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### **Non-Indian Agricultural Priority Central Arizona Project Water Reallocation** **Response to Public Comments** **January 18, 2013**

On December 10, 2004, the Arizona Water Settlements Act, Public Law 108-451 (Settlements Act), was enacted. The Settlements Act ratified the Arizona Water Settlement Agreement (Agreement) between the United States, the Arizona Department of Water Resources (Department), and the Central Arizona Water Conservation District (CAWCD) and provided for the reallocation of 96,295 acre-feet of Non-Indian Agricultural Priority Central Arizona Project Water (NIA Priority water) for municipal and industrial uses in the state of Arizona.

Both the Settlements Act and the Agreement required the Secretary of the Interior (Secretary) to reallocate the 96,295 acre-feet of NIA Priority water to the Department "to be held under contract in trust for further allocation."<sup>1</sup> Both the Settlements Act and the Agreement also specified that the Director of the Department shall submit a recommendation for reallocation to the Secretary, and any reallocation shall be based on the Director's recommendation or revised recommendation.<sup>2</sup> The Agreement further provided that the Department develop eligibility criteria and make the NIA Priority water available for reallocation "at periodic intervals, starting in 2010."<sup>3</sup> On August 22, 2006, the Secretary reallocated the 96,295 acre-feet of NIA Priority water to the Department

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<sup>1</sup> Settlements Act § 104(a)(2)(A); see also Agreement Paragraphs 3.1 and 9.3.1.

<sup>2</sup> Settlements Act § 104(a)(2)(C); see also Agreement Paragraph 9.3.4. The Department has traditionally provided recommendations of allocations of CAP water to the Secretary, consistent with its authority in A.R.S. § 45-107.

<sup>3</sup> Agreement Paragraph 9.3.4.

acknowledging that “before the water may be further allocated the Director of ADWR shall submit to the Secretary of the Interior a recommendation for reallocation.”<sup>4</sup>

The Department drafted its Proposed Process and Evaluation Criteria to reallocate the NIA Priority CAP water in periodic intervals with the first recommendation set for 2013. CAWCD developed proposed pricing components for this reallocation. The U.S. Bureau of Reclamation (Reclamation) drafted a process for reviewing the Department’s recommendation for the allocation. The Department held a public meeting on October 2, 2012 to present the background of this reallocation and the proposals from the Department, CAWCD, and Reclamation.

The Department accepted questions and comments regarding the proposed reallocation during the meeting as well as through the initial deadline of October 19, 2012. At the public’s request, the Department extended the deadline for public comment to November 9, 2012. All written comments are compiled and available on the Department’s web site.

The Department’s Proposed Process and Evaluation Criteria identified three goals for the 2013 reallocation of NIA Priority water:

1. To reduce groundwater overdraft;
2. To provide an additional source of water to areas with limited physical availability of groundwater; and
3. To meet the near-term demands for existing municipal water providers and industrial users of groundwater or Excess CAP water with permanent demands.

The goals associated with this reallocation process complement the AMA management goals and have been selected for this process to achieve good water management policies. While the Department recognizes that this 96,295 acre-feet of NIA Priority water will not be sufficient to achieve these goals on its own, the Department crafted the Proposed Process and Evaluation Criteria with the intent of furthering these goals. The Department recognizes that the Proposed Process and Evaluation Criteria may not address every possible scenario but will interpret and apply the selection criteria in a manner consistent with these objectives.

The Department will make two substantive changes to the Proposed Process and Evaluation Criteria. First, the Department will remove the proposed requirement for the relinquishment of groundwater allowance credits.

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<sup>4</sup> *Notice of Modification to the Secretary of the Interior’s Record of Decision, Publication of a Final Decision of CAP Water Reallocation*, 71 Fed. Reg. 50449, 50451 (Aug. 25, 2006).

Second, the Department will retain part of the Municipal Pool for allocation in 2021. This retention allows the Department to maintain some flexibility to adapt to changing water management goals as well as changing economic and hydrologic conditions. Although meeting near-term demands for existing municipal providers and industrial users with permanent demands remains one of the three identified goals, the Department recognizes that this goal must be balanced with economic constraints of prospective applicants and the possibility that aquifer conditions may change over time.

## **RESPONSE TO COMMENTS**

The Department appreciates the feedback received on its initial proposal. In order to facilitate a timely and efficient response, the Department has grouped the comments and the subsequent responses into the following categories:

### Demand and Supply Imbalance in 2020

The Department received several comments with respect to the 2020 date and the use of this date to establish a Demand and Supply Imbalance (DSI) for each applicant. Comments stated that the intended recipients would not be able to meet all of the criteria by this date and that the criteria exclude and penalize water providers with designations through 2025. The Department also received letters of support.

The Arizona Water Settlement Agreement does not mandate the use of the 2020 date for calculating DSI. The Department selected the year 2020 to identify near-term demands, which is a reasonable timeframe while recognizing that this date must be balanced with economic constraints and aquifer conditions that may change over time. Additionally, NIA Priority water is projected to be available more often in the near future than in the longer term. Finally, while this timeframe was decided independently from any Assured Water Supply process, it will coordinate well for those entities with designations that expire prior to 2025 and therefore have an immediate need for supply.

The Department plans to maintain the 2020 DSI requirement because it will further the identified goals. First, the DSI is in itself a calculation of groundwater overdraft (or potential overdraft) because it is a calculation of the anticipated demand compared to non-groundwater supplies. Second, assessing the DSI based on the year 2020 assists in determining the near-term demands. Finally, applicants with greater DSIs are likely to be located in areas with limited physical availability of groundwater.

### Central Arizona Groundwater Replenishment District

The Department received various comments regarding the Central Arizona Groundwater Replenishment District's (CAGRDR) participation in the 2013 reallocation process. Many comments supported the CAGRDR's participation in this reallocation process. Other comments recommended limitations on the CAGRDR's eligibility for an allocation.

The CAGRDR has a statutory enrollment and membership process that determines its replenishment obligations. The securing of additional water supplies to meet these replenishment obligations does not directly affect membership in the CAGRDR or its accrual of replenishment obligations.

The Proposed Process and Evaluation Criteria state that if the Department will recommend that a member service area or a water provider serving member lands receive a part of this reallocation, the Department will reduce the CAGRDR's DSI accordingly to account for the reduced demand to the CAGRDR. Member service areas or water providers serving member lands applying for this NIA Priority water must demonstrate how an NIA priority reallocation would be used to reduce their demands on the CAGRDR. These provisions address the concerns raised by comments proposing limitations on the CAGRDR's eligibility.

In the past, the Department has not required any designated provider to modify its designation to reflect a newly acquired water supply unless the provider's current, committed and 2 years of projected demand exceed the water supplies identified in the existing designation. The Department recognizes that a designated provider may have other factors to consider (e.g., a pending acquisition of another supply, pending consideration of new treatment facilities, possible new storage facilities, etc.) with the timing of an application to modify its designation.

Additionally, a Member Service Area Agreement is an agreement between the water provider and the CAGRDR. While the Department reviews those agreements prior to issuing a designation, the Department does not have the authority to require the CAGRDR and the designated provider to modify these agreements unless they are not consistent with the Assured Water Supply determination. Presumably, financial requirements and hydrologic reality will encourage water providers and the CAGRDR to reduce replenishment obligations whenever possible.

The Department will not require any applicant for NIA Priority water to modify its designation or Member Service Area Agreement as a result of a recommendation or a contract for NIA Priority water. The Department will leave those decisions to the water providers and the CAGRDR.

### Calculations of Pools

The Department received various comments regarding the calculation of some of the pools for the reallocation of NIA Priority water. The comments concern the pools within the 2013 reallocation, as well as the pool for those outside the three-county CAWCD service area (CAP service area) and the non-CAP service area pool.

To calculate the division of the pools between the CAP service area and the area outside of the CAP service area, the Department considered two separate, statewide studies that assessed demands for water uses, including industrial, environmental, agricultural, and municipal demands. These studies were the Water Resources Development Commission (WRDC)<sup>5</sup> and the Colorado River Basin Water Supply and Demand Study (Basin Study)<sup>6</sup>. These studies were conducted independently of one another and yielded different results. Based on water supply and projected demands, the WRDC indicated that 94% of the state's overall unmet water demands would occur inside the CAP service area, leaving 6% of the state's unmet demands outside of the CAP service area, based on the Phoenix AMA, Pinal AMA, and the Tucson AMA Basin data. The Basin Study concluded that 61% of the state's overall unmet water demands would occur inside the CAP service area and 39% of the state's unmet demands would be outside the CAP service area.

While both of these studies are comprehensive, the wide-ranging results of water demands for these two areas of interest led Department staff to consider values that fell between the results of the two studies, as a way of averaging the results. The numerical average of the two studies provides a division of 78% of the demand being inside the CAP service area and 22% outside the CAP service area. A division between the two areas close to this numerical average seemed reasonable and is further supported by population studies as described below.

The 2010 Census data provides an 80% to 20% division of the population between inside and outside the CAP service area, respectively. The most current DES population projections for 2020 provide a division of 82% inside and 18% outside of the CAP service area. The Department selected the 82%/18% division between the two areas because: (1) it is reasonably close to the average of the other two water demand methodologies; (2) it is a population projection for 2020, coincident with the time frame the Department selected for the DSI determination; and (3) it is consistent with ADWR's past reliance on DES projections for other demand forecasting efforts.

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<sup>5</sup> *Water Resources Development Commission Final Report Volumes I and II*; October 1, 2011; [http://www.azwater.gov/AzDWR/WaterManagement/WRDC\\_HB2661/Meetings\\_Schedule.htm](http://www.azwater.gov/AzDWR/WaterManagement/WRDC_HB2661/Meetings_Schedule.htm) as of 1/18/2013.

<sup>6</sup> *Colorado River Basin Water Supply and Demand Study*; U.S. Department of the Interior Bureau of Reclamation; December 2012; <http://www.usbr.gov/lc/region/programs/crbstudy/finalreport/index.html> as of 1/18/2013.

The Arizona Water Settlement Agreement specifies that the NIA Priority water shall be made available for reallocation to non-Indian M&I water users within the State of Arizona and the division of demands between the CAP Service Area and outside of the CAP Service Area is a fair representation of the State. The Department identified this division between the two areas in an unbiased manner in an attempt to balance opportunities to use the NIA Priority water.

The Industrial Pool was calculated as being 15% of the overall M&I demands for the CAP service area. The Department evaluated its AMA Assessment Reports<sup>7,8,9</sup> for the AMAs within the CAP service area. The AMA Assessment Reports revealed an industrial demand that was 12.5% of the overall M&I demand. The WRDC Study indicated that industrial demands accounted for 20.4% of the overall M&I demands for the AMA basins within the CAP service area. ADWR selected 15% as a value between these two studies, and applied that percentage to the amount available for reallocation within the CAP Service Area, 78,962 af, resulting in an Industrial Pool of 12,000 af. This Industrial Pool volume will be reallocated inside of the CAP service area only.

### Reviewing the Department's Recommendations

Various comments suggested that the Department should review the allocations to ensure that the plans for use of the NIA Priority water submitted with the applications are implemented as described and that the water is fully used. The Department's role, as defined in the Settlements Act, the Agreement, and state statute, is to recommend allocation volumes to the Secretary of the Interior. After the Secretary allocates the water, the Secretary will offer to enter into subcontracts for permanent service. As with previous allocations of CAP water, the Department will not seek revocation of an allocation or subcontract as long as the subcontractor is meeting the contract requirements. Applicants are required to demonstrate both the economic and

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<sup>7</sup> *DRAFT Demand and Supply Assessment 1985-2025 Phoenix Active Management Area*; Arizona Department of Water Resources; November 3, 2010;  
<http://www.azwater.gov/AzDWR/WaterManagement/Assessments/documents/PhoenixAMAAssessment11-8-2010.pdf> as of 1/18/2013.

<sup>8</sup> *DRAFT Demand and Supply Assessment 1985-2025 Pinal Active Management Area*; Arizona Department of Water Resources; May 13, 2011;  
<http://www.azwater.gov/AzDWR/WaterManagement/Assessments/documents/PinalAssessmentFinal5-23-2011.pdf> as of 1/18/2013.

<sup>9</sup> *DRAFT Demand and Supply Assessment 1985-2025 Tucson Active Management Area*; Arizona Department of Water Resources; May 28, 2010;  
<http://www.azwater.gov/AzDWR/WaterManagement/Assessments/documents/FINALTAMAASSESSMENT.pdf> as of 1/18/2013.

technological feasibility of using an allocation and the Department will not recommend an allocation to an applicant whose plan is merely speculative.

If an allocation holder seeks to transfer its allocation to another water user, the transfer would be subject to the Department's review. A transfer of an NIA Priority water allocation will be subject to the Department's Revised Policy Regarding Transfer of Central Arizona Project Municipal and Industrial Water Subcontract Entitlements (CR6), until such time the Department elects to develop an alternative policy to address transfers of NIA Priority water.

### Demonstration of Analysis of Costs and Feasibility Plans

Comments suggested that the required demonstration that the costs associated with acquiring and utilizing this water supply have been analyzed, and a plan to assess the feasibility of any infrastructure that might be needed may be conceptual upon submittal of the applications. The Department recognizes that the planning process is individual to each applicant and expects a reasonable demonstration of technological and economic feasibility. While the requirements specified for this reallocation process may use language similar to that used in other Department programs, the Department recognizes that this reallocation process is a separate and individual process. The Department does not intend to apply assured or adequate water supply criteria to applications for NIA Priority water.

### Recommendations for Priorities

Some comments suggested that the Department should give priority to existing CAP water users that currently take deliveries of their full allocations. Some comments suggested that the Department prioritize the use of NIA Priority water for firming or drought mitigation. Some comments recommended establishing priority for entities that have accrued long-term storage credits because those credits will serve as a back-up supply when the NIA Priority water is unavailable.

Giving priority to (1) existing CAP water users, (2) those who have accrued long-term storage credits, or (3) applicants that will use the water for firming or drought mitigation would not necessarily provide an additional source of water to areas with limited physical availability of groundwater, or meet the near-term demands for existing municipal providers and industrial users. Therefore, these recommendations for priorities do not serve the goals identified by the Department for this process.

While the Department will not establish priority for current CAP water users or for those who have accrued long-term storage credits, each applicant must identify how it will put the NIA Priority water to use in the near term and identify back-up supplies for use when the NIA Priority water is unavailable. Presumably, water users currently using CAP water and/or have accrued long-term storage credits will be able to demonstrate these requirements.

### Recharge and Recovery

Some comments recommend prioritizing water users that will use the NIA Priority water directly over those that will store and recover the water. Some comments also recommended placing additional requirements on NIA priority water planned for indirect delivery (recharged), such as restricting the recharge and recovery to the same sub-basin of use or recovering the credits within the area of impact of storage.

While the Department acknowledges that concerns about storage and recovery outside the area of impact are valid water management concerns, the Department views this issue as a broader water management concern applying to storage and recovery of any water supplies, and not just NIA Priority water. Storage and recovery of water will be regulated within the AMAs as identified in statute, and in the 4<sup>th</sup> Management Plans, without regard to how the particular water supply was acquired. Applicants for NIA Priority water must demonstrate that their proposed use will be consistent with the goals established for this allocation.

### Pro-Rata and Market-Based Distribution

Some comments oppose the pro rata distribution because it will result in allocations that are too small to make infrastructure investment worthwhile. Some comments suggested market-based distribution.

The Department recognizes that the proposed pro rata distribution would make smaller quantities of water available to a larger number of water users and that these smaller quantities may make it difficult to justify the infrastructure development costs. However, given the broad interest expressed in this reallocation, ADWR does not believe that selecting only a few recipients for reallocation would be prudent public policy. Therefore, the Department identified meaningful water management goals for this reallocation and drafted specific selection criteria to best allocate this water. Each entity

will need to assess its own circumstances with regard to its water resources planning and finances and determine whether to apply for this reallocation.

In addition, there are contractual and statutory requirements for the pricing of this water. CAWCD will establish a pricing policy for this water, ADWR will establish selection criteria, and each entity will make its own planning and business decisions regarding this reallocation.

### Relinquishment of Groundwater Allowance Credits

The Department will not be implementing this proposed requirement.

### Groundwater Management Goals

Many comments recommended that the NIA Priority water should not be used to foster growth without sufficient non-groundwater supplies as a back-up for this water. Some comments expressed concern that the NIA Priority water would be utilized to foster growth, and when this water is unavailable, groundwater would be used as the alternate supply.

The Department has identified the DSI for 2020 as the method for calculating each applicant's demand for NIA Priority water. This will include the calculation of the applicant's projected demand in the year 2020, as well as a consideration of the water supplies available to meet that demand in 2020. Each applicant is expected to show how its use of NIA Priority water will meet the goals established by ADWR for this reallocation process. Any applicant proposing to use groundwater as a back-up supply must demonstrate how its groundwater use will not contribute to groundwater mining within the AMA.

### Delay the 2013 Reallocation

The Department received recommendations to delay the output of the reallocation until the completion of the 4<sup>th</sup> Managements Plans and the CAGR 2015 Plan of Operation. While these planning documents will define important water management strategies, completion of these plans may not benefit the 2013 reallocation process.

### Industrial Pool

The Department received various requests for clarification about the Industrial Pool. The Department also received questions regarding industrial users receiving water from municipal providers. Some comments also recommended requiring General Industrial Use Permit holders who receive allocations to modify the terms of their permits to reduce groundwater use.

The Industrial Pool will be 12,000 af and will be made available during the 2013 reallocation. Allocation recommendations will be for specific uses in specified locations within the CAP service area. As discussed previously, subsequent transfer of the allocation will be subject to the Department's Revised Policy Regarding Transfer of Central Arizona Project Municipal and Industrial Water Subcontract Entitlements (CR6), until such time as the Department elects to develop an alternative policy to address transfers of NIA Priority water.

A qualified industrial user will include currently authorized groundwater users that can demonstrate a DSI for 2020 that is greater than 400 af. Excess CAP water will not be included as a supply in the calculation of the DSI.

If an industrial user receives water from a municipal provider, the municipal provider may coordinate with the industrial user to provide projected demands for 2020 in the municipal provider's application for the Municipal Pool. An industrial user may apply for water to serve its industrial uses in the Industrial Pool. The Department will work to ensure that individual facility industrial demands are not counted in both pools.

The Department does not need to require that applicants modify General Industrial Use (GIU) permits if an applicant receives an allocation recommendation. GIU permits include a requirement that if uncommitted municipal and industrial Central Arizona Project water is available or other surface water or effluent of adequate quality is available at a cost comparable to groundwater, the Director may require the permittee to use such water in lieu of groundwater. Additionally, the applications will be evaluated based on a demonstration of the replacement of an actual groundwater use.

### Municipal Pool

The Department received a question regarding the definition of the CAP service area: whether it refers to the AMAs or the three-county CAWCD service area. The Department also received comments regarding the demands for water to serve development on State Lands. Some comments proposed that the Department withhold

part of the Municipal Pool volume for a future reallocation process, possibly 2021, to allow further assessment of aquifer conditions and water management goals.

The applicable Municipal Pool area is the three-county CAWCD service area (CAP service area). Qualified applicants for the Municipal Pool will include public and private water providers and the CAGR. The State Land Department will remain on equal footing with and must meet the same criteria as other applicants in the reallocation process. If an applicant's planning area includes state-owned lands, the applicant can show projected demands for those areas and include those demands in its DSI for 2020.

After consideration of comments received, the Department has decided to retain part of the Municipal Pool for allocation in 2021. This retention allows the Department to maintain some flexibility to adapt to changing economic and hydrologic conditions. The Department proposes to retain 17,333 af for reallocation to the Municipal Pool inside the CAP service area in 2021, an amount equal to that being held for outside of the CAP service area. This leaves 34,629 af to be reallocated to the Municipal Pool in the initial round. Because the total volume to be allocated in 2013 has been reduced, the volume of water in each of the CAIDD and MSIDD Pools will also be reduced to 4,313 af each.<sup>10</sup>

### Outside CAP Service Area

The Department received various comments regarding the criteria for allocation outside the CAP service area in 2021. While most comments were supportive of the Department's proposal to make a volume of NIA Priority water available for reallocation outside the CAP service area in 2021, one comment questioned the proposal. Some comments requested information about the criteria.

As discussed previously, the Director of the Department is authorized by state statute to consult, advise, and cooperate with the Secretary regarding new allocations of Colorado River water or CAP water pursuant to A.R.S. § 45-107. In particular, the Department is authorized to recommend allocations of this NIA Priority water to the Secretary pursuant to the terms of the Settlements Act and the Agreement.

While the Settlements Act expressly prohibits most allocations outside the state of Arizona, the Settlements Act is silent on whether allocations may occur within the state of Arizona and outside the CAP service area.<sup>11</sup> Had Congress intended to limit reallocations to the CAP service area, it certainly could have done so. The Agreement

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<sup>10</sup> Agreement, Paragraphs 9.3.4.3 and 9.3.4.4.

<sup>11</sup> Settlements Act, § 104(e)(1).

itself provides that the Department “shall make [NIA Priority water] available for reallocation to non-Indian M&I water users *within the State of Arizona*.”<sup>12</sup> The State of Arizona, Reclamation, and CAWCD could have identified the CAP service area as a limitation for reallocation, had they intended to do so.<sup>13</sup>

Additionally, allocating CAP water outside the CAP service area is consistent with state statute and previous allocations. Section 48-3707(A), A.R.S. provides that “Water users outside the district may contract for a water supply from the central Arizona project directly with the secretary or with the district on the basis of paying costs allocated by the secretary.” In 1983, the Secretary allocated CAP water to 13 entities outside the CAP service area.<sup>14</sup>

The Department will not develop the criteria for the 2021 reallocation until closer to the 2021 timeframe. Waiting until closer to 2021 will allow the Department to consider water management goals and economic issues applicable at that time. The criteria developed for the 2021 reallocation may be modified to reflect changing economic and hydrologic conditions, and incorporate lessons learned in this initial round of reallocation. The Department will develop selection criteria that provide sound water management policy for the area of interest based on then current conditions. Additionally, if any water remains unallocated after the 2021 reallocation process, conditions will be assessed and the disposition of the remaining water will be determined at that time.

## **NEXT STEPS**

In early February 2013, the Department will post the Final Process and Evaluation Criteria for the 2013 NIA Priority Water Reallocation. Soon thereafter, the Department will schedule a meeting to discuss the application process with prospective applicants.

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<sup>12</sup> Agreement, Paragraph 9.3.4.2 (emphasis added).

<sup>13</sup> Compare Agreement, Paragraphs 9.3.4.3 and 9.3.4.4, in which the parties agreed to provide a right of first refusal for a volume of water in each of two specified areas.

<sup>14</sup> 48 Fed. Reg. 12446, Mar. 24, 1983.