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Sent via e-mail only:

Arizona Department of Water Resources
Attn: Sharon Scantlebury
P.O. Box 36020
Phoenix, AZ 85067-6020
sscantlebury@azwater.gov

Re: Written Comments on the Materials related to the Colorado River Indian Tribe
Proposal regarding Use of its Decreed Water

Dear Director Buschatske:

SRP thanks the Colorado River Indian Tribes (“CRIT” or “Tribes”), the United States, and the Arizona Department of Water Resources (“ADWR”) for the opportunity to provide written comments on the draft legislation and agreements regarding CRIT’s proposal for use of its decreed water rights off-reservation. SRP provided verbal comments at the December 7, 2020 public meeting and these written comments supplement those prior comments. First, SRP congratulates Chairwoman Amelia Flores, former Chairman Dennis Patch, Vice Chairman Keith Moses, the Tribal Council, and the CRIT Tribal Members on reaching this important milestone. The Tribe is on the threshold of an agreement with the state and federal governments on a historic program to make further economic use of the Tribe’s Colorado River rights. The CRIT program will benefit both the CRIT tribal members and off-reservation water users in the State of Arizona for decades to come.

As we noted in our December 7 comments, CRIT has shown great perseverance in getting to this point on the long road to gain authorization to do what many other Tribe’s in Arizona can do – utilize their Colorado River supplies off the reservation for further economic benefit for CRIT and others as well. The presentation of these draft agreements and federal legislation for public comment is a tremendous step in achieving CRIT’s goals, although more hard work will be required to cross the finish line.

In pursuit of these goals, as has been the history of CRIT, SRP encourages the Tribes to take the long view and seek mutual benefits when developing their water resources plans. The CRIT water that will be used off-reservation under the leasing, exchange, or underground storage program will provide important resources for off-reservation water users while also providing the Tribes with financial resources that are critically needed on the Tribes' reservation. SRP encourages CRIT to strive for maximizing the long-term benefits to both CRIT and the entities that will be fortunate to use this critical water supply.

Additionally, as the Tribes further develop their program, SRP encourages CRIT to build a broad coalition of support by creating benefits for a broad and diverse group of water interests throughout the state. Building the broad coalition of political support will be necessary to obtain the needed Congressional authorization for the program. In addition to building broad support for the program, focusing on areas of Arizona where water is needed to assist in the resolution of water supply conflicts will pave the way for future economic prosperity both on and off-reservation and cement the CRIT legacy in the water history of Arizona. The CRIT water resources under this program could be used to change the trajectory of water short areas of the state and resolve conflicts over water for the benefit of all Arizona citizens. SRP encourages the Tribe to think broadly when seeking out beneficiaries for this program.

Additionally, SRP has reviewed the draft agreements and draft legislation and offers some specific comments for the parties to consider. These are described in the Attachment to this letter. In closing, SRP looks forward to continuing to work with CRIT, state officials, and federal officials to support this historic effort and to assist in maximizing the benefits this critical resource will have on the CRIT and their fellow Arizona citizens.

Sincerely,



David C. Roberts

Attachment

Attachment

Specific Comments on the draft federal legislation (“CRIT Act”), CRIT-United States, State of Arizona Agreement (“CRIT-US-AZ Agreement”), and the CRIT-State of Arizona Agreement (“CRIT-AZ Agreement”)

CRIT Act:

1. Sections 4(c), 5(b) and 5(c). These Sections require that leases, exchanges, storage agreements, and water uses shall be in conformity with federal law generally. There may be some uncertainty over which provisions of federal law are referenced in these sections so SRP suggests that it may be useful to clarify those.
2. Section 4(d). The lease and exchange agreements referenced in Section 4(d) are subject to the Secretary’s approval. However, there does not appear to be a linkage between the Secretary’s approval of the leases and exchange agreements to CRIT compliance with the CRIT-AZ Agreement. CRIT may consider expanding the provision in Section 6(a) of the CRIT Act linking the Secretary's approval of the leases or exchange agreements to compliance with the CRIT Act and the CRIT-US-AZ Agreement to include the CRIT-AZ Agreement (referenced in Section 8 of the CRIT Act).
3. Section 7 of the CRIT-AZ Agreement and Section 9 of the CRIT-US-AZ Agreement provide for a limited waiver of sovereign immunity for ADWR solely for the purpose of interpretation or enforcement of the two agreements. SRP suggests it would be preferable for such limited waiver of sovereign immunity to be included in the CRIT Act and for it to be expanded to include such limited waiver for lease and exchange partners for interpretation and enforcement of the leases and exchanges. Moreover, it should be clarified whether the United States is a necessary party for the enforcement of the CRIT-AZ Agreement, CRIT-US-AZ Agreement, and the subsequent lease or exchange agreements. If so, the Act should also include such limited waiver of the United State’s sovereign immunity for those purposes.

CRIT-US-AZ Agreement:

1. Recital D provides that the Secretary will be authorized by the CRIT Act to approve water agreements that are in compliance with the CRIT Act and the CRIT-US-AZ Agreement. SRP offers the same comment with respect to waiver of sovereign immunity by the United States as provided in comment 3 to the CRIT Act above.
2. Section 4(2). Section 4(2) provides that CRIT shall submit proposed water agreements to the ADWR Director for review 60 days prior to execution of such agreements. The proposed water agreements and supplemental documents shall



include, among other things, a technical memoranda documenting the reduction in CRIT consumptive use. It does not appear that the technical memoranda referenced in this Section 4(2)(e) is subject to approval by the Secretary or ADWR. SRP suggests that in order to avoid any subsequent dispute over the calculation of the consumptive use quantification, such technical memoranda should be approved by both the Secretary and ADWR.

3. Section 9 provides that CRIT agrees to a limited waiver of sovereign immunity from suit by ADWR solely for the purpose of interpretation or enforcement of the CRIT-US-AZ Agreement. However, it is unclear what ADWR would be interpreting or enforcing as it does not appear that ADWR is required to make any substantive approvals under the agreement. It appears the only affirmative action CRIT is required to take as to ADWR is to provide notice, share information, and collaborate as provided in Recital E. SRP recommends the parties clarify the meaning of the limited waiver of sovereign immunity as to ADWR. In addition, as stated above in comment 3 to the CRIT Act, SRP suggests that the parties consider expanding the waiver of sovereign immunity to include lessees and exchange partners for the interpretation and enforcement of those agreements, similar to such waiver that was provided in the various Ak-Chin-Del Web leases for Central Arizona Project Water.

CRIT-AZ Agreement:

1. Recital D provides that the purpose of this agreement is for CRIT to provide notice, share information, and collaborate with ADWR. It does not seem clear from the language of the agreement what remedy ADWR has in the event CRIT does not meet these requirements. For example, if ADWR concludes under Section 4(3) that a proposed CRIT Water Agreement does not comply with the provisions of Section 4(3), it does not appear that ADWR has any remedy to enforce such noncompliance. In addition, it does not appear that CRIT is precluded from entering into a lease or exchange agreement if the provisions of Section 4(3) are not met. The parties should consider clarifying whether ADWR has a remedy if such was intended under the CRIT-AZ Agreement.
2. Section 7 provides that CRIT agrees to a limited waiver of sovereign immunity from suit by ADWR solely for the purpose of interpretation or enforcement of the CRIT-AZ Agreement. SRP provides the same comment here as provided in comment 3 to the CRIT Act and comment 3 to the CRIT-US-AZ Agreement above.