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*Via email and first class mail*

Sharon Scantlebury  
Docket Supervisor  
Arizona Department of Water Resources  
P.O. Box 36020  
Phoenix, AZ 85006-6020  
[sscantlebury@azwater.gov](mailto:sscantlebury@azwater.gov)

**Re: Comments on the Proposed Fourth Management Plan for the Santa Cruz Active Management Area**

Dear Ms. Scantlebury,

On behalf of Baca Float #3, LLC (“Baca Float”), we appreciate the opportunity to submit comments on the Proposed Management Plan for the Santa Cruz Active Management Area for the Fourth Management Period, 2010-2020 (August 18, 2020) (the “Proposed Plan”). Baca Float understands the importance of maintaining a safe-yield condition in the Santa Cruz Active Management Area (“SCAMA”) to prevent local water tables from experiencing long-term declines. A.R.S. § 45-562(C). We are pleased that the Arizona Department of Water Resources (“ADWR”) is willing to work with local stakeholders and consider our comments on the Proposed Plan.

**General Comments**

In 1994, when it created the SCAMA from the Tucson Active Management Area, the legislature recognized the unique nature of the Upper Santa Cruz River as an international stream and its unique hydrology. A.R.S. § 45-411.04(A). As such, the legislature called for coordinated management of groundwater and surface water in the region. A.R.S. § 45-411.04(B). However, the legislature specifically recognized that, “While the coordinated management can include all naturally occurring waters within the basin, it is not the intent of any party in the [SCAMA] or this legislature **to modify or amend** in any way the fundamental laws and rights to surface water and groundwater pursuant to the laws of this state.” A.R.S. § 45-411.04(D) (emphasis added). Moreover, the legislature made it clear that,

It is the express intent of the legislature that the creation of the Santa Cruz active management area is **not to affect** the definition of, or rights to, the surface waters and the groundwaters within this state, **or to establish any precedent** that could be used in a court of law to **define, limit, or extend** the rights of this state or the United States of America over the surface waters and groundwaters found within this state **or to define or limit the legal distinction between surface water and groundwater** in this state. A.R.S. § 45-411.04(C) (emphasis added).

In the Proposed Plan, however, ADWR does not reference the legislative intent expressed in A.R.S. § 45-411.04 and does not specifically state that the Proposed Plan shall *not* affect surface water rights, including surface water pumped from wells, or “subflow.” Subflow is legally characterized as surface water under Arizona law, so the shallow wells in the Santa Cruz River and its tributaries, from which Baca Float withdraws water, pump appropriable surface water under A.R.S. §§ 45-101(9), 45-141(A). *See In re Gila River System*, 9 P.3d 1069, 198 Ariz. 330 (Ariz. 2000) (“*Gila IV*”). The fundamental elements of a surface water right are: (1) the priority of senior surface water users to take water before all junior users during times of insufficient supply for all users, (2) the right to sever and transfer, and (3) the right to change the point of diversion and type of use. To maintain such rights, beneficial and continuous use are generally required. Baca Float holds some of the most senior surface water claims in the SCAMA, as well as substantial groundwater rights under the 1980 Groundwater Code. Baca Float is concerned that ADWR’s approach to the management of surface and groundwater rights under the Proposed Plan will affect the continuing use of its senior surface water rights.

While they are yet to be adjudicated, Baca Float’s senior surface water rights have been, and continue to be, supported by historical fact. Indeed, Baca Float holds surface water rights that are appurtenant to land “within the boundaries of a land grant from the United States Government to the heirs of Luis Maria Cabeza de Baca in 1860.” *See* Finding of Fact #2, Director’s Findings of Fact, Conclusions of Law, Decision and Order re: Certificate No. 36-42316, Rio Rico Properties Inc., ST-96-001 (TS-16) (May 16, 1996) (“S&T Order”) at 1. Baca Float’s prior vested surface water rights along the Santa Cruz River have priority dates tied to a perfected Spanish/Mexican land grant arising from the Treaty of Córdoba, Aug. 24, 1821 (also colloquially referred to as the United States’ Treaty of 1821 with Spain), and the Treaty of Guadalupe Hidalgo, July 4, 1848, 9 Stat. 922. In 1914, the United States Supreme Court upheld and confirmed the validity of this privately held land grant more commonly known as Baca Float Number Three. *See Lane v. Watts*, 234 U.S. 525, 540 (1914).

In the late 1980s, Irrigation Grandfathered Rights (“IGFR”) were also issued to Rio Rico Properties, Baca Float’s predecessor in interest. However, when those IGFRs were issued, the Department recognized that “the withdrawals on which [the] application was based were probably subflow of the Santa Cruz River.” *See*, Letter from Director Wesley E. Steiner to Rio Rico Properties (December 24, 1984), attached hereto. On certain irrigated parcels within Baca Float’s overall farming operation, these IGFR rights overlay the historic surface water rights. Thus, on certain parcels, the Department refers to these rights as “dual-filed” because the surface water rights have not been finally adjudicated, and the Gila River General Stream Adjudication Court has not made a final determination of the subflow zone for the Santa Cruz River. *See* S&T Order at 3.

At issue is the concern that the Proposed Plan is contrary to the basic elements of surface water law. The Proposed Plan will, in effect, give “priority” to groundwater uses and riparian areas by regulating water pumped from wells, even if that water is the basis of senior surface water claims. In fact, the basic concept of “safe-yield” is contrary to the fundamental principle of surface water law, e.g., that a senior user can take all the water necessary to fulfill its right as against all other junior uses. Should ADWR seek to regulate pumping of surface water, such actions could constitute a taking of property without just compensation in violation of the United States and Arizona Constitutions.

The geologic and hydrologic reality of the SCAMA further heightens these legal concerns. As you know the Nogales International Wastewater Treatment Plant (“NIWTP”) is located at the southern portion of Baca Float’s property, discharging effluent into the Santa Cruz River, which flows north for a reach of several miles. A significant riparian habitat has developed, primarily, as a result of the continuous discharge of nutrient-heavy effluent from the NIWTP within the Santa Cruz floodplain at Baca Float’s properties. Should ADWR seek to establish an underground storage facility for the storage of Mexican effluent credits, for example, the impact and burden of the regulation will be on the surface water rights and uses of Baca Float. We believe this could not only result in a taking without just compensation, it could also violate due process and equal protection of laws.

### **Specific Comments**

- *SCAMA is currently maintaining safe-yield as required by statute so no additional conservation requirements are necessary in the fourth management period.*

Safe-yield means “a long-term balance between the annual amount of groundwater withdrawn in an active management area and the annual amount of natural and artificial recharge in the active management area.” A.R.S. § 45-561. ADWR recognizes that “Since 1985, the use of water withdrawn from wells has fluctuated but has not shown a clear increasing or decreasing pattern.” Proposed Plan at 11-1, (Aug. 18, 2020). According to Tables 3-1(A), 3-1(B), municipal, exempt wells, industrial, and agricultural demands in the SCAMA in 2017 are in the same range as they were in 1985. *See* Water Demands and Supply, Proposed Plan at pp. 3-3 and 3-4 (Aug. 18, 2020). Table 3-4 demonstrates that total demand from all sectors was almost the same amount in 2015 as in 1985, and water withdrawn from wells was less in 2015 than in 1985. *See* Water Demands and Supply, Proposed Plan at pp. 3-13. In addition, artificial recharge remains fairly constant, including incidental agricultural recharge and effluent recharge. *See* Section 2.5.2 Underground Water Recharge and Discharge, Proposed Plan at 2-13 to 2-17. Offsets to groundwater pumping, including natural and artificial recharge are variable, but conservation requirements have little to no impact on natural variability in water supply. Therefore, SCAMA maintains a long-term balance between withdrawals and recharge and is in safe yield. So, no additional conservation requirements are necessary.

- *Riparian transpiration exceeds all other uses in the SCAMA and should not be given preference over other types of uses.*

Riparian transpiration in SCAMA comprised 19,712 acre-feet per year in 2017, which was an increase of 3,462 acre-feet since 2010 (more than the City of Nogales, Arizona pumped in 2017). See Table 2-1, Proposed Plan at p 2-16, and Figure 3A-2, Proposed Plan at 3-14. In contrast, *all* other water demands in the SCAMA added together account for 17,203 acre-feet per year in 2017, or 2,509 acre-feet *less than* riparian transpiration demands. See Tables 3-1(A) and 3-1(B), Proposed Plan at 3-3 and 3-4. Therefore, riparian transpiration demands are increasing and exceed all other demands combined in the SCAMA. To ratchet down conservation requirements on water users without addressing riparian demands effectively gives a preference to riparian demands over other types of demands.

- *ADWR incorrectly states that the Agricultural Program in the SCAMA Proposed Plan is “nearly identical” to the third management plan, and proposed changes are unnecessary.*

Between 1985 and 2017, total agricultural demand increased by only 877 acre-feet and irrigation acres decreased by 559 acres. See Table 4-1, SCAMA Agriculture Water Supply & Demand 1985-2017 (AF), Proposed Plan at 4-2. According to ADWR, the Agricultural Program in the Proposed Plan for the fourth management period is “nearly identical” to the third management plan. See Agricultural, Proposed Plan at p. 4-1. However, according to a recent document published by ADWR, the Proposed Plan includes the following changes: (1) Irrigation districts and water companies that provide water for irrigation must either line all canals or comply with 10% or less lost and unaccounted for water, (2) Best Management Practice (“BMP”) targets are increased to 12 points, with no more than 4 points from each category, (3) and BMP points values associated with categories 1 and 2 are modified. See Differences Between the 3<sup>rd</sup> and 4<sup>th</sup> Management Plans – Santa Cruz AMA (updated June 1, 2020). The anticipated water savings by imposing these changes are immaterial and result in an unnecessary burden to stakeholders. Simply put, these changes are not necessary because the SCAMA is currently meeting its management goal.

- *ADWR’s proposed changes to the Municipal Program are unnecessary.*

Between 1985 and 2017, municipal pumping in the SCAMA increased by only 1,915 acre-feet per year. See Table 5-1, Santa Cruz AMA Municipal Pumping by Sub-AMA area, 1985-2017 (AF), Proposed Plan at 5-5. In fact, municipal demand has decreased substantially since its peak in 2007. ADWR proposes the following changes to the Municipal Program: (1) GPCD calculation is modified to include Spill, (2) BMP points targets are increased, (3) and Points values for individual BMPs are updated. The anticipated water savings by imposing these changes are immaterial and result in an unnecessary burden to stakeholders. These changes are not necessary because the SCAMA is currently meeting its management goal.

- *ADWR incorrectly states that the Industrial Program in the SCAMA Proposed Plan is “the same as” the third management plan, and proposed changes are unnecessary.*

Between 1985 and 2017, total industrial demand in the SCAMA has decreased by 143 acre-feet. See Table 6-2, Santa Cruz AMA Historical Industrial Demand by Subsector, 1985-2017, (AF),

Proposed Plan at 6-6. According to ADWR, the Industrial Program in the Proposed Plan for the fourth management period is “the same as” the third management plan. *See* Industrial, Proposed Plan at p. 6-1. However, according to a recent document published by ADWR, the Proposed Plan includes the following changes: (1) Decrease of turf application rates from 4.6 to 4.45 AF/acre at five (5) planted/turf acres per hole, and (2) Turf related facilities that are not cemeteries are limited to 90 acres of turf. *See* Differences Between the 3<sup>rd</sup> and 4<sup>th</sup> Management Plans – Santa Cruz AMA (updated June 1, 2020). The anticipated water savings by imposing these changes are immaterial and result in an unnecessary burden to stakeholders. These changes are not necessary because the SCAMA is currently meeting its management goal.

- *Baca Float opposes Well Spacing Requirements for wells that withdraw subflow.*

In Section 10-901, ADWR proposes new Well Spacing Requirements for SCAMA, requiring that any person drilling a new well, a non-exempt well, or a replacement well in a new location must submit a hydrologic study demonstrating that withdrawals from the proposed well will not result in local water tables experiencing a long-term decline. Proposed Plan at 10-10. The hydrologic study must evaluate projected declines in water levels, and ADWR may refuse to issue a permit based on the study. *See* Section 10.8, Well Spacing Criteria, Proposed Plan at 10-8 to 10-9.

ADWR does not have the authority to require that senior surface water users submit a hydrologic study designed to protect water levels and maintain riparian habitats in local areas nor does it have authority to prohibit a senior surface water user from accessing and using its claimed water rights. ADWR cannot adopt rules that modify or amend laws relating to surface water and it cannot pass rules that affect rights to surface water. Baca Float’s wells pump subflow and it may change a point of diversion in accordance with the laws relating to surface water, not groundwater. Therefore, the Well Spacing Requirements proposed by ADWR are contrary to A.R.S. § 45-411.04 and are an unconstitutional taking of property without just compensation. The Well Spacing Requirements should be eliminated from the Proposed Plan in their entirety or clarified as being not applicable to holders of surface water claims in SCAMA

- *ADWR should reference A.R.S. § 45-411.04 in describing its Fourth Management Plan Regulatory Approach.*

Chapter 10 and specifically Appendix 10A Fourth Management Plan Regulatory Approach should Reference A.R.S. § 45-411.04 and expressly state that nothing in the plan will affect senior surface water rights. Furthermore, Chapter 10 should reference *Arizona Mun. Water Users Ass’n v. Arizona Dept. of Water Resources*, 888 P.2d 1323, 181, Ariz. 136 (Div. 1 1994), *review denied* (Feb. 22 1995), which upheld ADWR’s ‘stacking’ approach, holding that ADWR may count recovered effluent in determining compliance with management plan requirements, but “counting recovered effluent is not the same as regulation of effluent.” *Id.* at 1333, 146. Similarly, ADWR should recognize that surface water can be *counted* in determining compliance with management plan requirements, but it can’t be *regulated* without statutory authority.

- *ADWR does not have statutory authority for conjunctive management of groundwater and surface water.*

The Arizona legislature has not given ADWR authority to “conjunctively manage” groundwater, surface water and effluent as ADWR asserts in Section 11.2.5 Conjunctive Resource Management. Proposed Plan at 11-5. ADWR must remove this section from the Proposed Plan or revise it to accurately reflect ADWR’s authority for “coordinated management” of groundwater and surface water in accordance with A.R.S. § 45-411.04.

- *Baca Float is opposed to the adoption of draft Assured Water Supply Rules for SCAMA that are eleven years old.*

Baca Float is opposed to the adoption of draft Assured Water Supply Rules that were shared with stakeholders in 2009 before publication when a rulemaking moratorium was put into place by Governor Brewer. Proposed Plan at 11-8. The rulemaking moratorium remains in place. Should the moratorium be lifted for SCAMA Assured Water Supply Rules, ADWR would have to propose new Rules and engage stakeholders in a new public comment period.

### **Technical Corrections**

- ADWR references claims to Patagonia Lake and Pena Blanca Lake in Section 2.8.2, Surface Water. However, it neglects to include that Baca Float has surface water claims in Sonoita Creek. Proposed Plan at 2-21.
- ADWR states that Rio Rico Utilities, Inc. has the right to use NIWTP reclaimed water and that its rights are “lesser than” the City of Nogales, Arizona or Mexico. Section 8.3.2, Recharge Issues, Proposed Plan at 8-4 should be corrected to remove this unsubstantiated legal judgment by ADWR.
- In the Reclaimed Water, Direct Use section of Chapter 8, the discussion of a reclaimed water incentive discusses changes from the Second Management Plan to the Third Management Plan and should be updated. Proposed Plan at 8-10.
- In the Conclusion of Chapter 8, ADWR states that multiple strategies will be considered to attempt to “achieve” safe-yield. This should be changed to “maintain” since SCAMA is currently in safe-yield.

### **Conclusion**

In conclusion, Baca Float is committed to collaborating with ADWR in the development of optimal strategies to promote water conservation and efficiency in the SCAMA, while also respecting the priority of senior surface water rights on the Santa Cruz River and its tributaries. We appreciate this opportunity to provide comments on the Proposed Plan and ADWR’s willingness to take these comments into consideration prior to adopting the final Fourth Management Plan for the SCAMA. Baca Float reserves the right to comment on any future draft management plans for the SCAMA and intends to participate in the development of the Fifth Management Plan as well.

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Please don't hesitate to contact me should you have any questions. We welcome the opportunity to further discuss our comments with ADWR staff.

Sincerely,

A handwritten signature in black ink that reads "Lee A. Storey". The signature is written in a cursive style with a long, sweeping underline.

Lee A. Storey

Alexandra M. Arboleda

Counsel for Baca Float #3, LLC

cc: Thomas Buschatzke, ADWR Director  
Natalie Mast, Management Plans Program Manager  
Einav Henenson, AMA Director  
Andy Jackson, Baca Float #3, LLC  
Ben Dorris, Baca Float #3, LLC