

# Memo

To: Mayor and Council  
From: Ivan Legler, Town Attorney  
CC: Larry Tarkowski, Town Manager; Bill Kauppi, Management Services Director; Gary Kidd, Prescott City Attorney  
Date: November 12, 2008  
Re: Interpretation of Intergovernmental Agreement w/ Prescott

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A question has been raised about the Intergovernmental Agreement dated December 7, 2004 (IGA) between the City of Prescott (Prescott) and the Town of Prescott Valley (Prescott Valley) for the Big Chino Water Ranch Project (Project). Namely, does the IGA authorize Prescott Valley to incur expenses which Prescott would help pay according to its percentage of water allocation set forth in the IGA? I believe the IGA does authorize such expenses and payments.

Background: ARS §11-952(A) authorizes two or more government entities to enter into agreements to contract for services, jointly exercise any powers common to them, or take other joint or cooperative action. The only limitations are that each entity have separate authority under other law to take the actions involved, that the agreement be in a specified form, and that it be duly enacted. [ARS §§11-952 & 11-954]

This IGA [see attached] provides that Prescott and Prescott Valley will cooperate to carry out the Project. The Project involves finance, design, construction, operation and maintenance of facilities to withdraw groundwater from a ranch located in the Big Chino Sub-basin and to transport that water for use in Prescott and Prescott Valley. [Recital D; §§2.17 & 4] The primary purpose of the IGA is for Prescott to be able to increase the volume of water that is legally and physically available to it as an assured water supply by 4,717 acre feet per year, and for Prescott Valley to be able to obtain 4,000 acre feet per year that is legally and physically available to it for purposes of either designating it as an assured water provider or for developers to obtain certificates of assured water supply. [Recitals G & H] As duly-organized municipalities in Arizona, Prescott and Prescott Valley each have separate authority to own property, design and construct public improvements (e.g. wells and pipelines), and provide (or enter into contracts to provide) design, construction, operation, legal, accounting, financial, and other professional services. [ARS Title 9, Chapter 2, Articles 3 - 5] Each community has also been authorized by its citizens to operate water and wastewater utility systems. The IGA has been declared by legal counsel to be in proper form, and each community has duly adopted and recorded the same in accordance with applicable law. [IGA pp. 22 & 23; Prescott Resolution No. 3643]

Issue: The question raised focuses on the provisions of this particular IGA. Prescott is the sole owner of the ranch and has the express statutory authority to withdraw and transport groundwater from the ranch into the Prescott Active Management Area (PrAMA). [Recitals A & B; §§2.20 & 12] The IGA emphasizes Prescott's role of overseeing the finance, design and

construction of the facilities withdrawing and transporting the groundwater. [Recital D; §§2.7, 2.17, 4, 7, 9, 10 & 13] Specific mention is made of the obligation Prescott Valley has to reimburse Prescott for a portion of listed costs, based on Prescott Valley's percentage of water allocation. This includes Prescott's costs for ranch acquisition, professional services, and Project management, construction, operation and maintenance. [§§2.7, 2.16 & 11] Based on these provisions, opponents of the Project have argued that the IGA only authorizes Prescott to bill Prescott Valley for cost reimbursements using the percentages of water allocation. Specifically, they have argued that the IGA does not permit Prescott to reimburse Prescott Valley for costs Prescott Valley has incurred for lobbying and public relations services. But their argument fails to consider the IGA as a whole, examine the circumstances under which the IGA was entered into, or take into account the way the IGA has been administered by the parties since its inception.

Discussion: The Restatement (First) of Contracts, §235 (2008), sets forth the following rules (among others) which aid in the interpretation of contracts: (a) a writing is interpreted as a whole and all writings forming part of the same transaction are interpreted together, (b) all circumstances accompanying the transaction may be taken into consideration, and (c) if the conduct of the parties subsequent to a manifestation of intention indicates that all the parties placed a particular interpretation upon it, that meaning is adopted if a reasonable person could attach it to the manifestation.

Considering the first rule, numerous provisions in the IGA emphasize cooperation between Prescott and Prescott Valley in order to accomplish the "express intent and expectation of the parties" to make their respective amounts of water legally and physically available. [Recitals D, G & H; §1] It is true that Prescott Valley has no ownership interest, but it does own capacity in the Project. [§12.1] Thus, the two parties are expected to work together regarding Project design, construction, operation and maintenance; property acquisition; any property transfers; water storage, conservation, and recharge; safe-yield within PrAMA; environmental monitoring and mitigation; any agreement with Chino Valley; and general IGA administration. [§§4.1, 4.3, 4.4, 6, 7.2, 7.5, 7.6, 7.7, 7.8, 8, 10.3, 12.2, 12.3, & 13.4] In so doing, both Prescott and Prescott Valley must take *any action* needed to ensure that each receives its full entitlement of Project water. [§12.5 (emphasis added)] This includes in-house professional services by Prescott employees [§2.7], and professional services by others (including in-house services by Prescott Valley employees) that are "on behalf of Prescott in conjunction with" Project activities, "including, but not limited to, ...legal counsel, engineers, appraisers, contractors and hydrologists, ...". [§2.16] The definition of professional services is clearly broad enough to include services by attorneys, lobbyists, computer programmers, and public relations professionals in support of the Project.

More specifically, the IGA includes express provisions for Prescott to reimburse a portion of Prescott Valley costs, agree with Prescott Valley about their percentages of joint costs, or otherwise account for Prescott Valley costs in Prescott billings. This includes costs to oversize the pipeline for non-Project water, to oversize the Prescott Valley secondary line to deliver water to Prescott, to temporarily receive unused Project water, to achieve safe-yield in PrAMA, to monitor and mitigate any environmental impacts, and to account in operation and maintenance billings for Prescott Valley's professional service costs. [§§4.2, 5.1, 5.2, 7.4, 7.7, 7.8, & 11.3(c)(ii)(3)] It should be noted that there are two express references to Prescott making payments (or other accounting for Prescott Valley costs) based on the percentages of water allocation in the IGA. [§§5.2 & 11.3(c)(ii)(3)] Thus, taking the IGA as a whole, nothing precludes Prescott Valley from billing Prescott for a percentage of Prescott Valley costs for professional services provided on behalf of Prescott relating to lobbying and public relations in support of the Project. Indeed, §12.5 arguably requires such payments by Prescott.

Considering the second rule, the IGA was adopted by Prescott Valley during its regular meeting on December 2, 2004, and the circumstances accompanying the adoption are

illustrated by the meeting minutes. [See attached] Prescott Council member Bob Roecker and Prescott Manager Steve Norwood were in attendance and spoke. They and Prescott Valley Manager Larry Tarkowski emphasized the cooperative nature of the IGA, and Roecker referred specifically to a new “partnership” between the communities. [Minutes pp. 1 & 2] Tarkowski also noted the unusual 200-year term of the IGA, and emphasized the ongoing input Prescott Valley staff would have with regard to the Project. [Minutes p. 2] The first public comment was from a citizen who previously served on the Arizona Stream Commission (predecessor to the Arizona Water Commission). He commended both communities for their vision in adopting the IGA, and compared the Project to the Central Arizona Project (CAP). The CAP had required years of work, and obstacles and difficulties also lay ahead for the Project. But, he said, with due diligence those obstacles could be overcome. [Minutes p. 3] These comments suggest that the IGA was adopted in circumstances that emphasized its importance, its formation of a new “partnership” between the communities, and the need for flexibility over the long term to overcome obstacles and accomplish the Project.

With this in mind, it is not unusual that the conduct of the parties administering the IGA evidenced a broad interpretation almost from its inception. For example, in the Fall of 2005 a change of direction occurred with regard to the location of Prescott Valley’s secondary line. The IGA originally anticipated that Prescott Valley’s Project water would be transported through the Project pipeline to Prescott’s existing water facilities in Chino Valley, then through Prescott’s existing interconnection line to a point where it would be picked up by Prescott Valley’s secondary line for delivery. [§§2.6, 2.11, 2.12, 2.23 & 4.7] If, in the future, Prescott chose to recover its lost capacity in the interconnection line, Prescott Valley would be required to share the cost of replacing or oversizing that line. [§4.7] However, Prescott Valley had the option of designing and building its secondary line to bypass the interconnection line altogether (at its sole cost), and avoid the future cost share requirement. [§4.7(c)] Prescott and Prescott Valley staff and consultants began to explore this option in early Fall 2005. In so doing, it became apparent that an extended Prescott Valley secondary line would also provide good points of delivery for Prescott in areas planned for future annexation by Prescott. The two staffs did not wish to make the entire secondary line part of the Project (as provided in §2.23), but they did agree to make design and construction of that portion of the secondary line located in Chino Valley part of the Project. The parties clearly felt that this accommodation fell within the broad language of the IGA.

Similarly, as estimated Project costs increased, Prescott and Prescott Valley began to jointly explore finance, construction, ownership, and operation alternatives. The original language of the IGA anticipated traditional finance, design and construction by Prescott (with operation and maintenance either by Prescott or through a Prescott contract). [§§4.1, 4.3, 4.4, & 4.5] However, the parties have become aware of public/private partnerships used worldwide to finance, design, construct, own, and/or operate large public projects. Prescott will take the lead in exploring such options, but the parties are again giving the IGA a broad interpretation in order to consider such options. Thus, in accordance with rule 3, the conduct of the parties subsequent to adoption of the IGA has indicated that they consider the IGA broad enough to make needed course corrections in order to accomplish the Project. A reasonable person would, therefore, find the language of the IGA broad enough to allow Prescott Valley to take the lead in obtaining lobbying and public relations services for the Project (as well as certain legal services), and then bill Prescott for its portion according to the percentages of water allocation.

Another aspect of the question raised by Project opponents is whether Prescott may pay costs under contracts not first considered for formal adoption by the Prescott City Council in a public meeting. Of course, this too is resolved by ARS §11-952. So long as the government entities involved in the IGA have separate authority to take particular action (and have duly adopted the IGA), subsequent actions taken under the IGA by one entity will properly bind

the other so long as those actions are in accordance with the regulations of the one entity. There is no question that this is how the IGA has worked to-date when Prescott has billed Prescott Valley for actions Prescott has taken in accordance with its regulations. The same should apply when Prescott Valley has duly taken action under the IGA.<sup>1</sup>

Conclusion: Looking at the IGA as a whole, nothing precludes Prescott Valley from billing Prescott for a percentage of Prescott Valley costs for professional services provided on behalf of Prescott in conjunction with the Project. Indeed, §12.5 arguably requires such payments by Prescott. The circumstances under which the IGA was adopted support this interpretation, based on the “partnership” relationship between the communities that was intended to address any barriers that might arise over a very long term. Beginning in 2005 (shortly after inception of the IGA), the parties have shown by their conduct in administering the agreement that it is broad enough to make course adjustments as needed to accomplish the Project. The IGA is in proper form and has been duly adopted by each community. Each has the necessary authority to carry out the activities of the IGA (including the hiring of professional services for lobbying and public relations purposes). Prescott Valley has taken proper steps under its regulations to adopt contracts for lobbying and public relations services (along with certain legal services). For all of these reasons, I believe the IGA authorizes Prescott Valley to bill Prescott for these and similar professional service costs incurred for the Project, and Prescott is authorized to pay those billings.

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<sup>1</sup> It should be noted that Prescott Valley took the extra step of using Prescott's Request for Proposals (RFP) procedure and forms, and working directly with Prescott staff and consultants, in selecting the persons and firms who are providing lobbying, public relations and legal services.