15 person employed in an equivalent position. The application shall also  
16 include a resolution of the governing body of the city or town,  
17 authorizing that person to sign the application; or
- 18 2. If the applicant is a private water company, the applicant's  
19 authorized officer, managing member, partner, trust officer, trustee, or  
20 other person who performs similar decision-making functions for the  
21 applicant.

22 C. The Director shall give public notice of an application for  
23 designation in the same manner as provided for certificates in A.R.S. §  
24 45-578.

25 D. After a complete application is submitted, the Director shall review  
26 the application and associated evidence to determine:

- 27 1. The annual volume of water physically, continuously, and legally  
28 available for at least 100 years;
- 29 2. The term of the designation, which shall not be less than two years;
- 30 3. The applicant's estimated water demand;
4. The applicant's groundwater allowance; and
5. Whether the applicant has demonstrated compliance with all  
requirements in subsection (E) of this Section.

E. The Director shall designate the applicant as having an assured  
water supply if the applicant demonstrates all of the following:

1. Sufficient supplies of water are physically available to meet the  
applicant's estimated water demand, according to the criteria in R12-  
15-716;
2. Sufficient supplies of water are continuously available to meet the  
applicant's estimated water demand, according to the criteria in R12-  
15-717;

1 3. Sufficient supplies of water are legally available to meet the  
2 applicant's estimated water demand, according to the criteria in R12-  
15-718;

3 4. The proposed sources of water are of adequate quality, according to  
4 the criteria in R12-15-719;

5 5. The applicant has the financial capability to construct adequate  
6 delivery, storage, and treatment works in a timely manner according to  
7 the criteria in R12-15-720;

8 6. Any proposed groundwater use is consistent with the management  
9 plan in effect at the time of the application, according to the criteria in  
10 R12-15-721; and

11 7. Any proposed use of groundwater withdrawn within an AMA is  
12 consistent with the management goal, according to the criteria in R12-  
13 15-722.

14 F. The Director shall review an application for a designation of assured  
15 water supply pursuant to the licensing time-frame provisions in R12-15-  
16 401.

17 16. Generally, groundwater may not be transported from outside an AMA into an  
18 AMA. See A.R.S. § 45-551. But A.R.S. § 45-555 provides an exception under which  
19 Prescott may transport up to 14,000 AFY from the Big Chino Sub-basin to the Prescott  
20 AMA. A.R.S. § 45-555(E) provides:

21 This article does not apply to the withdrawal and transportation of up to  
22 fourteen thousand acre-feet per year of groundwater by the city of  
23 Prescott, or the United States in cooperation with the city of Prescott,  
24 from the Big Chino sub-basin of the Verde River groundwater basin if  
25 the groundwater is withdrawn and transported either:

26 1. In exchange for or replacement or substitution of supplies of water  
27 from the central Arizona project allocated to Indian tribes, cities, towns  
28 or private water companies in the Prescott active management area or  
29 in the Verde River groundwater basin.

30 2. For the purpose of directly or indirectly facilitating the settlement of  
the water rights claims of the Yavapai-Prescott Indian tribe and the  
Camp Verde Yavapai-Apache Indian community.

17 17. Under Arizona law, surface water and percolating groundwater are legally distinct  
18 types of underground water. Subflow is considered part of the stream (*i.e.*, surface  
19 water) and is subject to prior appropriation. Percolating groundwater is not appropriable  
20 and may be pumped by the overlying landowner, subject to the doctrine of reasonable  
21 use and the federal reserved water rights doctrine. See *Gila IV*.

1 18. Water in underground tributary aquifers is not a part of the surface stream and  
2 may not be considered subflow. This is true even though given enough time all  
3 extractions from a tributary aquifer will cause a more-or-less corresponding depletion  
4 from stream flow volume. *See Gila IV.*

5 19. ADWR has a statutory duty to provide technical assistance to the GSA Court.  
6 *See A.R.S. § 45-256.*

7 20. The judiciary is responsible for defining the limits of a subflow zone and has  
8 assigned that task to ADWR. The saturated floodplain Holocene alluvium is a geologic  
9 marker that will be the subflow zone. ADWR is required to map that zone in each area,  
10 but, where applicable, ADWR must also consider the test-factors set out by the GSA  
11 Court and it may also consider any appropriate local conditions.

12 21. Wells inside the subflow zone are under the jurisdiction of the GSA Court, but  
13 the well owner may show that they are not taking subflow. Wells outside the subflow  
14 zone that have a COD that extends into the subflow zone are also subject to the GSA  
15 jurisdiction. *See Gila IV.*

16 **ISSUE 9 – PURPORTED IMPACTS ON THE VERDE RIVER**

17 22. Appellants assert that Prescott’s pumping will have an impact on the Verde River  
18 that will lead to Prescott being required to reduce its pumping. Appellants then argue  
19 that, as a consequence, Prescott has not shown that it meets the requirement to show  
20 that the water will be physically, legally, and continuously available for 100 years.

21 **Call by a Senior Water-Rights Holder**

22 23. Appellants have not met their burden to show by clear and convincing evidence  
23 that Prescott will be pumping subflow. Consequently, Appellants have not shown that  
24 the pumped water might be subject to a call under the prior appropriation doctrine.  
25 Appellants have not shown that ADWR must consider in the Decision and Order the  
26 effect of Prescott’s pumping on surface water rights to the Verde River.

27 24. No subflow zone has been determined or mapped for the Verde River  
28 watershed. It is the judiciary that must determine the boundaries of the subflow zone.  
29 Consequently, the mere presence of saturated floodplain Holocene alluvium in the  
30 watershed can carry no substantial weight in this proceeding.

1 25. Appellants argue that Prescott might be ordered to restrict its pumping because  
2 the water might be subject to call by a holder of federal reserved water rights.  
3 Appellants' argument is based on speculation that is not supported by substantial  
4 evidence. Appellants have not shown that ADWR must consider in the Decision and  
5 Order the potential impact of Prescott's pumping on the holders of federal reserved  
6 water rights.

7 **Endangered Species Act**

8 26. Appellants assert that in the future Prescott's pumping may be restricted  
9 because, according to Appellants, it is likely that Prescott will be found to be in violation  
10 of the ESA.

11 27. Because Appellants' argument is based on speculation, Appellants have not met  
12 their burden to show that Prescott's pumping will violate the ESA.

13 28. Appellants have not shown that ADWR must consider in the Decision and Order  
14 the potential that Prescott's pumping might violate the ESA.

15 **Alleged Violation of the Yavapai-Prescott Indian Tribe Settlement Act**

16 29. The CBD Appellants argue that Prescott might be ordered to restrict its pumping  
17 because that pumping will violate the Yavapai-Prescott Indian Tribe Settlement Act. But  
18 the CBD Appellants rely on essentially the same evidence intended to show that there  
19 will be a violation of the ESA and that the pumping will deplete the flow of the Verde  
20 River.

21 30. The CBD Appellants have not met their burden to show that Prescott's pumping  
22 will violate the Yavapai-Prescott Indian Tribe Settlement Act.

23 31. The CBD Appellants have not shown that ADWR must consider in the Draft  
24 Decision and Order the possibility that Prescott's pumping might violate the Yavapai-  
25 Prescott Indian Tribe Settlement Act.

26 **ISSUE 1 – PHYSICAL, LEGAL AND CONTINUOUS AVAILABILITY**

27 **Climate Change**

28 32. Appellants argue that ADWR must consider the impact of climate change on  
29 Prescott's ability to pump water from the Big Chino Sub-basin.  
30

1 33. Appellants have not met their burden to show that the effects of climate change  
2 will prevent Prescott from pumping the water required to meet the DAWS as set forth in  
3 the Draft Decision and Order.

4 34. Appellants have not shown that ADWR erred in its application of the AWS  
5 statutes and rules to the Objections related to climate change.

6 **Other Groundwater Pumping**

7 35. Appellants argue that because others in the Big Chino Sub-basin will also be  
8 allowed to pump and use the groundwater, Prescott has not shown that the water will  
9 be physically, legally, and continuously available.

10 36. Appellants have not met their burden to show that the anticipated pumping by  
11 other water users actually will prevent Prescott from pumping the water required to  
12 satisfy the DAWS as set forth in the Draft Decision and Order. Consequently,  
13 Appellants have not shown that the water will not be physically, legally, or continuously  
14 available because others may also pump groundwater from the Big Chino Sub-basin.

15 37. Appellants have not shown that ADWR erred in its application of the AWS  
16 statutes and rules to the Objections related to other pumping in the Big Chino Sub-  
17 basin.

1 **Physical Availability**

2 38. The preponderance of the evidence shows that the water proposed to be  
3 imported into the Prescott AMA pursuant to A.R.S. § 45-555(E) will be physically  
4 available for 100 years.

5 39. Appellants have not shown that ADWR erred in its application of the AWS  
6 statutes and rules to the Objections related to physical availability.

7 **Legal Availability**

8 40. Because imported groundwater is not listed in R12-15-718(E), Appellants argue  
9 that there is no legal basis on which Prescott can show the imported groundwater  
10 qualifies for an AWS. ADWR asserts that R12-15-718(E) is not all-inclusive and that  
11 other rules and statutory provisions show that Appellants' argument is in error.

12 41. A.R.S. § 45-555(E) allows Prescott to import water from the Big Chino into the  
13 Prescott AMA. Although A.R.S. § 45-557 limits when groundwater from outside an AMA  
14 may be used for an AWS, none of those limitations apply to Prescott's Application.

15 42. A.A.C. R12-15-716(D)(2) provides a rule for determining the physical availability  
16 of groundwater to be withdrawn from a basin outside an AMA and imported into an  
17 AMA. Under Appellants' argument, this rule would be superfluous.

18 43. The intent of the legislature was to allow imported groundwater to be used as a  
19 basis for demonstrating an AWS.

20 44. Appellants have not shown that ADWR erred in its application of the AWS  
21 statutes and rules to the Objections related to legal availability.

22 45. The preponderance of the evidence shows that the water proposed to be  
23 imported into the Prescott AMA pursuant to A.R.S. § 45-555(E) will be legally available  
24 for 100 years.

25 **Continuous Availability**

26 46. The preponderance of the evidence shows that the water proposed to be  
27 imported into the Prescott AMA pursuant to A.R.S. § 45-555(E) will be continuously  
28 available for 100 years under the applicable rule. ADWR has also added a requirement  
29 that conditions the final approval of the DAWS on Prescott's submission of the AOC.  
30

1 47. Appellants have not shown that ADWR erred in its application of the AWS  
2 statutes and rules to the Objections related to continuous availability.

3 **ISSUE 3 –FINANCIAL CAPABILITY**

4 48. In its Draft Decision and Order, ADWR determined that Prescott has submitted  
5 the documentation required by the applicable rule and, consequently, that Prescott has  
6 demonstrated that it has the required financial capability.

7 49. Based on Mr. Harvey’s testimony, the CBD Appellants argue that: (1) Prescott’s  
8 CIP does not show that Prescott has the financial capability to construct the required  
9 infrastructure; and (2) the Decision and Order is in error because the debt-capacity  
10 calculations are not based on standard assumptions. See Exhibit ADWR 132A at  
11 Finding of Fact 48.

12 50. In light of Mr. Woodfill’s testimony, Mr. Harvey’s opinions show only that that  
13 there may be room for disagreement among economists and financial planners  
14 engaging in long-term planning. Consequently, Mr. Harvey’s testimony is not sufficient  
15 to show that Prescott does not have the financial capacity to construct the required  
16 facilities or that ADWR erred when it concluded that the debt-capacity calculations  
17 were prepared using standard assumptions.

18 51. The preponderance of the evidence shows that Prescott has met the  
19 requirements of the applicable rule and that Prescott has demonstrated the financial  
20 capability to construct the water facilities required to transport the water to be imported.

21 52. The CBD Appellants have not shown that ADWR erred in its application of the  
22 AWS statutes and rules to the Objections related to financial availability.

23 **ISSUE 2 – COMPLIANCE WITH A.R.S. § 45-555(E)**

24 **Water to Prescott Valley**

25 53. Appellants argue that water to be used by Prescott Valley does not qualify  
26 under A.R.S. § 45-555(E) because under that statute Prescott, and not Prescott Valley,  
27 may import the groundwater.

28 54. A.R.S. § 45-555(E) does not address or limit who may use water imported from  
29 Big Chino Sub-basin, nor does the statute address where that water may be used. In  
30 contrast, other provisions of A.R.S., Title 45, Chapter 2, Article 8.1 do place restrictions

1 on the use of water imported into the AMAs. As a matter of statutory construction, this  
2 shows that the legislature did not intend to place restrictions on the use of water that  
3 Prescott imports from the Big Chino Sub-basin.

4 55. Appellants have not shown that ADWR erred in its determination that Prescott  
5 may deliver the imported water to Prescott Valley.

6 **A.R.S. § 45-555(E)(1) CAP Water**

7 Prescott's CAP Allocation – 7,127 AFY

8 56. ADWR's position is that only CAP water that Prescott has not yet replaced is  
9 now eligible for replacement with imported water. Prescott argues that the statute has  
10 no limits or offsets that allow ADWR to make any deductions from the relinquished  
11 volume.

12 57. ADWR's interpretation of the statute is appropriate. It would not make sense to  
13 conclude that the legislature intended to allow Prescott to replace its CAP water more  
14 than once. Prescott has not met its burden to show that ADWR may not apply an offset  
15 to account for CAP water that has already been replaced.

16 58. ADWR found that 17.35% of Prescott's CVID purchase was made using money  
17 that was restricted in its use. But, because CAP water meets fully the requirements for  
18 an AWS, ADWR considered only water that also meets the AWS requirements to be  
19 replacement water. Consequently, ADWR determined that the 241.3 AFY has been  
20 replaced.

21 59. Appellants argue that: (1) Prescott's entire purchase from CVID should be  
22 considered as replacement water because Prescott used money from the account in  
23 which it deposited the \$3.4 million; and (2) because there is no relationship between  
24 the AWS statutes and A.R.S. § 45-555(E), ADWR erred by not using the full amount of  
25 Granite Creek water.

26 60. Contrary to Appellants' argument, these statutes are related by virtue of the fact  
27 they are within A.R.S. Title 45, Chapter 2. Appellants present no sound basis on which  
28 to conclude that by comingling the money, Prescott "tainted" money that did not carry  
29 any restrictions on its use.

1 61. Appellants do not present a sufficient basis on which to conclude that ADWR's  
2 interpretation of the statute is in error.

3 62. Prescott has not met its burden to show that ADWR erred in its determination  
4 that 241.3 AFY of Prescott's CAP allocation was previously replaced and is  
5 consequently not now eligible for replacement with imported water.

6 63. Appellants have not shown that ADWR erred in its determination that A.R.S. §  
7 45-555(E)(1) allows Prescott to import 6,885.7 AFY as replacement water for its CAP  
8 allocation.

9 The Tribe's CAP Allocation – 500 AFY

10 64. ADWR determined that Prescott was not entitled to replacement water for the  
11 Tribe's 500 AFY because there was no agreement between Prescott and the Tribe for  
12 Prescott to replace the Tribe's CAP allocation in the AMA.

13 65. Prescott argues that under a plain reading of subsection (E)(1) it is entitled to  
14 replace any CAP allocation that has been relinquished and that ADWR is adding a  
15 limitation that is not present in the statute.

16 66. Although ADWR is entitled to deference in interpreting the statute, that  
17 deference does not extend to adding a limitation or requirement that is not in the  
18 statute. In this case, ADWR is effectively adding to the statute a requirement that any  
19 replacement is contingent on an agreement between Prescott and the original right-  
20 holder. If the legislature had intended to condition Prescott's right to replacement water  
21 on the existence of an agreement with the original right-holder, the legislature would  
22 have included such a restriction in the statute. As a matter of statutory construction,  
23 ADWR's position cannot be sustained.

24 67. Appellants' argument that Prescott may not replace the Tribe's CAP allocation  
25 because the Tribe spent its sale-proceeds, also requires adding a limitation that is not  
26 in the statute (*i.e.*, it requires the statute to read that Prescott can import replacement  
27 water unless the original right-holder spent the money it received for the sale of that  
28 water).

29 68. Prescott has met its burden to show that it is authorized to import 500 AFY from  
30 the Big Chino Sub-basin to replace the Tribe's CAP allocation.

1 **A.R.S. § 45-555(E)(2) Water to Facilitate Settlement of the Tribe's Claims**

2 Type 2 Extinguishment Credits – 950.7 AFY

3 69. The preponderance of the evidence shows that Prescott's pledge of its Type 2  
4 rights helped facilitate settlement of the Tribe's claims.

5 70. Because Prescott gave up its right to extinguish the Type 2 rights, ADWR  
6 determined that Prescott should be allowed to replace a volume of water equivalent to  
7 the AWS-credit that the Type 2 rights would have provided to Prescott on  
8 extinguishment. ADWR's conclusion is not an unreasonable reading of subsection  
9 (E)(2).

10 71. Appellants' argument that ADWR should not have included this water because  
11 the Type 2 rights were not extinguished is not a sufficient basis on which to conclude  
12 that ADWR's determination was made in error.

13 72. Appellants' argument that these extinguishment credits are a double counting of  
14 the 231 AFY under Prescott's obligation to deliver water to the Tribe is not persuasive  
15 because the Type 2 rights secure more than just the delivery obligation.

16 73. Appellants have not shown that ADWR erred when it determined that Prescott  
17 may import from Big Chino Sub-basin 950.7 AFY for the Type 2 rights.

18 Prescott's Water Service to the Tribe – 231 AFY

19 74. In its Draft Decision and Order, ADWR determined that Prescott's agreement to  
20 provide the Tribe water service in perpetuity and to provide the Tribe with first priority to  
21 550 AFY facilitated the settlement even though Prescott had existing obligations to the  
22 Tribe. Consequently, ADWR determined that the delivery obligation meets the  
23 requirement of subsection (E)(2).

24 75. Mr. Ogo negotiated the settlement for the Tribe and, consequently, his opinion  
25 that the new obligations were important to the Tribe carries more weight than does Mr.  
26 Sommers' opinion that these concessions were not sufficient to meet the statute. The  
27 preponderance of the evidence shows that Prescott's commitments to the Tribe  
28 facilitated the settlement.

1 76. Appellants have not shown that ADWR erred when it determined that Prescott  
2 may import from Big Chino Sub-basin 231 AFY for water that will be delivered to the  
3 Tribe under the terms of the Settlement Agreement.

4 Water from Granite Creek – 643 AFY

5 77. The preponderance of the evidence shows that it was CVID that provided the  
6 Tribe with the 643 AFY of Granite Creek water. Essentially, ADWR’s position is that  
7 replacement water under subsection (E)(2) is limited to contributions by Prescott.  
8 Prescott argues that because it recognized these rights in the Settlement Agreement, it  
9 qualifies to import that volume of water.

10 78. The statute supports ADWR’s position. Because Prescott benefits from  
11 imported water under (E)(2), the reasonable reading of the statute is that for Prescott to  
12 qualify for imported water, Prescott, and not CVID, must have provided something to  
13 the Tribe to facilitate the settlement. Merely acknowledging the water rights provided by  
14 CVID is not sufficient to meet the intent of the statute.

15 79. Prescott has not shown that ADWR erred when it determined that Prescott may  
16 not import from Big Chino Sub-basin 643 AFY for the Granite Creek water.

17 CAP Water under A.R.S. § 45-555(E)(2)

18 80. Prescott argues that the CAP relinquishments facilitated the settlement by  
19 causing Scottsdale and others to support the settlement. Consequently, according to  
20 Prescott, the CAP relinquishments also meet the requirements of subsection (E)(2).

21 81. Prescott’s interpretation of the statute is not persuasive. Because Prescott  
22 benefits from imported water under (E)(2), the reasonable reading of the statute is that  
23 Prescott must have provided something to the Tribe to facilitate the settlement. The  
24 sale of CAP water to Scottsdale is not sufficient to meet the intent of the statute.

25 82. Prescott’s entire CAP allocation of 7,127 AFY has been accounted for or  
26 replaced, which provides another basis on which Prescott’s argument fails for that  
27 water.

28 83. Prescott has not shown that A.R.S. § 45-555(E)(2) allows it to import water for  
29 the relinquished CAP allocations.

30 **ISSUE 4 – CALCULATION FOR ASSURED WATER SUPPLY PURPOSES**

1 84. Appellants argue that the water to be delivered to Prescott Valley does not meet  
2 the AWS rules.

3 85. ADWR found that Prescott Valley is a “customer reasonably projected to be  
4 added” under the definition of “projected demand” found at A.A.C. R12-15-701(57).  
5 Appellants argue that this was an error because Prescott Valley is not in Prescott’s  
6 service area.

7 86. A.A.C. R12-15-701(57) defines "Projected demand" as  
8 [T]he 100-year water demand at build-out, not including committed or  
9 current demand, of customers reasonably projected to be added and  
10 plats reasonably projected to be approved within the designated  
11 provider's service area and reasonably anticipated expansions of the  
12 designated provider's service area.

13 87. ADWR’s determination that the water to be used by Prescott Valley meets the  
14 definition of projected demand is not an unreasonable reading of the rule.

15 88. ADWR found that Prescott is authorized to import from the Big Chino Sub-basin  
16 8,067.4 AFY and that all of that water meets the AWS requirements. Appellants have  
17 not shown that ADWR’s determination that this 8,067.4 AFY meets the AWS  
18 requirements was made in error.

19 89. If the requested water does not meet the requirements of A.R.S. § 45-555(E), it  
20 necessarily does not meet the AWS requirements. Consequently, in all cases where  
21 ADWR determined that Prescott’s request did not comply with A.R.S. § 45-555(E),  
22 ADWR found that Prescott did not meet the AWS requirements. With the exception of  
23 the 500 AFY for the Tribe’s allocation, ADWR’s determination was correct.

24 90. Because ADWR erred when it concluded that Prescott was not entitled to  
25 replace the Tribe’s CAP allocation and because the preponderance of the evidence  
26 shows that this 500 AFY would otherwise meet the AWS requirements, the Draft  
27 Decision and Order should be amended to include the designation of an additional 500  
28 AFY.

29 **RECOMMENDED ORDER**

30 **IT IS RECOMMENDED** that the Director of ADWR modify the Draft Decision and Order  
to show that Prescott may import 500 AFY to replace the Tribe’s CAP allocation;

1 **IT IS FURTHER RECOMMENDED** that the Director of ADWR modify the Draft Decision  
2 and Order to include the additional 500 AFY in Prescott's DAWS;

3 **IT IS FURTHER RECOMMENDED** that the Director of ADWR modify the Draft Decision  
4 and Order to include the changes in Prescott and ADWR's Stipulation; and

5 **IT IS FURTHER RECOMMENDED** that the Director of ADWR affirm the Draft Decision  
6 and Order in all other respects.

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1 Done this day, October 29, 2009

2  
3 /s/ Thomas Shedden  
4 Thomas Shedden  
5 Administrative Law Judge

6 Copy e-mailed this 29th day of  
7 October, 2009 to:

8  
9 Janet L. Ronald and Scott M. Deeny  
10 Deputy Counsels for the Arizona Department of Water Resources  
11 Michael J. Pearce, Maguire & Pearce, PLLC  
12 Counsel for the City of Prescott  
13 Timothy Hogan and Joy Herr-Cardillo, Arizona Center for Law in the Public Interest  
14 Counsels for Center for Biological Diversity; Sierra Club – Grand Canyon  
15 Chapter, Doris Cellarius; Audrey Clark; Edith A. Dillon; Thomas L. Fleischner;  
16 Santiago F. Galvis, Leslie K. Hoy, Harry M. Hollack; Charles A. Johnson; Jo Ann  
17 Johnson; Joanne Oellers; Chris Rigby  
18 John B. Weldon, Jr. and Lisa M. McKnight, Salmon, Lewis & Weldon, PLC  
19 Counsels for Gary Beverly, Tom Atkins, and Anthony J. Krzysik  
20

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