

**Agenda Number 7.**

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**MEETING DATE:** September 1, 2016

**AGENDA ITEM:** Report on, Discussion, and Consideration of Action for Agricultural Pool Forbearance Program

**RECOMMENDATION:**

Staff recommends that the Board approve the standard form forbearance agreement, authorize its execution by the General Manager in substantially the same form as presented today, and retain the cost savings in the CAWCD strategic reserves.

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**FINANCIAL IMPLICATIONS:**

Impact on Budget: No expense impact on General Fund

Additional spending authority requested: None

Impact on Reserves: Reserves will increase as the intent is to maintain the savings in the strategic reserves

Impact on Rates: No additional impact on published rates

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**LINKAGE TO STRATEGIC PLAN, POLICY, STATUTE OR GUIDING PRINCIPLE:**

2016 CAWCD Board of Director Strategic Plan

- Finance: Maintaining CAP's Financial Health
- Project Reliability: Effectively Operate and Maintain CAP Assets
- Water Supply: Reliability of the CAP Water Supply

Policy for Excess Water Marketing for Non-Indian Agricultural Use – 2004 Through 2030

Supplemental Policies for Marketing Excess Water for Non-Indian Agricultural Use 2004 Through 2030 established on December 5, 2002, November 4, 2010, and October 2, 2014

**PREVIOUS BOARD ACTION/ACTIVITY:**

August 4, 2016	The Board was initially briefed on this agricultural pool forbearance program
January 7, 2016	The Board approved a Forbearance III Program whereby certain agricultural districts agreed to forbear the remainder of their CAP entitlement in 2016
October 2, 2014	The Board modified the Ag Pool Program policies so that the Board retains discretion over Ag Pool Water that is forborne pursuant to contractual agreement with CAWCD

**ISSUE SUMMARY/DESCRIPTION:**

At the January 7, 2016, meeting of the CAWCD Board of Directors, the Board approved a forbearance program under the MOU program that allowed certain irrigation districts to forbear any or all of their remaining excess water from the pool of non-Indian agricultural use water ("Ag Pool Water") in 2016. This program is saving 10,627 acre-feet in Lake Mead in 2016 at no cost to CAP and with no additional compensation paid to the participating districts.

Given the success of this program, CAWCD staff recommend the establishment of an on-going forbearance program that would allow CAWCD's irrigation district customers to forbear any portion of their Ag Pool Water in 2017 and beyond. This program is estimated to generate water savings of 38,000 acre-feet in 2017, which will be retained by CAWCD for use at the discretion of the Board, including as part CAP's Lake Mead reservoir protection efforts and potentially part of Arizona's implementation of the proposed Lower Basin Drought Contingency Plan. The districts which are anticipated to participate in this program have previously indicated that they will utilize other water sources to replace their forborne water supply and, in nearly all cases, CAWCD staff anticipate that those alternate supplies are in-lieu GSF water from other CAP customers.

This forbearance program would have positive impacts on CAWCD reserves. First, many of CAWCD's irrigation district customers qualify for one or more agricultural incentives on the pumping energy charge. Those incentives are paid for using CAWCD reserves and can cost up to \$16/af in 2017. Second, as part of the agreement struck in the Arizona Water Settlement Agreement, CAWCD pays the Fixed OM&R costs for deliveries of Ag Pool Water. That money is also paid out of CAWCD reserves and will cost \$87/af in 2017. In this program, for each acre-foot of Ag Pool Water that an irrigation district agrees to forbear, CAWCD's reserves will not need to pay either the agricultural incentive or the Fixed OM&R cost. At this time, CAWCD staff recommend that these savings remain in CAWCD reserves.

As this program will reduce the volume of water available for delivery to all CAP customers, implementing this program will result in a minimal increase in rates. CAWCD staff believes that this rate increase is consistent with the philosophy of CAP's Lake Mead reservoir protection efforts in providing a measurable benefit for all CAP system users. Moreover, this rate impact was previously addressed and incorporated into the 2017 rate structure at the June 9, 2016 meeting of the CAWCD Board of Directors. No additional rate impacts are anticipated as a result of this program.

CAP staff have coordinated with Arizona Department of Water Resources ("Department") to ensure that the additional forbearance is consistent with the Department's policies. The Department reconfirmed their position that forbearance programs, such as this one, are consistent with and meet the spirit of the "reasonably" available language present in each of the district's permits as a requirement to participate as a groundwater savings facilities.

The standard form forbearance agreement is attached.

**SUGGESTED MOTION:**

Staff recommends that the Board approve the standard for forbearance agreement, authorize its execution by the General Manager in substantially the same form as presented today, and maintain the cost savings in the CAWCD strategic reserves.

Attachment.

\_\_\_\_\_  
**AND**

**CENTRAL ARIZONA WATER CONSERVATION DISTRICT  
2017-2030 AGRICULTURAL POOL FORBEARANCE PROGRAM AGREEMENT**

This Forbearance Agreement is made this \_\_\_ day of \_\_\_\_\_, 2017, by and between \_\_\_\_\_ (the "Contractor"), and the Central Arizona Water Conservation District ("CAWCD"), a multi-county water conservation district organized under existing laws of the State of Arizona.

**RECITALS**

A. As part of CAWCD's commitment to reducing the risk of water shortage in the Lower Colorado River Basin, CAWCD has agreed to establish a forbearance program whereby irrigation districts holding contracts for water from the pool of non-Indian agricultural use water established pursuant to CAWCD Policy on Excess Water Marketing for Non-Indian Agriculture Use - 2004 through 2030 dated May 18, 2000 ("Ag Pool Water") can agree to reductions of deliveries of their Ag Pool Water volumes in any of the years 2017-2030.

B. For each acre-foot of Ag Pool Water that participating irrigation districts choose to forbear, that district will be relieved of the requirement to accept delivery of that water and will not be responsible for the payment of any CAP charges.

C. CAWCD will retain any forborne water for use at the discretion of the Board, including as part of CAP's Lake Mead reservoir protection efforts and potentially part of Arizona's implementation of any proposed Lower Basin Drought Contingency Plan.

D. Contractor desires to participate in this Forbearance Program and enter into this Forbearance Agreement.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are acknowledged, and intending to be legally bound, the Parties agree as follows:

**ARTICLE 1  
DEFINITIONS**

1.1 "Ag Pool Water" means Excess Water from the pool of non-Indian agricultural use water established pursuant to CAWCD Policy on Excess Water Marketing for Non-Indian Agriculture Use - 2004 through 2030 dated May 18, 2000.

1.2 "CAP Repayment Stipulation" shall mean the Stipulated Judgment and the Stipulation for Judgment (including any exhibits to those documents) entered on November 21, 2007, in the United States District Court for the District of Arizona in the consolidated civil action

styled *Central Arizona Water Conservation District v. United States, et al.*, and numbered CIV 95-TUC-WDB (EHC) and CIV 95-1720-PHX-EHC.

1.3 "Excess Water" means "Excess Water" as that term is defined in section 5(d)(1) of the Stipulation for Judgment portion of the CAP Repayment Stipulation.

1.4 "Excess Water Agreement" means the Agreement Providing for the Delivery of Excess Central Arizona Project Water dated \_\_\_\_\_, 20\_\_.

1.5 "Party" or "Parties" means one or both of the parties to this Forbearance Agreement.

1.6 "Year" means a calendar year.

## **ARTICLE 2 TERM AND TERMINATION OF FORBEARANCE AGREEMENT**

2.1 Term: This Forbearance Agreement shall be effective as of the date set forth in the introductory paragraph of this Forbearance Agreement and shall terminate on December 31, 2030 unless either party notifies the other by October 1 of any year that it does not wish to renew the Agreement.

## **ARTICLE 3 PROCEDURE FOR FORBEARING AG POOL WATER**

3.1 For the purposes of placing its water order consistent with section 5(b)(ii) of the Excess Water Agreement, on or before October 1 of each Year, Contractor shall continue to submit in writing to CAWCD a water delivery schedule indicating the amounts of Excess Water desired by the Contractor during each month of the following Year, but shall also indicate on the schedule the annual volume of water that Contractor has chosen to forbear pursuant to this Agreement.

3.2 Notwithstanding section 5(c) of the Excess Water Agreement, in any Year in which Contractor has agreed to forbear water pursuant to this Agreement, Contractor may not amend its water order so as to request a decrease of the amount of water that Contractor has agreed to forbear. Provided that a decrease is not requested, Contractor retains the right to amend its monthly water delivery schedule pursuant to section 5(c) of the Excess Water Agreement.

3.3 Any water that Contractor chooses to forbear pursuant to this Agreement shall not be re-marketed pursuant to CAWCD Policy on Excess Water Marketing for Non-Indian Agriculture Use - 2004 through 2030 dated October 2, 2014.

3.4 Except as provided in sections 3.1 and 3.2, all terms, conditions, and provisions of the Excess Water Agreement shall remain unchanged and in full force and effect during the term of this Forbearance Agreement.

3.5 This Article 3 shall not survive termination of this Forbearance Agreement.

#### **ARTICLE 4 REPRESENTATIONS AND WARRANTIES**

4.1 Representations and Warranties of Contractor: Contractor represents and warrants as follows: (i) Contractor is an irrigation and drainage district duly organized and validly existing under the laws of the State of Arizona. To the best of Contractor's knowledge the execution and delivery hereof to CAWCD and the performance by Contractor of its obligation under this Agreement will not violate the terms or provisions of any agreement, document or instrument to which Contractor is a party or by which Contractor is bound; (ii) All proceedings required to be taken by or on behalf of Contractor to authorize it to make, deliver and carry out the terms of this Forbearance Agreement have been duly and properly taken.

4.2 Representations and Warranties of CAWCD: CAWCD represents and warrants as follows: (i) CAWCD is a multi-county water conservation district duly organized and validly existing under the laws of the State of Arizona. To the best of CAWCD's knowledge, the execution and delivery hereof to Contractor and the performance by CAWCD of its obligation under this Agreement will not violate the terms or provisions of any agreement, document or instrument to which CAWCD is a party or by which CAWCD is bound; (ii) All proceedings required to be taken by or on behalf of CAWCD to authorize it to make, deliver and carry out the terms of this Forbearance Agreement have been duly and properly taken.

#### **ARTICLE 5 LIMITATION ON REMEDIES**

5.1 No Party shall be entitled to seek any remedy for a breach of, or default under, this Forbearance Agreement except for those remedies already provided in the Excess Water Agreement.

#### **ARTICLE 6 GENERAL PROVISIONS**

6.1 Interpretation: This Agreement is governed by and must be construed and interpreted in accordance with and in reference to the laws of the State of Arizona and any applicable federal laws, without regard to conflicts of laws provisions. Any action to resolve any

dispute regarding this Forbearance Agreement shall be taken in a state court of competent jurisdiction located in Maricopa County, Arizona.

6.2 Third Party Rights: The Parties do not intend to create rights in or to grant remedies to any third party or others as a beneficiary of this Forbearance Agreement or of any duty, covenant, obligation or undertaking established thereunder.

6.3 Assignment: No Party may assign, delegate, or otherwise transfer this Forbearance Agreement, any interest therein, or the Party's rights or obligations under this Forbearance Agreement without the prior written consent of the other Party.

6.4 Amendments: This Forbearance Agreement may be modified, amended or revoked only by the express written agreement of the Parties hereto.

6.5 Waiver: No delay in exercising any right or remedy shall constitute a waiver unless such right or remedy is waived in writing signed by the waiving Party. The waiver by either Party of a breach of any term, covenant, or condition in this Forbearance Agreement shall not be deemed a waiver of any other term, covenant, or condition of this Forbearance Agreement.

6.6 Severability: Any determination by any court of competent jurisdiction that any provision of this Forbearance Agreement is invalid or unenforceable does not affect the validity or enforceability of any other provision of this Forbearance Agreement.

6.7 Captions: All captions, titles, or headings in this Forbearance Agreement are used for the purpose of reference and convenience only and do not limit, modify, or otherwise affect any of the provisions of this Forbearance Agreement.

6.8 Notices: Except as otherwise required by law, any notice given in connection with this Forbearance Agreement must be in writing and must be given by personal delivery, overnight delivery, facsimile, or United States certified or registered mail. Any such notice must be addressed to the appropriate Party at the following address (or at any other address as a Party may hereafter designate by written notice given as required by this paragraph):

**CONTRACTOR:**

For delivery use:

For U.S. Mail use:

**CAWCD:**

For delivery use:

For U.S. Mail use:

Notice is deemed to have been given on the date on which notice is personally delivered, delivered to an overnight delivery service, transmitted by facsimile or mailed. Notice is deemed to have been received on the date on which the notice is actually received or delivery is refused.

6.9 Additional Acts and Documentation: Each Party, upon the request of the other Party, agrees to perform such further acts and to execute and deliver such other documents as are reasonably necessary to carry out the provisions of this Forbearance Agreement.

6.10 Attorneys' Fees: In the event it becomes necessary for any Party hereto to institute legal proceedings to enforce any of the provisions of this Agreement, the prevailing party shall be entitled to collect its costs and reasonable attorneys' fees from the non-prevailing party.

IN WITNESS WHEREOF, the Parties hereto have executed this Forbearance Agreement on the day and year first above written.

**CAWCD: CENTRAL ARIZONA WATER CONSERVATION DISTRICT**

By: \_\_\_\_\_

Its: \_\_\_\_\_

ATTEST:

\_\_\_\_\_

CONTRACTOR:

\_\_\_\_\_

By:

\_\_\_\_\_

Its:

\_\_\_\_\_

ATTEST:

\_\_\_\_\_