

AGREEMENT FOR FUNDING THE RECOVERY OF LONG-TERM STORAGE CREDITS STORED ON BEHALF OF SOUTHERN NEVADA WATER AUTHORITY IN THE TUCSON ACTIVE MANAGEMENT AREA

This Agreement for Funding the Recovery of Long-Term Storage Credits Stored on Behalf of Southern Nevada Water Authority in the Tucson Active Management Area (the "Agreement") is made this ___ day of _____, 2018, the Effective Date, as defined herein, between the Central Arizona Water Conservation District ("CAWCD"), a multi-county water conservation district organized under existing laws of the State of Arizona, and Southern Nevada Water Authority ("SNWA"), a Nevada joint powers agency and political subdivision of the state of Nevada. CAWCD and SNWA are sometimes collectively referred to herein as the "Parties" or individually as a "Party."

RECITALS

A. Among the statutory duties of the Arizona Water Banking Authority ("AWBA") is the authority to enter into interstate water banking agreements with appropriately authorized agencies in Nevada and California pursuant to Arizona Revised Statutes § 45-2471. On May 20, 2013, the AWBA and SNWA entered into the Third Amended and Restated Agreement for Interstate Water Banking (defined as the "Interstate Water Banking Agreement.")

B. Consistent with A.R.S. § 45-2471(C)(6), which requires the appropriate agency in Nevada or California to agree to pay all costs that are or will be incurred in storing and recovering Colorado river water, section 3.4.1 of the Interstate Water Banking Agreement states that "all costs of the development of ICUA ... shall be borne by SNWA."

C. AWBA has stored over 600,000 acre-feet of CAP Water in the aquifers of Central and Southern Arizona in order to generate long-term storage credits ("Banked LTSCs") for the purposes of interstate water banking with SNWA.

D. Pursuant to A.R.S. § 45-2423(A)(5), CAWCD has been designated the recovery agent for the AWBA for the purposes of recovering Banked LTSCs to meet interstate water banking obligations.

E. On June 9, 2010, CAWCD, AWBA, SNWA, and the Colorado River Commission of Nevada entered into a recovery agreement addressing some of the details of recovery of Banked LTSCs. The recovery agreement contemplates various recovery methods, including credit exchange.

F. One credit exchange option available would involve CAWCD recovering Banked LTSCs and exchanging the recovered water with a CAP customer that has scheduled CAP Water for delivery at an underground storage facility for annual storage and recovery purposes. Rather than accepting CAP Water for delivery, the CAP customer will accept an equivalent amount of recovered Banked LTSCs in exchange for a reduction in its CAP Water delivery.

G. As one method for SNWA to fund this recovery option, SNWA has agreed to advance certain funds to CAWCD as pre-payment for recovery of a portion of the water stored in the Tucson Active Management Area ("AMA") by AWBA for SNWA. CAWCD will use the funds to secure an exchange and recovery capacity agreement with the City of Tucson ("Tucson") allowing CAWCD to recover Banked LTSCs from the Tucson recovery infrastructure up to the volume of the SNWA Tucson Recovery Capacity, and not to exceed the Maximum Total SNWA Tucson Recovery Capacity, and exchange the recovered water for a reduction in Tucson's CAP water deliveries.

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

**ARTICLE 1
DEFINITIONS**

For the purposes of this Agreement, the following terms have the meaning defined in this Article. The first letters of terms so defined are capitalized herein.

- 1.1 “ADWR” shall mean the Arizona Department of Water Resources.
- 1.2 “Banked LTSCs” shall mean the long-term storage credits as defined in A.R.S. § 45-802.01 that were accrued by the AWBA for the purposes of interstate water banking and that are transferred from the AWBA to CAWCD for recovery by CAWCD.
- 1.3 “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.
- 1.4 “CAP Water” shall mean “Project Water” as that term is defined in the CAP Repayment Stipulation.
- 1.5 “Consolidated Decree” shall mean the Consolidated Decree entered by the United States Supreme Court in *Arizona v. California*, 126 S. Ct. 1543, 547 U.S. 150 (2006).
- 1.6 “Effective Date” shall mean the date on which all of the following events have occurred: (1) each of the Parties have executed this Agreement; and (2) AWBA, CAWCD, SNWA and CRCN have each signed a letter from AWBA acknowledging the recovery and exchange of Banked LTSCs that will occur pursuant to this Agreement.
- 1.7 “Arizona Water Company Funding Agreement” shall mean the Agreement for Funding the Recovery of Long-Term Storage Credits Stored on behalf of Southern Nevada Water Authority among CAWCD and SNWA dated March 29, 2017, relating to the recovery of Banked LTSCs from an Arizona Water Company recharge and recovery facility in the Pinal Active Management Area.
- 1.8 “ICUA” shall mean Intentionally Created Unused Apportionment as that term is defined in 43 CFR 414.
- 1.9 “Interstate Water Banking Agreement” shall mean the Third Amended and Restated Agreement for Interstate Water Banking” or any subsequent amendments or modifications to the Third Amended and Restated Agreement.
- 1.10 “Recovery Capacity Payment” shall have the meaning provided in section 3.1 of this Agreement.
- 1.11 “Regulatory Fees” shall have the meaning provided in section 3.2 of this Agreement.

1.12 “SNWA Tucson Recovery Capacity” shall mean up to 10,000 acre-feet per year of Banked LTSCs that SNWA may request to be developed as ICUA and that may be recovered by CAWCD in coordination with Tucson.

1.13 “Maximum Total SNWA Tucson Recovery Capacity” shall mean up to 65,000 acre-feet of Banked LTSCs that SNWA may request to be developed as ICUA and that may be recovered by CAWCD during the Term of this Agreement.

1.14 “Term” shall mean the 31-year period commencing on January 1, 2020, and ending on December 31, 2050.

ARTICLE 2 TERM AND TERMINATION

2.1 Term of SNWA Tucson Recovery Capacity. SNWA’s Tucson Recovery Capacity shall be valid for a period of 31 years commencing on January 1, 2020, and ending on December 31, 2050 (defined as the “Term”).

2.2 Termination. Should the SNWA Tucson Recovery Capacity become permanently unavailable or non-operational due to the action or lack of action of Tucson or another third party, either Party may terminate the Agreement by written notice to the other Party.

2.3 Reimbursement of Payment. If this Agreement is terminated pursuant to section 2.2, CAWCD shall diligently seek from Tucson reimbursement of that portion of the Recovery Capacity Payment attributable to the remaining volume of Banked LTSCS (in acre-feet) that could have been recovered and exchanged at the time the Agreement was terminated at a reimbursement rate of \$15.38 per acre-foot. For example, if this Agreement is terminated pursuant to section 2.2 when 35,000 acre-feet of Banked LTSCs could still have been recovered, CAWCD shall seek reimbursement of \$538,300 from Tucson [$\$15.38/\text{acre-foot} \times 35,000 \text{ acre-feet} = \$538,300$]. To the extent CAWCD receives reimbursement from Tucson, CAWCD shall transfer those proceeds to SNWA.

ARTICLE 3 DEVELOPMENT OF SNWA RECOVERY CAPACITY

3.1 Recovery Capacity Payment. Within thirty (30) days following the Effective Date, SNWA shall transfer one million dollars (\$1,000,000) to CAWCD (the “Recovery Capacity Payment”). CAWCD shall use the Recovery Capacity Payment exclusively to secure the SNWA Tucson Recovery Capacity for the Term of this Agreement.

3.2. Regulatory Fees. SNWA acknowledges that CAWCD will incur certain ADWR fees to implement the recovery and exchange of Banked LTSCs on behalf of SNWA, including but not limited to application fees for recovery permits, a fee for a notice of water exchange, annual fees for the assignment of Banked LTSCs from AWBA to CAWCD and fees for the recovery of Banked LTSCs (collectively, “Regulatory Fees”). SNWA agrees to pay for any Regulatory Fees incurred by CAWCD to implement this Agreement. CAWCD shall submit an itemized invoice to SNWA for any Regulatory Fees incurred by CAWCD to implement this Agreement along with a copy of the invoice and/or receipt issued by ADWR for such Regulatory Fees. Within sixty (60) days of receipt of CAWCD’s invoice, SNWA shall make payment to

CAWCD in the amount invoiced by electronic funds transfer to the account designated by CAWCD pursuant to section 3.3 of this Agreement. Notwithstanding anything to the contrary in the Arizona Water Company Funding Agreement, SNWA agrees to pay for Regulatory Fees incurred by CAWCD to implement the Arizona Water Company Funding Agreement under the same invoicing procedure provided in this section 3.2. CAWCD shall keep full and complete records of the Regulatory Fees incurred to implement this Agreement and the Arizona Water Company Funding Agreement and the amounts paid by SNWA to reimburse CAWCD for such Regulatory Fees. CAWCD shall make those records available to SNWA for inspection, audit, and copying during normal business hours without charge. Prior to taking any action with ADWR that will cause CAWCD to incur Regulatory Fees for which CAWCD will seek reimbursement from SNWA pursuant to this Section 3.2, CAWCD shall consult with SNWA regarding the action and the Regulatory Fees that CAWCD expects to incur.

3.3 Electronic Funds Transfer. Payments to CAWCD under this Agreement shall be made by Electronic Fund Transfer to the Treasury, State of Arizona, at the account number designated by CAWCD, or to such other account as CAWCD may designate.

3.4 Account Maintenance. CAWCD will ensure that all payments submitted by SNWA are properly accrued in the proper account maintained by CAWCD.

ARTICLE 4 SNWA RECOVERY CAPACITY

4.1 SNWA Tucson Recovery Capacity. For any year during the Term in which SNWA requests development of ICUA pursuant to the Interstate Water Banking Agreement, CAWCD shall recover and exchange up to 10,000 acre-feet per year of Banked LTSCs in the Tucson AMA at no additional charge to SNWA with the exception of reimbursement of CAWCD, as provided in section 3.2 of this Agreement, for any Regulatory Fees incurred by CAWCD to implement this Agreement. Recovery of any of the SNWA Tucson Recovery Capacity pursuant to this Agreement shall not count against the 50,000 acre-feet of Banked LTSCs for which recovery has been pre-paid as described in the Interstate Water Banking Agreement. Furthermore, this Agreement creates capacity only and SNWA's Interstate Account balance will not be reduced if SNWA chooses not to recover any or all of SNWA's Long Term Storage Credits made available pursuant to this Agreement. Unless otherwise agreed to by the Parties in writing, only Banked LTSCs created at the following Tucson AMA facilities may be recovered and exchanged pursuant to this Agreement: Lower Santa Cruz Recharge Project, Avra Valley Recharge Project, Pima Mine Road Recharge Project and Central Avra Valley Storage and Recovery Project.

4.2 Maximum Total SNWA Tucson Recovery Capacity. In no event may the maximum volume of Banked LTSCs that are recovered and exchanged by CAWCD pursuant to this Agreement exceed 65,000 acre-feet for the Term; provided, however, that this Agreement shall in no way limit SNWA's right to recover Banked LTSCs under other arrangements that may run concurrently.

4.3 Use it within Term or Lose It. CAWCD's obligation to recover and exchange Banked LTSCs using the SNWA Tucson Capacity at no additional charge, with exception of the Regulatory Fees referenced in sections 3.2 and 4.1, is limited to the Term whether SNWA exercises the Maximum Total SNWA Tucson Recovery Capacity or not.

ARTICLE 5
DEFAULT AND REMEDIES

5.1 Specific Performance. The Parties agree that monetary damages will be ineffective in remedying any breach of this Agreement, other than nonpayment, and that a court may order specific performance.

5.2 Default. CAWCD and SNWA shall pay all monies and carry out all other performances, duties and obligations agreed to be paid and/or performed by them pursuant to this Agreement. A default by CAWCD or SNWA in the covenants and obligations to be kept and performed shall be an act of default under this Agreement.

5.3 Failure by a Third Party to Perform. The Parties acknowledge that the SNWA Tucson Recovery Capacity developed pursuant to section 3.1 is under the care and control of a third party and that the SNWA Tucson Recovery Capacity may become permanently unavailable or non-operational for reasons outside the control of either Party. If the SNWA Tucson Recovery Capacity does become permanently unavailable or non-operational due to the action or lack of action by a third party, neither Party to this Agreement shall be considered to be in default and the Parties' only recourse is termination of this Agreement and any reimbursement of the Recovery Capacity Payment available pursuant to sections 2.2 and 2.3 of this Agreement, respectively.

5.4 Uncontrollable Forces. No Party to this Agreement shall be considered in default in the performance of any of its obligations under the Agreement (other than the obligation of SNWA to make payment) when a failure of performance shall be due to uncontrollable forces. The term "uncontrollable force" shall mean any cause beyond the control of the Party unable to perform such obligation, including, but not limited to, failure or threat of failure of facilities, flood, earthquake, storm, fire lightning, and other natural catastrophes, epidemic, war, civil disturbance or disobedience, strike, labor dispute, labor or material shortage, sabotage, restraint by order of a court or regulatory agency of competent jurisdiction, and action or non-action by, or failure to obtain the necessary authorizations or approvals from, any federal or state governmental agency or authority, which by exercise of due diligence such Party could not reasonably have been expected to avoid and which by exercise of due diligence it shall be unable to overcome. Nothing contained herein shall be construed to require any party to settle any strike or labor dispute in which it is involved.

5.5 Remedy. If a default by CAWCD or SNWA, then, within thirty (30) days following notice of such default by the non-defaulting Party, the defaulting Party shall remedy such default either by advancing the necessary funds and/or rendering the necessary performance. Such notice shall specify the existence and nature of such default.

5.6 Time is of the Essence. If a dispute arises over any action to be undertaken pursuant to the terms of this Agreement, the Parties recognize and acknowledge that time is of the essence in the conduct of the Parties under the terms of this Agreement.

ARTICLE 6
REPRESENTATIONS AND WARRANTIES

6.1 Representations and Warranties of SNWA. SNWA represents and warrants as follows: (i) SNWA is a Nevada joint powers agency and political subdivision of the state of Nevada, created by agreement dated July 25, 1991, as amended November 17, 1994, and January 1, 1996, pursuant to N.R.S. §§ 277.074 and 277.120. SNWA is authorized under N.R.S. § 538.186 to enter into this Agreement and, pursuant to its contract issue under section 5 of the Boulder Canyon Project Act of 1928, SNWA has the right to divert ICUA released by the Secretary for use within the State of Nevada pursuant to Art. II(B)(6) of the Consolidated Decree; (ii) to the best of SNWA's knowledge the execution and delivery hereof to CAWCD and the performance by SNWA of its obligation under this Agreement will not violate the terms or provisions of any agreement, document or instrument to which SNWA is a party or by which SNWA is bound; and (iii) all proceedings required to be taken by or on behalf of SNWA to authorize it to make, deliver and carry out the terms of this Agreement have been duly and properly taken.

6.2 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 SNWA 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 Agreement have been duly and properly taken.

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 its conflicts of laws provisions. Any action to resolve any dispute regarding this 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 Agreement or of any duty, covenant, obligation or undertaking established thereunder.

7.3 Successors to CAWCD and SNWA. If CAWCD should be dissolved or cease to perform any of the functions provided for in this Agreement, the rights and obligations of CAWCD shall be binding upon, and inure to the benefit of, any successor multi-county water conservation district or other legal subdivision of the State of Arizona that succeeds to such functions. If the SNWA should be dissolved or cease to perform any of the functions provided for in this Agreement, the rights and obligations of the SNWA shall be binding upon, and inure to the benefit of, any successor joint powers agency or other legal subdivision of the State of Nevada that succeeds to such functions or, in the absence of any such agency, the members of the SNWA.

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

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 Agreement shall not be deemed a waiver of any other term, covenant, or condition of this Agreement.

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

7.7 Captions. All captions, titles, or headings in this 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 Agreement.

7.8 Notices. Except as otherwise required by law, any notice given in connection with this 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):

SNWA:

For delivery and U.S. mail use c/o General Manager
1001 S. Valley View Boulevard
Las Vegas, Nevada 89153

With a copy to: General Counsel
1001 S. Valley View Boulevard
Las Vegas, Nevada 89153

CAWCD:

For delivery use: c/o General Manager
23636 N. 7th Street
Phoenix, AZ 85024

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

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.

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 Agreement.

7.10 Cancellation. Notice is hereby given of the cancellation provisions of A.R.S. § 38-511.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement on the dates written below.

CAWCD: **CENTRAL ARIZONA WATER CONSERVATION DISTRICT**

By: _____
Theodore C. Cooke

Its: General Manager

Date: _____

Approved to as form:

Jay Johnson, General Counsel

SNWA: **SOUTHERN NEVADA WATER AUTHORITY**

By: _____
John J. Entsminger

Its: General Manager

Date: _____

Approved as to form:

Greg J. Walch, General Counsel