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**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

In the Matter of the Application for a  
Permit to Transport water Out of State  
  
Permit No. 33-96790  
  
Applicant: Wind River Resources, L.L.C.

**No. 07A-TR001-DWR**  
  
**APPLICANT'S RESPONSE TO  
MOTION TO INTERVENE BY BIASI  
WATER COMPANY**  
  
(Assigned to the Honorable Thomas  
Shedden)

The Applicant, Wind River Resources, LLC ("Wind River") objects to the Motion to Intervene by Biasi Water Company (Biasi) for the following reasons:

First, the Motion to Intervene is untimely. This matter has been pending before the Arizona Department of Water Resources ("ADWR") since Wind River's Application was filed on March 15, 2005. Thus, the application has been a matter of public record now for almost two years. And, even though the Notice of Hearing in this matter was issued on January 12, 2007, Biasi was aware of this proceeding long before that time. If Biasi wanted to intervene in this matter, it should have sought intervention before ADWR when it became aware of this pending application which was at least some time in mid-2006.

Second, this proceeding has to be conducted under the provisions of Chapter 1, Article 11, Title 45 of the Arizona Revised Statutes, A.R.S. § 45-291 through 45-294. This proceeding currently

1 pending before the Office of Administrative Hearings is under the legislative mandate of A.R.S. § 45-  
2 292E which provides:

3 E. An administrative hearing shall be held on the application,  
4 and the director shall give notice of the hearing by publication  
5 once a week for three consecutive weeks in a newspaper of general  
6 circulation in the county or counties from which the applicant  
7 proposes to transport the water. The hearing shall be conducted in  
8 the area from which water is proposed to be transported. Any  
9 interested person, including the department, may appear and give  
10 oral or written testimony on all issues involved.

11 For whatever reason, the legislature has mandated that this current process is strictly an  
12 “administrative hearing” of limited participation. Only the applicant and ADWR are allowed to  
13 participate in this matter as parties. The case management orders already issued in this matter have  
14 already recognized the limitations placed by the legislature on who may appear. As provided in sub-  
15 part E, “interested persons” “may appear and give oral or written testimony on all issues involved”  
16 but may not participate as “parties”. By this statutory language, the Office of Administrative  
17 Hearings appears to be relegated to the position of taking oral or written testimony from interested  
18 persons but any findings of fact and conclusions of law made by the Administrative law judge must  
19 be based on “evidence” contained in the ADWR record or as presented by the Applicant and/or  
20 ADWR at the time of the Administrative Hearing. Any other interpretation of this language would  
21 simply eviscerate the apparent legislative intent. If Biasi were allowed to intervene, then,  
22 presumably, any “interested person” could move to intervene as a “party” to these proceedings. If  
23 that had been the intent of the Arizona Legislature in drafting the statutory provisions, then the  
24 language would simply have provided for an objection process at the ADWR level where people  
25 could file formal objections to the Application and become “parties” to a “contested case” regarding  
26 whether the Application should be permitted or denied.

27 Pursuant to A.R.S. § 45-292F, the administrative proceedings are governed by A.R.S. § 45-  
114, subsections A and B, which provide that, if the administrative hearing his held before the  
Director’s decision, the administrative proceeding is a contested case. However, as this hearing  
officer’s case management orders have already previously pointed out, “interested persons”

1 participation is limited to oral or written testimony and they are not allowed to submit exhibits, or  
2 cross-examine witnesses at the hearing. Therefore, the only “parties” to the “contested case” are the  
3 applicant and ADWR.

4 To now change this administrative proceeding to a full scale administrative “trial” would not  
5 only be contrary to the statutory provisions but would also be highly prejudicial to the applicant since  
6 the applicant has never had the benefit of being formally apprised of any “interested persons” position  
7 and/or evidence to support any position that any “interested person” may want to take. Obviously,  
8 turning this matter now from an administrative hearing into a full blown contested case in which  
9 “interested persons” can intervene and present evidence, cross-examine witnesses, and submit  
10 exhibits would turn this process into a proceeding that would violate the applicant’s constitutional  
11 procedural due process rights under both the Arizona Constitution and the United States Constitution.

12 Procedural due process guarantees that permissible governmental interference is fairly  
13 achieved. Simpson v. Owens, 207 Ariz. 261, 85 P.3d 478 (App. 2004). Here, the applicant is  
14 attempting to exercise its right to transport water, an article of commerce, in interstate commerce as  
15 allowed by the Commerce Clause of the United States Constitution. See Sporhase v. Nebraska, 458  
16 U.S. 941 (1982). The Arizona law attempting to put restrictions on that right must meet both  
17 substantive and procedural due process requirements. A proceeding that allows “Interested Persons”  
18 to now become “parties”, at this late date, and put on full-blown testimony, evidence and exhibits  
19 which the applicant has never even been previously apprised of severely interferes with the  
20 applicant’s right to procedural due process.

21 For the reasons set forth above, it is respectfully requested that the Hearing Officer deny  
22 Biasi’s Motion to Intervene and any other Motions to Intervene that may be filed by any other  
23 “interested person”.

24 Dated this 30<sup>th</sup> day of January, 2007.

25 SALMON, LEWIS & WELDON, P.L.C.

26  
27 By M. Byron Lewis

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