

**Agenda Number 9.**

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**MEETING DATE:** August 3, 2017

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

**RECOMMENDATION:**

Staff recommends that the Board approve the attached standard form forbearance agreement and authorize its execution by the General Manager in substantially the same form as presented today.

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**FINANCIAL IMPLICATIONS:**

Impact on Budget: No expense impact on General Fund

Additional spending authority requested: None

Impact on Reserves: For this forbearance program, the incremental impact on reserves is anticipated to be around \$400K, though it could be up to \$600K depending on participation.

Impact on Rates: This program will result in an approximately \$0.25 to \$0.35 increase to the Fixed OM&R rate in 2018 and 2019.

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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
- Water Supply: Reduce risk associated with CAP's junior priority

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:**

June 8, 2017                      The Board was initially briefed on this agricultural pool forbearance program

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:**

As part of its efforts to forestall shortage in the Lower Colorado River Basin, since 2014 CAWCD has approved a few forbearance programs with Ag Pool Water users that allow those districts to forbear some or all of their excess water from the pool of non-Indian agricultural use water. As consideration for their past involvement in those programs, those Ag Pool Water users have received reductions on their Pumping Energy Charge for Ag Pool Water deliveries in 2015 through 2018. Due to those reductions, and the other agricultural incentives that CAWCD has historically offered to Ag Pool Water users (meeting settlement pool goals, meeting AWBA/CAGR D GSF goals, and meeting recovery goals), the Pumping Energy Charge was \$36/af in 2015, \$38/af in 2016, \$53/af in 2017, and is anticipated to be around \$55/af in 2018.

All of these programs end after 2018. As a result, the Pumping Energy Rate is anticipated to rise to \$68/af in 2019 before dropping back to \$56/af in 2020 due to the closure of Navajo Generating Station.

In an attempt to further contribute to Lake Mead stabilization efforts and to smooth the significant bump in the Pumping Energy Rate in 2019, CAWCD staff have developed a forbearance program that would allow irrigation districts that participated in CAWCD's past forbearance programs to voluntarily forbear either 2,000 acre-feet or 2.5% of their total Ag Pool Water, whichever is lesser, in exchange for a reduction in their Pumping Energy Charge in 2019.

If participating entities are able to forbear water in both 2018 and 2019, the reduction in the 2019 Pumping Energy Charge would be \$7/af. If, however, a shortage is declared on the Colorado River for 2019, participating entities would be relieved of their obligation to forbear Ag Pool Water in 2019 (as their deliveries will most likely be cut due to the shortage) and the reduction in the Pumping Energy Charge would only be \$4/af for 2019.

CAWCD staff anticipates that this program will generate at least 4,000 acre-feet of conserved water in 2018 and 4,000 acre-feet of conserved water in 2019. This program will not supersede or supplant CAWCD's other Ag Pool Water forbearance program which allows Ag Pool Water users to fully eliminate Ag Pool Water deliveries and relieve themselves completely of the Pumping Energy Charge.

The anticipated incremental cost of this program is about \$400K, which is the cost of applying a \$7/af incentive to the anticipated water deliveries for MSIDD and CAIDD in 2019 minus the reserves that are saved by eliminating the coverage of Fixed OM&R for 4,000 acre-feet of Ag Pool Water in both 2018 and 2019. Should other Ag Pool Water users participate in this program and otherwise fully order their Ag Pool Water in 2019, the incremental cost of this program could be up to \$600K.

As this program will reduce the volume of water available for delivery to all CAP customers, implementing this program will result in an approximately \$0.25 to \$0.35 increase to the Fixed OM&R rate in 2018 and 2019. 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.

The standard form forbearance agreement is attached.

**SUGGESTED MOTION:**

Staff recommends that the Board approve the standard form forbearance agreement and authorize its execution by the General Manager in substantially the same form as presented today.

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**AND**  
**CENTRAL ARIZONA WATER CONSERVATION DISTRICT**  
**2018-2019 AGRICULTURAL POOL FORBEARANCE PROGRAM AGREEMENT**

This Forbearance Agreement is made this 1st day of October, 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") and that previously participated in the Forbearance Program can agree to reductions of deliveries of their Ag Pool Water volumes in 2018 and 2019.

B. In exchange for reducing deliveries of Ag Pool Water in 2018 and 2019, CAWCD shall reduce the Pumping Energy Charge for participating irrigation districts for Ag Pool Water deliveries in 2019.

C. CAWCD will retain any forborne water for use at the discretion of the Board, including as part of CAWCD's Lake Mead reservoir protection efforts.

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 "Forbearance Program" means the forbearance program that was approved by the CAWCD Board on October 2, 2014 in which Contractor agreed to reduce deliveries of a portion of its Excess Water in exchange for a reduction in the Pumping Energy Charge paid per acre-foot of Contractor's deliveries of Ag Pool Water in 2015 and 2016.

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

1.7 "Year" means a calendar year.

## **ARTICLE 2**

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

2.1 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, 2019 except that:

2.2 Contractor may elect to terminate this Agreement by providing written notice to CAWCD by October 1, 2018. Should Contractor elect to terminate this Forbearance Agreement pursuant to this section 2.2, Contractor shall not receive the reduction in its Pumping Energy Charge as described in Section 4.1.

## **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 submit in writing to CAWCD a water delivery schedule indicating the amounts of Ag Pool Water desired by the Contractor during each month of the following Year, but shall also indicate on the schedule the

annual amount of Ag Pool Water which Contractor has chosen to forbear pursuant to this Agreement provided that such amount equals to or exceeds 2.5% of the total amount of Contractor's Ag Pool Water or 2,000 acre-feet per Year, whichever is lesser.

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 cause a decrease in the total amount of water that Contractor has agreed to forbear in that Year. Provided that such a decrease is not caused, 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 The reductions of deliveries agreed to in this Forbearance Agreement may be in addition to reductions agreed to by Contractor and CAWCD in other forbearance programs.

3.5 If the Secretary of the Interior declares a shortage on the Colorado River that results in the volume of Ag Pool Water available for delivery is less than 300,000 acre-feet in 2019, Contractor shall be relieved of its obligation to forbear Ag Pool Water in 2019. In that event, Contractor shall still receive the reduction in its Pumping Energy Charge as described in Section 4.1.

3.6 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.

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

#### **ARTICLE 4 WATER SERVICE CHARGE**

4.1 In exchange for forbearing deliveries of a portion of its Ag Pool Water, CAWCD will reduce the Pumping Energy Charge by \$7 per acre-foot of the Contractor's Ag Pool Water deliveries in Year 2019.

4.2 The Pumping Energy Charge reduction shall apply only to Ag Pool Water deliveries in Year 2019.

4.3 This reduction in the Pumping Energy Charge shall apply only to Contractor's Ag Pool Water that is either currently allocated to Contractor or Ag Pool Water that was previously allocated to Contractor prior to adoption of CAWCD Supplemental Policy for Marketing Excess Water for NIA Use 2004-2030-UPDATE dated November 4, 2010.

**ARTICLE 5  
REPRESENTATIONS AND WARRANTIES**

5.1 Representations and Warranties of Contractor: Contractor represents and warrants as follows: (i) Contractor is an \_\_\_\_\_ duly organized and validly existing under the laws of the State of Arizona; (ii) 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; and (iii) 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.

5.2 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; (ii) 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; and (iii) 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 6  
LIMITATION ON REMEDIES**

6.1 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 7  
GENERAL PROVISIONS**

7.1 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 conflict 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.

7.2 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.

7.3 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.

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

7.5 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.

7.6 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.

7.7 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.

7.8 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: c/o General Manager  
23636 N. 7<sup>th</sup> Street  
Phoenix, AZ 85024

For U.S. Mail use: c/o General Manager  
P.O. Box 43020  
Phoenix, AZ 85080-3020

Notice may be personally delivered, delivered to an overnight delivery service, transmitted by facsimile or mailed by U.S. mail. Notice is effective on the date on which the notice is actually received or delivery is refused.

7.9 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.

7.10 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:

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CONTRACTOR:

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By:

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Its:

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ATTEST:

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