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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA, Plaintiff, vs. ARIZONA DEPARTMENT OF WATER RESOURCES, an agency of the State of Arizona; THOMAS BUSCHATZKE, Director of the Arizona Department of Water Resources, in his official capacity, Defendants.	Case No. CV2025-002623 **MOTION TO DISMISS** **{Oral Argument Requested}** Hon. Scott Blaney

INTRODUCTION

Homeowners across Arizona rely on the Arizona Department of Water Resources' ("ADWR") 100-year Assured Water Supply ("AWS") program even if they don't know it. Under that program, a subdivision developer must obtain either a certificate of assured water supply ("certificate") or a commitment of service from a water provider with a designation of assured water supply ("designation") before selling homes within an Active Management Area ("AMA") of the state. A.R.S. § 45-576. Certificates and designations include a determination from ADWR that sufficient water will be available for the proposed uses for at least 100 years because Arizona homeowners shouldn't have to worry that their homes will one day be without water. *See* A.R.S. §§ 45-401, 45-576. To implement the AWS program, and with public and stakeholder input, ADWR adopted rules (*see* A.A.C. R12-701, *et seq.*) including the "physical availability" rule for groundwater found at A.A.C. R12-15-716(B). This rule assesses whether groundwater is "physically available" for an applicant's proposed use for at least 100 years after accounting for existing uses and previously issued assured water supply determinations over a 100-year period. *Id.*

In 2017 (under Governor Doug Ducey), ADWR reported that, for purposes of the assured water supply program, groundwater had been overallocated in the Pinal AMA.[1] ADWR's updated groundwater model for the Pinal AMA showed that over a 100-year period, wells supplying water for both existing residents and approved, future homes were

[1] *2019 Pinal Model and 100-Year AWS Projection-Technical Memorandum*, ARIZ. DEP'T OF WATER RES., March 24, 2025, https://infoshare.azwater.gov/docushare/dsweb/View/Collection-19686.

projected to run dry – resulting in "unmet demand" for groundwater. Moreover, in deeper areas of the aquifer, water levels at assured water supply wells were projected to exceed 1,100 feet deep – the maximum depth to groundwater for the Pinal AMA permitted by ADWR's physical availability rule. Unmet demand and depth-to-water are not separate rules or substantive policies as Plaintiff, Home Builders Association of Central Arizona ("HBACA") characterizes them; ADWR considers both unmet demand and depth-to-water exceedances under A.A.C. R12-15-716(B).

Relying on this updated groundwater model, ADWR notified all applicants with pending AWS applications in the Pinal AMA that they may not be able to demonstrate physical availability of groundwater when considering existing uses and AWS determinations in the area.

In June 2023 (under Governor Katie Hobbs), ADWR released an updated groundwater model for most of the Phoenix AMA and completed a model run that also showed that groundwater had been overallocated in the Phoenix AMA, resulting in both unmet demand and depth-to-water exceedances.[2] Like the Pinal AMA, ADWR notified applicants that they may not be able to demonstrate physical availability of groundwater when considering existing uses and AWS determinations in the area.

Against this backdrop, HBACA sued to challenge ADWR's authority to consider AMA-wide unmet demand and 100-year depth-to-water exceedances when determining whether groundwater is "physically available" for an applicant's proposed subdivision use.

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[2] *2023 Phoenix AMA Groundwater Model*, ARIZ. DEP'T OF WATER RES, March 24, 2025, https://infoshare.azwater.gov/docushare/dsweb/View/Collection-21998

Under A.R.S. § 41-1034(B), HBACA argues that ADWR's implementation of A.A.C. R12-15-716(B) is (1) a practice or substantive policy statement that should be a separate rule, and (2) is not authorized by A.R.S. § 45-576(M).

But HBACA's claims fail because ADWR can consider AMA-wide unmet demand and depth-to-water exceedances under its existing rules and A.R.S. § 45-576, which require an applicant to account for existing uses and issued AWS determinations in the affected area to determine the physical availability of groundwater. For the below reasons, ADWR and Director Buschatzke in his official capacity (collectively "ADWR") move to dismiss HBACA's Complaint under Rule 12(B)(6) of the Arizona Rules of Civil Procedure.

BACKGROUND

The AWS program operates under an extensive set of rules adopted by ADWR, including the requirement in A.A.C. R12-15-716(B)[3] that groundwater[4] is physically available for an applicant's proposed groundwater use for at least 100 years after accounting for existing uses and previously issued determinations over a 100-year period (the "Physical Availability Rule"). To demonstrate that groundwater will be physically available, the applicant must "submit a hydrologic study, using a method of analysis approved by the Director, that accurately describes the hydrology of the affected area." A.A.C. R12-15-

[3] An excerpt of the relevant rule language is attached as **Exhibit A**.

[4] The rule also incorporates stored water, known as long-term storage credits, that will be recovered outside the area of impact of the storage. *See* A.R.S. § 45-802.01(2) and (12); A.A.C. R12-15-716(B). Throughout this brief, discussion of the rule and its implementation will reference "groundwater," although it also applies to stored water that will be recovered outside the area of impact of storage.

716(B). In the Phoenix and Pinal AMAs, applicants satisfy this requirement using ADWR's most recent numerical groundwater flow model for the respective AMA. Both models include large areas of the respective AMAs because the Director has determined, consistent with A.A.C. R12-15-716(B) that each area constitutes the "affected area" of groundwater withdrawals. *See also* A.R.S. § 45-401(13) (defining "[g]roundwater basin" as an area that "enclose[s] a relatively hydrologically distinct body or related bodies of groundwater").

The model run must demonstrate that "the groundwater will be withdrawn from depths that do not exceed the applicable maximum 100-year depth-to-static water level" – 1000 feet below land surface in the Phoenix AMA and 1100 feet below land surface in the Pinal AMA. A.A.C. R12-15-716(B)(2)(a)-(b). This requirement necessarily applies to groundwater withdrawals for all AWS determinations.

The model run must project the 100-year depth-to-water by incorporating withdrawals of groundwater in the area to satisfy each of the following over the 100-year period:

- Water demands associated with current water users, including irrigation and industrial uses, as well as municipal uses, described in the rule as "existing uses." A.A.C. R12-15-716(B)(3)(b).
- Water demands associated with certificates of assured water supply (for subdivisions), designations of assured water supply (for water providers' service areas), and analyses of assured water supply (for master-planned communities), and that are not yet included in existing uses. A.A.C. R12-15-716(B)(3)(c). These are often referred to as "issued demands" or "issued determinations."

- Water demands associated with the applicant's proposed use. A.A.C. R12-15-716(B)(3)(d).

The model run thus must show that water can be withdrawn for the proposed use after satisfying each of the water demands in the affected area, as described above. If some of the demands in the model run are not satisfied during the 100-year period (or are "unmet demands"), then the model run does not satisfy the rule requirement because it has not included those withdrawals in the projection of the 100-year depth-to-water.

ADWR adopted the current version of the Physical Availability Rule in 2006 after following all statutory rulemaking requirements. *Notice of Final Rulemaking*, 12 A.A.R. 3475 (Sept. 29, 2006). ADWR adopted a similar rule in 1995 after following all statutory requirements. *See id.* at 3476, 3484. The 2006 rulemaking involved extensive public participation and comment, including 19 informal meetings held to solicit public input and two informal comment periods before the formal comment period. *Id.* at 3477.

In response to the groundwater overallocation in the Pinal AMA based on ADWR's implementation of its Physical Availability Rule, in 2021 the Arizona Legislature enacted a statute clarifying certain aspects of the Physical Availability Rule, without modifying ADWR's interpretation of its rules as it regards the HBACA Complaint. A.R.S. § 45-576.08; *see also* Ariz. Laws 2021, Ch. 17, § 1 (1st Reg. Sess.) (effective Sept. 29, 2021).

ARGUMENT

I. The Physical Availability Rule requires that ADWR consider "unmet demand" throughout the model area.

In Count 1 of the Complaint, HBACA argues that ADWR failed to follow APA procedures for rulemaking for the AMA-wide unmet demand requirement. But this requirement is included in the Physical Availability Rule. The rule requires an applicant to account for previously allocated groundwater uses in an affected area when demonstrating whether groundwater is physically available for the applicant's proposed use. A.A.C. R12-15-716(B)(3). If previously allocated groundwater uses are unmet in the affected area, then ADWR cannot approve the application because the applicant cannot fully account for those uses as required by the rule.

A. Applicants must submit a hydrologic analysis that accurately describes the "affected area" and that is approved by the Director of ADWR.

A.A.C. R12-15-716(B) requires that an AWS applicant "submit a hydrologic study, using a method of analysis approved by the Director, that accurately describes the hydrology of the affected area." *See also* A.R.S. § 45-577(B). The Director may approve AMA-wide groundwater models that include most of the AMA as the "affected area" when available data shows that the water underground in the basin is connected. *Id*. In other words, if groundwater modeling shows the water underground within a basin is connected, the Director can reasonably consider the basin to be the "affected area." As long as the area is affected, nothing in the rule requires that it be limited to a certain size. As detailed below, under A.A.C. R12-15-716(B)(3), an applicant's model must account for other allocated uses in this "affected area."

B. An applicant's model run must calculate the groundwater available for its proposed use after accounting for groundwater allocated to other uses in the area.

An applicant's model run must demonstrate that groundwater withdrawals will not exceed the applicable maximum depth-to-water level in the Physical Availability Rule for 100 years. A.A.C. R12-15-716(B)(2). The model run must account for groundwater associated with existing uses and previously issued AWS determinations over the 100-year period in the area. A.A.C. R12-15-716(B)(3) then requires the Director to calculate the projected 100-year depth-to-water level by adding the projected groundwater declines "for the area" for (1) existing uses, (2) issued AWS determinations, and (3) the applicant's proposed use.

C. The existence of unmet demand in a model run means that the model cannot account for groundwater demands associated with other uses in the area, as required by A.A.C. R12-15-716(B)(3).

ADWR uses the term "unmet demand" to mean that modeling shows that well locations, either for an existing use or AWS determination, will go dry or hit bedrock before the end of the 100-year period. The model therefore stops including those withdrawals after the well goes dry. If an applicant submits a model run that doesn't account for the full volume of groundwater withdrawals for existing uses and issued determinations in the area over the 100-year period, then the applicant does not satisfy the plain language of the Physical Availability Rule. That's because the rule requires the Director to "add" the projected decline for the "estimated demand" for assured water supply determinations and the projected decline for existing uses in the area for a 100-year period. A.A.C. R12-15-716(B)(3). In other words, if an allocated groundwater use is "unmet" in the model run (meaning the well location for that use is simulated to go dry or hit bedrock), then the applicant didn't add the full 100-year demand for that groundwater use to its model run. As

an example, if the model run shows that the well location for a groundwater user will go dry in year 20, the applicant has added or accounted for only 20% of the 100-year demand for this allocated use.

D. Accounting for existing uses and issued AWS determinations is consistent with the purpose of the Physical Availability Rule and fundamental to the AWS program.

Requiring AWS applicants to account fully for already allocated groundwater uses in the affected area is fundamental to the AWS program. The Legislature requires ADWR and its Director to assure homeowners that they will have a water supply for *at least* 100 years. A.R.S. § 45-576(M). An applicant cannot demonstrate groundwater is "available" for its proposed use if it fails to account for other groundwater uses in the affected area. A.A.C. R12-15-716(B). If the model run shows unmet demand for well locations with existing and approved AWS groundwater uses, this creates significant uncertainty about how those groundwater uses will be satisfied and how it will impact the applicant's proposed use. Moreover, the groundwater cannot be "available for the proposed use," A.R.S. § 45-576(M), if other groundwater users in the area already depend on the same groundwater supply.

Failing to account for unmet demand in well locations with AWS determinations in the area is also inconsistent with the purpose of the Physical Availability Rule.[5] In its 2006 Notice of Final Rulemaking, ADWR explained that A.A.C. R12-15-716 sought to prevent

[5] The same principles of construction that apply to statutes apply to the regulations promulgated by an administrative agency. The fundamental purpose of statutory construction is to determine legislative intent or "the intent of the licensing agency which promulgated the regulations." *Marlar v. State*, 136 Ariz. 404, 410–11 ¶¶ 3-6 (App. 1983).

overallocation of groundwater resources and ensure the continued validity of ADWR's 100-year assured water supply determinations:

> The emergency rules were necessary after the Department discovered an omission in the current rules that could have forced ADWR to ignore the projected demand of designated providers and the demand of issued certificates and water reports for which plats had not been recorded when reviewing subsequent applications for the physical availability of groundwater. Failure to consider those demands in a review of physical availability could lead to over-allocation of groundwater supplies. This situation would have removed the certainty of the existence of a designated provider or the issued certificate or water report. The proposed rule removes this omission, thus protecting the program's effectiveness.

Notice of Final Rulemaking, 12 A.A.R. 3475, 3484 (Sept. 29, 2006).

ADWR's intent was thus clear: it adopted the Physical Availability Rule to prevent new development from undermining the security of existing assured water supply determinations. ADWR explained that ignoring the projected water needs of designated providers and issued certificates "would have removed the certainty of the existence of a designated provider or the issued certificate." *Id.* Unmet demand for a designated provider or issued certificate in a model run presents the same concern: approving the new application could remove the certainty of the existence of the designated water provider or issued certificate and would result in overallocation of groundwater supplies.

E. Requiring ADWR to ignore unmet demand conflicts with ADWR's rule for analyses of AWS.

Approval of a new AWS application without considering any unmet demand in the affected area in a model run would also conflict with A.A.C. R12-15-703 (the "Analysis Rule."). The Analysis Rule allows developers to demonstrate physical availability of groundwater before obtaining a certificate of assured water supply and provides:

> If groundwater is a source of supply in the analysis and the applicant demonstrates that groundwater is physically available under subsection (E)(1) of this Section, the Director *shall consider that supply of groundwater reserved for the use of the proposed development in subsequent determinations of physical availability pursuant to R12-15-716(B).*

R12-15-703(F)(1) (emphasis added.) The Physical Availability Rule also requires the inclusion of groundwater associated with all analyses of AWS (and other agency determinations of AWS) in the area in the calculation of the projected 100-year depth-to-static water level. A.A.C. R12-15-716(B)(3)(c). If ADWR approved a new application despite unmet demand associated with analyses of AWS on file with the agency in the area, ADWR's action would conflict with the Analysis Rule's requirements. Rather than assume groundwater is "reserved" for the development, each new applicant could effectively ignore unmet demand for existing analysis holders. The Analysis Rule proves that the Physical Availability Rule requires new applicants to account fully for the demands of previously issued Assured Water Supply determinations in the affected area including analyses, certificates and designations of AWS as specified in A.A.C. R12-15-716(B)(3).

ADWR's application of its Physical Availability Rule is also consistent with the Arizona Supreme Court's analysis of the rule in *Silver v. Pueblo Del Sol Water Co.,* 244 Ariz. 553, 559 (2018). In determining whether ADWR must consider an unquantified federal reserved right under the Physical Availability Rule, the Supreme Court stated that the rule does not require ADWR to measure the "impact" an applicant's use will have on those unquantified rights. *Id.* at 559, ¶ 20. The Physical Availability Rule expressly requires applicants to account for existing uses and approved assured water supply determinations in the area in determining whether groundwater is available for an applicant's proposed use.

A.A.C. R12-15-716(B)(3). If an applicant cannot account for those demands, it has not met the requirements in the rule.

ADWR's requirement that the full groundwater demands for all existing uses and AWS determinations in an affected area be included the model run to show physical availability is included in A.A.C. R12-15-716(B), which was adopted pursuant to the APA. Count 1 of the Complaint should therefore be dismissed.

II. The Physical Availability Rule regarding unmet demand is consistent with and reasonably necessary to carry out the purposes of A.R.S. § 45-576 and the Groundwater Code.

In Count 2 of its Complaint, HBACA contends that the AMA-wide unmet demand requirement of its Physical Availability Rule is inconsistent with A.R.S. § 45-576(M) and therefore inconsistent with A.R.S. § 45-1030(A). But HBACA is wrong again. The Physical Availability Rule, including its application to AMA-wide unmet demand, is consistent with and reasonably necessary to carry out the purposes of the A.R.S. § 45-576 and the Groundwater Management Act.[6] It is also specifically authorized by A.R.S. § 45-576.[7] The Legislature enacted the Groundwater Code because Arizonans are "dependent in whole or in part upon groundwater basins for their water supply" and the excess withdrawal of groundwater is "threatening to destroy the economy of certain areas of this state and is threatening to do substantial injury to the general economy and welfare of this state and its

[6] A rule is invalid unless it is consistent with the statute, reasonably necessary to carry out the purpose of the statute and is made and approved in substantial compliance with sections 41-1021 through 41-1029 and articles 4, 4.1 and 5 of this chapter, unless otherwise provided by law." A.R.S. § 41-1030(A).

[7] A rule must also be specifically authorized by statute. A.R.S. § 41-1030(D)(3).

citizens." A.R.S. § 45-401(A). The Groundwater Code thus seeks "to conserve, protect, and allocate the use of groundwater resources of the state." A.R.S. § 45-401(B).

A.R.S. § 45-576(A) requires a person who proposes to offer subdivided lands for sale or lease to obtain either (1) a certificate of assured water supply or (2) a commitment of service from a water provider that has a designation of AWS from ADWR. "Assured Water Supply" means "sufficient groundwater, surface water or effluent of adequate will be continuously available to satisfy the water needs of the proposed use *for at least 100 years*." (emphasis added). A.R.S. § 45-576(M). And A.R.S. § 45-576(H) empowers ADWR to "[a]dopt rules to carry out the purposes of this section." *Id.*

Because ADWR must adopt rules for issuing AWS determinations for at least 100 years, rules that ensure subdivisions have at least a 100-year assured water supply are both consistent with and necessary to carry out A.R.S. § 45-576. To prove the point, a determination that sufficient water "will be continuously available" necessarily requires a determination that the water will be physically present and accessible for the proposed use.

The Physical Availability Rule also recognizes that water underground is connected (A.A.C. R12-15-716(B)) and an applicant's model run must fully account for other uses in an affected area to have any meaning (A.A.C. R12-15-716(B)(3)). If an applicant submits a model run that shows unmet demand for other groundwater uses in the affected area, it has not fully accounted for those uses in the area. This protects homeowners, businesses, and the economy more broadly from the devasting impacts of a water provider's inability to provide a sufficient water supply to meet customer needs.

Further, if ADWR were powerless to adopt a rule that requires new applicants to account for the demands of already issued AWS determinations, it could undermine *every* AWS determination issued by ADWR. Developers could build new subdivisions based on groundwater that is currently being used by existing residents, in a real sense, "robbing Peter to pay Paul." True, excluding substantial demands from the model area would increase the ability to show groundwater availability for new growth – but at catastrophic cost to water supplies for existing users and issued determinations. The suggestion that the Legislature tasked ADWR with assuring a water supply for new subdivisions for at least 100 years but did not intend ADWR to consider threats to the water supplies for current users and issued determinations in the area is absurd.

Moreover, the Arizona Legislature acknowledges ADWR's Physical Availability Rule and its implementation, meaning that "physical availability" as defined by ADWR, "has acquired a technical legal sense, apart from its ordinary meaning, that should be given effect." *Silver*, 244 Ariz. at 560 ¶ 22 (discussing and applying this "prior-construction" canon) (cleaned up). Indeed, the Legislature enacted A.R.S. § 45-576.08 in 2021 and expressly referenced "physical availability" of groundwater in the Pinal AMA. This acknowledged and responded to ADWR's Physical Availability Rule, including unmet demand and depth-to-water exceedances, and its implementation in the Pinal AMA. And though the Legislature deemed certain withdrawals physically available in that statute and simultaneously modified ADWR's rule for material plat changes in A.R.S. § 45-579.01, it did *not* amend, change, or disapprove of rules regarding unmet demand or depth-to-water

exceedances. Ariz. Laws 2021, Ch. 17, §§ 1, 3 (1st Reg. Sess.) (effective Sept. 29, 2021); *see also* A.A.C. R12-15-708 (incorporating legislative modifications).

Requiring that the full groundwater demands for all existing uses and AWS determinations for an affected area be included in a model run to show physical availability is therefore consistent with A.R.S. § 45-576 and the Groundwater Code as a whole. As a result, the Court should dismiss Count 2.

III. ADWR must consider depth-to-water exceedances in the locations of assured water supply determinations throughout the model area.

Count 3 of HBACA's Complaint argues that ADWR failed to follow APA procedures for rulemaking for the AMA-wide depth-to-water requirement. But ADWR properly considers AMA-wide depth-to-water level exceedances in well locations with issued AWS determinations in the area under the Physical Availability Rule.

As described in Part I.A., *supra*, A.A.C. R12-15-716(B) requires an applicant to submit a model (a hydrologic study) of the "affected area," which may include the entire AMA. A.A.C. R12-15-716(B)(3)(c) requires an AWS applicant to add the projected decline during the 100-year period for the estimated water demand of AWS determinations. ADWR issues those AWS determinations only after it determines that the estimated demand will not exceed the AMA depth-to-water limit in the rule over a 100-year period. A.A.C. R12-15-716(B)(2). So if a new AWS applicant's model shows that the depth-to-water level over a 100-year period has been exceeded for an existing AWS determination in the affected area, the applicant has not demonstrated that groundwater will be withdrawn above the maximum static depth-to-water level in the affected area.

This application of A.A.C. R12-15-716(B)(3)(c) also tracks the Physical Availability Rule's stated intent: to ensure the continued water supply for current residents and issued AWS determinations. *Notice of Final Rulemaking*, 12 A.A.R. 3475, 3484 (Sept. 29, 2006). Existing AWS determinations would mean nothing if an applicant doesn't have to account for them within the depth-to-water levels under which ADWR issued them. For example, a new applicant's pumping could cause an existing determination to exceed the applicable depth-to-water level. The existing determination would no longer meet the Physical Availability Rule's requirements, thus invalidating the assured water supply. It's absurd to suggest that an applicant can demonstrate an assured water supply while rendering a previous determination in the area invalid.

Similarly, if a later applicant caused groundwater withdrawals associated with an analysis of AWS to exceed the maximum depth-to-water level, then the applicant could no longer rely on that analysis to obtain a certificate. The requirement in A.A.C. R12-15-703(F)(1) that ADWR "reserve" the groundwater for the analysis when reviewing subsequent applications pursuant to A.A.C. R12-15-716(B) would be meaningless.

The requirement that groundwater withdrawals for AWS determinations in the affected area cannot exceed the maximum depth-to-water level is consistent with A.A.C. R12-15-716(B) and was adopted pursuant to the statutory requirements for rulemaking. The Court should thus dismiss Count 3.

IV. ADWR's application of its Physical Availability Rule regarding maximum depth-to-water is consistent with A.R.S. § 45-576.

Finally, HBACA posits in Count 4 that the AMA-wide depth-to-water requirement of ADWR's Physical Availability Rule is inconsistent with A.R.S. § 45-576(M) and thus violates A.R.S. § 45-1030(A). Not so. ADWR's consideration of AMA-wide depth-to-water level exceedances for issued AWS determinations in the affected area under its Physical Availability Rule is specifically authorized by, consistent with, and reasonably necessary to carry out the purpose of A.R.S. § 45-576 and the Groundwater Code for many of the same reasons explained in Part II, *supra*.

To reiterate, A.R.S. § 45-576 requires ADWR to issue 100-year AWS determinations. And ADWR's consideration of AMA-wide depth-to-water level exceedances for issued determinations in its Physical Availability Rule ensures that new AWS determinations do not invalidate those already issued in an affected area, which could include most of an AMA. *See* discussion *supra* Part III. This interpretation protects against the untenable result of requiring ADWR to revoke an AWS determination issued yesterday because an AWS determination issued today will cause the groundwater withdrawals to exceed the maximum depth-to-water level.[8] ADWR is unaware of any other statutory framework that requires an agency to issue new licenses at the expense of those already issued. And again, the Arizona Legislature acknowledges and accepts the Physical Availability Rule, and ADWR's interpretation and application of its meaning should be "given effect." *Silver*, 244 Ariz. at 22-28; *see also supra* p. 13.

[8] Under its rules ADWR can revoke certificates of assured water supply only if no lots within the subdivision have been sold to consumers. A.A.C. R12-15-709.

ADWR's requirement that groundwater withdrawals for AWS determinations in the affected area cannot exceed the maximum depth-to-water level is consistent with A.R.S. § 45-576. The Court should also dismiss Count 4.

CONCLUSION

For all these reasons, the Court should dismiss HBACA's Complaint with prejudice and without leave to amend.

RESPECTFULLY SUBMITTED this 28th day of March, 2025.

ARIZONA DEPARTMENT OF WATER RESOURCES

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ORIGINAL of the forgoing E-filed
with the Court this 28th day of March, 2025
via EfileAZ with a copy automatically to
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EXHIBIT A

TITLE 12. NATURAL RESOURCES

CHAPTER 15. DEPARTMENT OF WATER RESOURCES

The table of contents on page one contains links to the referenced page numbers in this Chapter.
Refer to the notes at the end of a Section to learn about the history of a rule as it was published in the *Arizona Administrative Register*.

This Chapter contains rules that were filed to be codified in the *Arizona Administrative Code* between the dates of

October 1, 2024 through December 31, 2024

Questions about these rules? Contact:

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PREFACE

Under Arizona law, the Department of State, Office of the Secretary of State (Office), Administrative Rules Division, accepts state agency rule notice and other legal filings and is the publisher of Arizona rules. The Office of the Secretary of State does not interpret or enforce rules in the *Administrative Code*. Questions about rules should be directed to the state agency responsible for the promulgation of the rule.

Scott Cancelosi, Director
ADMINISTRATIVE RULES DIVISION

RULES

ARTICLE 4. LICENSING TIME-FRAMES

Article 4, consisting of Sections R12-15-401 and Table A, adopted effective December 31, 1998; filed in the Office of the Secretary of State July 28, 1998 (Supp. 98-3).

ARTICLE 5. RESERVED

ARTICLE 6. RESERVED

ARTICLE 7. ASSURED AND ADEQUATE WATER SUPPLY

Article 7, consisting of Sections R12-15-701 through R12-15-725, adopted effective February 7, 1995.

1. After notifying the designated provider and initiating a review of the designated provider's status, the Director deter mines that the designated provider has less water, according to the criteria in R12-15-714(E), than the amount required for a 100-year supply for the provider's:
   a. Current demand,
   b. Committed demand, and
   c. Projected demand for the next two calendar years;
2. The designated provider fails to construct adequate delivery, storage, and treatment works in a timely manner; or
3. ADEQ or another governmental entity with equivalent jurisdiction has determined, after notice and an opportunity for a hearing, that the designated provider is in significant noncompliance with A.A.C. Title 18, Chapter 4 and is not taking action to resolve the noncompliance.

F. To determine whether the designation should be revoked, the Director shall use the standards in place at the time of review. If the Director determines that a designation of adequate water supply should be revoked, the Director shall provide for an administrative hearing, in accordance with A.R.S. Title 41, Chapter 6, Article 10.

G. If a designated provider's designated status terminates, the provider may apply for re-designation at anytime after termination.

H. Notwithstanding any other provision in this Article, a decision and order of the Director designating a city, town, or private water company as having an assured water supply is not affected by this Article solely because the rule numbers cited in the decision and order may have changed after the effective date of the decision and order.

Historical Head

Adopted effective February 7, 1995 (Supp. 95-1). Section repealed; new Section made by final rulemaking at 12 A.A.R. 3475, effective September 12, 2006 (Supp. 06-3).

R12-15-716. Physical Availability

A. The volume of a proposed source of water that is physically available to an applicant for a determination of assured water supply or a determination of adequate water supply is the amount determined by the Director to be physically available pursuant to subsections (B) through (L) of this Section.

B. If the proposed source is groundwater, the applicant shall submit a hydrologic study, using a method of analysis approved by the Director, that accurately describes the hydrology of the affected area. Except as provided in subsection (D) of this Section, the Director shall determine that the proposed volume of groundwater will be physically available for the proposed use if both of the following apply:

1. The groundwater will be withdrawn as follows:
   a. Except as provided in subsection (B)(1)(b) of this Section, from wells owned by the applicant or the proposed municipal provider that are located within the service area of the applicant or the proposed municipal provider or from proposed wells that the Director determines are likely to be constructed for future uses of the applicant or the proposed municipal provider.
   b. If the application is for a dry lot development, from wells that the Director determines are likely to be constructed on individual lots.
2. Except as provided in subsection (C) of this Section, the groundwater will be withdrawn from depths that do not exceed the applicable maximum 100-year depth-to-static water level according to the following:

Type and location of development	Maximum 100-year depth-to-static water level
a. Developments in Phoenix, Tucson, or Prescott AMAs, except dry lot developments	1000 feet below land surface
b. Developments in Pinal AMA, except dry lot developments	1100 feet below land surface
c. Developments outside AMAs, except dry lot developments	1200 feet below land surface
d. Dry lot developments	400 feet below land surface

3. The Director shall calculate the projected 100-year depth-to-static water level by adding the following for the area where groundwater withdrawals are proposed to occur:
   a. The depth-to-static water level on the date of application.

b. The projected declines caused by existing uses, using the projected decline in the 100-year depth-to-static water level during the 100-year period after the date of application, calculated using records of declines for the maximum period of time for which records are available up to 25 calendar years before the date of application. If evidence is provided to the Director of likely changes in pumpage patterns and aquifer conditions, as opposed to those patterns and conditions occurring historically, the Director may determine projected declines using a model rather than evidence of past declines.

c. The projected decline in the depth-to-static water level during the 100-year period after the date of application, calculated by adding the projected decline from each of the following that are not accounted for in subsection (B)(3)(b) of this Section:

i. The estimated water demand of issued certificates and water reports that will be met with groundwater or stored water recovered outside the area of impact of the stored water, not including the demand of subdivided lots included in abandoned plats;

ii. The estimated water demand of designations that will be met with groundwater or stored water recovered outside the area of impact of the stored water; and

iii. The groundwater reserved for developments for which the Director has issued an analysis pursuant to R12-15-703 or R12-15-712.

d. The projected decline in depth-to-static water level that the Director projects will result from the applicant's proposed use over a 100-year period.

C. The Director shall lower the maximum 100-year depth-to-static water level requirement specified in subsection (B)(2) of this Section for an applicant seeking a determination of adequate water supply if the applicant demonstrates both of the following:

1. Groundwater is available at the lower depth; and
2. The applicant has the financial capability to obtain the groundwater at the lower depth, according to the criteria in R12-15-720.

D. If the proposed source is groundwater that will be withdrawn from a groundwater basin outside an AMA and transported into an AMA, the Director shall determine that the proposed volume of groundwater will be physically available if both of the following apply:

1. The groundwater will be withdrawn from wells owned by the applicant or the proposed municipal provider or from proposed wells that the Director determines are likely to be constructed for the future uses of the applicant or the proposed municipal provider.
2. Withdrawal of the groundwater will comply with any depth-to-static water level criteria, decline rate criteria, and volume limitation criteria prescribed by statute. If there are no applicable depth-to-static water level criteria prescribed by statute, withdrawal of the groundwater shall comply with the depth-to-static water level criteria in subsection (B)(2) of this Section.

E. Subject to subsection (L) of this Section, if the proposed source of water is surface water, other than CAP water, or Colorado River water, the Director shall determine the annual volume of water that is physically available for the proposed use, taking into consideration the priority date of the right or claim, by calculating 120% of the firm yield of the proposed source at the point of diversion as limited by the capacity of the diversion works; except that if the applicant demonstrates that an alternative source of water will be physically available during times of shortage in the proposed surface water supply, the Director shall determine the annual volume of water available by calculating 100% of the median flow of the proposed source at the point of diversion as limited by the capacity of the diversion works. The Director shall determine the firm yield or median flow as follows:

1. By calculating the firm yield or median flow at the point of diversion based on at least 20 calendar years of flow records from the point of diversion, unless 20 calendar years of records are unavailable and the Director determines that a shorter period of record provides information necessary to determine the firm yield or median flow; or
2. By calculating the firm yield or median flow at the point of diversion using a hydrologic model that projects the firm yield or median flow, taking into account at least 20 calendar years of historic river flows, changes in reservoir storage facilities, and projected changes in water demand. The yield available to any applicant may be composed of rights to stored water, direct diversion, or normal flow rights. If the permit for the water right was issued less than five years before the date of application, the Director shall require the applicant to submit evidence, as applicable, in accordance with this subsection.

F. Subject to subsection (L) of this Section, if the proposed source of water is CAP water, the Director shall determine the annual volume of water that is physically available for the proposed use as follows:

1. If the applicant or the proposed municipal provider has a non-declining, long-term municipal and industrial subcontract for CAP water, calculate 100% of the annual amount of water established in the subcontract.
2. If the applicant has a lease for Indian priority CAP water, calculate 100% of the annual amount of water established in the lease.
3. If the applicant has a subcontract for CAP water other than a non-declining, long-term municipal and industrial subcontract or a lease for Indian priority CAP water:
   a. If the applicant submits evidence of sufficient backup water supplies, calculate 100% of the annual amount of water established in the subcontract. The applicant may establish backup water supplies by one or more of the following:
      i. A drought response plan;
      ii. Long-term storage credits;
      iii. A contract for water with a multi-county water conservation district; or
      iv. Evidence of other backup supplies that are physically, continuously, and legally available.

GOOD FAITH CONSULTATION CERTIFICATE

Undersigned counsel for the Arizona Department of Water Resources and Thomas Buschatzke, in his capacity as Director of the Arizona Department of Water Resources (ADWR), hereby submits this "Good Faith Consultation Certificate," as required by Ariz. R. Civ. P. 12(j) and in compliance with Ariz. R. Civ. P. 7.1(h), with respect to the Rule 12(b)(6) motion to dismiss filed herein.

Through counsel, ADWR, has tried in good faith to resolve issues presented in the lawsuit by personally conferring with counsel for Plaintiff, Home Builders Association of Central Arizona (HBACA). The specific personal consultation efforts (and results) are detailed below as follows:

> Counsel for ADWR conferred with counsel for Plaintiff on Thursday, March 20, 2025, by video conference, and explained that ADWR intended to file a motion to dismiss the lawsuit because ADWR properly considers AMA-wide unmet demand and depth-to-water exceedances for assured water supply determinations under its existing physical availability rule, A.A.C. R12-15-716, and ADWR's application of its physical availability rule is consistent with and authorized by statute. Counsel for the parties did not resolve the legal issues in the case.

Based upon the foregoing, undersigned counsel for ADWR hereby certifies that, after personal consultation and good faith efforts to do so, counsel for the parties have been unable to satisfactorily resolve the dispute which is the subject of the ADWR's Motion to Dismiss under Rule 12(b)(6).

RESPECTFULLY SUBMITTED this 28th day of March, 2025

ARIZONA DEPARTMENT OF WATER RESOURCES

Nicole D. Klobas, Chief Counsel
Emily Petrick, Deputy Counsel
Kimberly Parks, Deputy Counsel