

Margaret J. Vick, PLC

140 E Rio Salado Pkwy Unit 607
Tempe, Az 85281

602.814.7666
margaret.vick@mvicklaw.com

COMMENTS

To: Vineetha Kartha, ADWR
From: Colorado River Indian Tribes
Subject: Proposed ICS Exhibits

The following are comments on the proposed Exhibits for Intentionally Created Surplus submitted on behalf of the Colorado River Indian Tribes to Vineetha Kartha at vkartha@azwater.gov in accordance with the Arizona Intrastate Process for ICS Projects.

Legal Rights to Water Used to Create ICS

In reviewing all the proposed Exhibits, it is apparent that the basis of the water right should be included in each Exhibit and the method of accounting for the consumptive use(CU) volumes for ICS. The Proposed Exhibit for the Colorado River Indian Tribes will be revised to include citation to the 2006 Consolidate Decree in *Arizona v. California*¹ and reference to the annual Water Accounting and Use Reports published annually by Reclamation.²

The legal basis for the water used for ICS creation is key to obtaining approval from the other basin states and contractors and to accurately account for the water.

These comments do not and are not intended to question the authority of each of the proponents to create ICS, however, the description of the water rights should be included and should be legally accurate.

- The MVIDD Proposed Exhibit references the Reclamation Contracts with the Secretary under the Boulder Canyon Project Act. These water rights are accounted for by Reclamation in the annual Water Accounting and Use Reports.
- The CAWCD Proposed Exhibit should include the contract number and basis of the water right being used. CAWCD has previously created System Efficiency ICS for Warren H. Brock and the Yuma Desalting Plant and Binational ICS. The footnotes in Table 22 of the Water Use and Accounting Report provide the basis for these volumes. The CAWCD reductions will be accounted for by Reclamation in the annual Water Accounting and Use Reports.

¹ *Arizona v. California*, 547 U.S. 150, 158, 169 (2006), commonly referred to as the 2006 Consolidated Decree.

² Available at <https://www.usbr.gov/lc/region/g4000/wtracct.html>

- The Wellton Mohawk proposed Exhibit for Land Fallowing and the proposed Exhibit for extraordinary conservation programs that existed on January 1, 2006 should include references to the water rights being used to create ICS. These reductions will be accounted for by Reclamation in the annual Water Accounting and Use Reports.
- The Gila River Indian Community (GRIC) includes reference to the Arizona Water Settlements Act, Pub. L. 108-451, as the source of the water rights to be used in their proposed Exhibit but then goes on to describe those rights differently than in the Act. Legal definitions of water rights should be specific and accurate to avoid mischaracterizations, confusion and so that they may be accounted for with accuracy.

The Gila River Indian Community proposed ICS Exhibit and the GRIC ICS Plan of Creation describe the water right for ICS Creation as “a right to receive 311,800 acre-feet per year (AFY) of *mainstream* Colorado River water, which is delivered through the Central Arizona Project (CAP)”; and “an entitlement to 311,800 acre-feet per year (AFY) of *mainstem* Colorado River water delivered via the Central Arizona Project (CAP).” (emphasis added)

The Arizona Water Settlements Act Pub. L. 108-451 referenced in the GRIC Exhibit does not use either of these descriptions for the water rights or entitlements of the GRIC, nor does the Settlement Agreement referenced in the Proposed Exhibit. The Contract with the Secretary for delivery of the water through the CAP describes the water being delivered as “Project Water.”

The terms “mainstream” and “mainstem” do not appear to be used in any of GRIC documents establishing their waters rights. The GRIC water rights are described as CAP Water and as Project Water.

“Mainstream” is a term defined by the Supreme Court in *Arizona v California* and used by the Court to describe those water rights adjudicated and decreed by the Court.³ The United States is enjoined from delivering water other than as provided in the decree.⁴

All water diversions, return flows, and consumptive uses from the mainstream are accounted for by Reclamation and reported in the annual Water Accounting and Use Reports. CAWCD diversions and consumptive use are reported by Reclamation in these reports. Deliveries from the CAP to end users such as GRIC are not included in these Reports.

The phrase “mainstream water delivered through the CAP” implies a very different situation than having a CAP NIA priority or Indian priority rights to

³ *Arizona v. California*, 547 U.S. 151, 153, Sec. I (A) (2006).

⁴ *Id.* at Sec. I (B).

“Project Water.” The phrase “mainstream water delivered through the CAP” describes wheeling of water that is not Project Water. This situation would use the recently developed System Use Agreement.

There is disagreement among the DCP Stakeholders about the definition of “Contractor” as used in the 2007 Interim Guidelines. This is not going to be resolved in the ICS documents. Hopefully this will be clarified when the 2007 Interim Guidelines are re-negotiated.

The Framework Agreement among the United States, the State of Arizona, and CAWCD for an Arizona ICS Program includes a work-around for this disagreement allows for creation of ICS by GRIC. The CRIT support this mechanism.

The Colorado River Indian Tribes request that the description of each entities water rights be included in the Proposed Exhibits as those rights are described in source documents that are referenced. This will permit full and accurate accounting for all ICS that is created.

The Arizona DCP documents and the high-stakes involved in these negotiations require that all those involved be precise and accurate. This is not the appropriate forum to assert unresolved legal issues. There are other forums and there will be other times to resolve the definition of “Contractor” in the 2007 Interim Guidelines.

Uniform Criteria for Creation of Extraordinary Conservation Intentionally Created Surplus (EC ICS)

The criteria for “use” of water by the Proponent should be uniform for all EC ICS.

- CRIT included in its proposed Exhibit that the lands to be fallowed would have been irrigated 3 out of the most recent 5 years. CRIT will clarify that the consumptive use average for this time period will determine the amount of EC ICS created.
- MVIDD proposes a similar methodology to that proposed by CRIT with the added step of eliminating the highest and lowest annual CU amounts.
- Wellton-Mohawk proposes in the Exhibit for Land Fallowing an average consumptive use for lands irrigated during 3 of the last 4 years.
- Wellton-Mohawk proposes in the Exhibit for the lands that were subject to Extraordinary Conservation Programs that existed on January 1, 2006 that a reduction in consumptive use will be taken from the full entitlement for the District. It would be helpful to have more information about the previous water use and the Extraordinary Conservation Program that existed on January 1, 2006.

- The GRIC proposes to not exceed a 5-year average baseline from which the reduced C.U. will be calculated.
- CAWCD proposes use of the water delivery or demand equal to the average of the highest 4 out of the previous 5 years. It is not clear if this is a reduced consumptive use from fallowing or a reduced delivery amount.

Guidelines

It would be helpful to have guidelines for creation of ICS in Arizona that include criteria for calculating reductions in consumptive use and that provide a process for drafting and submitting creation plans and delivery agreements.