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## **ARIZONA DEPARTMENT OF WATER RESOURCES**

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### **E-mail followed by mail**

September 6, 2011

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Dear Tom and Terri Sue,

The Department has reviewed the latest version of the ADD Water Program Proposal ("Proposal") dated July 14, 2011. We appreciate the time and effort that has gone into developing this version of the Proposal and we are committed to continue working with Central Arizona Water Conservation District (CAWCD) and the stakeholder group to develop the Program. We have identified a number of policy and legal issues that warrant further consideration as described below.

Under the Proposal, the CAWCD would obtain water from various sources, including (1) Colorado River water through a Section 5 contract with the U.S. Bureau of Reclamation, (2) groundwater imported from outside of an Active Management Area ("AMA"), (3) brackish groundwater from within an AMA, and (4) water from ocean desalination at some future time. Water would be acquired in regularly scheduled phases, in volumes identified during a pre-launch planning process. CAWCD plans to acquire a total of 300,000 acre-feet plus an additional 50,000 acre-feet for the Just Water Program component. CAWCD has identified a total acquisition volume of 30,000 acre-feet for phase one.

### Allocation Process

The Proposal describes an allocation process in which interested entities submit a statement of interest to the Department. The Department pre-qualifies potential contractors who are determined eligible to obtain this water supply.

The Department has offered to review requests from potential contractors early in the process and identify the recommendations it would make to the Secretary of the Interior ("Secretary") for such transfers. As noted in the Proposal, the Department intends to make recommendations using the criteria identified in its Substantive Policy Statement # CR7, Policy and Procedures for Transferring an Entitlement of Colorado River Water, dated May 24, 2004 ("Policy # CR7") but may develop procedures specific to the ADD Water Program. However, the Secretary of the Interior must approve the final volumes and contract terms.

The Department's ability to analyze and pre-qualify a transfer will depend on the completeness of the information that is submitted to the Department. Changes during the pre-qualification period (as described in the Proposal, Allocation Process, items 3.a-f) such as changes in an entity's acquisition volumes, place and/or type of proposed use, may invalidate the Department's pre-qualification and necessitate the submission of additional information in order to complete the pre-qualification process.

Earlier drafts of CAWCD Staff proposals included a fee for the Department's review of potential contractors. Given that the review process may create a substantial burden on the Department's resources, it seems appropriate that those who seek to gain the most will pay the cost. Because legislation would be required to authorize the Department to collect a fee, the Department requests that a fee for review be included in any future proposals.

Page 11 of the Proposal states that potential contractors will attempt to reach agreement on how to allocate water and that the Department "will certify that an allocation agreement was reached among the potential contractors and will submit the results of that agreement to CAWCD." If the Department cannot certify that an allocation agreement has been reached, then equal shares of the acquired water supply would be available. The purpose and basis for the allocation certification described in the Proposal is not clear. Although there may be a practical limit on the amount of time available to reach agreement over how the supply will be allocated among interested parties before default to an "equal shares" allocation, Department certification of an agreement doesn't directly address the underlying issue. We suggest removing this provision.

The Proposal identifies senior Colorado River water rights as a preferred acquisition water supply. Since many Priority 3 or higher Colorado River water rights are often quantified based on consumptive water use, the transfer of a right away from the mainstream is expected to be a complicated process. This type of transfer action could entail a new quantification and contract for both the transferred water and the remaining entitlement holder in order to effect a true reduction in water use equivalent to the transferred volume.

Also, the Department will not recommend the conveyance of an entitlement to unused Colorado River water as described in the Proposal. See Policy # CR7 at page 4. The Department also requires transfer applicants to “describe[] how they will divert, convey and use the water within a reasonable timeframe.” Policy # CR7 at page 7.

#### ADD Water Supply Portfolios

The Proposal describes the acquisition of multiple, varied water supplies that will be managed as either a single long-term or short-term water portfolio. Long-term water supplies are defined as available for 100-years or longer, and are assumed to be suitable for demonstrating an Assured Water Supply under existing ADWR rules.

The Department has various concerns related to the “portfolio” concept. The Proposal indicates that CAWCD will enter into a single contract with each contractor for all of the water in one of two portfolios (a Long-Term portfolio, consisting of water supplies that will be available for 100 years or more, and a Short-Term portfolio, consisting of water supplies that will be available for less than 100 years).

While it may be possible to group multiple sources of water supply together for contracting purposes, some water supplies may need to be treated separately. For example, groundwater transported from the McMullen Valley basin pursuant to A.R.S. § 45-552 may only be transported to the Phoenix Active Management Area (AMA) and may only be used by the entities identified in statute. If such groundwater is included as part of a portfolio, only those contractors eligible to receive and use the groundwater pursuant to A.R.S. § 45-552 would be eligible to receive any water from that portfolio under the Proposal.

While other statutes allowing groundwater transportation into AMAs have fewer restrictions, such transportation is limited to uses within AMAs. See A.R.S. §§ 45-553 and 45-554. Transportation outside a groundwater basin for use outside AMAs is generally prohibited. The Proposal limits the use of ADD Water to uses within the CAP service area, but identifies exceptions. If transported groundwater is included in a portfolio, users outside the AMAs may not be eligible to receive any water from that portfolio as the Proposal is drafted. The same concern would apply to potential Just Water contractors.

It is also unclear how the portfolio concept will work in the context of multiple Colorado River water supplies. Although those supplies may be from the same source, i.e., the Colorado River, some contracts with the Secretary may have specific conditions on use. It is important that the contracts with users acknowledge and implement those conditions.

Also in relation to the comingling of water supplies, the Proposal states on page 11 that “Unused ADD Water that is Colorado River water will automatically

become Excess CAP Water and will be disposed of by CAWCD in the same manner as other Excess CAP Water.” The Department has two comments on this statement. First, if the supplies are treated as a portfolio, it is unclear how CAWCD intends to separate unused Colorado River water from other unused ADD water supplies. Second, Excess CAP water is a defined category of CAP water. As noted on page 3 of the Proposal, ADD water is non-Project Water, while Excess CAP water is Project Water. Non-Project water does not qualify as and should not be treated the same as Excess CAP water.

#### Assignment and Lease of Colorado River Water

The Proposal provides for the assignment of ADD Water supplies (including Colorado River water). The Department would review such assignments according to the criteria identified in Substantive Policy Statement # CR6, Revised Policy Regarding Transfer of Central Arizona Project Municipal and Industrial Water Subcontract Entitlements, dated February 27, 2006 (Policy # CR6). After Colorado River water has been transferred from the mainstream to CAWCD and allocated for use within an AMA, its subsequent transfer raises various groundwater management issues, in particular the question of whether the Colorado River supply will be replaced with groundwater withdrawals. The Department developed Policy # CR6 in order to address those groundwater management concerns. The Proposal acknowledges that the Department and the Secretary will review the assignment, but also sets forth a separate list of priorities for prospective assignees. In some cases, the list identified in the Proposal may be inconsistent with the Department’s Policy # CR6.

The Proposal also sets forth provisions for leases of ADD Water supplies. The Department has concerns similar to those raised above regarding groundwater management, and intends to review proposed leases subject to Policy # CR6 for recommendation to the Secretary. Additionally, the Department notes that the initial review for transfers of Colorado River water takes into consideration whether the prospective transferee has the need and ability to put the water supply to use in the near term. Therefore, the Department may not recommend an initial contract for ADD Water if the potential contractor’s intent is to lease the water for a substantial period of time.

#### CAP Canal Capacity

Although the Proposal addresses the use of CAP Canal capacity for conveyance and delivery of ADD water with respect to shortages and surpluses, the Proposal does not address other canal capacity issues. In particular, the U.S. Bureau of Reclamation (“Reclamation”) has indicated that it owns and controls canal capacity that is not required for conveyance and delivery of Project water. If Reclamation requires the use of the additional canal capacity, it may have priority over ADD water deliveries. If ADD water is an interruptible supply due to Reclamation’s ability to claim the additional canal capacity, ADD water supplies may not be continuously available for 100 years for purposes of the Assured and Adequate Water Supply program.

### Brackish Groundwater

The Proposal identifies brackish groundwater as a source of supply, but does not discuss the supply in detail. Because the Proposal clearly states that the ADD Water program is intended to be compatible with the current Assured Water Supply program, it is important to note that brackish groundwater from within an AMA may not constitute a 100-year assured water supply. Assuming that the brackish groundwater would be from a waterlogged area within an AMA, such water may be consistent with the management goal pursuant to A.A.C. R12-15-722(G)(2). The rule provides that groundwater withdrawn from a portion of an AMA that is exempt from conservation requirements due to waterlogging pursuant to A.R.S. § 45-411.01 is considered consistent with the management goal. However, a determination under 722(G)(2) is made each year after the water is used and is subject to review at least every 15 years. Additionally, the current exemption from conservation requirements is only effective through calendar year 2019. A.R.S. § 45-411.01.

### Just Water

The Proposal also includes a brief outline of items pertaining to the Just Water program on page 18. One provision, Water Allocation, provides that “ADWR (or other appropriate regional or statewide entity) will determine how to distribute/allocate available Just Water supplies.” It is not clear how this provision works in the context of other provisions of the Just Water proposal. In particular, the Proposal also provides that if CAWCD does not receive payment for the water supplies within a reasonable time, CAWCD has sole discretion for disposition of those water supplies. While CAWCD certainly has discretion in the matter, the ultimate disposition of Colorado River water supplies would still be subject to the Department’s review and recommendation to the Secretary, pursuant to Policy # CR7, as well as the Secretary’s review and approval.

As stated above, the Department requires transfer applicants to “describe[] how they will divert, convey and use the water within a reasonable timeframe.” Policy # CR7 at page 7. In addition to ensuring that applicants have a plan to develop the necessary infrastructure to convey the water and put it to use, the Department also considers financial capability. In most cases, an applicant’s inability to pay for the water supply or related infrastructure becomes apparent during the Department’s review of proposed transfers. Therefore, the Department’s review prior to the purchase of the water supply should prevent most instances of failure to pay CAWCD for the water supply.

At this time, the description of the Just Water program is very general, particularly regarding the Department’s role in the process. The Department may have additional comments on the Just Water program when that concept is more fully developed.

Conclusion

Allocation of the state's water supplies must protect the welfare of Arizona citizens, whether or not those citizens are ADD Water participants. We recognize the importance of the ADD Water Program and are committed to working with CAP to develop alternatives that address the important issues described in this letter. Please feel free to contact me if you have any questions; I can be reached at 602-771-8586.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas Buschatzke". The signature is fluid and cursive, with a large initial "T" and a long, sweeping underline.

Thomas Buschatzke  
Assistant Director, Water Planning Division

C:  
Sandra Fabritz-Whitney, Director