Southern Arizona Water Rights Settlement Act

The San Xavier District ("SXD") of the San Xavier Indian Reservation, Arizona, is one of 11 political subdivisions of the Tohono O'odham Nation ("Nation"). Water rights appurtenant to that portion of the San Xavier Reservation that lies within the Upper Santa Cruz River Basin (eastern portion of the Reservation) was the subject of the United States v. Tucson and Papago Tribe v. Tucson water rights litigation filed in 1975. This litigation was settled by the Southern Arizona Water Rights Settlement Amendments Act of 2004, P.L. 108-451, 118 Stat. 3536 (December 10, 2004) (SAWRSA) and implementing settlement agreements, with an Enforceability Date of December 14, 2007.

A critical component of SAWRSA is Section 310, the Cooperative Fund. The Fund was created by the initial settlement legislation of 1982, Southern Arizona Water Rights Settlement Act, P.L. 97-293, 96 Stat. 1261 (October 12, 1982), with an initial balance of $10.5 million. The purpose of the fund is to pay the delivery cost of 66,000 AFY of SAWRSA CAP Water to the Tohono O’odham Nation and the San Xavier District as replacement for the natural San Xavier Reservation water supply, which was
unlawfully appropriated by Tucson and other defendants prior to 1982. The Act requires that the Interior Secretary deliver 50,000 AFY to the San Xavier Reservation and 16,000 AFY to the Schuk Toak Reservation. Of the 66,000 AFY, 37,800 AFY is Indian priority water, equivalent to CAP municipal and industrial delivery priority water ("M&I"), and 28,200 is non-Indian agricultural priority water ("NIA").

SAWRSA also required Tucson to make available to the Secretary 28,200 AFY of effluent to offset the Secretary's obligation to deliver 28,200 AFY of CAP NIA water to the Nation. The Secretary takes deliver of the effluent at Tucson's Roger Road treatment plant outfall into the bed of the Santa Cruz River. The Secretary allows the effluent to recharge into the bed of the Santa Cruz River as an in-channel or "managed" recharge project. Pursuant to Arizona law, this generates marketable long-term storage credits equal to 50% of the water actually recharged.

In recent years the Nation has taken delivery of the full 66,000 AFY of SAWRSA CAP Water to which it is entitled, although it is not yet able to use the full amount. The Nation recharges unused SAWRSA CAP Water at off-Reservation recharge facilities to generate marketable Arizona long-term storage credits.

**Bureau of Reclamation Firming Obligation**

Section 105(b)(1)(A) of the Arizona Water Settlements Act, P. L. 108-451, 118 Stat. 3478 (December 10, 2004), requires the Interior Secretary to “firm” 28,200 AFY of NIA priority water to CAP M&I delivery priority for 100 years. It was originally
expected that this water would be Indian priority CAP Water, but the Arizona
Congressional delegation negotiated with the Secretary to firm NIA water instead so
that Arizona interests could have the top priority Indian water. The BOR has estimated
that this obligation requires approximately 900,000 AFY of ongoing storage. In the
absence of specific dedicated surface or groundwater storage, the BOR maintains a
“firming account” of marketable long-term storage credits, which it augments in several
ways. The primary source of credits for the firming account is managed recharge of the
Secretary’s 28,200 AFY of Tucson effluent in the Santa Cruz River. After evaporation
losses, this currently generates approximately 12,000 AFY of recharge credits. As of
last year, the BOR had accumulated only 120,000 credits in the Tohono O’odham
firming account.

The BOR has taken the position that credits generated by effluent recharge are
interchangeable with the firming fund such that effluent recharge credits in the firming
fund can be sold to benefit the Cooperative Fund. Only the sale of these credits in the
past has kept the Cooperative Fund viable to the present. Such sales reduce the credits
available in the firming fund.

The Cooperative Fund is in Crisis

Virtually all of the water supply for the San Xavier Reservation is SAWRSA CAP
Water. In addition to its own use, the District provides Asarco with 10,000 AFY of its
SAWRSA CAP Water to reduce Asarco’s groundwater use. The Cooperative Fund was
intended to be a permanent fund generating enough annual interest income to pay CAP delivery costs. Interest rates were much higher when the Fund was established in 1982 than subsequently. The Fund was underfunded at the outset, and is unable to generate enough income to pay delivery costs in perpetuity as intended. Funds available to pay delivery costs are sufficient only through 2022 [CHECK THIS], despite the fact that fixed OM&R is paid by the Lower Colorado River Basin Development Fund ("Basin Fund"), and despite the fact the Nation and the Bureau of Reclamation ("BOR") have worked diligently to find ways to minimize the annual delivery cost paid by the Fund and to augment income to the Fund. Shortfalls are expected in the Basin Fund as early as 2020, and the Basin Fund is expected to run out entirely in 2046, leaving no source of funds to pay SAWRSA CAP Water delivery costs. Despite the Nation's efforts to persuade Congress to augment the Cooperative Fund's capital account sufficiently to generate enough income to pay SAWRSA CAP Water delivery costs, the probability that Congress will do this in the foreseeable future is nil.

To keep the Fund viable for a few more years, the Nation and the BOR have entered into a firming agreement whereby the BOR uses firming funds available from the LCRBDF to pay part of variable OM&R charges to deliver SAWRSA CAP Water. This reduces outflow from the Cooperative Fund and extends the life of the Fund. In return, the Nation must earmark equivalent Arizona long-term storage credits held in its credit account with the Arizona Department of Water Resources as committed to the BOR's firming fund.
Practically speaking, this means that when NIA water shortages occur and the BOR must draw on its firming fund to meet its obligation to deliver 28,200 AFY of NIA water, it will simply notify the Nation that up to 28,200 AFY of earmarked credits have been "delivered" to the Nation to make up the shortage. The earmark will come off that quantity of water. However, the economic benefit to the Nation promised by SAWRSA from the delivery of the shortage quantity of water is lost to the Nation because the shortage amount is not actually delivered. The Nation simply loses the economic benefit of that quantity of water. Because of the anticipated failure of the Cooperative Fund, and anticipated shortages in the availability of NIA water to meet the BOR's obligation, the Nation is not and will not receive the full benefit of the water rights settlement they made in good faith with the state of Arizona and non-Indian water users in the Tucson Basin. This constitutes yet another failure by the United States, and in this case, the State of Arizona, to fulfill legal, treaty and contractual obligations to Arizona Indian Tribes.

95% Credit for Managed Effluent Recharge is Critical

The BOR estimates that monies available in the Fund to pay variable OM&R for delivery of SAWRSA CAP Water will only last through 2020. The Arizona law allowing a 50% credit for managed recharge sunsets in 2025. According to the BOR, the Basin Fund will be able to pay fixed OM&R for the delivery of SAWRSA CAP Water only through 2040, leaving no source of funds to pay any part of SAWRSA CAP Water delivery costs.
However, the BOR also estimates that if Arizona law permanently allowed 95% credit for recharge of the Secretary's effluent, the Cooperative Fund could pay SAWRSA CAP Water delivery costs indefinitely [CHECK NOTES]. It is imperative that this Council support the efforts of the Tohono O'odham Nation, the San Xavier District, and the BOR to persuade the Arizona legislature to permanently allow 95% credit for managed Tucson effluent recharge in the Santa Cruz River.