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12 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
13 **IN AND FOR THE COUNTY OF YAVAPAI**

14 GEORGE W. HANCE, et al.,

15 Plaintiffs,

16 v.

17 WALES ARNOLD, et ux., et al.,

18 Defendants.

19 In the matter of the VERDE DITCH  
20 COMPANY

No. P1300 CV 4772

Division 1

**ARIZONA DEPARTMENT OF  
WATER RESOURCES' COMMENTS  
TO REVISED MEMORANDUM OF  
UNDERSTANDING**

21 Pursuant to Minute Entry Order filed May 15, 2015, the Arizona Department of  
22 Water Resources ("ADWR") hereby files comments to the Revised Memorandum of  
23 Understanding ("Revised MOU") among the Salt River Project Agricultural Improvement  
24 and Power District and the Salt River Valley Water Users' Association (collectively  
25 "SRP"), and the Verde Ditch Company ("VDC"). SRP and VDC are referred to in the  
26 Revised MOU as "Parties." ADWR's comments address the severance and transfer  
procedures described in the Revised MOU.



1 required to be paid by the applicant. ADWR further explained that it is required to enter a  
2 decision on each application individually, and not as part of a bulk filing as suggested in  
3 the MOU.

4 On April 8, 2015, the Court held a status conference followed by a Minute Entry  
5 Order that addressed issues described in the Report to the Court, in which the Court  
6 indicated, *inter alia*, that it “is not approving the MOU with the concurrent [approval]  
7 process that had been proposed.” Minute Entry Order at 2.

8 On May 13, 2015, SRP filed a revised draft MOU based on discussions among  
9 counsel for SRP, VDC, the Nation, the United States, and ADWR. The revised draft  
10 MOU included several changes relating to the severance and transfer process. During a  
11 May 15, 2015 status conference, the Court reviewed and commented on the proposed  
12 changes. The Court ordered VDC and SRP to “lodge with the Court the version of the  
13 MOU and form of Order they wish the Court to approve as well as provide copies to all  
14 joined parties by Monday, June 15, 2015.” Minute Entry Order at 3.

#### 15 **REVISED MOU**

16 As ordered by the Court, VDC filed the Revised MOU on June 15, 2015. Although  
17 many of ADWR’s prior concerns have been addressed regarding the severance and  
18 transfer procedures, some issues remain. These issues are described below as they appear  
19 in the Revised MOU.

20 **Scope of the Revised MOU (recitals and definitions).** The Revised MOU  
21 indicates that it is intended to assure that water from the Verde River Ditch is being used  
22 on land with “Historic Water Use.” Recital G states:<sup>2</sup>

23 The Parties intend for this MOU to set forth a process whereby they can  
24 work together, along with the water users on the Verde Ditch, to agree, as

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25 <sup>2</sup> The recitals are “expressly incorporated and included as part of this MOU.” Revised  
26 MOU at 2, ¶ 1.

1 among the Parties, upon the existence of Historic Water Use for specific  
2 parcels served by the Verde Ditch; to attempt to resolve issues with respect  
3 to lands served by the Verde Ditch that do not have Historic Water Use or  
4 have disputes regarding the existence of Historic Water Use; and to provide  
*a process to ensure that only lands that have Historic Water Use receive  
and use water from the Verde Ditch.*

5 Revised MOU at 2 (emphasis added). The term “Historic Water Use is defined in ¶ 4.11  
6 of the Revised MOU as follows:

7 “Historic Water Use” or “HWU” shall mean use of the waters of the Verde  
8 River System through the Verde Ditch that was (a) commenced on a  
9 particular parcel prior to June 12, 1919 or (b) commenced after June 12,  
10 1919 pursuant to a certificate of water right issued by ADWR or other state  
11 agency of similar jurisdiction prior to January 1, 2014 or pursuant to a  
severance and transfer of a pre-1919 right approved under applicable law.<sup>3</sup>

12 *Id.* at 4.

13 The definition of HWU appears to refer to water rights. However, the Revised  
14 MOU indicates that the Parties do not intend for the MOU to address any of the attributes  
15 of a water right, although the Court may exercise its authority to do so. Recital H states in  
16 part:

17 *This MOU is not intended to address or resolve any attributes of any water  
18 rights other than that Historic Water Use exists for particular parcels of  
19 land. Issues such as priority date, quantity, purpose of use, and season of  
20 use are specifically left for resolution in some other forum or agreement;  
21 provided, however, that this MOU does not limit the Hance v. Arnold  
22 Court’s authority, to the extent such authority otherwise exists, to address  
those issues as part of its review and confirmation of Historical Water Uses  
for parcels of land entitled to receive water from the Verde Ditch pursuant to  
the determinations of the Hance v. Arnold Court.*

23 Revised MOU at 2 (emphasis added). Recital H goes on to explain that the Revised MOU  
24 is not a guarantee against future challenges to a shareholder’s rights to use water from the  
25 Verde Ditch by a party other than the VDC or SRP.

26 <sup>3</sup> It is not clear to ADWR why January 1, 2014 is used in the definition of HWU.

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Nothing in this MOU is intended to provide a guarantee to any VDC shareholder or water user that its right to use water delivered from the Verde River through the Verde Ditch may not be challenged by parties other than VDC or SRP, in the Adjudication or otherwise.

*Id.* The guarantees that are included in the MOU are discussed Sections 6, 7, and 12 (discussed below). In these sections of the MOU, SRP agrees not to challenge the existence of HWU on certain lands, and VDC agrees not to challenge SRP Rights.<sup>4</sup>

The Revised MOU does not indicate in the recitals or elsewhere whether the Court will be determining the attributes of any water rights held by VDC shareholders as part of the severance and transfer process described in the Revised MOU. As indicated previously in these proceedings, ADWR believes that this Court does have jurisdiction to determine those attributes and that the MOU should clarify whether the Court intends to exercise that authority. ADWR believes that such a clarification would help eliminate any confusion regarding ADWR’s concurrent jurisdiction under A.R.S. § 45-172.

As described in ADWR’s Position Statement, A.R.S. § 45-172 requires ADWR to determine that:

- (1) vested or existing rights to the use of water will not be affected, infringed upon or interfered with;
  - (2) the quantity of water diverted or used after the transfer of the rights will not exceed the vested rights existing at the time of the severance and transfer;
  - (3) the water right sought to be transferred has been lawfully perfected;
  - (4) the water right sought to be transferred has not been forfeited or abandoned;
- and

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<sup>4</sup> “SRP Rights” are defined as “any rights or claims to rights to use water on land included within the Salt River Reservoir District, a map of which is set forth in Exhibit 2, regardless of whether such rights are claimed or held by the District, the Association, or Association shareholders.” Revised MOU at 5, ¶ 4.21.

1 (5) the written consent and approval of the appropriate irrigation district,  
2 agricultural improvement district or water users' association has been obtained.  
3 ADWR believes that, in the exercise of the Court's jurisdiction, it may be appropriate for  
4 the Court to make these determinations.

5 Whether the water rights appurtenant to HWU lands have been forfeited or  
6 abandoned due to lack of use are outside the scope of the Revised MOU, as are other  
7 issues involving water right attributes. ADWR suggests that the scope of the Court's  
8 review of severances and transfers be stated in the appropriate sections of the Revised  
9 MOU to avoid uncertainty about the Court's process and its relationship to ADWR's  
10 statutory process.

11 **HWU Lands (Section 5).** The Revised MOU categorizes lands receiving water  
12 from the Verde River through the Verde Ditch depending on whether the lands are  
13 currently receiving and using water, and whether the lands have HWU. The Revised  
14 MOU refers to the lands with HWU as "**Verde Ditch HWU Lands.**" Revised MOU at 6,  
15 ¶ 5.3.01. The Verde Ditch HWU Lands that are currently receiving and using water from  
16 the Verde Ditch are referred to as "**Green Lands.**" *Id.* at ¶ 5.3.02. The Verde Ditch HWU  
17 Lands that are not currently receiving or using water from the Verde Ditch are referred to  
18 as "**Purple Lands.**" *Id.* at ¶ 5.3.03. In addition, there are other lands that are currently  
19 receiving or using water from the Verde Ditch, but which appear to lack records that  
20 support HWU, and these lands are referred to as "**Orange Lands.**" *Id.* at ¶ 5.3.04.

21 These categories depend, in part, on whether or not the lands are "currently using  
22 or receiving water." However, the time frame for the word "currently" is not stated, and it  
23 is unclear whether the lack of current use has any legal effect on the validity of the water  
24 rights, or whether those water rights may be severed and transferred. ADWR suggests  
25 that these matters be clarified.  
26

1            **Interim Agreements (Section 6).** Under ¶ 6.1, during the time between the  
2 Execution Date of the MOU and the date when the Final Settlement Agreement becomes  
3 effective pursuant to Section 12 of the MOU, SRP agrees not to contest the existence of  
4 HWU: (1) for Green Lands [as described in Section 7], or (2) for Orange Lands for which  
5 Severance and Transfer Agreements have been executed, approved by the Court and  
6 recorded [as described in Sections 8 and 9]. Under ¶ 6.2, during the same time frame,  
7 “VDC agrees to not contest the existence of the SRP Rights in any Proceeding.”<sup>5</sup>

8            Section 6 is silent regarding SRP’s consent to the existence of HWU on Purple  
9 Lands that are *not* part of a Severance and Transfer Agreement. By definition, Purple  
10 Lands have been determined to have HWU. Also, it is conceivable that there may be  
11 partial severances and transfers of water rights from Purple Lands. ADWR suggests that  
12 SRP’s consent to the existence of HWU on Purple Lands be addressed in this section.

13            **HWU for Green Lands (Section 7).** Under ¶¶ 7.1 and 7.2, upon achieving  
14 agreement of the existence of HWU for Green Lands, the owner and the Parties will  
15 execute an HWU Agreement. Under ¶ 7.3, the HWU Agreement will be recorded with  
16 the Yavapai County Recorder. The HWU Agreement will require the Court’s approval of  
17 severances and transfers of water rights under certain circumstances.

18            Under ¶ 7.2 of MOU, in the HWU Agreement, the owner of the Green Lands shall  
19 agree, in writing, to: (1) not claim HWU for any other lands on the parcel in question as  
20 against SRP; (2) not convey VDC shares to another parcel, unless “made in conjunction  
21 with a severance and transfer performed pursuant to the procedures set forth in this MOU  
22 and as governed by the *Hance v. Arnold* Court;” and (3) not expand water use on the  
23 parcel “except in conjunction with a severance and transfer as set forth in the MOU and as  
24 governed by the *Hance v. Arnold* Court.” Also, “SRP shall agree, in writing, to not

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26 <sup>5</sup> The definitions of “Proceeding” and “SRP Rights” are set forth in ¶¶ 4.16 and 4.21 of  
the MOU. Revised MOU at 4-5.

1 contest the existence of Historic Water Use for the Green Lands at issue in that agreement  
2 in any Proceeding.”<sup>6</sup> However, consistent with the limited scope of the MOU described  
3 above in Recitals G and H, it does not appear that SRP’s agreement will extend to any  
4 other water rights attributes that the Court may address as part of a severance and transfer  
5 process.

6 The language of ¶ 7.2 underscores the importance of describing in the MOU the  
7 issues that will be addressed by this Court in the severance and transfer process. ADWR  
8 believes that this would avoid potential confusion over the concurrent jurisdiction  
9 between the Court and ADWR. ADWR further suggests that the form of the HWU  
10 Agreement be approved by the Court, perhaps as an exhibit to the MOU, to assure  
11 consistency with the MOU.

12 **Severances and Transfers (Section 8).** The title of Section 8 is “Severances and  
13 Transfers from Purple or Green Lands to Orange Lands.” Neither this title nor the section  
14 itself indicates what is being severed and transferred. If in fact it is the water rights that  
15 are appurtenant to Purple or Green Lands that are being severed and transferred, then  
16 ADWR suggests that the title be revised to read: “Severances and Transfer of Water  
17 Rights from Purple or Green Lands to Orange Lands.”<sup>7</sup>

18 Clarification also would be helpful in ¶ 8.1. Under ¶ 8.1, the Parties agree to  
19 “facilitate severance and transfers so that *lands receiving water from the Verde Ditch are*  
20 *amended appropriately and have a recognized right* that is protectable under state law”  
21 (emphasis added). It is not clear what the italicized language means.

22 Paragraph 8.5, provides that upon the execution of a Severance and Transfer  
23 Agreement to sever and transfer water rights from Purple or Green Lands to Orange  
24

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25 <sup>6</sup> Under ¶ 4.16, “Proceeding” is defined as “any judicial, administrative, or legislative  
26 proceeding.” Revised MOU at 4.

<sup>7</sup> Compare to the title of section 9 which does include the words “water rights.”

1 Lands, SRP's consent and the approval of the *Hance v. Arnold* Court must be obtained,  
2 after which VDC's records will be amended and the Severance and Transfer Agreement  
3 will be recorded with the Yavapai County Recorder. Under ¶ 8.6, upon the Court's  
4 approval of a "severance and transfer application," an HWU Agreement will be executed,  
5 which then will be subject to the same procedures and limitations described in ¶¶ 7.1 to  
6 7.3 for an HWU Agreement for Green Lands.

7 It is not clear what the scope of the Court's approval of a severance and transfer  
8 will include. ADWR believes that it would be helpful to indicate in the MOU whether the  
9 Court will be making a determination regarding the attributes of the water rights  
10 appurtenant to the Green or Purple Lands to be severed and transferred under the MOU.  
11 Also, ADWR suggests that the form of a Severance and Transfer Agreement as well as  
12 any HWU Agreement be subject to Court approval, and perhaps be included as exhibits to  
13 the MOU to assure consistency with the MOU.

14 **Additional Water Rights for Orange Lands (Section 9).** The title of section 9 is  
15 "Securing Additional Water Rights for Orange Lands if Purple or Green Lands are not  
16 Sufficient." For clarification, ADWR suggests revising the title to Section 9 to read:  
17 "Securing Additional Water Rights for Orange Lands if Water Rights for Purple or Green  
18 Lands Are Not Sufficient." Likewise, ADWR suggests the following revision to ¶ 9.1:

19 The Parties acknowledge that the water rights appurtenant to ~~number of~~  
20 acres of Historic Water Use acres voluntarily severed and transferred from  
21 the Purple or Green Lands might or might not be sufficient to provide  
22 Historic Water Use for all acres of Orange Lands.

23 Revised MOU at 9. Similarly, ADWR suggests revising ¶ 9.2 as follows:

24 If the Parties determine that no water rights appurtenant to additional acres  
25 of with Historic Water Use are reasonably available for voluntary severance  
26 and transfer from Purple or Green Lands to satisfy the remaining needs for  
such Historic Water Use on Orange Lands, the Parties agree to work

1 cooperatively to attempt to locate additional sources of water rights, as  
2 evidenced by Historic Water Use, for the remaining Orange Lands...

3 *Id.*

4 **ADWR's Role (§§ 8.5, 8.7 & 9.5).** Paragraphs 8.5 and 9.5 each contain a sentence  
5 that provides that a Transferee under a Severance and Transfer Agreement may make  
6 "necessary filings with ADWR." Paragraph 8.7 refers to the availability of a severance  
7 and transfer process independent of the MOU. ADWR assumes that each of these  
8 paragraphs refers to A.R.S. § 45-172.

9 The last sentence of both §§ 8.5 and 9.5 states that after a Severance and Transfer  
10 Agreement has been executed and approved by the Court:

11 The Transferee may proceed with any *necessary filings* with ADWR, but  
12 nothing in this MOU requires any filing with ADWR if it is not otherwise  
13 required under applicable law.

14 Revised MOU at 9, 10 (emphasis added). The term "necessary filings" is not defined and  
15 the last phrase regarding "applicable law" is vague. Also, this sentence provides that a  
16 Transferee may file an application with ADWR for a particular severance and transfer  
17 *after* the Court has already approved the severance and transfer. As ADWR has indicated  
18 in these proceedings, ADWR will not exercise jurisdiction over a severance and transfer if  
19 the Court has already exercised its jurisdiction. ADWR recommends that this sentence be  
20 removed from paragraphs 8.5 and 9.5.

21 Paragraph 8.7 raises similar concerns. This paragraph states:

22 Nothing contained herein shall preclude or prohibit an individual landowner  
23 from pursuing all rights and remedies to obtain a *severance and transfer*  
24 *independent of the process set forth herein under state law.* However,  
25 *neither Party is obliged to approve a severance and transfer but shall use*  
26 *good-faith efforts in consideration of any such transfer.* In the event either  
Party receives an application for a severance and transfer affecting an  
Historic Water Use served by the Verde Ditch, the Party receiving the  
application will provide notice to the other.

1 Revised MOU at 9 (emphasis added). This paragraph refers to a “severance and transfer  
2 independent of the process set forth herein under state law,” which ADWR assumes is a  
3 reference to A.R.S. § 45-172. Regardless of whether the severance and transfer is  
4 pursuant to the MOU or not, the Court still has jurisdiction over any proposed severance  
5 and transfer, and as long as the Court exercises its jurisdiction ADWR will not. Also, this  
6 paragraph indicates that SRP and VDC are not “obliged to approve any such severance  
7 and transfer but shall use good-faith efforts in consideration of any such transfer.” The  
8 reference to “good-faith” efforts is vague. ADWR recommends that this paragraph be  
9 deleted.

10 **Completion Targets (Section 11).** ADWR suggests revisions to Section 11 to  
11 clarify that it is the water rights appurtenant to HWU lands that are being severed and  
12 transferred. ADWR suggests revising ¶ 11.1 to read:

13 The Parties agree that, although obtaining the severance and transfer of  
14 sufficient water rights ~~Historic Water Use~~ to all Orange Lands and  
15 agreement upon the existence of Historic Water use for Green Lands could  
16 be time-consuming and difficult tasks, they will make diligent efforts  
toward completing these tasks in a timely manner.

17 Revised MOU at 11.

18 **Final Settlement Agreement (Section 12).** Pursuant to ¶ 12.2, SRP will agree in  
19 writing in the Final Settlement Agreement to not contest “the existence of Historic Water  
20 Use for (a) Green Lands for which HWU Agreements have been executed and recorded,  
21 and (b) Orange Lands for which Severance and Transfer Agreements have been executed,  
22 approved by the Parties and the *Hance v. Arnold* Court and recorded.” Pursuant to ¶ 12.3,  
23 in the Final Settlement Agreement, “VDC will agree, in writing, to not contest the  
24 existence of the SRP Rights in any Proceeding.<sup>8</sup>”

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25  
26 <sup>8</sup> *Ibid.*

1 Section 12 is silent regarding SRP's consent to the existence of HWU on Purple  
2 Lands that are *not* part of a Severance and Transfer Agreement. By definition, Purple  
3 Lands have been determined to have HWU. Also, it is conceivable that there may be  
4 partial severances and transfers of water rights from Purple Lands. ADWR suggests that  
5 SRP's consent to the existence of HWU on Purple Lands be addressed in this section.

6  
7 **CONCLUSION**

8 ADWR respectfully requests that the Court take ADWR's comments into  
9 consideration, and order that certain provisions of the MOU be revised consistent with  
10 those comments.

11 **DATED** this 15th day of July, 2015.

12 ARIZONA DEPARTMENT OF WATER  
13 RESOURCES

14 

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19 **ORIGINAL** of the foregoing  
20 sent by Federal Express this 15<sup>th</sup> day of July 2015  
21 for filing to:

22 Clerk of the Superior Court  
23 Yavapai County, Division 1  
24 120 South Cortez Street  
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1 **COPIES** of the foregoing sent by first-class  
2 mail and emailed this 15<sup>th</sup> day of July 2015 to:

3 Honorable David L. Mackey (jjaramil@courts.az.gov)  
4 Judge of the Superior Court and Master of the Verde Ditch  
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11 **COPY** of the foregoing sent by first-class  
12 mail this 15<sup>th</sup> day of July 2015 to:

13 Don Ferguson  
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17 **ADDITIONAL COPY** of the foregoing sent  
18 by first by first-class mail and emailed this 15<sup>th</sup>  
19 day of July 2015 to:

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