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August 14, 2012

Via Email: glwalker@azwater.gov

Gerry Walker
ARIZONA DEPARTMENT OF WATER RESOURCES
3550 N. Central Ave., Second Floor
Phoenix AZ 85012-2105

Re: *Comments on behalf of the Pascua Yaqui Tribe and Yavapai-Apache Nation to the Revised Draft of the Water Resources Development Commission (WRDC) Supplemental Report provided by Colleen K. Lane on August 7, 2012*

Dear Mr. Walker:

This Firm represents the Pascua Yaqui Tribe and Yavapai-Apache Nation as its Special Legal Counsel for water related matters. Pursuant to Ms. Colleen K. Lane's email dated August 7, 2012, please accept these comments on behalf of the Pascua Yaqui Tribe and Yavapai-Apache Nation to the revised draft of the WRDC Supplemental Report.

We are particularly concerned that Recommendation 1 does not fully and accurately reflect the concerns raised by the Tribes and Tribal entities which were discussed at the working group specifically established to address the Tribal issues. Indeed, the Tribal working group reached consensus on a number of issues which were then presented to the WRDC, but which are not accurately reflected in the language of Recommendation 1 pertaining to these Tribal concerns.

Even though the WRDC failed to adopt any of the Tribal working group recommendations into the Supplemental Report (see enclosed recommendations), the Supplemental Report simply fails to accurately describe the Tribal working group recommendations in the first instance.

To remedy this oversight, the following is our comment for a revision to Recommendation 1 which more accurately reflects the content and scope of the Tribal working group's recommendations:

During discussions regarding RWAA formation, a working group was tasked with deliberating issues raised by Tribes and Tribal entities. The Tribes are concerned that they could be negatively impacted by a RWAA's activities and they also believe that they may be able to provide benefits if they could partner with a RWAA. The Tribes also believe that the legislation should allow them to participate as members of a RWAA, on par with other public and private entities.

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The following are concepts developed by this working group, which were accompanied by specific language that was proposed by the working group for Appendix A Legislative Recommendations Committee Legal Subcommittee on the General Concepts for a RWAA:

- A RWAA can acquire, hold and sell water rights, but only as permitted by existing state and federal law.
- A RWAA should cooperate with other public and private entities, including the federal government, any federal department or agency, as well as any Tribe.
- A RWAA should respect the sovereignty of all tribal governments.
- Upon the request of a Tribe, a RWAA should meet and confer with the Tribe to discuss potential partnering opportunities and seek to resolve Tribal concerns about a RWAA's planned actions or projects, including, but not limited to, potential impacts on Tribal water rights and resources, Tribal sacred sites, Traditional Cultural Properties, and Tribally sensitive species.
- A RWAA should maintain a list of interested persons and any Arizona Tribes who have requested to receive notices from a RWAA and provide notice (either by mail or email) of RWAA public meetings, the completion of written studies developed or conducted by the RWAA, and the submittal of any final application for a permit or approval to be issued by a state or federal agency or department. (This concept is not only intended to assist Tribes in being informed of RWAA activities, but for the general public as well).
- Tribes may be members of a RWAA.
- Similar to the notification required for the Board of Supervisors, all tribes in Arizona should be notified when a RWAA is proposed to be formed and should be provided information regarding the RWAA's membership, the water supply issues that are being addressed, and proposed locations of water use.
- ADWR should establish a listserv for interested persons to receive notice of the formation of a RWAA in Arizona. (This concept is not only intended to assist Tribes in being informed of RWAA activities, but for the general public as well).
- Similar to any aggrieved person, any aggrieved Arizona tribe may contest the formation of the RWAA. (It should be noted that the WRDC has proposed that the grounds for protesting are limited to whether the formation of the authority occurred in substantial compliance with the authorizing statutes and the Tribal working group has not proposed anything different).

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- Deleted: <#>All tribes in Arizona shall be notified in writing when a RWAA is proposed to be formed and shall be provided information regarding the RWAA's membership, the water supply issues that are being addressed, and proposed locations of water use.
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The WRDC did not reach agreement regarding including any of these concepts within the proposed recommendation for a RWAA.

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As you can see, the draft revision to the Supplemental Report provided on August 7, 2012, by Ms. Lane, does not fully reflect the important concepts which were developed by the Tribal working group.

By this letter, we request that the statements above be incorporated into the revised draft of the Supplemental Report, and request that the WRDC support the language adopted by the Tribal working group and seek language in the legislation that (1) supports appropriate Tribal notice, (2) the ability for Tribes to participate equally in RWAAAs as members or partners, and (3) the cooperation of RWAAAs to address Tribal concerns related to RWAA formation and operations.

Yours Truly,

MONTGOMERY & INTERPRETER, PLC

A handwritten signature in blue ink that reads "Robyn L. Interpreter". The signature is written in a cursive style with a large initial 'R'.

Robyn L. Interpreter, Esq.

Enclosure

cc: Yavapai-Apache Nation
Pascua Yaqui Tribe

APPENDIX A

WATER RESOURCES DEVELOPMENT COMMISSION Legislative Recommendations Committee Legal Subcommittee

General Concepts for a Regional Water Augmentation Authority Revised

June 22, 2012

Reflecting General Consensus of the WRDC at its Meeting on June 22, 2012

Showing Concepts Developed by the Small Group at its Meeting on July 9, 2012
(Concepts are Shown by Underlined and Stricken Text)

~~Powers. and Duties.~~ The Authority may:

1. Plan, design, construct, own and operate water projects
2. Acquire and sell water, except may not engage in the retail sale of water¹
3. Acquire, hold and sell water rights, as permitted by state and federal law, including protections for water rights and entitlements. [Comment: This proposed language is intended to be a restatement of existing law and is not intended to establish a new standard for Regional Water Augmentation Authorities.]
4. Exercise the power of limited eminent domain authority in accordance with A.R.S. Title 12, Chapter 8, Article 3. The power of eminent domain shall be limited to the condemnation of real property necessary for pipelines, other infrastructure and easements for the authority's water projects. The authority may not exercise the power of eminent domain to:
 - Condemn water, water rights, wells or existing water systems.
 - Condemn land owned by another governmental entity.
 - Acquire electrical facilities.
5. Use existing public rights-of-way and public easements consistent with the underlying purpose and authority of the right-of-way or easement
6. Lease and exchange water
7. Acquire, hold and assign long-term storage credits
8. Sue and be sued

¹ "Retail" is intended to mean that the authority may not sell water directly to customers of a municipal water provider without the municipal provider's consent.

9. Employ necessary staff
10. Charge fees for services and water sales
11. Negotiate agreements to use existing facilities
12. Provide for payment of debts
13. Borrow money, as more specifically addressed in the Revenues and Financing section of this Appendix A
14. Issue revenue bonds and pledge revenues of the authority for the repayment of the bonds as more specifically addressed in the Revenues and Financing section of this Appendix A
15. Enter into contracts, including contracts for services with private entities
16. Cooperate with other public and private entities, including but not limited to (a) the state and political subdivisions of the state, (b) the federal government or any federal department or agency, and (c) any Tribe.
17. Acquire and lease real and personal property
18. Make investments
19. Transport and deliver water
20. Acquire electrical power for authority purposes
21. Treat water if treatment does not conflict with another entity's jurisdiction and the entity consents to treatment
22. Partner with Tribes
23. Partner with federal agencies

Duties. The Authority shall:

1. Respect the sovereignty of all Tribal governments.
2. Upon the request of an Arizona Tribe, promptly meet and confer with the Tribe to:
 - a. Discuss potential opportunities to partner with the Tribe under such terms as may be mutually agreeable to the Tribe and the Authority.
 - b. Seek to resolve in advance Tribal concerns about the Authority's planned actions or projects, including but not limited to, potential impacts on Tribal water rights and

resources, Tribal sacred sites, Traditional Cultural Properties, and Tribally sensitive species.

3. Maintain a list of interested persons and any Arizona Tribes who have requested to receive notices from the Authority, and provide written notice of the following (via mail or email) to the person or persons, including the person or persons designated by any Arizona Tribe:
 - a. Any public meetings to be held by the Authority.
 - b. The completion and availability of written studies on the water supply projects to be developed by the authority conducted by or on behalf of the Authority.
 - c. The submission of any final application for a permit or approval to be issued by any state or federal agency or department that requires public notice by the state or federal agency or department.

Revenues and Financing

1. Revenue bonds to finance the development and construction of water projects, including the acquisition of water and water rights. The development of revenue bonding power for the Authority will require the advice of bond experts and should be done in the context of drafting legislation to enable the establishment of Regional Water Augmentation Authorities. Following is a list of the types of provisions that could be considered:
 - a. Authority to issue revenue bonds and the purposes for which bonds may be issued.
 - b. Process for issuing revenue bonds:
 - Resolution of Board of Directors: required content, including a description of the undertaking/project to be financed by the bonds.
 - Public notice of and hearing on the resolution.
 - c. Information required to be included in the bonds, such as interest rate, due date, registration of bonds, etc.
 - d. Provisions of the bond sale.
 - e. Sources of revenue that may be pledged to repay bond holders.
 - f. Authority to impose fees and charges to help pay the bonds when due.
 - g. Statement that the bonds are not an obligation of any member of the Authority or the state or any political subdivision of the state.
 - h. Statement of the statutes controlling the validity of the bonds.
 - i. Qualification of bonds to be a legal investment of other public agencies.
 - j. Authority to issue refunding bonds for outstanding bonds.
 - k. Authority to partner with other public entities in issuing bonds.
 - l. Any minimum required investment grade rating for the bonds.
2. User fees, to pay for the cost of operating and maintaining water projects and repay revenue bonds.
3. Membership fees, to pay for overhead, administrative and managerial costs of the Authority and repay revenue bonds.

4. Eligibility to apply for WIFA technical assistance and loans, including the Clean Water Revolving Fund, the Drinking Water Revolving Fund and the Water Supply Development Revolving Fund.
5. Grants
6. Proceeds from loans or advances, except that the:
 - a. Authority may borrow money only at commercially reasonable interest rates
 - b. Loans may not be pledged to repay bonds
7. Capital contributions from private parties
8. Other sources of revenue as determined by the governing body, except for ad valorem taxes and general obligation bonds

Authority Membership

1. Voluntary
2. Must share in the costs of financing a project and services of the authority
3. Any municipality regardless of whether it owns and operates a water treatment or distribution system
4. Any Title 48 entity that has the authority to treat and distribute water for domestic, commercial and industrial purposes
5. Any Title 45 county water augmentation authority
6. Any Title 45 county water authority
7. Counties
8. Private water companies
9. Other water-centered Title 48 entities
10. Private entities
11. Members do not have to be adjoining/coterminous
12. Tribes or their Tribal entities or authorities

Authority Governance

1. Board of Directors
 - a. Each member would be entitled to appoint one member of its governing body to the Board of Directors.
 - b. Each Director shall serve at the pleasure of the member who appointed the Director.
2. The authority has the rights and immunities of a municipal corporation that are granted by the constitution and the statutes of this state, including immunity of its property and bonds from taxation.
3. The authority is a political subdivision of the state subject to the laws affecting political subdivisions, including the Open Meeting Laws and public records statutes.

Authority Formation

1. Two or more eligible entities, at least one of which is a public agency, may form an authority. The authority must have a clear public purpose. Each eligible entity must adopt a resolution approving its membership in and establishment of the authority.
2. The authority shall notify the board of supervisors of each county in which a proposed use of water from the authority will be located of the authority's formation, and file with each board of supervisors organizational documents that describe the authority, its membership, the water supply issues to be addressed by the authority, and the proposed locations of uses of water supplied by the authority.
3. Concurrently with the notice required by paragraph 2 of this section, the authority shall provide notice of the authority's formation to the office of the chairperson of each Arizona Indian Tribe with a copy of the organization documents that describe the authority, its membership, the water supply issues to be addressed by the authority, and the proposed locations of uses of water supplied by the authority.
4. The authority shall publish a notice of the authority's formation once each week for two consecutive weeks in a newspaper of general circulation in each county in which a proposed use of water from the authority will be located.
5. The authority shall provide notice of the authority's formation to an ADWR listserv established specifically for interested persons who have requested to be on such a listserv to receive notice of the formation of any authority within the State of Arizona.
6. Any aggrieved person or aggrieved Arizona Tribe may contest the formation of the authority by filing an action in the superior court of any county in which a proposed use of water from the authority will be located. Any contest must be filed within 30 days of the second publication of the notice. The grounds for objection are limited to whether the formation of the authority occurred in substantial compliance with the authorizing statutes.

7. The superior court shall determine whether the formation of the authority occurred in substantial compliance with the authorizing statutes.
8. The formation of the authority is lawful and conclusive against all persons if an action is not filed as provided above, or if an action is filed, the action is unsuccessful.

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