

Action Brief

BOARD OF DIRECTORS



Agenda Number 2.d.

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DATE: November 24, 2009

AGENDA ITEM: Renewal of Agreements Between CAWCD and the Town of Gilbert to Store Water at the Agua Fria and Tonopah Desert Recharge Projects.

RECOMMENDATION:

Staff recommends that the Board approve the renewal of the Agreements for Water Storage at the Agua Fria and Tonopah Desert Recharge Projects between CAWCD and Town of Gilbert.

FINANCIAL IMPLICATIONS: None

RELEVANT POLICY, STATUTE OR GUIDING PRINCIPLE: None

PREVIOUS BOARD ACTION/ACTIVITY:

On December 4, 2003, the Board approved the Agreement between CAWCD and the Town of Gilbert to store water at the Agua Fria Recharge Project.

On September 1, 2005, the Board approved the Agreement between CAWCD and the Town of Gilbert to store water at the Tonopah Desert Recharge Project.

ISSUE SUMMARY/DESCRIPTION:

The Town of Gilbert's existing Water Storage Agreements with CAWCD to store water at the Agua Fria and Tonopah Desert Recharge Projects have expired. Pursuant to the terms of both water storage agreements the Town of Gilbert desires to renew both water storage agreements for an additional term of 10 years.

We have attached the Agreement for Storage of Water at Aqua Fria Recharge Project facility. Both water storage agreements include CAWCD's standard requirements pertaining to scheduling storage capacity, water measurement and accounting, billing and payment. For this reason, we did not include copies of the other agreement. We can provide that agreement if the Board has any questions. The water storage rate charged to the Town of Gilbert for recharge in any particular year is as established in CAWCD's Water Rate Schedule.

SUGGESTED MOTION:

I move that the Board approve the Agreements for Water Storage at the Agua Fria and Tonopah Desert Recharge Projects between CAWCD and Town of Gilbert.

Attachment

**AGREEMENT FOR STORAGE OF WATER
AT THE
AGUA FRIA RECHARGE PROJECT**

1. PARTIES:

This agreement is made and entered into the _____ day of _____, 2009, by and between the CENTRAL ARIZONA WATER CONSERVATION DISTRICT, hereinafter referred to as “CAWCD”, and the TOWN OF GILBERT, hereinafter referred to as “Gilbert”.

2. RECITALS:

- 2.1 CAWCD is responsible for operating the Agua Fria Recharge Project (“AFRP”), an underground storage facility. The AFRP is located in the Phoenix Active Management Area, within the floodplain of components: (a) an in-channel component, known and regulated as the managed underground storage facility pursuant to ADWR permit no. 71-569775, where CAP water is released from the Agua Fria Siphon Blowoff Structure into the channel of the Agua Fria River for underground storage and/or conveyance as in-channel surface water flows approximately four miles downstream to the constructed underground storage facility; and (b) a constructed component, known and regulated as the constructed underground storage facility pursuant to ADWR permit no. 71-569776, consisting of an in-channel diversion dam and headworks structure, which divert water from the channel into a conveyance canal for delivery to approximately 115 acres of spreading basins.
- 2.2 ADWR has issued CAWCD a Constructed Underground Storage Facility Permit (Permit No. 71-569776) for the AFRP. The Permit authorizes the underground storage of a maximum of 100,000 acre-feet of water annually at the AFRP. The AFRP is a State Demonstration Recharge Project pursuant to A.R.S. §45-891.01 et seq.
- 2.3 Gilbert desires to store CAP water at the AFRP and CAWCD agrees to make available unused storage capacity at the AFRP for such storage, in accordance with the provisions of this Agreement.

NOW THEREFORE, in consideration of the foregoing, the payments to be paid by Gilbert, and the covenants and agreements contained in this Agreement, and other good and valuable consideration, CAWCD and Gilbert agree as follows:

3. DEFINITIONS:

As used in this Agreement, the following terms, when capitalized, have the following meanings:

- 3.1 ADWR: The Arizona Department of Water Resources.
- 3.2 CENTRAL ARIZONA PROJECT (CAP): The water delivery works of the CAP including, but not limited to, the CAP canal, its turnout structures and associated measuring devices.
- 3.3 AFRP: The combined constructed underground storage facility and managed underground storage facility, constructed and operated by CAWCD pursuant to the Permits, which is located in portions of Sections 17, 20, 29, 31 and 32, Township 5N, Range 1E, and Section 6, Township 4N, Range 1E, GSRB&M, Maricopa County, Arizona.
- 3.4 AFRP SIPHON BLOWOFF STRUCTURE: The point at which Gilbert Water is diverted from the CAP canal for delivery into the AFRP.
- 3.5 GILBERT WATER: CAP water scheduled by Gilbert under the terms of its Excess Water Contract and/or CAP Water Service Subcontract.
- 3.6 PARTY/PARTIES: Either one or both of the parties to this Agreement.
- 3.7 PERMIT: The Constructed Underground Storage Facility Permit issued by the ADWR for the AFRP facility, permit no. 71-569776.

4. SCOPE OF SERVICES:

This Agreement is limited to the diversion of water at the Agua Fria Siphon Blowoff Structure in to the AFRP and the storage of such water at the AFRP by CAWCD for the benefit of Gilbert. CAWCD shall deliver Gilbert Water, which is scheduled by Gilbert for storage at AFRP in accordance with this Agreement, and CAWCD shall store such water underground at the AFRP for the benefit of Gilbert.

5. TERM OF AGREEMENT:

This Agreement shall become effective when executed by both Parties and shall remain in effect for ten (10) years unless the Parties agree in writing to extend the term or unless it is sooner terminated or canceled in accordance with the terms of this Agreement.

6. CONDITIONS RELATING TO STORAGE:

- 6.1 All storage of CAP water at the AFRP shall be consistent with Arizona law.
- 6.2 Gilbert shall obtain a water storage permit from ADWR authorizing it to store Gilbert Water at the AFRP.

6.3 CAWCD's storage of Gilbert Water at the AFRP shall, at all times, comply with the Permit. CAWCD shall be responsible for filing annual reports as required by the Permit. CAWCD shall promptly notify Gilbert of any changes or modifications to the Permit that would affect Gilbert's rights under this Agreement. If the Permit is canceled or expires for any reason, Gilbert may terminate this Agreement.

7. PROCEDURE FOR SCHEDULING STORAGE CAPACITY

7.1 As soon as practicable after the date of execution of this Agreement, Gilbert shall submit to CAWCD a proposed schedule indicating the amount of AFRP storage capacity it desires to use during the year in which this Agreement is executed. Thereafter, on or before October 1 of each year during the term of this Agreement, Gilbert shall submit to CAWCD a proposed schedule indicating the amount of AFRP storage capacity Gilbert desires to use during the following year.

7.2 As soon as practicable after receipt of Gilbert's proposed schedule following the execution of this Agreement, CAWCD shall return to Gilbert the schedule, as adjusted by and acceptable to CAWCD, indicating the amount of AFRP storage capacity that is available to Gilbert for the year in which this Agreement is executed. Thereafter, on or before November 15 of each year during the term of this Agreement, CAWCD shall return to Gilbert the schedule, as adjusted by and acceptable to CAWCD, indicating the amount of AFRP storage capacity that is available to Gilbert for the following year.

8. WATER STORAGE RATE

Each year under the term of this Agreement, CAWCD shall establish a per acre-foot recharge rate ("Annual Recharge Rate") for use of AFRP storage capacity for the following year, in accordance with CAWCD's adopted Recharge Rate Policy. Gilbert shall be obligated to pay CAWCD this annual Recharge Rate for each acre-foot of storage capacity used by Gilbert during the year. Such payment shall be in accordance with the provisions of Section 13 below.

9. OPERATING AGENT:

9.1 CAWCD shall be responsible for operating the AFRP.

9.2 CAWCD shall retain sole responsibility and authority for decisions relating to the AFRP operating and maintenance practices, including maintenance scheduling and the selection of periods when maintenance will be done.

9.3 Whenever practicable, CAWCD shall inform Gilbert ninety (90) days in advance of any matter which may substantially affect the AFRP or the rights of Gilbert.

10. DESTRUCTION/RECONSTRUCTION OF THE AFRP:

In the event of destruction of all or part of the AFRP, CAWCD may repair or reconstruct the AFRP, but CAWCD shall not be obligated to do so.

11. WATER MEASUREMENT AND ACCOUNTING:

11.1 CAWCD shall base its accounting for water delivered to the AFRP on actual measurements, methods required by the Permit and/or generally accepted accounting and engineering practices.

11.2 CAWCD shall install and maintain a flow measurement system to measure the amount of water diverted from the CAP into the AFRP. CAWCD shall test and maintain the accuracy of this system within plus or minus 5 percent of actual flows.

11.3 CAWCD shall determine evaporation losses representative of the conditions at or near the AFRP using the method indicated in the Permit or using actual measurements, when available. Any other losses in the AFRP shall be calculated using generally accepted engineering practices.

11.4 All losses that occur at the AFRP, other than by evaporation, will be calculated using generally accepted engineering practices and water-level readings from the gages in the basins.

11.5 CAWCD shall prepare a monthly water accounting report of water stored at the AFRP for Gilbert. The report shall include the daily amount of water stored and the losses calculated as described in this Section.

11.6 CAWCD shall provide the ADWR with water accounting reports for the AFRP as required by the Permit.

11.7 The water accounting reports prepared pursuant to this Section shall be sent to Gilbert monthly and shall be retained by CAWCD for at least three years.

11.8 CAWCD shall provide Gilbert copies of the AFRP annual reports submitted to ADWR.

12. WATER QUALITY:

Gilbert shall indemnify and hold harmless CAWCD against all losses to third parties resulting from water quality degradation or harm to property caused by Gilbert's use of the AFRP, due to the commingling of Gilbert Water with the groundwater. Further, Gilbert waives any claim on its own behalf against

CAWCD for water quality degradation or harm to property arising from such commingling, unless such claim is intended to enforce the indemnification provision of this Section; provided, however, that Gilbert shall indemnify and hold harmless CAWCD only to the extent that indemnification is not provided to CAWCD by the State of Arizona pursuant to A.R.S. §45-898.01; and provided, further, however, that Gilbert's indemnification shall only extend to the percentage of degradation attributable to the water stored on behalf of Gilbert at the AFRP under the terms of this Agreement. Gilbert retains the right to claim over against any other entity, including CAWCD, storing water in the AFRP in the amount proportionate to such amount stored by those other entities. In no event shall CAWCD assume liability for water quality degradation resulting from the storage of water in the AFRP, solely due to its performance of obligations as the operating agent under this Agreement.

13. BILLING AND PAYMENTS:

13.1 On or before the 15th day of each month, CAWCD will bill Gilbert for each acre-foot of storage capacity used by Gilbert during the previous month. The amount billed to Gilbert shall be equal to the Annual Recharge Rate multiplied by the number of acre-feet of Gilbert Water delivered to the AFRP as measured at the AFRP Turnout Structure. Gilbert shall pay CAWCD within thirty (30) days of receipt of such bill. Payment is not contingent upon and is not related to Gilbert's accrual of long-term storage credits from water stored at the AFRP.

13.2 If payment due under this Agreement remains unpaid more than sixty (60) days after its due date, CAWCD may terminate this Agreement effective upon written notice to Gilbert. In the event CAWCD terminates this Agreement, Gilbert shall remain obligated to pay any outstanding balance.

14. AUTHORIZATIONS AND APPROVALS:

Gilbert shall be responsible for obtaining, at its own expense, any permits, authorizations and approvals required for the underground storage and recovery of water in the AFRP or for Gilbert's performance under this Agreement. Gilbert shall keep CAWCD informed of its applications for such permits and authorizations. CAWCD will share information with Gilbert to assist Gilbert in its permit application. Gilbert shall also be responsible for filing any annual reports or other documents necessary to maintain its right to store water at the AFRP.

15. LIABILITY

- 15.1 Each Party shall assume liability for its own negligence and shall indemnify the other against any damages the non-negligent Party incurs as a result of the negligent Party's action or inaction.
- 15.2 CAWCD shall assume no liability to Gilbert for claims of damage resulting from CAWCD's decision to curtail or stop water flows to the AFRP site during storm or emergency conditions.
- 15.3 CAWCD shall assume no liability to Gilbert for quantities of recoverable or unrecoverable water stored underground or removed from underground storage; nor to replace water lost, unintentionally misdirected or otherwise failing to reach the underlying aquifer. CAWCD, Gilbert and any other entities storing water at the AFRP shall share in any deficiency resulting from such lost, misdirected or otherwise unstored water in proportion to the amount of the AFRP capacity it used at the time the deficiency accrued.
- 15.4 Liability, as described in Section 12 related to water stored in the AFRP by Gilbert prior to termination of this Agreement, shall remain with Gilbert after termination of this Agreement. This Section 15.4 shall survive expiration or termination of this Agreement, and remain in full force and effect.
- 15.5 In the event any third party institutes an action against CAWCD, Gilbert or other entities storing water at the AFRP for claims arising from the activities undertaken pursuant to this Agreement, the parties named in the action shall meet to determine the procurement of legal counsel and the steps to take to defend against the action.

16. INSURANCE

- 16.1 During the term of this Agreement, unless otherwise agreed in writing by CAWCD, Gilbert shall procure and maintain in force or cause to be procured and maintained in force the following types of insurance:
 - 16.1.1 Commercial General Liability Insurance naming CAWCD as an additional insured, including bodily injury, personal injury, property damage, wrongful death, and contractual liability with a minimum limit of \$1,000,000 per occurrence.
 - 16.1.2 Business Automobile Liability Insurance with a minimum limit of \$1,000,000.

16.1.3 Worker's Compensation as required by Arizona State law and Employees' Liability Insurance with limits of \$1,000,000 per accident, \$1,000,000 per employee per disease and \$1,000,000 aggregate for disease.

16.1.4 Commercial Umbrella – combined single limit of \$4,000,000.

16.2 Any insurance carried by CAWCD shall be excess and not contributory insurance to any insurance afforded hereunder. Gilbert shall submit satisfactory proof of insurance to CAWCD prior to use of the AFRP. Such proof of insurance shall be in the form of a certificate stating the coverage provided and that such insurance shall not be canceled until after thirty (30) days prior written notice thereof shall have been give to CAWCD.

16.3 With written approval of CAWCD, Gilbert may self-insure or combine the coverages required by this Agreement with coverages outside the scope of that required by this Agreement.

16.4 If Gilbert fails to acquire, provide or continue the insurance coverages required, CAWCD may terminate this Agreement immediately upon written notice to Gilbert.

17. DEFAULT:

17.1 Gilbert and CAWCD shall pay all monies and carry out all other performances, duties and obligations agreed to be paid and/or performed by them pursuant to this Agreement. A failure by Gilbert or CAWCD to adhere to the covenants and obligations to be kept and performed by it shall be an act of default under this Agreement.

17.2 In the event of a default by CAWCD or Gilbert, then, within thirty (30) days following notice of such default either Party may cure the default either by advancing the necessary funds and/or rendering the necessary performance. Such notice shall specify the existence and nature of such default. If such default is not remedied within the time specified, the non-defaulting party may terminate this Agreement upon 24 hours written notice.

18. UNCONTROLLABLE FORCES:

Neither Party to this Agreement shall be considered in default in the performance of any of its obligations under this Agreement (other than obligations of Gilbert to pay costs and expenses) when a failure of performance is due to Uncontrollable Forces. The term "uncontrollable forces" shall mean any cause beyond the control of the Party unable to perform such obligation, including but not limited to,

the failure of or threat of failure of facilities, flood, earthquake, storm, fire, lightning and other natural catastrophes, epidemic, war, riot, civil disturbance or disobedience, labor dispute, labor or material shortage, sabotage, government priorities and restraint by court order or public authority, and action or non-action by or failure to obtain the necessary authorizations or approvals from any governmental agency or authority not a Party to this Agreement, which by exercise of due diligence, it shall be unable to overcome.

19. RESOLUTION OF DISPUTES:

A Party having a dispute under this Agreement that cannot be resolved by the Parties, may submit the dispute to arbitration. Arbitration shall be subject to the following provisions:

19.1.1 Arbitration shall be binding only upon the consent of the Parties.

19.1.2 A Party wishing to submit a dispute to arbitration shall provide thirty (30) days written notice to the other party of its intent to pursue arbitration and shall name one arbitrator at that time. Within fifteen (15) days of receiving this notice, the other Party to the dispute shall name one arbitrator and give written notice to the other Party of its selection. The two selected arbitrators shall, within five (5) days of selection of the second arbitrator, jointly select a third arbitrator.

19.1.3 Within thirty (30) days from the selection of the third arbitrator, the arbitrators shall hold a hearing. Within thirty (30) days from the conclusion of the hearing, the arbitrators shall render a decision on the dispute.

19.1.4 Arbitration shall be subject to the Arizona Arbitration Act, Arizona Revised Statutes, Title 12, Chapter 9, Article 1. In the event of a conflict between this Agreement and the Arizona Arbitration Act, the provisions of this Agreement shall prevail.

19.1.5 A Party that is dissatisfied with the results of non-binding arbitration may pursue any other legal or equitable remedy not expressly provided for in this Section 19 and available to resolve the dispute.

20. ACTION PENDING RESOLUTION OF DISPUTES:

Pending the resolution of a dispute pursuant to Section 19, each Party shall proceed, to the extent legally permissible, in a manner consistent with this Agreement, and shall make payments required in accordance with the applicable provisions of this Agreement. Any amount paid by a Party pursuant to this Section 20 during the course of such dispute shall be subject to refund and adjustment upon a final resolution of any dispute involving an amount due.

21. GOVERNING LAWS

This Agreement shall be governed by laws of the State of Arizona.

22. BINDING OBLIGATIONS:

All of the obligations set forth in the Agreement shall bind CAWCD and its successors and assigns. This Agreement shall not be assigned by Gilbert or accrue to Gilbert's successor, nor shall the AFRP capacity use rights hereunder of Gilbert be used by another party. CAWCD retains the right to sell, lease, assign or otherwise convey its ownership of the AFRP to a third party. In such event, CAWCD may cancel this Agreement upon written notice to Gilbert.

23. NOTICES:

23.1 Notice, demand or request provided for in this Agreement shall be in writing and shall be deemed properly served, given or made if delivered in person or sent by registered or certified mail, postage prepaid, to the persons specified below:

Central Arizona Water Conservation District
c/o General Manager
P.O. Box 43020
Phoenix, AZ 85080-3020

Town of Gilbert
c/o Water Resources Manager
90 E. Civic Center Drive
Gilbert, AZ 85296

23.2 A Party may, at any time, by notice to the other Party, designate different or additional persons or different addresses for the giving of notices.

24. THIRD PARTY BENEFICIARIES:

This Agreement shall not be construed to create rights in, or to grant remedies to, any third party as a beneficiary of this Agreement or of any duty, obligation or undertaking established herein.

25. WAIVER:

The waiver by either Party of a breach of any term, covenant or condition in this Agreement shall not be deemed a waiver of any other term, covenant or condition or any subsequent breach of the same or any other term covenant or condition of this Agreement.

26. HEADINGS:

Title and paragraph headings are for reference only and are not part of this Agreement.

27. ENTIRE AGREEMENT:

The terms, covenants and conditions of this Agreement constitute the entire agreement between the Parties relative to the use of AFRP storage capacity, and no understandings or agreements not herein expressly set forth shall be binding upon them. This Agreement may not be modified or amended in any manner unless in writing and signed by both Parties.

IN WITNESS WHEREOF, this Agreement is executed by the Parties hereto.

CENTRAL ARIZONA WATER CONSERVATION DISTRICT

By: _____
Susan Bitter Smith, President

Attest: _____
Secretary

TOWN OF GILBERT

By: _____

Its: _____