

1 Kimberly R. Parks (Bar No. 032828)  
2 Kome Akpolo (Bar No. 032562)  
3 Arizona Department of Water Resources  
4 Legal Division  
5 1110 W. Washington, Suite 310  
6 Phoenix, Arizona 85007  
7 Telephone: 602-771-8472  
8 Fax: 602-771-8687  
9 [krparks@azwater.gov](mailto:krparks@azwater.gov)  
10 [oakpolo@azwater.gov](mailto:oakpolo@azwater.gov)

11 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
12 **IN AND FOR THE COUNTY OF MARICOPA**

13 IN RE THE GENERAL ADJUDICATION  
14 OF ALL RIGHTS TO USE WATER IN  
15 THE GILA RIVER SYSTEM AND  
16 SOURCE

17 W-1 (Salt)  
18 W-2 (Verde)  
19 W-3 (Upper Gila)  
20 W-4 (San Pedro)  
21 (Consolidated)

22 Contested Case No. W1-11-3107

23 **ARIZONA DEPARTMENT OF**  
24 **WATER RESOURCES' RESPONSE**  
25 **TO SALT RIVER PROJECT'S**  
26 **MOTION CONCERNING**  
**SEVERANCE AND TRANSFER AND**  
**CHANGE-IN-USE APPLICATIONS**

(Special Master Susan Ward-Harris)

**CONTESTED CASE NAME:** *In re Paul L. Sale Invest. Co.*

**HSR INVOLVED:** San Pedro River Watershed Hydrographic Survey Report

**DESCRIPTIVE SUMMARY:** The Arizona Department of Water Resources hereby responds to "Salt River Project's Motion to Determine Jurisdiction and Proper Forum for Post-Abstract Severance and Transfer and Change-in-Use Applications."

1 **NUMBER OF PAGES:** Eighteen

2 **DATE OF FILING:** June 10, 2022

3  
4 **I. INTRODUCTION**

5 The Salt River Project Agricultural Improvement and Power District (“District”) and Salt River Valley Water Users’ Association (collectively “SRP”) filed a “Motion to Determine Jurisdiction and Proper Forum for Post-Abstract Severance and Transfer and Change-in Use Applications” (“Motion”). In its Motion, SRP requests that the Special Master find this Court has either exclusive or at least concurrent jurisdiction with the Arizona Department of Water Resources (“ADWR”), and is the proper forum, to review and approve applications for severances and transfer (“S&T”) of water rights or changes in use. Motion at 9-10, 13. SRP defines “post-abstract” as “the time period between when (1) the Special Master approves an abstract and designates it for inclusion in the Catalog, and (2) the Court enters a final decree for a particular watershed.”<sup>1</sup> Motion at 2. SRP’s position is not supported by the S&T statute or the change of use statute.

16 Pursuant to A.R.S. § 45-172, the director of ADWR (“Director”) has exclusive jurisdiction to approve an S&T application filed any time prior to entry of the final decree. Also, pursuant to A.R.S. § 45-156(B), the Director has jurisdiction to approve certain changes in use filed any time prior to entry of the final decree, subject to legislative approval under certain circumstances. These statutes do not require the approval of the Superior Court, and do not otherwise vest the Superior Court with jurisdiction over post-abstract S&T applications or changes of use. Instead, the legislature vested the Superior

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26 <sup>1</sup> This Response does not address the extent of the Director’s authority after the Superior Court enters a decree.

1 Court with jurisdiction to determine the extent and relative priorities of existing water  
2 rights in a stream adjudication. *See* A.R.S. §§ 45-251 through -257.

3 Nonetheless, SRP argues the Superior Court has at least concurrent jurisdiction  
4 with the Director over the S&T of water rights and changes in use because such  
5 jurisdiction is “inherent in the nature of the adjudication process itself,” and it would be  
6 “prudent” for the Superior Court to exercise jurisdiction for a variety of reasons. Motion  
7 at 9, 13. Sections 45-172 and 45-156(B) do not support SRP’s position.

8 **II. THE LEGISLATURE VESTED THE DIRECTOR, NOT THE SUPERIOR**  
9 **COURT, WITH JURISDICTION OVER CHANGES IN USE AND SEVERANCES**  
10 **AND TRANSFERS OF WATER RIGHTS.**

11 SRP argues the statutes do not provide “a clear delineation of whether this Superior  
12 Court or ADWR has jurisdiction over S&Ts and changes in use.” Motion at 5. This  
13 argument ignores the clear language of A.R.S. §§ 45-172 and -156(B). SRP fails to  
14 consider either the “chosen” or “unchosen” words in those statutes, which are both  
15 indicative of the legislature’s intent. *See Welch v. Cochise County Board of Supervisors*,  
16 251 Ariz. 519, 529, ¶ 36 (2021). The legislature’s inclusion of the word “Director,” but  
17 not any words referring to the Superior Court in A.R.S. §§ 45-156(B) and -172 must be  
18 construed as intentional under the “canon of construction *expressio est exclusio alterius* –  
19 that is, the expression of one item implies the exclusion of others.” *Id.*

20 Significantly, when the legislature intended a court to have jurisdiction over the  
21 S&T of a water right, the statute so stated. Pursuant to A.R.S. § 45-176,<sup>2</sup> a water right  
22 may be severed and transferred for the benefit of an Indian Tribe with a congressionally  
23 approved water rights settlement agreement to certain lands and for uses within the Little  
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25 <sup>2</sup> This statute was enacted in 2004 for the benefit of the Zuni Indian Tribe with a delayed  
26 repeal “from and after December 31, 2019.” Laws 2004, 2<sup>nd</sup> Reg. Sess., Ch. 93, § 2.

1 Colorado River basin “subject to the approval by a *Superior Court of competent*  
2 *jurisdiction, or if none, by the director pursuant to section 45-172.*” (Emphasis added.)

3 In addition to explicitly mentioning “a Court of competent jurisdiction,” the italicized  
4 language reinforces the legislature’s intent in section 45-172 to only authorize the Director  
5 (not the Superior Court) to approve S&Ts of water rights.

6 **A. The Change-in-Use Statute Requires the Approval of the Director Not**  
7 **the Superior Court.**

8 Pursuant to A.R.S. § 45-156, “[a] change in the use of water appropriated for  
9 municipal, domestic, or irrigation uses shall not be made without the approval of the  
10 director,” but under certain circumstances (involving the generation of certain  
11 hydroelectric energy or power) “approval shall not be granted unless authorized by an act  
12 of the legislature,” with certain exceptions.<sup>3</sup> The statute required legislative approval and  
13 could have required the Superior Court’s approval, but it did not. Section 45-156(B) does  
14 not require the approval of, or otherwise mention, the Superior Court.

15 **B. The Severance and Transfer Statute Requires Approval of the Director**  
16 **not the Superior Court.**

17 Pursuant to A.R.S. § 45-172(A), a water right may be severed from its current  
18 place of use and transferred for certain uses without losing its priority date,<sup>4</sup> upon  
19 approval of an application filed with the Director. Initially, the Director must determine  
20 whether the proposed S&T satisfies the requirements set forth in the introductory

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22 <sup>3</sup> Section 45-156 does not require an application *per se* to be filed or set forth  
23 requirements that must be satisfied in order for a change-in-use to be approved.  
24 Undersigned counsel understands the change-in-use statute has not been used in the recent  
25 past, and that changes in use are typically obtained by compliance with the severance and  
26 transfer statute.

<sup>4</sup> Frequently, applications are filed to sever and transfer a pre-1919 water right for which a  
claim has been filed pursuant to the Water Rights Registration Act. *See* A.R.S. §§ 45-181  
through -185.

1 language of section 45-172(A), which limits the transfer of a severed water right for the  
2 uses described therein and requires compliance with certain “limitations and conditions.”

3 Section 45-172(A) states:

4           A water right may be severed from the land to which it is appurtenant or  
5 from the site of its use if for other than irrigation purposes and with the  
6 consent and approval of the owner of such right, may be *transferred for use*  
7 *for irrigation of agricultural lands or for municipal, stock-watering, power*  
8 *and mining purposes and to the state or its political subdivisions for use for*  
9 *recreation and wildlife purposes, including fish, without losing priority*  
10 *theretofore established, subject to the following limitations and conditions:*

11 (Emphasis added.) The “limitations and conditions” mentioned in section 45-172(A) are  
12 set forth in subsections 45-172(A)(1) through (A)(5), which also must be satisfied.  
13 Pursuant to subsection 45-172(A)(6), certain S&Ts are excepted from these requirements,  
14 and pursuant to subsection 45-172(A)(7), the Director is required to follow certain  
15 administrative procedures.

16           The Director’s approval of a proposed S&T is required by subsection 172(A)(1),  
17 which states, “Except as otherwise provided in this section<sup>5</sup> no such severance or transfer  
18 shall be made *unless approved by the director, and the approval of the director* shall  
19 *prescribe the conditions of the approval.*<sup>6</sup> (Emphasis added.) To obtain the Director’s  
20 approval, subsection 172(A)(7), requires that an application for a S&T “be filed with the  
21 *director,*” and that the Director publish notice of the application once a week for three  
22 consecutive weeks. (Emphasis added). Any “interested person” may file written  
23 objections within 30 days of the last publication, and an administrative hearing may be  
24 held before the Director’s decision if an objection has been filed or is otherwise deemed

25 <sup>5</sup> See section 45-172(A)(6).

26 <sup>6</sup> The “conditions for approval” include a description of the place of use, type of use and  
quantity of use upon transfer of the water right.

1 necessary.<sup>7</sup> Subsection 45-172(B) indicates “administrative proceedings, rehearing or  
2 review and judicial review of decisions of the director” are governed by section 45-114,  
3 subjecting administrative proceedings to title 41, chapter 6, article 10, titled “Uniform  
4 Administrative Appeals Procedures.”

5 In order for the Director to approve an S&T application, the following provisions  
6 must be satisfied.

7 Vested or existing rights to the use of water shall not be affected, infringed  
8 upon nor interfered with,<sup>8</sup> *and* in no event shall the water diverted or used  
9 after the transfer of such rights exceed the vested rights existing at the time  
10 of such severance and transfer, *and* the *director* shall by order define and  
11 limit the amount of water to be diverted or used annually subsequent to such  
12 transfer.” (Emphasis added). [Subsection 45-172(A)(2)].

12 The water rights sought to be transferred shall have been lawfully perfected  
13 under the laws of the territory or the state of Arizona<sup>9</sup> *and* shall not have  
14 thereafter been forfeited or abandoned.”<sup>10</sup> (Emphasis added). [Subsection  
15 45-172(A)(3)].

15 No such severance and transfer shall be permitted or allowed from lands  
16 within the exterior boundaries of any irrigation district, agricultural  
17 improvement district or water users’ association without first having  
18 obtained the written consent and approval of such irrigation district,  
19 agricultural improvement district or water users’ association. [Subsection  
20 172(4)].

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21 <sup>7</sup> Legislation enacted in 1998 amended subsection 45-172(A)(7) by no longer requiring  
22 mandatory hearings and added section 45-172(B) requiring instead compliance with  
23 section 45-114 governing administrative proceedings, *inter alia*. See Laws 1998, 2<sup>nd</sup> Reg.  
24 Sess., Ch. 57, § 75.

25 <sup>8</sup> Whether vested or existing water rights are “affected, infringed upon or interfered with”  
26 involves a technical analysis, not a legal analysis.

<sup>9</sup> The applicant has the burden of proving the water rights sought to be severed and  
transferred have been “lawfully perfected.”

<sup>10</sup> The Director has jurisdiction to determine whether a water right has been forfeited or  
abandoned. See A.R.S. §§ 45-188 and -189.

1 In addition to these requirements, subsection 45-172(A)(5) requires all applications  
2 proposing to sever and transfer a water right “on or from any watershed or drainage area  
3 which supplies or contributes water for the irrigation of lands within an irrigation district,  
4 agricultural improvement district or water users’ association,” to be submitted to the  
5 governing board of that district or association for consent. In order for the S&T  
6 application to be “accepted for filing by the director,” it must be accompanied by evidence  
7 of the board’s written consent or failure to act within 45 days after the application was  
8 submitted (deemed an approval). However, pursuant to subsection 45-172(A)(6), the  
9 Director’s approval is not required for the S&T of an irrigation water right within an  
10 irrigation district to other land within the same irrigation district with the consent of the  
11 irrigation district and affected landowners within that district.

12 The Director’s approval of an S&T application is based on a determination that the  
13 requirements of A.R.S. § 45-172 set forth above have been satisfied. The Director’s  
14 approval is not an adjudication of the water right sought to be severed and transferred  
15 because it does not determine its relative priority “within a river system or source.” See  
16 A.R.S. § 45-251(2). Thus, it is not surprising the Superior Court is not mentioned in  
17 A.R.S. § 45-172. The Superior Court’s jurisdiction is separately described in sections 45-  
18 251 through -257. See Section IV, *infra*.

19 **III. SINCE THE ENACTMENT OF THE SURFACE WATER CODE IN 1919,**  
20 **JURISDICTION OVER ADMINISTRATION OF APPROPRIABLE WATER**  
21 **RIGHTS HAS BEEN SEPARATE FROM JURISDICTION OVER THE**  
22 **ADJUDICATION OF EXISTING WATER RIGHTS.**

23 In 1919, the legislature enacted the State Water Code (“1919 Code”), which  
24 created the office of State Water Commissioner (“Commissioner”) who was vested with  
25 “general control and supervision of the waters of the State of Arizona and of the  
26 appropriation and of the distribution thereof, excepting such distribution as is hereinafter

1 reserved to Water Commissioners appointed by the Superior Courts under existing  
2 decrees.”<sup>11</sup> See Laws 1919, Ch. 164, § 2. The Commissioner was succeeded by the State  
3 Land Commissioner in 1943, followed by the State Land Department in 1950, the Arizona  
4 Water Commission in 1979, and the Director in 1980.<sup>12</sup>

5 The 1919 Code also authorized the Superior Court to adjudicate water rights and  
6 enter a decree determining the rights to waters of a stream, by following certain  
7 procedures. The Commissioner had a role in the adjudication of water rights both prior to  
8 and after entry of a decree by the Superior Court, but the Commissioner did not have  
9 jurisdiction to enter a decree. See 1919 Code, §§ 16 through 33.

10 **A. The State Water Commissioner’s Jurisdiction Over Appropriable**  
11 **Water Included the Severance and Transfer of Water Rights.**

12 The Commissioner’s broad authority over the appropriation of waters of the state  
13 included jurisdiction over the S&T of water rights for irrigation uses. The S&T of a water  
14 right used for irrigation purposes necessitated by a “natural cause beyond the control of  
15 the owner,” required the approval of the Commissioner as stated below:

16 All water used in this State for *irrigation* purposes shall remain appurtenant  
17 to the land upon which it is used; provided, that if for any *natural cause*  
18 beyond control of the owners it should at any time become impracticable to  
19 beneficially or economically use water for irrigation of any land to which  
20 water is appurtenant, said right may be severed from said land, and  
21 simultaneously transferred and become appurtenant to other land, without  
22 losing priority of right theretofore established, if such change can be made  
23 without detriment to existing rights, *on the approval of an application of the  
owner to the Commissioner.* Before the approval of such transfer an  
inspection shall be made by the Commissioner or persons deputized by him,  
and the Commissioner shall approve or disapprove such transfer and

24 <sup>11</sup> A reworded version of this provision is found in A.R.S. § 45-103(B). Because the Gila  
25 River adjudication is ongoing, there are no “existing decrees.”

26 <sup>12</sup> See Laws 1943, Ch. 28, §§ 2, 5; Laws 1950, Ch. 30, § 1; Laws 1979, Ch. 139, § 7;  
Laws 1980, Ch. 1, § 35, section 45-103.



1 prescribe the conditions therefor. Such order shall be subject to appeal as in  
2 this act provided.

3 *Id.* at § 48 (emphasis added).

4 The 1919 version of the S&T statute remained virtually unchanged until 1962,<sup>13</sup>  
5 when it was significantly amended and codified as A.R.S. § 45-172. The current  
6 enactment of A.R.S. § 45-172 includes the same requirements as those in the 1962  
7 version, with the exception of a 1998 amendment modifying subsection 45-172(A)(7) and  
8 adding subsection 45-172(B), concerning administrative procedures.<sup>14</sup> See Section II,  
9 *supra*. The Commissioner also had jurisdiction over changes in use pursuant to a 1927  
10 amendment to the 1919 Code, which has remained virtually unchanged.<sup>15</sup> As successor to  
11 the Commissioner, the Director currently has jurisdiction over S&Ts pursuant to section  
12 45-172 and changes in use pursuant to section 45-156(B).

13 **B. The Commissioner had a Statutory Role in the Adjudication of Water**  
14 **Rights both Before and After the Superior Court’s Entry of a Decree, but the**  
15 **Superior Court did not have a Statutory Role in Severances and Transfers**  
**and Changes in Use.**

16 The 1919 Code required the Commissioner to determine “the relative rights of the  
17 various claimants to the waters of [a] stream upon the Commissioner’s initiative or  
18 petition filed by one or more water users on a stream,” and to enter an “order of  
19 determination” for hearing with the Superior Court, which had jurisdiction to enter a  
20 decree adjudicating those water rights by following certain procedures. *Id.* at §§ 16-33.  
21 Following the Superior Court’s entry of a decree, the Commissioner also was required to  
22 divide the state into water districts and appoint a water superintendent for each water  
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25 <sup>13</sup>See Laws 1962, Ch. 113, § 5.

26 <sup>14</sup>See Laws 1998, Ch. 57, § 75.

<sup>15</sup>See Laws 1927, Ch. 109, § 7.

1 district for enforcement purposes. *Id.* at §§ 34-35. The Director currently has this  
2 responsibility pursuant to A.R.S. §§ 45-109, -110 and -112.

3 In 1979, the legislature enacted A.R.S. § 45-252 requiring that a petition for the  
4 adjudication of water rights be filed with the Superior Court instead of the State Water  
5 Commission (the Commissioner’s successor at that time).<sup>16</sup> The legislature also enacted  
6 A.R.S. § 45-256(A), requiring the Superior Court or Special Master to “request technical  
7 assistance from the commission in all aspects of the general adjudication with respect to  
8 which the commission possesses hydrological or other expertise.” In addition, pursuant to  
9 A.R.S. § 45-257(B)(3), after the decree was entered, it was referred to the Commission  
10 “for administration and enforcement under the continuing jurisdiction of the Superior  
11 Court.”

12 In 1980, the Director succeeded to the powers and duties of the State Water  
13 Commission, and the 1979 versions of sections 45-256(A) and 45-257(B)(3) were  
14 amended to reflect that change, *inter alia*.<sup>17</sup> See A.R.S. § 45-103(A). Thus, by statute,  
15 the Director and the Director’s predecessors had a role in the adjudication of water rights  
16 since 1919. However, neither the 1919 Code nor statutes enacted subsequent thereto  
17 vested the Superior Court with jurisdiction over, or otherwise provided the Superior Court  
18 with a role concerning, S&Ts of water rights and changes of use. See Section II, *supra*.

19 **IV. SRP MISTAKENLY ARGUES THAT INCLUDING ABSTRACTS OF**  
20 **WATER RIGHTS INTO THE SPECIAL MASTER’S CATALOG VESTS THE**  
21 **SUPERIOR COURT WITH JURISDICTION OVER SEVERANCES AND**  
22 **TRANSFERS OF WATER RIGHTS AND CHANGES IN USE.**

23 By separate orders in this contested case, both dated April 13, 2022 (“Orders”), the  
24 Special Master approved abstracts of water rights concerning two watershed file reports

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25 <sup>16</sup> See Laws 1979, 1<sup>st</sup> Reg. Sess., 34<sup>th</sup> Legislature, Ch. 139, § 39.

26 <sup>17</sup> See Laws 1980, Ch. 1, §§ 69, 70.

1 (“WFRs”), one for the irrigation of the North Tract of the San Pedro River Preserve and  
2 one for the South Tract of the San Pedro River Preserve, both owned by the District  
3 (“Water Right Abstracts”). Attached to the Orders were copies of Water Right Abstracts,  
4 which were stipulated to by parties to the contested case. The Special Master stated these  
5 stipulated Water Rights Abstracts would “be included in a Catalog of Proposed Water  
6 Rights [“Catalog”] created pursuant to Section 15 of the Rules for Proceedings Before the  
7 Special Master” (“Special Master’s Rules”). Because the Special Master approved the  
8 Water Rights Abstracts, SRP argues that “all water rights claims addressed in the two  
9 WFRs now have been fully adjudicated.” Motion at 4. This is incorrect.

10 An adjudication of water rights is “an action for the judicial determination or  
11 establishment of the extent and priority of the rights of all persons to use water in any  
12 river system and source.” A.R.S. § 45-251(2). Including a water right abstract in the  
13 Catalog by the Special Master is the first step of several that need to be completed before  
14 the water right is adjudicated by final decree of the Superior Court. The additional steps  
15 include filing the Catalog with the Superior Court, providing notice with the opportunity  
16 to file objections, conducting a hearing on objections, and filing a report with a proposed  
17 decree, followed by the Superior Court’s final decree. See Special Master’s Rules, §§ 15-  
18 17. Neither these procedures nor the statutory procedures set forth in A.R.S. §§ 45-251  
19 through -257 governing the Superior Court’s adjudication of water rights vest the Superior  
20 Court with jurisdiction over S&Ts of water rights or changes in use prior to entry of a  
21 decree.<sup>18</sup>

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24 <sup>18</sup> SRP’s reliance on a September 26, 2002 order entered by Judge Ballinger in *In re Sands*  
25 *Group of Cases*, Contested Case No. W1-11-19, at 4 is misplaced. Motion at 9, n. 9. The  
26 discussion at page 4 of that order does not address the Superior Court’s jurisdiction over  
S&Ts of water rights prior to the entry of a decree.

1 According to SRP’s Motion, the District intends to “pursue one or more  
2 applications to change the place of use and purpose of use of the irrigation water rights for  
3 both the North and South Tracts” to instream use in the San Pedro River for wildlife  
4 purposes. *Id.* at 4. SRP contends the Superior Court has jurisdiction to make these  
5 changes post-abstract upon motion filed by the District rather than following the  
6 “administrative process” before ADWR. *Id.* at 2, 9. This assertion ignores language to  
7 the contrary in A.R.S. § 45-172 (governing S&Ts of water rights) and A.R.S. § 45-156(B)  
8 (governing changes in use). These statutes do not vest the Superior Court with  
9 jurisdiction over S&Ts of water rights or changes in use. See Section II, *supra*.

10  
11 **V. SRP’S ARGUMENTS IGNORE THE CLEAR LANGUAGE OF SECTIONS  
12 45-172 AND 45-156(B) AND THEY LACK PROPER FOUNDATION.**

13 SRP’s Motion sets forth six reasons the Superior Court should exercise jurisdiction  
14 “post abstract” over S&Ts and changes in use of water rights. Motion at 9-13. None of  
15 those reasons assert the S&T and change-in-use statutes vest jurisdiction in the Superior  
16 Court, but instead are based on SRP’s belief that it would be “prudent” for the Superior  
17 Court to exercise jurisdiction. *Id.* at 13. These arguments lack a legal basis.

18 The proper inquiry must be based on A.R.S. §§ 45-172 and -156(B), which are  
19 binding authority. See *Maricopa County Mun. Water Conservation Dist. No. 1 v.*  
20 *Southwest Cotton Co.*, 39 Ariz. 65, 79, 4 P.2d 369, 374 (1931).” (stating the law of prior  
21 appropriation “is binding authority as general law,” and that “matters of judicial  
22 construction based on necessity, reason, analogy and convenience, with us merely involve  
23 an interpretation of the language of our statutes, using the ordinary statutory canons”).<sup>19</sup>  
24 The same analysis applies to the S&T and change of use statutes, which may result in

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25 <sup>19</sup> Cited by the Special Master with approval in *In re Town of Huachuca*, Contested Case  
26 No. W1-11-0245, Decision on Issues of Broad Legal Importance at 12, filed August 2,  
2021.

1 changes to the place of use, quantity of use and/or type of use of an existing water right.  
2 See Section II, *supra*. In addition, SRP’s six arguments, even if they were relevant (which  
3 they are not), lack proper foundation, as discussed below.

4 (1) In the “interest of judicial efficiency and administration” SRP contends that any  
5 post-abstract changes in place or purpose of use “will need to be addressed by the Special  
6 Master or the Court *in some fashion* so that they can be incorporated into the final  
7 decree.” *Id.* at 10 (emphasis added). SRP does not define the criteria or procedures the  
8 Superior Court would use, or explain why it would be more efficient for the Superior  
9 Court to exercise jurisdiction over the S&T of water rights and changes of use than the  
10 Director, who has statutory authority to do so.

11 Pursuant to A.R.S. § 45-172, an application to sever and transfer a water right must  
12 be filed with the Director for approval. In order to obtain the Director’s approval, the  
13 applicant must prove the water right sought to be severed and transferred has been  
14 lawfully perfected and will be used for one of the purposes set forth in section 45-172(A),  
15 *inter alia*. See Section II, *supra*. For pre-1919 water rights, documentation of historical  
16 use must be provided, and if the Special Master has approved a water right abstract and  
17 included it in the Special Master’s Catalog, that information also may be provided. See  
18 Section IV, *supra*. In addition, the applicant must provide evidence establishing that the  
19 water right upon transfer will be put to one of the proposed uses authorized by section  
20 172(A), and the applicant’s remaining requirements in section 45-172(A) have been  
21 satisfied. SRP acknowledged it already has used this process. Motion at 8, n. 6.<sup>20</sup>

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22 <sup>20</sup> SRP indicated after it filed a severance and transfer and change of use application for  
23 irrigation water rights held by the District, it filed a motion with the Special Master to  
24 approve Water Rights Abstracts for those water rights and include them in the Catalog.  
25 Thereafter, SRP indicated it “continued to pursue” its severance and transfer and change-  
26 in-use application. Not mentioned by SRP is that the Director accepted SRP’s proof of  
historical use of its claimed pre-1919 water rights based on extensive historical  
documentation submitted by SRP and considered the Special Master’ approval of the

1 (2) SRP posits that “[a]ny technical or other expertise that ADWR possesses with  
2 respect to S&T and change-in-use applications could be provided to the Superior Court  
3 and the Special Master through [ADWR’s] technical adviser role,” if the Superior Court  
4 were to exercise jurisdiction over S&Ts and changes in use. *Id.* at 11. This would result  
5 in an impermissible bootstrap of ADWR’s statutory jurisdiction over S&T applications  
6 and changes in use into the adjudication statutes where no such jurisdiction exists. In  
7 addition, ADWR’s role as technical adviser to the Superior Court is limited to  
8 “hydrological or other expertise,” to assist with the adjudication of water rights, not to  
9 implement ADWR’s separate statutory authority.

10 (3) SRP appears to argue the Superior Court’s exercise of jurisdiction over a S&T  
11 application as part of the adjudication of water rights would provide better notice to  
12 “parties” interested in the S&T application. *Id.* This argument ignores the provisions of  
13 A.R.S. § 45-172(A)(7), which requires notice by publication and the opportunity for  
14 “interested persons” to file objections, which are not limited to parties to an adjudication  
15 proceeding.

16 (4) SRP acknowledges the Director’s final decision on a S&T application is subject  
17 to judicial review, but argues the Superior Court with jurisdiction over adjudication  
18 proceeding should review the Director’s final decision because the Superior Court already  
19 exercises jurisdiction over a water right when the Special Master includes a water right  
20 abstract in the Catalog. *Id.* at 11-12. Including a water right abstract in the Special  
21 Master’s Catalog is not an adjudication of the water right, but is only one of several steps  
22 that must be completed in order for the Superior Court to enter a final decree pursuant to  
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24 Water Rights Abstracts, but denied SRP’s severance and transfer and change-in-use  
25 application on other grounds. SRP then filed a notice of appeal seeking administrative  
26 review of the Director’s decision. The matter is pending in the Office of Administrative  
Hearings.

1 A.R.S. § 45-257. See Section IV, *supra*. Furthermore, that process does not displace the  
2 Director’s jurisdiction over a S&T of a water right pursuant to A.R.S. § 45-172, which  
3 does not adjudicate that water right.<sup>21</sup>

4 (5) SRP maintains the Superior Court and the Special Master should undertake “the  
5 review and approval of post-abstract S&T and change-in-use applications” because it  
6 “makes sense as a practical matter.” *Id.* at 12. SRP contends the “process will benefit  
7 from the specialized expertise of the [Adjudication] Court, the Special Master and  
8 ADWR.” (Emphasis omitted). *Id.* at 13. ADWR is not aware of any legal authority  
9 supporting SRP’s argument that the Superior Court’s jurisdiction should be based on  
10 practicality and not statutory authority. Similar arguments were rejected by the Special  
11 Master in another contested case.<sup>22</sup>

12 (6) SRP contends the Superior Court should have jurisdiction over S&Ts of water  
13 rights and changes in use rather than the Director, because judicial review of the  
14 Director’s decision would be pursuant to the *Arizona Rules of Procedure for Judicial [sic]*  
15 *Appeals of Administrative Decisions*, which “apply to agency appeals in general and are  
16 not directed toward the specific procedural issues that arise in general stream  
17 adjudications.” *Id.* at 13. Instead, if the Superior Court were to exercise jurisdiction over  
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19 <sup>21</sup> SRP improperly relies upon *Gabel v. Tatum*, 146 Ariz. 527 (App. 1985) to support its  
20 argument. In that case, the Arizona Court of Appeals affirmed the trial court’s dismissal of  
21 a declaratory judgment action filed to “sort out the water rights of ninety families abutting  
22 or using a ditch located in the larger system,” because those water rights would be decided  
23 in the pending Gila River adjudication. *Id.* at 528-29. In this matter, whether a severance  
24 and transfer application should be approved will be decided by the Director pursuant to  
25 A.R.S. § 45-172, not as part of an adjudication proceeding.

26 <sup>22</sup> See *In re Town of Huachuca*, *supra*, where the Special Master rejected a requested  
equitable remedy stating that, “Such a remedy would eviscerate the administrative process  
established by the water appropriation statutes.” Likewise, granting SRP’s requested relief  
would “eviscerate the administrative process” established by the severance and transfer  
statute, which is binding authority. See Section II, *supra*.

1 applications for S&Ts, SRP argues the Superior Court’s decision on applications for  
2 S&Ts and changes in use would be entered pursuant to the Special Master’s Rules and  
3 then be subject to “direct interlocutory review by the Supreme Court,” thereby addressing  
4 “certain issues that are unique to such [adjudication] proceedings.” *Id.* This is untenable  
5 reverse logic. The existence of rules and orders governing adjudication proceedings does  
6 not lead to the conclusion that the Superior Court must then have jurisdiction over S&Ts  
7 and changes in use. Also, applying those adjudication rules and orders to decisions  
8 concerning S&Ts and changes in use would be unnecessarily complicated by the  
9 comprehensive nature of a general stream adjudication.

10 In addition, SRP’s position subverts the administrative process provided by statute  
11 with an unspecified process *not* provided by statute. SRP’s argument undercuts existing  
12 statutory authority in A.R.S. § 45-172(A)(7) and (8) providing the applicant and any  
13 “interested person” with the right to seek (1) administrative review of the Director’s  
14 decision pursuant to *Uniform Administrative Appeals Procedures*,<sup>23</sup> and (2) judicial  
15 review pursuant to the *Arizona Rules of Procedure for Judicial Review of Administrative*  
16 *Decisions*,” which also appear to apply to changes in use under A.R.S. § 45-156(B).

17 SRP’s position also ignores the narrow circumstances under which interlocutory  
18 review by the Supreme Court would be available in the Gila River adjudication pursuant  
19 to the Supreme Court’s “Special Procedural Order Providing for Interlocutory Appeals  
20 and Certifications” (“SPO”),<sup>24</sup> cited by SRP. Motion at 13. The SPO provides procedures  
21 for seeking review of Superior Court rulings “arising from this adjudication” by filing a  
22 petition with the Court. *See* SPO at 1. However, whether the petition would be granted is  
23 “discretionary,” depending upon the Court’s consideration of (but not limited to) certain  
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25 <sup>23</sup> A.R.S. §§ 41-1092 through -1092.12.

26 <sup>24</sup> *See In re the General Adjudication of All Rights to use Water in the Gila River System and Source*, Action No. WC-1, WC-2, WC-3 and WC-4 (consolidated), Sept. 26, 1989.



1 factors set forth in the SPO. *Id.* Notably, since the SPO was adopted in 1989, the  
2 Supreme Court has not granted interlocutory review to review fact-driven decisions by the  
3 Superior Court concerning specific water rights as proposed here by SRP (review of  
4 which is provided by statute), but instead to review various precedent-setting legal issues  
5 “arising from the adjudication.”<sup>25</sup>

6 Based on the six arguments described above, SRP maintains it would be “*prudent*”  
7 for the Superior Court to review and approve post-abstract S&T and change-in-use  
8 applications. *Id.* Regardless of whether it would be prudent or not, the Superior Court’s  
9 jurisdiction depends exclusively on statutory authority, which does not exist.  
10 Furthermore, SRP’s arguments do not establish that the Superior Court’s exercise of  
11 jurisdiction “post-abstract” actually would be “prudent,” as discussed above.

## 12 **VI. CONCLUSION**

13 SRP’s request for relief should be denied for the reasons set forth above. Prior to  
14 entry of the final decree by the Superior Court, A.R.S. § 45-172 vests the Director with  
15 exclusive jurisdiction over S&Ts, and A.R.S. § 45-156(B) vests the Director with  
16 jurisdiction over changes in use of water rights, subject to legislative approval under  
17 certain circumstances. The Superior Court is not vested with jurisdiction pursuant to  
18 either section 45-172 or section 45-156(B).

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24 <sup>25</sup> SRP does not address the fact that a petition for interlocutory review of the Superior  
25 Court’s decision may be unopposed, thereby potentially providing the petitioner with  
26 “another bite at the apple” with no opposition before the Supreme Court, upending the  
adjudication process established by statute and the Special Master’s Rules.

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**DATED** this 10<sup>th</sup> day of June, 2022.

ARIZONA DEPARTMENT OF WATER  
RESOURCES



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Kimberly R. Parks, Deputy Counsel  
Kome Akpolo, Deputy Counsel

**ORIGINAL** of the foregoing Response  
sent by first-class mail on June 10, 2022, to:

Clerk of the Maricopa Superior Court  
Attn: Water Case  
601 W. Jackson Street  
Phoenix, Arizona 85003

**COPY** of the foregoing Response  
sent by first-class mail on June 10, 2022, to:

Special Master Susan Ward Harris  
Maricopa County Superior Court  
Central Court Building  
201 West Jefferson Street, Suite 3A  
Phoenix, AZ 85003-2205

**COPIES** of the foregoing Response  
sent by first-class mail on June 10, 2022 to  
all parties on the Superior Court-approved mailing list for  
Contested Case No. W1-11-3107.

