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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

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

(Oral Argument Requested)

(Assigned to The Honorable Scott Blaney)

INTRODUCTION

This lawsuit challenges two unlawful rules imposed by the Arizona Department of Water Resources ("ADWR" or "Department") that have effectively halted new home construction in some of Maricopa County's fastest-growing and most affordable areas.

Arizona law requires developers to obtain a Certificate of Assured Water Supply ("Certificate") from ADWR to build homes. The statute requires proof of "[s]ufficient groundwater … to satisfy the water needs of the *proposed use*." A.R.S. § 45-576.[1] But ADWR's rules unlawfully demand more: they require applicants to prove adequate groundwater not just for their project, but for the entire model run of the Phoenix Active Management Area ("AMA")—a region larger than Connecticut. ADWR's "AMA-Wide Unmet Demand Rule" and "AMA-Wide Depth-to-Water Rule" (the "AMA-Wide Rules") have created an extreme, legally unsupported barrier to development.

The AMA-Wide Rules are invalid for two independent reasons.

First, they are subject to the Administrative Procedure Act ("APA") because they impose binding, generally applicable requirements and thus qualify as rules under Arizona law. *See Arizona State Univ. v. Arizona State Ret. Sys.*, 237 Ariz. 246, 250–52 ¶¶ 16–22 (App. 2015). Yet ADWR adopted them without following the APA's mandatory rulemaking procedures. Under A.R.S. § 41-1034(B), Plaintiffs are entitled to a declaration on Counts 1 and 3 on that ground alone.

Second, ADWR lacks statutory authority to impose the AMA-Wide Rules. State law requires agency rules to be consistent with their governing statutes, reasonably necessary to achieve their purposes, and specifically authorized by the Legislature. A.R.S. § 41-1030(A), (D). The AMA-Wide Rules meet none of those standards. They contradict Section 45-576's plain language by shifting the focus from an applicant's "proposed use" to a speculative, region-wide analysis the Legislature never required or authorized; they contravene the purpose of Arizona's comprehensive water code; and ADWR can point to *no* specific statutory authority to impose them.

[1] All emphasis herein is added unless otherwise specified.

In its Motion to Dismiss ("Mot."), ADWR fails to address the core issues in this case: these are agency rules that required formal rulemaking—and ADWR had no legal power to adopt them. Likewise, ADWR does *not* contend that it adopted the AMA-Wide Rules in compliance with the APA.

Instead, ADWR tries to sidestep that issue by arguing that its actions are already authorized under existing agency regulations. This argument also fails. The Physical Availability Rule, A.A.C. R12-15-716(B), provides for a site-specific evaluation about whether water is available to supply the proposed development for 100 years. As the Arizona Supreme Court has recognized, the plain language of the Physical Availability Rule "requires [ADWR] to measure the impact of 'existing uses' on groundwater supply available for an applicant, not the impact of the applicant's proposed groundwater use on 'existing uses.'" *Silver v. Pueblo Del Sol Water Co.*, 244 Ariz. 553, 559 ¶ 20 (2018). Accordingly, the Physical Availability Rule requires ADWR to issue a Certificate if the applicant can demonstrate that water is physically available to support the applicant's development.

The Court should deny ADWR's motion, declare that the AMA-Wide Rules are rules under Section 41-1034, and declare that the AMA-Wide Rules are therefore invalid due to ADWR's failure to comply with statutory rulemaking requirements and because ADWR lacks the statutory authority to impose them.

FACTUAL BACKGROUND

Under the Assured Water Supply Program, developers of subdivided real estate located within an AMA must demonstrate an assured water supply before they can subdivide and sell lots. A.R.S. § 45-576(A). To demonstrate an assured water supply, municipal water providers may apply for a Designation of Assured Water Supply to cover their entire service area. A.R.S. § 45-576(A). If they do not obtain service from a designated provider, however, individual developers located within the Phoenix AMA *must* apply for and obtain a Certificate to subdivide. A Certificate is unique to the individual development and demonstrates sufficient water for that development. *Id.* Developers in

the Phoenix AMA must obtain a Certificate before platting subdivision lots, receiving a Public Subdivision Report, all necessary steps before beginning construction of new subdivisions. *See* A.R.S. §§ 9-463.01(I), 11-822(A), 32-2183(G).

To obtain a Certificate, a developer must show that "sufficient groundwater, surface water or effluent of adequate quality will be continuously available to satisfy the water needs of *the proposed use* for at least one hundred years." A.R.S. § 45-576(M). As part of this showing, a developer must demonstrate that the water supply will be "physically available" for 100 years. A.A.C. R12-15-716. If the developer demonstrates, among other things, that sufficient groundwater is physically available to meet the water demand of the subdivision, the Director "*shall* issue" a Certificate to the developer. A.R.S. § 45-578(D).[2]

In determining whether a developer has demonstrated that groundwater for the proposed use is physically available for 100 years, the applicant must submit to ADWR hydrologic studies that "accurately describe the hydrology *of the affected area*" and demonstrate that "the groundwater" to serve the development "will be physically available *for the proposed use*." A.A.C. R12-15-716(B); *see also* A.R.S. § 45-576(M). The sources of groundwater are wells that will serve the proposed use. Accordingly, the applicant must show: "The groundwater will be withdrawn … 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." *Id.*; R12-15-716(B)(1)(a). Groundwater is physically available if it "will be withdrawn from depths that do not exceed" 1,000 feet below ground surface. *Id.* (B)(2).

In November 2024, ADWR released an updated version of a groundwater model covering most of the Phoenix AMA (the "Phoenix AMA Model"), which purported to show that unmet demand and exceedances of the 1,000-foot depth-to-water limit exist within the Phoenix AMA. Based on application of the AMA-Wide Rules, ADWR has taken a regulatory stance that it will not issue any Certificates based, in whole or in part, on

[2] The other requirements for obtaining a Certificate are not at issue in this litigation.

groundwater to developers located within the Phoenix AMA model domain.

ADWR's stance is premised on ADWR's interpretation of its mission to protect any well[3]—regardless of its location—throughout the entire Phoenix AMA model domain under the Department's AMA-Wide Rules. Under this AMA-Wide Unmet Demand Rule, if modeling predicts that, within the next 100 years, ***a single well*** may not be able to fully satisfy its predicted demand ***in any location*** within the Phoenix AMA Model domain, then ADWR concludes that there is no physically available groundwater ***anywhere*** within the Phoenix AMA Model domain, even if that well could be reasonably relocated to secure a full water supply. Under its AMA-Wide Depth-to-Water Rule, if modeling predicts that, within the next 100 years, depth-to-water will exceed 1,000 feet ***in any location*** within the Phoenix AMA Model domain, then ADWR concludes that there is no physically available groundwater ***anywhere*** within the Phoenix AMA Model domain.

Through its imposition of the AMA-Wide Rules, the Department has placed developers', including HBACA members', applications for Certificates on indefinite hold. The Department has simply refused to assess physical availability consistent with state law and has transformed the physical availability assessment from a site-specific assessment into an AMA-wide standard. This means that HBACA members are unable to develop their land because ADWR will not issue them Certificates. In other words, ADWR's AMA-Wide Rules have halted all new home construction in large portions of Maricopa County, stranding property owners, including HBACA members, without the ability to develop their land. This has caused and will continue to cause financial loss to HBACA members.

LEGAL STANDARD

Dismissal of a complaint is only appropriate if "as a matter of law plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof." *Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶ 8 (2012) (cleaned up, citation omitted). Motions to

[3] If the well is connected to a municipal water system, tied to an assured water supply determination, or permitted for the recovery of long-term storage credits, which encompasses thousands of wells throughout the Phoenix AMA.

dismiss are disfavored and "should not be granted unless it appears certain that a party would not be entitled to relief on its asserted claim." *Ariz. Soc'y of Pathologists v. Ariz. Health Care Cost Containment Sys. Admin.*, 201 Ariz. 553, 557 ¶ 19 (App. 2002). To determine if a claim for relief can be granted, "courts must assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts," and rely on the complaint and any exhibits referenced in the complaint. *Coleman*, 230 Ariz. at 356 ¶ 9.

ARGUMENT

I. The AMA-Wide Rules are agency rules.

ADWR's motion entirely fails to address a critical question: whether the AMA-Wide Rules qualify as agency rules subject to the rulemaking process.

Counts 1 and 3 seek declaratory relief under Section 41-1034 that these policies are, in fact, rules. ADWR's sole response to this in its motion is to make the conclusory assertion that "Unmet [D]emand and [D]epth-to-[W]ater are not separate rules or substantive policies." Mot. at 2. That's it. It offers no meaningful argument—no legal analysis, no statutory interpretation, no substantive explanation at all. For this reason alone, the Court should deny the motion as to these counts.[4] Courts typically disregard "bald assertion[s] … offered without elaboration or citation to any constitutional provisions or legal authority." *In re U.S. Currency in Amount of $26,980.00*, 199 Ariz. 291, 299 ¶ 28 (App. 2000). A government defendant cannot obtain dismissal based on a conclusory assertion that its actions were lawful. *Donahoe v. Arpaio*, 869 F. Supp. 2d 1020, 1065 (D. Ariz. 2012), *aff'd sub nom. Stapley v. Pestalozzi*, 733 F.3d 804 (9th Cir. 2013).

In any event, the Unmet Demand and Depth-to-Water Rules are agency rules under state law. The APA defines a "rule" as "an agency statement of general applicability that

[4] Nor can ADWR make a subsequent motion seeking dismissal of Counts 1 and 3 on the theory that the AMA-Wide Rules are not agency rules. *See* Ariz. R. Civ. P. 12(g)(2) ("Except as provided in Rule 12(h)(2) or (3), a party who makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.").

implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of an agency." A.R.S. § 41-1001(21). Thus, an agency practice or policy is a rule if it "[1] is generally applicable," and "[2] implements, interprets or prescribes law or policy, *or* describes the procedure or practice requirements of an agency." *Arizona State Ret. Sys.*, 237 Ariz. at 250 ¶ 16.

The Unmet Demand and Depth-to-Water Rules easily satisfy this standard.

A. The AMA-Wide Rules are generally applicable.

An agency rule is "generally applicable" when it applies uniformly to all parties subject to the rule. In *Arizona State Retirement System*, the court held that a policy used consistently across all pension-system employers was a rule under the APA because it was generally applicable. *Id.* Similarly, in *Carondelet Health Services, Inc. v. Arizona Health Care Cost Containment System Administration*, the court found that an agency's interpretation of a reimbursement formula qualified as a rule because the methodology was "generally applied to all hospitals." 182 Ariz. 221, 227 (App. 1994).

The AMA-Wide Rules meet this standard of general applicability because they apply to all Certificate applicants—including all subdivision developers. ADWR acknowledges this. It says that "a subdivision developer must obtain a … [C]ertificate … before selling homes within an Active Management Area," and "ADWR cannot approve the application" if unmet demand exists. Mot. at 1, 6. It concedes the same for the AMA-Wide Depth-to-Water Rule. Mot. at 14. These blanket, non-discretionary applications of both Rules for all Certificate applicants in the Phoenix AMA meet the standard for general applicability.

B. ADWR is implementing, interpreting, and prescribing state law, and describing a procedure and practice of the agency when imposing the Rules.

The AMA-Wide Rules also satisfy the second prong of the definition of "rule": they implement, interpret, or prescribe statutory law. *Arizona State Ret. Sys.*, 237 Ariz. at 250 ¶ 16. In fact, the bulk of ADWR's own Motion (at 11–17) is devoted to explaining how these Rules implement and interpret A.R.S. § 45-576—effectively conceding they are rules.

To "implement" means to carry a statute into practical effect; to "interpret" means to explain its meaning; and to "prescribe" means to dictate or direct. *Id.* at 251 ¶ 17; *Black's Law Dictionary* (12th ed. 2024).

As the court held in *Arizona State Retirement System*, an agency policy that puts a statute into effect is *implementing* a statute and is therefore a rule subject to the APA. 237 Ariz. at 251 ¶ 17.

The same logic applies here. A.R.S. § 45-576(M) defines "assured water supply" and sets the criteria for issuing certificates. ADWR's AMA-Wide Rules dictate how that statute is applied in practice—imposing substantive, binding requirements on all applicants. These are not internal guidelines; they have the force of law.

ADWR admits this. Its Motion states the AMA-Wide Rules are necessary to "ensure subdivisions have at least a 100-year assured water supply … [that is] consistent with and necessary to carry out A.R.S. § 45-576." Mot. at 12. That is textbook implementation. And under the APA, when an agency implements a statute through generally applicable policy, it must do so through formal rulemaking.

Moreover, ADWR is also *interpreting* § 45-576(M). Just as the agency in *Arizona State Retirement System* interpreted a pension statute by applying actuarial assumptions, 237 Ariz. at 251 ¶ 18, ADWR interprets § 45-576(M) by defining how to measure whether an assured supply exists. That includes expanding the statute's scope to consider water use by third parties entirely unrelated to an applicant's proposed use—an interpretive leap not found in the text of the statute (or the Physical Availability Rule).

ADWR itself characterizes the AMA-Wide Rules as an "interpretation" of the statute. Mot. at 16. (alleging that "ADWR's consideration of AMA-wide depth-to-water level exceedances [is an] … *interpretation* [of the statute that] protects against [harms]" and that "ADWR's *interpretation and application of [the statute's] meaning* should be 'given effect.'" Whether that interpretation is valid is beside the point: under *Arizona State Retirement System*, such interpretations constitute rulemaking and trigger the APA.

Because ADWR failed to follow APA rulemaking procedures, the AMA-Wide Rules

are invalid. A.R.S. § 41-1030(A). At a minimum, Plaintiffs' allegations that the AMA-Wide Rules are, in fact, rules and ADWR's failure to meaningfully dispute those allegations is sufficient to survive a motion to dismiss.

II. The AMA-Wide Rules are not consistent with, nor reasonably necessary to carry out the purposes of Section 45-576, nor are they specifically authorized by state law.

Administrative agencies may only exercise authority that has been expressly granted to them by the legislature. *Cochise Cnty. v. Kirschner*, 171 Ariz. 258, 261 (App. 1992) (an agency's rulemaking authority is limited to "the grant of legislative power as expressed in the enabling statutes." (citation omitted)). Whether an agency rule falls within its statutory authority is a matter of statutory interpretation. *Dioguardi v. Superior Ct.*, 184 Ariz. 414, 417 (App. 1996). That interpretation lies with this Court, not with ADWR. Arizona law is clear that the agency's interpretation of the relevant statutory authority is entitled to no deference and the reviewing court will decide all legal questions. *Simms v. Simms*, No. 1 CA-CV 23-0139, 2025 WL 838114, at *5 ¶ 31 (Ariz. App. Mar. 18, 2025).

In 2022, the Legislature amended Section 41-1030 to unequivocally state that a rule is "invalid unless it is consistent with the statute [and] reasonably necessary to carry out the purpose of the statute." A.R.S. § 41-1030(A). The statute also clarifies that "[a]n agency shall not… [m]ake a rule that is not *specifically authorized by statute.*" A.R.S. § 41-1030(D)(3). Thus, for an agency rule to be lawful, it must satisfy three independent criteria: (1) consistency with statute, (2) necessity to fulfill the statute's purpose, and (3) specific statutory authorization. Failure to meet any one of these requirements renders a rule invalid.

The AMA-Wide Rules fail all three.

A. The AMA-Wide Rules are not consistent with Section 45-576.

The AMA-Wide standards in the Unmet Demand and Depth-to-Water Rules are not consistent with the plain language of A.R.S. § 45-576, which requires an applicant-specific analysis tied to the applicant's "proposed use."

Under § 45-576(M), an "assured water supply" means water that is "continuously available to satisfy the water needs of the *proposed use* for at least one hundred years." The

statute focuses on whether the applicant has enough water for their specific project—not whether sufficient water exists for every potential user across the AMA.

Yet ADWR's AMA-Wide Unmet Demand Rule flips this standard. According to ADWR, if its groundwater model detects any "unmet demand" anywhere within the 100-year model run of the Phoenix AMA, the applicant has not satisfied the statutory test—even if the applicant's proposed use is fully supported. Mot. at 12. In other words, the agency's requirements transform the individualized inquiry required by law into a sweeping, AMA-Wide burden with no statutory basis.

Statutory interpretation begins with the plain language, and each word and phrase must be given effect. *Cleckner v. Arizona Dep't of Health Servs.*, 246 Ariz. 40, 43 ¶ 9 (App. 2019). If the statute is unambiguous, that ends the matter. *In re Drummond*, 543 P.3d 1022, 1025 ¶ 5 (Ariz. 2024). Section 45-576(M) unambiguously requires that applicants demonstrate water availability for their *own* proposed use—nothing more.

ADWR contends that *Silver* supports its imposition of the AMA-Wide Rules. Mot. at 10. But that decision says the opposite. There, the Arizona Supreme Court rejected the argument that ADWR must evaluate the effects of a project on *other* users. Instead, the Court held that ADWR must determine whether *existing uses* affect the *applicant's* water supply—not the other way around. *Silver*, 244 Ariz. at 559 ¶ 20. Thus, by requiring applicants to account for area-wide unmet demand and depth-to-water projections affecting unrelated users, ADWR is imposing a new standard that is contrary to the groundwater framework the Supreme Court set out in *Silver*.

The AMA-Wide Rules fundamentally alter the statutory inquiry under Section 45-576(M) and impose obligations that neither the statute nor the Physical Availability Rule require. In doing so, ADWR has exceeded its legal authority and adopted an interpretation squarely at odds with *Silver* and the relevant statute and rule.

B. The AMA-Wide Rules are not necessary to carry out the purpose of state law—they contradict it.

Nor are the AMA-Wide Rules "reasonably necessary" to carry out the purpose of

A.R.S. § 45-576. In fact, they run contrary to it. The statute's clear purpose is to ensure that a proposed development has access to a 100-year water supply—not to authorize an agency to mandate sweeping water policies for the state. *See* A.R.S. § 45-576(M).

As the Supreme Court recognized in *Silver*, Title 45 reflects a careful legislative balance between responsible water management and the protection of private property rights. 244 Ariz. at 562 ¶ 31. ADWR's rules upset that balance by inserting new, burdensome requirements not found in the statute, which affected some of Maricopa County's most affordable and fastest-growing areas.

But "[an] agency's policy preferences cannot trump the words of the statute." *Nat'l Treasury Emps. Union v. Chertoff*, 452 F.3d 839, 865 (D.C. Cir. 2006). Nor may courts expand statutes to cover matters the legislature did not address. *Silver*, 244 Ariz. at 564. Yet that is precisely what ADWR invites this Court to do—authorize agency-made rules based not on statutory mandate, but on policy concerns. *See* Mot. at 13.

Even if those concerns had merit—they do not—they are legislative, not administrative, questions. *See Universal Roofers v. Indus. Comm'n*, 187 Ariz. 620, 622 (App. 1996) ("Whether the statute should be amended ... is for the legislature to decide."). As *Silver* reaffirmed, decisions about acceptable water supply risk "are policy judgment[s] best suited for the legislature." 244 Ariz. at 566 ¶ 44; see also *Arizona Pub. Serv. Co. v. Long*, 160 Ariz. 429, 436 (1989) (policy regarding water resource management belongs to the legislature).

By enacting the Rules, ADWR has exceeded its authority. The Rules are not necessary to implement Section 45-576—they contradict it, both in letter and in purpose.

C. The AMA-Wide Rules are not specifically authorized by statute.

If any doubt remains about the legality of the AMA-Wide Rules, it's resolved by Section 41-1030(D)(3), which expressly prohibits agencies from making rules that are "not *specifically authorized by statute*." The Legislature's use of the word "specifically" demands a clear and direct statutory basis. It means something that is "explicit" and "well-defined," and "authorized" means "[t]o give legal authority." SPECIFIC, AUTHORIZE,

Black's Law Dictionary (12th ed. 2024).

The Arizona Supreme Court has confirmed this principle. In *City of Flagstaff v. Associated Dairy Products Co.*, it held that express statutory authority must be granted "in direct terms, definitely and explicitly," and not "implied" or left to inference. 75 Ariz. 254, 257 (1953). Specific statutory authority is just that—specific. It empowers agencies to act only within clear, narrowly defined and express limits.

ADWR cannot point to a single statute that authorizes it to apply AMA-Wide Rules to refuse to issue Certificates. No such authority exists. And under Section 41-1030(D)(3), absence of such authority is fatal.

What's more, the Legislature has shown that when it intends to grant regulatory power, it does so precisely. In *Merrick v. Rottman*, for example, the court rejected the Funeral Board's claim of implied enforcement authority because the statute already specified how the law was to be enforced—and cease-and-desist orders weren't included. 135 Ariz. 594, 598 (App. 1983). The court made clear: "[g]iven these specific enforcement powers, no additional powers may be implied." *Id.*

What's more, Arizona's groundwater statutes are among the most detailed in the nation.[5] This is true regarding the statutory framework for groundwater management generally and the assured water supply program in particular. *See* A.R.S. §§ 45-401–45-704. It is no accident then, that the statutes *do not* include the sweeping AMA-Wide requirements that ADWR has attempted to impose. As legal scholars have noted, "[t]he Code provides quite specifically for the contents of an application for a certificate of assured

[5] Arizona's groundwater statutes have often been praised for their thoroughness. *See, e.g.*, Jon L. Kyl, *The 1980 Arizona Groundwater Management Act: From Inception to Current Constitutional Challenge*, 53 U. Colo. L. Rev. 471, 471, 503 (1982) (praising the Act as "a thorough blueprint for state management and regulation of groundwater"); Philip R. Higdon & Terence W. Thompson, *The 1980 Arizona Groundwater Management Code*, 1980 Ariz. St. L.J. 621, 621 (1980) (describing the "painstaking" and "comprehensive" nature of the code).

water supply, the procedures for obtaining one, and appeals of adverse decisions."[6]

The Supreme Court's reasoning in *Long*, 160 Ariz. 429, applies here. There, the Court declined to infer authority where the Legislature had deliberately omitted it. "[I]t [is] almost impossible to believe," the Court said, "that if the legislature had intended to manage, restrict or regulate" the use of municipal effluent, "it would not have done so explicitly." *Id.* at 436.

The same is true here. If the Legislature intended to impose regional, far-reaching standards like those ADWR has created, it would have said so. Instead, it expressly limited the assured water supply requirement to water for "the proposed use." A.R.S. § 45-576(M). ADWR's rules go far beyond filling in gaps—they rewrite the statute entirely. That's not rulemaking. That's legislating. And in the absence of *specific* statutory authority, under Section 41-1030(D)(3), the Unmet Demand and Depth-to-Water Rules are invalid.

III. The Physical Availability Rule does not authorize ADWR to impose the AMA-Wide Unmet Demand Rule.

ADWR attempts to justify its Rules, not on the basis of whether these policies are rules or whether they are statutorily authorized, but rather by arguing that the Physical Availability Rule authorizes the Department to impose them. While that issue does not answer the claims in this case, ADWR is wrong on this point too.

As an initial matter, the phrase "unmet demand" does not appear anywhere in state law or in the agency's own rules. It was simply invented by the agency and applied across the board to applicants for certificates of assured water supply.

The Physical Availability Rule, on the other hand, was adopted through rulemaking and, at least on its face, complies with state law. Consistent with A.R.S. § 45-576(M), the Physical Availability Rule focuses on site-specific groundwater assessments, not area-wide demand conditions. That rule calculates depth-to-water "for the area where groundwater withdrawals are proposed to occur" by adding (1) depth to water on the date of the

[6] Philip R. Higdon & Terence W. Thompson, *supra*, 1980 Ariz. St. L.J. at 621 (describing the "painstaking" and "comprehensive" nature of the code).

application, (2) projected declines caused by existing water uses, and (3) projected declines caused by estimated demands of already issued certificates and designations and analyses of assured water supply. A.A.C. R12-15-716(B)(3). The language of the rule is quite clear. Significantly, the point of adding the projected decline of the aquifer due to existing and future approved uses is to determine whether the depth-to-water criteria has been met *for the proposed use*. *See Silver,* 244 Ariz. at 558-59 ¶ 17. In other words, the rule requires an analysis of depth-to-water at the location of the proposed groundwater withdrawals, factoring in declines from existing and proposed uses—but only to determine if water is physically available for the applicant's *proposed use*.

ADWR argues that it has the authority to enforce the AMA-Wide Unmet Demand Rule because a developer's modeling "must account for groundwater associated with existing uses and previously issued [Assured Water Supply] determinations" in the area. Motion at 7. ADWR further contends that 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." *Id*. However, while the Department may consider groundwater demands associated with existing uses in determining physical availability, this consideration is limited to existing uses that will affect the groundwater physically available *for the proposed use*. A.A.C. R12-15-716(B)(3)(c).

Silver is again instructive here. In that case, Pueblo del Sol Water Company ("Pueblo") was seeking a designation of water adequacy and needed to demonstrate the physical availability of groundwater, applying A.A.C. R12-15-716.[7] Environmental groups challenged ADWR's physical availability determination, arguing that it failed to consider

[7] Outside of an AMA, certain subdivisions are subject to determinations of "adequacy" of the water supply, which is determined by the same Physical Availability Rule applying different depth criteria. *See* A.R.S. § 45-108; A.A.C. R12-15-714(E)(1) (physical availability criteria to apply to designation of adequate supply.) A Designation of Adequate Water Supply is identical in all respects relevant here to a Designation of Assured Water Supply. *Cf.* A.A.C. R12-15-711 (Designation of Assured Water Supply); *id.*, R12-15-714 (Designation of Adequate Water Supply).

the impact of future withdrawals on unquantified federal claims to surface and groundwater. 244 Ariz. at 556 ¶ 4. The Court found that the Physical Availability Rule imposed two criteria on Pueblo, which Pueblo met: (1) withdrawals must come from qualifying wells, and (2) groundwater must be physically available above the regulatory depth-to-water threshold. *Id.* at 558-59 ¶ 17.

In addressing plaintiffs challenge that federal reserved claims need to be addressed, the Court concluded:

> On its face, the regulation requires ADWR to do the converse. Namely, it requires the agency to measure the impact of "existing uses" on groundwater supply available for an applicant, not the impact of the applicant's proposed groundwater use on "existing uses." The regulation operates to ensure that enough groundwater is physically available in the aquifer *to meet the needs of the applicant*, after accounting for declines in supply "caused by existing uses." The regulation is not a mechanism for considering potential legal disputes between groundwater users. Because Pueblo indisputably satisfies both prongs of the physical availability regulation, the court of appeals erred in requiring ADWR to consider BLM's unquantified federal reserved water right as part of the physical availability analysis.

Id. at 559 ¶ 20 (citations omitted). Therefore, the Court expressly rejected the argument that the Physical Availability Rule requires an analysis of how the proposed use would affect other users, including unquantified federal claims. Rather, the Court concluded that ADWR's task is to ensure water is physically available for the applicant *after* accounting for declines caused by *existing* uses. Contrary to ADWR's claims, the regulation does not serve as a mechanism to protect distant third parties or resolve legal disputes between groundwater users.

In its Motion, ADWR reverses this logic and contends that its application of the Unmet Demand Rule is consistent with *Silver* because, "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." Mot. at 10 (citing *Silver,* 244 Ariz. at 559 ¶ 20). ADWR uses this conclusion as basis to support a requirement that an applicant "account for existing uses and approved assured water supply determinations." *Id.* at 10.

In effect, it is doing the opposite of what the Court directs in *Silver*; *i.e.* ADWR is refusing to evaluate the availability of groundwater to the applicant at depths above the regulatory limit because of purported impacts to other parties.

Contrary to *Silver*, ADWR now claims that it can deny Certificate applications based on the mere existence of unmet demand *anywhere* in the model area of the Phoenix AMA. According to ADWR, this broad unmet demand standard justifies halting the processing of all Certificate applications—even where the applicant's proposed use satisfies the site-specific depth-to-water requirements.

This approach not only flips the holding of *Silver* on its head, but it also lacks any legal foundation. First, ADWR has made no finding that the applicant is the cause of the unmet demand. Second, ADWR does not evaluate whether the proposed use would, in fact, impair existing or other proposed groundwater uses. If the goal was to protect existing and approved uses, then the evaluation would be whether the applicant's pumping in the "affected area," A.A.C. R12-15-716(B), actually impacts those uses. ADWR makes no such determination. Instead, the Department categorically halts applications based solely on AMA-Wide modeling outcomes, regardless of whether the applicant can show sufficient groundwater for its own "proposed use."

This flawed reasoning culminates in ADWR's sweeping interpretation of "affected area." The Department argues that because groundwater across the Phoenix AMA is hydrologically connected, the entire AMA qualifies as the "affected area" under the Unmet Demand Rule. Mot. at 6. But, as set out above, the Physical Availability Rule is rooted in a site-specific analysis that evaluates where groundwater withdrawals are proposed for that use, which is consistent with A.R.S. § 45-576(M). It is not a license for ADWR to cast a regulatory net over the entire Phoenix AMA to prevent any new home construction. The fact that groundwater in multiple groundwater subbasins is somehow "connected" is not a determination that pumping at one location "affects" pumping at another.

No rule or statute supports ADWR's purported determination that the "affected area" encompasses "most of the AMA." Indeed, such a theory would lead to absurd results.

Under ADWR's proposed interpretation of the "affected area," a single well in Apache Junction, at the far eastern edge of Phoenix AMA, could prevent issuance of a certificate for an applicant in Buckeye—on the opposite end of the AMA. That interpretation has affected the fate of the Assured Water Supply Program for the *entire* AMA.

ADWR's interpretation is contrary to the Physical Availability Rule and state law, which require a determination of whether there is sufficient groundwater "for the *proposed use*" (*i.e.*, the development). A.R.S. § 45-576(M)(1)(c)(3); A.A.C. R12-15-716(B). The AMA-Wide Unmet Demand Rule and ADWR's view of the "affected area" are unsupported and arbitrary. ADWR's obligation is to determine whether water is physically available for the *proposed use*—not to protect against speculative impacts to unrelated uses countless miles away. Its current approach transforms a rule meant to guide a specific site assessment into a blunt policy tool that exceeds the Department's legal authority.

IV. The Physical Availability Rule does not authorize ADWR to impose the AMA-Wide Depth-to-Water Rule.

ADWR also incorrectly contends that the Physical Availability Rule authorizes imposition of the AMA-Wide Depth-to-Water Rule. Specifically, ADWR argues that the Physical Availability Rule authorizes the Department to enforce the AMA-Wide Depth-to-Water Rule by requiring applicants to submit a hydrologic study "of the 'affected area,' which [ADWR contends] may include the entire AMA." Mot. at 14. According to ADWR, if an applicant's model "shows that the depth-to-water level over a 100-year period has been exceeded for an existing [Assured Water Supply] determination in the affected area," then the applicant has failed to demonstrate that groundwater will be withdrawn from above the maximum static depth-to-water level. *Id.*

This interpretation is inconsistent with the plain language of the rule. When groundwater is the proposed source of supply, the applicant must show that "*the groundwater* will be withdrawn from depths that do not exceed the applicable maximum 100-year depth-to-static water level." *See* A.A.C. R12-15-716(B)(2). There is no

ambiguity here: "*the groundwater*" clearly refers to the groundwater intended to serve the proposed use, not groundwater located anywhere in the AMA.

The rule further reinforces this point by directing the Director to calculate the 100-year projected depth-to-static water specifically "*for the area where groundwater withdrawals are proposed to occur* …" R12-15-716(B)(3). This calculation is based on existing and approved Assured Water Supply uses in that specific area—not AMA-Wide conditions.

ADWR's attempt to stretch "the affected area" under the Physical Availability Rule to encompass the entire model area of the Phoenix AMA is unfounded and contrary to the rule's intent. Nothing in the Physical Availability Rule authorizes ADWR to impose such an unsurmountable obligation. Instead, the Physical Availability Rule merely requires an applicant to show "the hydrology *of the affected area*" in order to demonstrate that the groundwater "will be physically available for the *proposed use*." A.A.C. R12-15-716(B). That use refers to groundwater available at or above 1,000 feet below ground surface where the *development* is planned—not groundwater throughout the entire AMA.

If a developer demonstrates that sufficient groundwater is physically available *at the proposed site*, then under the Physical Availability Rule and applicable statutes, ADWR "shall" issue a Certificate. *Id.*; A.R.S. §§ 45-576(M), 45-578(D). Because neither the Physical Availability Rule nor any other statute or validly promulgated rule authorizes the Department to impose the AMA-Wide Depth-to-Water Rule to assess groundwater availability for a site-specific proposed use, the Court should deny the Motion.

CONCLUSION

Based on the foregoing, the Court should deny ADWR's Motion to Dismiss.

RESPECTFULLY SUBMITTED this 15th day of May 2025.

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CERTIFICATE OF SERVICE

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