Policy and Procedures for Transferring an Entitlement of Colorado River Water

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I. INTRODUCTION

This statement of policy applies to the transfer by non-federal Arizona contractors of mainstream Colorado River entitlements allocated for irrigation and municipal and industrial (M&I) purposes within the State of Arizona.

Definition of Water Entitlements

The right or authorization to beneficially use Colorado River water is defined as an entitlement. Entitlements held by non-federal Arizona Colorado River water users are created by decree of the United States Supreme Court (Court) or through a contract with the Secretary of the Interior (Secretary) under Section 5 of the Boulder Canyon Project Act (BCPA) of December 21, 1928.

Federal and State Authorities

The BCPA federalized the administration of Colorado River water rights by requiring a contract with the Secretary to use Colorado River water under either Section 4 or 5 of the Act. A contractual right, issued under the authority of the BCPA, is a permanent entitlement administered by the U.S. Bureau of Reclamation (Reclamation).

Pursuant to A.R.S. § 45-105, the Director of the Arizona Department of Water Resources (Department) is generally responsible for formulating plans and programs for the development, management, conservation and use of surface water and groundwater throughout the state. Consistent with this responsibility, under A.R.S. § 45-107, entities which contemplate the transfer of their entitlements are required to cooperate, confer and obtain the advice of the Director.

In 1994, the state legislature reemphasized the importance of the role of the Director in the distribution of Colorado River water within the state. The specific statutory mandate in A.R.S. § 45-107(D) states:

> Individuals, irrigation districts, corporations, state departments, agencies, boards, commissions and political subdivisions of the state shall cooperate, confer with and obtain the advice of the director as to those negotiations, contracts and subcontracts described in subsection C that affect the allocation and use of main stream Colorado river water or the allocation and use of Colorado river water delivered through the central Arizona project. For a proposed contract or subcontract or a proposed amendment of a contract or subcontract that will result in a transfer of an allocation or entitlement of Colorado river water, including central Arizona project water, from a non-Indian Arizona contractor or subcontractor for a term of more than one year, the obligation to cooperate, confer with and obtain the advice of the director shall include *the obligation to submit to the director for review the proposed contract or subcontract or the proposed amendment, and all related exhibits and agreements, prior to its execution by the contractor or subcontractor.* (Emphasis added)

Pursuant to the aforementioned statutory responsibility and authority, the Director will review any proposed transfer by a non-federal Arizona contractor of a Colorado River entitlement for the purpose of determining the potential impacts caused by the redistribution of water. After review, the Director will recommend to the Secretary the appropriate redistribution of mainstream Colorado River water supplies consistent with the policies and laws of the state. The importance of the

Director's review is underscored by the fact that mainstream water is, in most cases, the only dependable supply of water for urban, industrial and agricultural water users located within the accounting surface or floodplain of the Colorado River. Therefore, due to the importance of the distribution of Colorado River water to the welfare and economy of the state, explicit policy and procedures are necessary to ensure adequate and consistent evaluation of any proposed transfer of a Colorado River entitlement.

Purpose of Policy

The purposes of this policy are: 1) to establish a procedure to obtain the advice and review of the Director; and 2) to describe the criteria and analysis the Department will utilize to evaluate proposed transfers, including conveyances, leases or assignments, of mainstream Colorado River water.

The Director's advice to and consultation with the Secretary will be consistent with these policies and procedures.

II. SCOPE OF POLICY

General Application

This policy applies to the transfer of a Colorado River entitlement within the State of Arizona for a period of more than one year. It does not pertain to transfer actions involving the export of water to another state or to Mexico.

It is limited to non-federal Arizona entities or individuals holding a valid Colorado River water delivery contract with the Secretary. It applies to all priorities of entitlements held by this category of Colorado River water users (see Appendix A for definitions of priorities).

With the potential exception of proposed entitlement assignments, the Department will not recommend the conveyance or lease of any entitlement to unused or surplus Colorado River water apportionment. If such entitlements are not needed by a contractor, the Department will recommend that the unneeded contract be terminated and, if necessary, a new one created.

Subcontract, lease or water use conversion actions within an existing contract service area that are conducted in accordance with an existing Colorado River water delivery contract are not subject to this policy.

Entitlement Transfer Actions

Conveyances, leases and assignments are separate types of entitlement transfer actions. The review and consultation process with the Director varies depending on the type of transfer action that is requested and the type of entitlement that is involved. The specific entitlement transfer actions are described below.

Conveyance of an Entitlement

An entitlement transfer action is considered a conveyance when a Colorado River contractor proposes to permanently transfer all or a portion of its entitlement to another entity that will not serve the same contract service area and/or proposes to change the type of water use.

Lease of an Entitlement

A lease is a temporary transfer action involving all or a portion of a Colorado River entitlement. The purpose for leasing an entitlement is to provide a temporary water supply to another party located outside of the existing contract service area without the contractor permanently relinquishing or abandoning the entitlement. Generally, leases are inappropriate for permanent municipal and industrial water uses that cannot be interrupted or discontinued. If a water entitlement lease is proposed for a period of more than five years, the applicant for the lease action must demonstrate that the existing water use will not be abandoned and explain why a long-term lease is necessary for the intended new use. The Department will review the applicant's justification for a long-term lease and may recommend a lease for more than five years duration. However, if a long-term water supply is needed, the parties should consider a permanent conveyance.

Assignment of an Entitlement

An entitlement transfer action is considered an assignment when a Colorado River contractor proposes to permanently convey all or a portion of its entitlement to another entity that will serve the same type of use within the same contract service area.

Quantification of an Entitlement Available for Conveyance or Lease

Contract assignment actions do not involve a change in type of use or a change in the place of use. As such, assignment actions are not subject to the following limitations that may be applied to the conveyance or lease of an entitlement.

The amount of water available for conveyance or lease will be limited to the quantity of water that will result in a consumptive use that is no greater than the maximum amount of the entitlement. During the review of an application to transfer, the Director will consider several factors. These factors include the past and reasonable future quantity of consumptive use of water associated with the entitlement, potential negative impacts to the water supplies of other Colorado River entitlement holders, water quality impacts related to return flows and other pertinent impacts that could occur as a result of the proposed transfer.

Within Arizona, the amount of water associated with a Colorado River entitlement is limited to a specific maximum amount that may be consumptively used or diverted on an annual basis. In a few instances, entitlements are limited to the amount of water that may be beneficially used.

A consumptive use entitlement limits the quantity of water that may be consumed by an entitlement holder. Consumptive use is the amount of water diverted less the amount that is returned to the mainstream by the entitlement holder. The amount of a consumptive use entitlement that may be available for conveyance or lease will be limited to the maximum amount of the entitlement.

A diversion entitlement is limited by the quantity of water that may be diverted by the entitlement holder. Any return flow that results from the use is credited to Arizona's 2.8 million acre-feet allocation and is available to other water users. A proposed conveyance or lease must not negatively impact the quantity of water available to other entitlement holders. If the new use will result in the same return flow to the mainstream as the retired use, the amount of entitlement available for conveyance or lease for the new use will be limited to the maximum amount of the diversion entitlement. If the proposed new use will result in reduced return flow, the amount of water that will be available for conveyance or lease will be limited to the consumptive use associated with the maximum amount of the diversion entitlement.

A beneficial use entitlement is limited by the quantity of water that may be beneficially used by an entitlement holder for a specific type of use in a specific place of use. To determine how much water may be available for conveyance or lease with this type of entitlement, the amount of water that is beneficially used on an annual basis must be quantified as an annual consumptive use. The consumptive use amount that may be conveyed or leased will be limited to the quantity of water that is no greater than the maximum amount of the entitlement that was consumptively used by the entitlement holder.

III. CONSULTATION PROCESS

Request for Consultation

The Director must be consulted prior to the execution of a transfer of a water delivery contract. The request for consultation with the Director must be made in writing by the entity proposing to transfer its entitlement and include contact information for the parties involved in the proposed transaction.

Water Management Plans

Each request for consultation involving the conveyance or lease of an entitlement must include a water use management plan. Development of a management plan will generally not be necessary for most proposed assignment actions. The amount of information needed for a particular assignment action will be determined upon the initiation of consultation with the Director.

The Director will use the water use management plan information to evaluate the proposed transfer action and make recommendations to the Secretary. The water use management plans will also be available for public review and comment. These plans must include, at a minimum, the following information.

For the entity transferring the entitlement:

a. A description and quantification of the proposed water use to be transferred;
b. A map of the contract area and the location of the retired water use and associated points of diversion and return;
c. A description of how the existing water use will be terminated;
d. A demonstration that the transfer will not interfere or infringe upon any vested or existing water rights within its contract service area;

e. For partial transfer of an entitlement, an explanation of all expected changes to water provider operations and deliveries to remaining customers due to the proposed transfer;
f. An explanation of how the transfer is consistent with local area ordinances, rules and regulations;
g. A description and quantification of the proposed new water use.

For the receiving entity:

h. A map showing the service area, points of diversion and points of return associated with the new use;
i. Calculations showing the amount of Colorado River water that will be diverted, consumptively used and returned to the river;
j. A demonstration of its ability to divert, convey and consumptively use water within a reasonable timeframe;
k. A demonstration that the transfer will not interfere or infringe upon any vested or existing water rights within its contract service area;
l. A list that identifies and quantifies all water supplies currently available to meet its current, committed and projected municipal and industrial (M&I) water demand;
m. An explanation showing how the conveyance is consistent with local area ordinances, rules and regulations, including those limiting the use of potable water supplies for lakes, golf courses, etc.;
n. Entities proposing to temporarily lease an entitlement must provide information describing the intent to terminate the Colorado River water use or substitute water supplies at the conclusion of the lease.

In addition to the water management plan information, the Department will need to be provided with the necessary approvals that are signed by all parties to the proposed transfer and provided with any proposed contracts or agreements, all addendum and attachments to same and all related exhibits and agreements.

Other Considerations

When considering a proposed transfer action, in addition to evaluating the required information listed above, the Department will also assess beneficial use and Mexican Treaty obligation issues.

Beneficial Use and Water Demand

The Department will not consider transfer actions for speculative purposes. Therefore, for all proposed entitlement transfer actions, the entity receiving the entitlement must demonstrate that the water will be put to beneficial use. The beneficial use may be an existing one associated with current, committed and/or projected M&I water demands or it may be a proposed new M&I use.

Applicants that do not possess the ability to immediately divert, convey and consumptively use the water will not be excluded from the application and consideration process. However, in addition to their application, they must submit a fully developed plan that describes how they will divert, convey and use the water within a reasonable timeframe.

1944 Mexican Treaty Obligations

Proposed conveyance actions will be evaluated to ensure that the transaction will not negatively impact the United States' ability to meet its 1944 Treaty obligations for delivery of Colorado River water to Mexico or to meet the Minute 242 salinity control requirement.

Public Notice Process

Conveyances and Leases

To initiate a consultation, the parties to a proposed transfer action shall submit water management plans and all other related exhibits and agreements to the Director at least one hundred fifty (150) days prior to contract execution.

After all of the necessary documents and information have been submitted, the Department will advertise the proposed conveyance or lease once per week for two (2) consecutive weeks in a newspaper of general circulation within the state. The Department will also provide a notice to the county planning and zoning department office within the county of origin. The contractor conveying its entitlement must provide notice of the proposed action to all water users within its contract service area. Notices may also be sent to a list of other interested parties. The list, which will be kept on file with the Department, will be composed of individuals and entities that wish to be advised of pending requests to initiate a Colorado River contract transfer action. All documents submitted to the Department will be made available to the public upon request.

The Department will accept public comment on the proposed transfer action for thirty (30) days following the second advertisement. Public comment will be considered during the Department's review. The Director will issue a recommendation regarding the conveyance or lease to the Secretary within sixty (60) days from the end of the public comment period, unless additional time is needed to resolve claims of negative impacts to third parties.

Some entities or individuals may claim that they will be negatively impacted if a conveyance or lease, as proposed, is approved. When potentially negative impacts are claimed, the Department will notify the entity giving up its entitlement and the receiving entity(s) about the claimed impacts. The Department will provide up to ninety (90) days for all parties to attempt to resolve or mitigate the claimed impacts and to provide information to the Secretary. If agreed upon by all parties, an extension may be requested if more time is needed to resolve outstanding issues.

As a result of negotiations, if the proposed agreement changes the distribution of water, the Department will review the revised transfer action and make a recommendation to the Secretary. If the parties cannot agree to resolve or mitigate the claimed impacts, the Department will make its recommendation independently from the parties at the end of the negotiation period.

Assignments

The parties to the assignment shall submit a request for consultation and supporting documentation to the Director at least forty-five (45) days prior to execution.

The Department will conduct an expedited review of the assignment of an entitlement. Because the allocation will be used to serve the same use within the same area, it will be presumed to be consistent with the state's water management objectives and will not be subject to public review and comment. The Director will issue a recommendation to the Secretary within thirty (30) days after all necessary documents have been submitted for review.

IV. EFFECTIVE DATE

This substantive policy statement shall become effective immediately. The Director may modify or revoke this policy at any time.

DATED this 24TH day of May, 2004.

Herbert R. Guenther
Director
Arizona Department of Water Resources

APPENDIX A

First Priority
Satisfaction of Present Perfected Rights as defined and provided for in the Decree.

Second Priority
Satisfaction of Secretarial Reservations and Perfected Rights established or effective prior to September 30, 1968.

Third Priority
Satisfaction of Entitlements pursuant to contracts between the United States and water users in the State of Arizona executed on or before September 30, 1968.

Fourth Priority
Satisfaction of entitlements pursuant to: (i) contracts, Secretarial Reservations, and other arrangements between the United States and water users in the State of Arizona entered into or established subsequent to September 30, 1968, for use on Federal, State, or privately owned lands in the State of Arizona (for a total quantity of not to exceed 164,652 acre-feet of diversions annually); and (ii) Contract No. 14-06-W-245 dated December 15, 1972, as amended, between the United States and the Central Arizona Water Conservation District for the delivery of Mainstream Water for the Central Arizona Project, including use of Mainstream Water on Indian lands.

Entitlements having fourth-priority as defined in (i) and (ii) herein are coequal. Reductions in Entitlements having a fourth priority shall be borne by each Entitlement holder in the same proportion as its Entitlement, or as required by law, regulation, or Secretarial determination. If, however, a reduction-sharing agreement is entered into between two or more such authorized users, then the reduction shall be shared among the parties as provided in the agreement, subject to approval by the Contracting Officer after consultation with ADWR.

Fifth Priority
Satisfaction of Entitlements to any Unused Arizona Entitlement.

Any entity with a contract for fifth-priority water shall utilize its fifth-priority Entitlement only after the Contracting Officer has determined that Mainstream Water is available under applicable law or regulation, and the Contracting Officer provides written notification that such Mainstream Water is available in a specific year, subject to the scheduling and the reduction provisions of the contract. Reduction or elimination of the fifth-priority water use shall be determined by the Contracting Officer after consultation with ADWR, or on the basis of the contract dates, or as required by law or regulation.

Sixth Priority
Satisfaction of Entitlements to Surplus Water.

Any contractor for sixth-priority water shall utilize its sixth-priority Entitlement only after the Contracting Officer has determined that Mainstream Water is available under applicable law or regulation, and the Contracting Officer provides written notification that such Mainstream Water is available in a specific year, subject to the scheduling and reduction provisions of the contract. Reduction or elimination of the sixth-priority water use shall be as determined by the Contracting Officer or on the basis of the contract dates, or as required by law or regulation.

Excerpt from Section 7 of the Colorado River water entitlement contract between the U.S. Bureau of Reclamation and Crystal Beach Water Conservation District, Contact No. 6-07-30-W0352, November 21, 1997