

Agenda Number 12.

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MEETING DATE: August 3, 2017

AGENDA ITEM: Discussion and Possible Consideration of Action Regarding Governor Ducey's Plenary Group on Water and the Colorado River and Groundwater Workgroups

RECOMMENDATION: No recommendation at this time

FINANCIAL IMPLICATIONS: None

LINKAGE TO STRATEGIC PLAN, POLICY, STATUTE OR GUIDING PRINCIPLE:

CAWCD Board of Directors 2016 Strategic Plan

- Leadership and Public Trust: Image/Knowledge & Visibility of Central Arizona Project, Relationships, Water Leadership, CAP Board Leadership
- Water Supply: Reliability of the CAP Water Supply
- Project Reliability: Provide reliable and cost effective water deliveries

PREVIOUS BOARD ACTION/ACTIVITY:

- June 28, 2017 Executive Committee meeting

ISSUE SUMMARY/DESCRIPTION:

Attached is a document providing background and analysis of all the issues raised in Governor Ducey's Colorado River Work Group. To provide more context, also attached are 4 documents distributed by ADWR for the July 27, 2017, Colorado River Work Group meeting, outlining the State's position and proposals on some of the issues discussed in the background and analysis document. Staff plans to discuss each of the issues in open session. While this matter has been agendized for action, no specific action is being recommended at this time. Further, if questions arise that are appropriate for discussion in Executive Session, an opportunity for that discussion will also be provided.

SUGGESTED MOTION:

None

Attachments.

**Governor's Water Discussion – Colorado River Work Group
Background and Analysis of Issues**

The Governor's office has identified five priorities for the Colorado River as well as eleven other measures that the State advocates. In addition, the Governor's office has indicated its willingness to consider and potentially support changes to CAWCD governance. This paper outlines the position of the State, as articulated at the Colorado River Work Group meetings, and outlined in the attached document presented by the State at the June 20, 2017, Colorado River Work Group meeting, and provides background and analysis of the issues.

A. Five Priorities Identified by the State as "Actions needed for the management of risk at Lake Mead"

1. Lower Basin Drought Contingency Plan (LBDCP)

Background. The hydrologic modeling conducted by Reclamation in support of the 2007 Colorado Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead (2007 Guidelines) projected about a 10% chance of Lake Mead falling to elevation 1020 by 2026. In 2015, Reclamation conducted an updated hydrologic study, which included the risks of climate change on the Colorado River Basin, and determined that the risk of Lake Mead reaching elevation 1020 by 2026 had increased to about 25 percent. In response to Reclamation's updated study, principals from Arizona, Nevada and California (the Lower Basin States) and the United States began developing a plan to reduce the risk of Lake Mead falling to elevation 1020 to about the same probability that was anticipated when the Interim Guidelines were adopted in 2007. The negotiations resulted in the development of the draft Lower Basin Drought Contingency Plan (LBDCP). The LBDCP is intended to be an overlay on the 2007 Guidelines. It would be in place through the term of the 2007 Guidelines, expiring in 2026. The most significant component of the LBDCP is additional water use reductions by Arizona and Nevada, at higher elevations and in greater volumes than those provided in the 2007 Guidelines, and water use reductions by California at lower reservoir elevations. Mexico is also poised to take greater reductions under Minute 323. Additionally, the United States would conserve 100,000 acre-feet of Colorado River water per year in Lake Mead.

State position. The State supports completion of the LBDCP.

Analysis. On June 8, 2017, the CAWCD Board approved Talking Points that included the following statement on LBDCP:

CAWCD supports the interstate Drought Contingency Plan (DCP) - CAWCD has supported DCP from the beginning and remains fully supportive of it. We believe that DCP is necessary to "bend the curve" and slow the decline in Lake Mead. DCP is a vitally important interim step towards the long-term goal of addressing the structural deficit and the ongoing drought.

2. Drought Contingency Plan Plus (DCP Plus)

Background. Implementing the LBDCP would result in greater reductions for Arizona than

under the 2007 Guidelines. For example, in a Tier 1 shortage (Lake Mead below elevation 1075) the CAP water supply would be reduced by 512,000 acre-feet under the LBDCP as compared to 320,000 acre-feet under the 2007 Guidelines. If a shortage were declared within the next few years, the increased reduction under the LBDCP would significantly reduce the volume of water that agricultural users had anticipated receiving primarily from the Agricultural Settlement Pool. DCP Plus began as a concept to mitigate the impacts of an early shortage declaration on CAP agricultural water users, with the specific objective of reducing the annual probability of shortage to less than 50% for 2018 through 2020.

Modeling in 2016 suggested that Arizona would need to conserve about 1.25 million acre-feet in Lake Mead in 2017 through 2019 to reduce shortage probabilities below 50%. Thus, the version of DCP Plus that was under discussion late last year sought to identify programs and sources to generate 1.25 million acre-feet through a combination of compensated and uncompensated system conservation and Intentionally Created Surplus (ICS).

Colorado River runoff in 2017 was above average. As a result, there will not be a shortage in 2018 and the probability of a shortage being declared for 2019 or 2020 is significantly less than 50%. ADWR is now working on a more adaptive DCP Plus plan that would require lower conservation volumes than previously contemplated. CAP technical staff have been working with ADWR technical staff on modeling and other technical analysis in support of DCP Plus.

CAP, working with its partners, has actively supported efforts to delay the onset of shortage since 2014. Over the past four years CAP has invested \$10 million in conservation and ICS programs and forgone the collection of \$6 million in fixed OM&R (a cost borne by CAP water users) to leave more than 600,000 acre-feet in Lake Mead through 2017. CAP expects to continue to leave water in Lake Mead each year, to fund the Pilot System Conservation Program and to support other programs to delay shortage. CAP staff has and continues to work collaboratively with ADWR technical staff to facilitate and support a technically robust approach to defining appropriate conservation volumes to meet the policy objective of reducing the risk of shortage to Arizona.

State position. Adoption of DCP Plus is a pre-condition to Arizona approving the LBDCP. The State requires completion of an intrastate DCP Plus program to achieve two stated purposes: “to partially mitigate the impacts of DCP reductions and delay its effects” and (2) “to gain consensus support among Arizona water users for needed legislative action.” (ADWR needs legislative approval to implement DCP, specifically to forbear ICS created by other Lower Basin Section 5 Contractors pursuant to the DCP.) ADWR’s new, adaptive DCP Plus program would set annual conservation targets for Lake Mead based on projected shortage probabilities in coming years.

Analysis. The State has not provided a term sheet identifying the particulars of its DCP Plus program, so a full analysis is not possible at this time. The original justification for DCP Plus—to reduce the probability of shortage through 2020 to less than 50%—has already been met through the combination of: (1) the efforts of CAWCD, MWD, SNWA and Reclamation under the MOU program, which have contributed more than 740,000 acre-feet to Lake Mead through 2017, (2) the Pilot System Conservation Program, which has conserved more than 100,000 acre-feet across the Colorado River system; and (3) slightly improved hydrology.

When Arizona is eventually faced with shortage, there are a number of tools available to mitigate the impacts of LBDCP reductions on Arizona water users, including use of water stored in Lake Pleasant, use of CAP ICS credits and recovery of water stored underground.

It is not clear whether the State views Tribal ICS or management of CAP Excess Water as required elements of DCP Plus. Modeling shows that neither is necessary to implement the adaptive conservation program that ADWR is currently advocating.

On June 8, 2017, the CAWCD Board approved Talking Points, which included the following statement on DCP Plus:

CAWCD supports the development of an implementation plan for DCP in Arizona - CAWCD is committed to working with ADWR, CAP contractors and other stakeholders to develop an intra-Arizona plan that will generate the necessary support to approve and implement DCP in Arizona, often referred to as "DCP Plus." Arizona's plan should be flexible, in order adapt to changing circumstances and conditions. CAWCD remains confident that the common ground exists to achieve consensus on such a plan.

3. Tribal Intentionally Created Surplus (ICS)

Background. The 2007 Guidelines created the Intentionally Created Surplus (ICS) program under which "Contractors" in Arizona, California and Nevada—those holding entitlements to Colorado River mainstream water under Section 5 of the Boulder Canyon Project Act or the decree in *Arizona v. California*—may store intentionally unused Colorado River water in Lake Mead (as ICS credits) for later delivery.

On-river tribes with decreed rights to Colorado River water are already eligible to create ICS under the 2007 Guidelines. Individual CAP water users—whether Indian tribes or M&I providers—are not Section 5 Contractors and are not eligible to create and hold ICS under the Guidelines.

The ICS program established under the 2007 Guidelines has strict rules that address who may create and hold ICS credits, annual and total accumulation limits on credits by each Lower Basin state and conditions on when ICS credits may be taken out of Lake Mead. Currently, Arizona's cumulative limit for Extraordinary Conservation ICS is 300,000 acre-feet. The LBDCP contemplates increasing the cumulative limit by 200,000 acre-feet for each Lower Basin State. While there are a number of Arizona mainstream Colorado River contractors that could potentially qualify to create ICS, to date CAWCD is the only Section 5 Contractor in Arizona that has created ICS.

State position. The State supports increasing Arizona's cumulative ICS limit to 500,000 acre-feet as part of the LBDCP. ADWR supports dedicating 255,000 acre-feet of that total for Arizona Indian tribes. The State has concluded that any Arizona tribe with a federally enacted water rights settlement that includes an entitlement to CAP water to be considered a "Contractor" under the 2007 Guidelines. As Contractors, such tribes would be entitled to create, hold and dispose of ICS credits in Lake Mead under the same rules that apply to other Contractors. The State suggests that a tribal ICS program is needed to achieve DCP Plus

conservation volumes.

The State has not provided specifics on the terms for creation, implementation and regulation of a Tribal ICS Program, and has not clarified whether such a program would operate independently of the adaptive DCP Plus program.

Analysis. The State is proposing a fundamental change in how Lake Mead is managed. This change would have substantial long-term implications for all Arizona Colorado River contractors as well as California and Nevada Colorado River contractors. Before considering such a change, there needs to be analysis and discussion of the potential benefits of a tribal ICS program versus the potential costs to Arizona and its water users. Modeling indicates that a tribal ICS program is not needed to implement DCP Plus.

Expanding the ICS program, specifically to allow the release or recovery of ICS created by individual entities, could trigger or exacerbate a Colorado River shortage causing harm to other CAP water users.

ICS was created as a water management tool in the 2007 Guidelines to assist Contractors, like CAP, who have the responsibility to bear the consequences of shortage for their water users. Separating these two mechanisms (ICS as a water management tool and dealing with shortage) fundamentally “breaks” a key provision of the 2007 Guidelines by turning ICS into an economic tool to benefit an individual party and leaving the costs, or consequences of shortage to be borne by other parties, namely CAP and its water users. Creating a new class of marketable assets in Lake Mead without the existing checks and balances for impacts to the Colorado River system would create more uncertainty and risk.

4. The management of CAP Excess Water

Background. Article 8.7(e) of the 1988 Master Repayment Contract gave CAWCD the right to sell and use Excess Water. The extent of that authority was disputed and resolved in the CAP repayment litigation. Section 5(d) of the Repayment Stipulation defines Excess Water as “all Project Water that is in excess of the amounts used, resold, or exchanged pursuant to long-term contracts and subcontracts for Project Water service.” That section gives CAWCD “exclusive right in its discretion to sell or use all Excess Water for any authorized purpose of the CAP” and gives CAWCD authority to establish programs for the sale or use of Excess Water, which the Board has exercised by adopting and refining an Access to Excess policy. Under the Arizona Water Settlements Act and related agreements, the first priority for Excess Water is the Agricultural Settlement Pool, currently 300,000 AF per year, declining to 225,000 AF per year in 2024 and ending in 2030.

State position. The State has not clearly set forth its position on Excess Water other than to state that “agreement is needed” on “management of excess water” by CAP.

Analysis. Management of Excess Water is a fundamental authority of the CAWCD Board. For many years, the CAWCD Board has exercised its authority to manage CAP Excess Water to advance multiple, important policy objectives for the benefit of Arizona. CAP has already shown it is willing to manage Excess Water to achieve the objectives of LBDP and DCP Plus. CAP has always been willing to forgo delivery of water made available pursuant to an

approved system conservation program. In Talking Points approved on June 8, 2017, the CAWCD Board “recognize[d] the potentially central role of excess water in the development of a DCP implementation plan.” CAWCD’s Board President recently established a CAP Excess Water Task Force to review and consider revised policies for CAP Excess Water. That Task Force will be meeting in the near future to engage CAP water users and other stakeholders on this issue.

5. Establish permanent system conservation program

State position. The State supports a permanent program within Arizona for creating compensated system conservation.

Analysis. While no details have been revealed, such a program would presumably match up entities willing to fund conservation (NGOs, cities, etc.) with Colorado River water users willing to forego consumptive use in exchange for compensation. No specifics have been offered about how such a program would be implemented, making it difficult to provide an analysis. At a minimum, an ongoing system conservation program must be flexible, do no harm to CAP water users and avoid unintended consequences to the Colorado River system. A permanent system conservation program could effectively result in a permanent reduction of Arizona’s 2.8 million acre-foot Colorado River entitlement.

B. Eleven Additional Measures Identified by the State as “Actions needed to realize greater certainty for the State’s management of Colorado River water and the minimization of risk at Lake Mead”

1. Make the State of Arizona (the ADWR Director) responsible for forbearing the diversion of Arizona’s water conserved in Lake Mead through system conservation or intentionally created surplus

Background. CAWCD’s water delivery contract with the Secretary of the Interior gives CAP the express right to divert and use any and all of Arizona’s 2.8 MAF Colorado River entitlement that is not used in any year by those holding senior or co-equal Colorado River rights within Arizona. That supply—defined as “Project Water”—is then made available by CAP to those entities holding long-term contracts and subcontracts for Project Water service. Project Water that is not ordered by long-term contractors and subcontractors in any year becomes Excess Water. The CAP Repayment Stipulation gives CAWCD “exclusive right in its discretion to sell or use all Excess Water for any authorized purpose of the CAP.”

When an on-river water user senior to CAP implements system conservation, the natural result is an increase in the unused Arizona apportionment available for diversion by CAP under its water delivery contract. Similarly, when a CAP contractor implements system conservation the natural result is an increase in the amount of Excess Water available for delivery by CAP. CAWCD has consistently agreed to forbear diversion or delivery of water created through an approved system conservation program that demonstrates a reduction in existing consumptive use, whether on-river or within the CAP system.

State position. The ADWR Director should be responsible for forbearing the diversion of Colorado River water conserved in Lake Mead through system conservation or ICS.

Analysis. Granting ADWR the unilateral authority to forbear diversion of Colorado River water would abrogate the rights of all individual Arizona Colorado River contractors by giving the ADWR Director the power to determine how much water Colorado River water each contractor may divert in any year. The State’s proposal would undermine the doctrine of prior appropriation in Arizona and violate the priority system established under the CAP water delivery contracts. In addition, ADWR forbearance decisions would impact CAP water rates and finances. The State has identified no authority for this proposition and it is unnecessary; CAWCD has never failed to forbear water made available through an approved system conservation program that demonstrates a reduction in existing consumptive use.

2. Require approval from the Director of ADWR prior to any negotiations regarding any interstate agreements or agreements with the United States involving the use, storage, or conservation of Colorado River water and subject any CAWCD interstate agreements or agreements with the United States involving the use, storage, or conservation of Colorado River water to approval by the Director of ADWR

Background. With respect to agreements between CAWCD and the United States regarding the use, storage and conservation of Colorado River water, CAWCD was created for the purpose of contracting with the Secretary of the Interior for the delivery of the CAP water supply and for repayment of CAP construction costs that were reimbursable by the State of Arizona. With respect to interstate agreements involving the use, storage or conservation of Colorado River water, over the past decade, CAWCD has partnered with the Metropolitan Water District of Southern California, Southern Nevada Water Authority, Denver Water, Reclamation and others to improve Colorado River reliability. Examples include funding construction of Brock Reservoir, the Yuma Desalting Plant Pilot Run, the Pilot System Conservation Program, the Memorandum of Understanding for Pilot Drought Response Actions, Minute 319 conservation, Upper Basin weather modification programs and the Multi-Species Conservation Program. In that time, CAWCD has expended more than \$40 million on these programs, leading to the conservation of more than 700,000 acre-feet of Colorado River water by the end of 2017.

State position. The State proposes to seek legislation that requires approval from the ADWR Director prior to beginning negotiations regarding any interstate agreements or agreements with the United States involving the use, storage, or conservation of Colorado River water. Also, the State proposes to seek legislation that requires approval from the ADWR Director prior to entering any interstate agreements or agreements with the United States involving the use, storage, or conservation of Colorado River water.

Analysis. CAWCD’s essential function is to negotiate and enter into agreements with the United States for the delivery, use and storage of Colorado River water. Further, CAWCD routinely consults with ADWR before entering into potential agreements with water delivery entities in other states and will continue to do so. Where ADWR has indicated opposition—for example, the 2015 interstate banking agreement proposed by MWD—CAWCD has declined to proceed. CAWCD regularly participates in ADWR’s Colorado River Advisory Council in an effort to develop consensus on Colorado River programs. The current arrangement has proven effective and there are no apparent reasons for change.

3. Prohibit CAWCD from contracting for federal lobbying services

Background. CAWCD's federal lobbying activity has been vital to Arizona over the years, helping to secure passage of the Arizona Water Settlements Act, the Hoover Power Allocation Act, the Lower Colorado River Multi-Species Conservation Program Act, multiple Indian water rights settlements, authorization of the Pilot System Conservation Program and funding for the Colorado River Salinity Control Program, among other measures.

State position. CAWCD should be prohibited from contracting for federal lobbying services.

Analysis. Prohibiting CAWCD from contracting for federal lobbying services would weaken Arizona's influence in Washington and limit CAWCD's ability to influence the actions of its primary counterparty, the United States Department of the Interior. Moreover, the State's proposal would violate CAWCD's rights under the First Amendment of the U.S. Constitution.

4. Require the Auditor General to perform a financial and performance audit of CAWCD once every three years

Background. As a governmental entity, all decisions of the CAWCD Board are made in open, public session. CAP finances are audited annually by an independent accounting firm and CAP has received a clean opinion for three decades. The CAWCD Board has established an independent Internal Audit function that has completed dozens of performance audits over the last twenty years. CAWCD's budget and financial reports consistently receive awards from the Government Finance Officers Association. CAP has also retained outside consultants to evaluate its management, maintenance and other practices, again with highly favorable results. CAP is currently undergoing a performance and financial audit by the Auditor General. The Bureau of Reclamation is permitted to audit CAWCD's operations under its contracts, and just completed an audit of 7 years of operations.

State position. The Auditor General should be required to perform a financial and performance audit of CAWCD every three years.

Analysis. CAWCD's performance and finances are already audited regularly and the results of those audits are a matter of public record. There is no reason to expend limited State funds to duplicate that work, nor should Arizona Water Banking Authority funds be used for that purpose as is the case with the current CAWCD audit by the Auditor General.

5. Expressly affirm through legislation that CAWCD does not have sovereign immunity

Background. This issue is discussed at length in CAWCD's separate paper on 11th Amendment Immunity. In short, CAWCD raised the defense five years ago in a lawsuit brought by a former CAP employee under the Family & Medical Leave Act, which is now on appeal before the Ninth Circuit. If upheld by the Court, the defense would only apply to certain actions for damages in federal court. Significantly, it would not apply if a CAP contractor or subcontractor sought to enforce the terms of its contract in either state or federal court and the limitation on claims for damages would not apply to cases brought in state court.

State position. The State should enact legislation expressly affirming that CAWCD does not have sovereign immunity. The State has suggested that CAP would use 11th Amendment

immunity to escape its obligations under CAP delivery contracts and breach those contracts with impunity.

Analysis. This matter is currently on appeal before the 9th Circuit, which will decide whether CAP has immunity from certain actions under the 11th Amendment of the U.S. Constitution. On June 8, 2017, the CAWCD Board approved “Talking Points”, which included the following statement on CAWCD’s assertion of 11th Amendment immunity:

CAWCD’s assertion of 11th Amendment immunity was raised in the context of employment litigation and only applies narrowly – This defense was asserted in pending Family Medical Leave Act (FMLA) litigation in an effort to save money for CAP water users and taxpayers and prevent future, similar claims. Even if successful in the pending suit, this defense would only apply to damages claims in federal court; it does not apply in state court and is not relevant to, and will not be asserted in, matters relating to CAP water delivery contracts. In this regard, CAWCD regrets the confusion caused by its initial Answer to the Complaint in the Ak-Chin litigation, and the language in that Answer has been corrected.

6. Explore ways of making the CAGR D more sustainable

Background. Arizona law requires CAGR D to submit an updated Plan of Operation to ADWR every ten years. The Plan must include an estimate of CAGR D’s projected groundwater replenishment obligations for the next 100 years, a description of the water resources that CAGR D plans to use for replenishment purposes during the next 20 years and water resources potentially available to CAGR D during the subsequent 80 years, and a description of replenishment facilities and capacity available to CAGR D. Between the second and eighth year of the plan, if the ADWR Director finds that there has been an unexpected increase in CAGR D’s projected replenishment obligation or reduction in water supply available to meet that obligation, the Director shall require CAGR D to submit a revised plan. A.R.S. §45-576.03(R).

CAGR D is also required to submit an annual report of its activities to ADWR.

CAGR D submitted its current Plan of Operation in 2014 and the ADWR Director approved that plan in 2015, finding that it is consistent with achieving the management goals of the three Active Management Areas served by CAGR D.

State position. The State advocates exploring ways of making the CAGR D more sustainable.

Analysis. No specifics have been offered for this proposed measure so no analysis is possible at this time. CAP welcomes and supports appropriate efforts to make the CAGR D more sustainable while meeting its statutory obligations and managing costs to CAGR D members. The CAGR D and Underground Storage Committee has identified with staff some issues that could be included in a careful look at the underlying authorization and structure of the CAGR D.

7. Allow Arizona Water Banking Authority direct access to the water storage tax

Background. In 1990 the Arizona legislature authorized CAWCD to levy an ad valorem tax of up to 4-cents per \$100 of assessed valuation in Maricopa and Pima Counties to develop, operate and maintain state demonstration projects for underground storage and recovery. In 1994, based on recommendations from the Governor’s Central Arizona Project Advisory Committee,

the Legislature expanded CAWCD's 4-cent taxing authority to Pinal County and provided that the resulting revenues may be used for CAP repayment and OM&R costs. After the Arizona Water Banking Authority (AWBA) was created in 1996, the Legislature modified CAWCD's 4-cent taxing authority to provide that annual revenues not needed for CAP repayment or OM&R are to be transferred to the Arizona Water Banking Fund. Since 2003, following the Legislature's sweep of certain monies from the Arizona Water Banking Fund, CAWCD has retained all 4-cent tax revenues in its own account and has used those funds primarily to pay the OM&R costs of delivering CAP water to AWBA. More recently, 4-cent tax revenues have also been used to fund AWBA's acquisition of long-term storage credits. In 2013, CAWCD used \$45 million of accumulated 4-cent tax revenues to cover CAP repayment and OM&R costs.

The CAWCD Finance Audit and Power Committee has begun discussion to develop a long-range plan for use of 4-cent tax revenues. In June 2017, AMWUA advocated to the CAWCD Board that 4-cent tax revenues be used for CAP repayment to help reduce M&I capital charges.

State position. AWBA should be allowed direct access to the 4-cent water storage tax levied by CAWCD.

Analysis. CAP uses 4-cent tax revenues in accordance with Arizona law. The State has the authority to levy its own tax for the AWBA or any other state purpose. To require the CAWCD Board to levy the 4-cent tax and automatically transfer any resulting revenues to AWBA would violate the Arizona Constitution. It would also deprive CAWCD of a significant revenue source available to meet CAP repayment and OM&R costs.

8. Address the issue of present perfected rights regarding tribal water rights awarded in *Arizona v California* and the potential for their use off reservation

Background. In *Arizona v. California*, the U.S. Supreme Court recognized four Arizona Indian reservations (Fort Yuma, Fort Mojave, Cocopah and Colorado River Indian) as having present perfected rights (PPRs) to Colorado River water. Under current federal law, that water may not be used or transferred off reservation.

State position. The State advocates addressing the issue of PPRs regarding tribal water rights awarded in *Arizona v. California* and the potential for their use off reservation.

Analysis. Any change to existing law would require new federal legislation.

9. Expand AWBA authority to enter into partnerships for recovery for non-tribal entities

Background. Currently CAWCD is the recovery agent for AWBA for non-Indian firming.

State position. The State advocates expanding AWBA authority to enter into partnerships for recovery for non-tribal entities.

Analysis. CAP is willing to explore making AWBA or another entity responsible for recovery for non-tribal firming. Any proposal would need to consider the following issues: (1) If recovery activities touch the CAP system in any way, then CAP would need to be involved, even if it were not the recovery agent because that kind of recovery would implicate the System Use Agreement; (2) checks and balances should be in place to ensure the appropriate use of credits

generated from taxes levied by CAWCD; and (3) if CAP is doing the recovery, the costs need to be recouped by CAP.

10. Expand AWBA authority to lease water for purposes other than Indian Firming

State position. The State advocates expanding AWBA authority to lease water for purposes other than Indian Firming.

Analysis. No specifics have been offered for this proposed measure so no analysis is possible at this time.

11. Expand AWBA authority to exchange credits accrued with water storage tax monies and withdrawal fee monies if the exchange improves recovery to make water available for firming

State position. The State advocates expanding AWBA authority to exchange credits accrued with water storage tax monies and withdrawal fee monies if the exchange improves recovery to make water available for firming.

Analysis. No specifics have been offered for this proposed measure so no analysis is possible at this time.

C. **The final measure identified by the State under the category of “Actions needed to realize greater certainty for the State’s management of Colorado River water and the minimization of risk at Lake Mead”**

State position. “Governance of the CAWCD is a matter of considerable interest to many stakeholders in Arizona. The State has heard expressions of support for a spectrum of changes in the CAWCD governance, ranging from replacing the current board structure with an alternative, to various other substantive modifications. The State presently neither supports nor opposes changes in the composition of the CAWCD board. However, the State is willing to evaluate any thoughtful, well-developed plan that is proposed during this process.”

Background. As provided in the Colorado River Basin Project Act, the United States informed Arizona that it preferred to contract for CAP repayment and water use with a single organization covering the entire CAP service area and having the power to levy taxes. At the urging of Representative John J. Rhodes, a special committee was established to study the advantages and disadvantages of various approaches to CAP contracting. That committee recommended creation of a single district composed of Maricopa, Pinal and Pima counties and governed by a board representative of the three counties on the basis of population and elected at large in the three counties. Then-Governor Jack Williams supported the committee’s recommendations and championed legislation to implement them. The resulting legislation, drafted by the Arizona Attorney General’s office and the Arizona Legislative Council, among others, was enacted in 1971. Shortly thereafter, Maricopa, Pinal and Pima counties petitioned to create the Central Arizona Water Conservation District (CAWCD) for the purpose of contracting with the Secretary of the Interior for the delivery of the CAP water supply and for repayment of CAP construction costs that were reimbursable by the State of Arizona.

As one of CAWCD’s authorized purposes is to levy an ad valorem tax across the three county

service area, CAWCD is constitutionally required to be governed by an elected board. This fifteen-person board is elected by the voters of the three counties. Board elections are non-partisan, its members are uncompensated and the term of office is six years, with elections staggered so that five seats are on the ballot every other year. In 1999, weighted voting was introduced as a means to allow the Board to remain at fifteen members while retaining the three counties' proportionate representation.

The Board is structured to carry out its functions in the best interests of its constituents and importantly, the CAWCD Board is subject to the Arizona Open Meetings Law, requiring that its actions be taken at meetings that are open to the public.

CAWCD's governance structure as a tax-levying public improvement district originates, in part, from the Colorado River Basin Project Act of 1968. Section 403(b)(1) provides that the irrigation and M&I CAP water supply "may, in the event the Secretary determines that it is necessary to effect repayment, be pursuant to master contracts with organizations which have power to levy assessments against all taxable real property within their boundaries." Historical documents support that the Secretary of the Interior and the Office of Management and Budget required Arizona to form a single entity with the power to levy ad valorem taxes before construction of the CAP would be authorized. See e.g., 1971 Ariz. Sess. Laws, Ch. 50, § 1 (HB 333).

The CAWCD Board also must exercise its authority within the parameters of its contracts. The Master Repayment Contract (MRC) with the United States includes provisions that limit changes in CAWCD's organization while the contract is in effect. Specifically, Article 10.10 provides "[w]hile this contract is in effect, no change shall be made in the Contractor's organization, by exclusion of land, by dissolution, consolidation, merger or otherwise, except upon the Contracting Officer's written consent; provided, however, that approval is hereby given to the inclusion of other counties as part of Contractor's service area, except, however, that the United States shall not be required, under this contract, to construct project facilities to serve lands within said additional counties." In addition, Article 10.11 provides that no assignment or transfer of interests under the MRC are valid until approved in writing by the Secretary. Taken together, any significant changes in CAWCD governance or shifting of CAWCD authorities under the MRC to other entities (e.g., control of Excess Water) would arguably require prior written consent of the Secretary of the Interior.

ATTACHMENT

Colorado River Work Group Meeting 6/20/2017

Actions needed for the management of risk at Lake Mead

1. The interstate Drought Contingency Plan (DCP).
2. The intrastate Drought Contingency Plan Plus (DCP Plus).
3. Tribal Intentionally Created Surplus (ICS) program.
4. The management of excess water by the Central Arizona Conservation District (CAWCD); agreement is needed on the way forward.
5. Establishment of a permanent system conservation program.

Actions needed to realize greater certainty for the State's management of Colorado River water and the minimization of risk at Lake Mead

Governance of the CAWCD is a matter of considerable interest to many stakeholders in Arizona. The State has heard expressions of support for a spectrum of changes in the CAWCD governance, ranging from replacing the current board structure with an alternative, to various other substantive modifications. The State presently neither supports nor opposes changes in the composition of the CAWCD board. However, the State is willing to evaluate any thoughtful, well-developed plan that is proposed during this process.

For the present, the State advocates the following CAWCD governance measures:

1. CAWCD Governance
 - a. Make the State of Arizona (the ADWR Director) responsible for forbearing the diversion of Arizona's water conserved in Lake Mead through system conservation or intentionally created surplus.
 - b. Subject any CAWCD agreements with other States or water users that involve Colorado River water to approval by the Director of ADWR.
 - c. Prohibit CAWCD from contracting for federal lobbying services.
 - d. Require the Auditor General to perform a financial and performance audit of CAWCD once every three years.
 - e. Expressly affirm through legislation that CAWCD does not have sovereign immunity.
 - f. Explore ways of making the CAGR more sustainable.
 - g. Allow Arizona Water Bank Authority (AWBA) direct access to the water storage tax.

Additional Actions

2. Colorado River Issues
 - a. Address the issue of present perfected rights regarding tribal water rights awarded in *Arizona v. California* and the potential for their use off reservation.
3. AWBA
 - a. Expand AWBA authority to enter into partnerships for recovery for non-tribal entities.

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- b. Expand AWBA authority to lease water for purposes other than Indian Firming.
 - c. Expand AWBA authority to exchange credits accrued with water storage tax monies and withdrawal fee monies if the exchange improves recovery to make water available for firming.

Background Information on State's Proposal Regarding Agreements Involving the Use, Storage, or Conservation of Colorado River Water

The State has concerns regarding CAWCD's transparency and accountability. One example provided to the Colorado River Work Group was the proposal to sell Arizona's Colorado River water to a California water user, which was discussed with CAWCD's Board in executive session. CAWCD staff also negotiated drought planning efforts, including allowing California to take additional Colorado River water during shortage, as well as the 2014 MOU with Reclamation and other Lower Basin water users, without the State's participation. Additionally, CAWCD entered the Pilot System Conservation Program Funding Agreement, in which CAWCD contributed funds toward conservation programs throughout the Colorado River Basin, without ADWR's involvement.

The State of Arizona should speak with one voice.

These types of agreements could have long-range impacts on all Arizona water users and should not be negotiated or finalized without approval by the State, acting through the Director of ADWR. Ensuring that any interstate agreements or agreements with the U.S. regarding Colorado River water are approved by ADWR will ensure that Arizona speaks with one voice on Colorado River water.

Although the State strongly believes that CAWCD lacks legislative authorization to engage in any negotiations or agreements with interstate entities involving the State's entitlement to the Colorado River, given the past activities, it believes it is prudent to adopt a statute expressly prohibiting such activities.

The State proposes to seek legislation that requires approval from the ADWR Director **prior to beginning negotiations** regarding any interstate agreements or agreements with the United States involving the use, storage, or conservation of Colorado River water.

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The State also proposes to seek legislation that requires approval from the ADWR Director **prior to entering** any interstate agreements or agreements with the United States involving the use, storage, or conservation of Colorado River water.

**State's Proposal Statement Regarding Agreements Involving the Use, Storage,
or Conservation of Colorado River Water**

The State proposes to seek legislation that requires approval from the ADWR Director **prior to beginning negotiations** regarding any interstate agreements or agreements with the United States involving the use, storage, or conservation of Colorado River water.

The State also proposes to seek legislation that requires approval from the ADWR Director **prior to entering** any interstate agreements or agreements with the United States involving the use, storage, or conservation of Colorado River water.

State's Proposal for Audits of CAWCD

The State proposes that legislation be enacted which would require CAWCD to undergo ongoing reviews by the Auditor General for a specified number of years. These reviews would be special audits, and the legislation would make clear that the Auditor General must reach out to stakeholders to identify specific concerns and issues for the audit's focus.

After the initial ongoing audit period, the State proposes that CAWCD undergo regular performance audits every five years (as is currently done for the Tourism and Sports Authority). The State's proposed legislation would also contain a provision allowing the Auditor General to attend CAWCD's executive sessions, as the Auditor General is currently authorized to do for many of the entities it audits.

**State's Proposal for Legislative Affirmation of CAWCD's Lack of 11th Amendment
Sovereign Immunity**

To protect the interests of those entitled to Colorado River water delivered through the CAP, as well as other Colorado River contractors, the State proposes to seek legislation amending A.R.S. § 48-3702 to include the following provision:

“A multi-county water conservation district is not an arm, instrumentality or agency of the state, does not have sovereign immunity under the Eleventh Amendment of the federal constitution, and shall not plead the defense of sovereign immunity under the Eleventh Amendment of the federal constitution in any action.”