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THE ARIZONA DROUGHT CONTINGENCY PLAN: A TRIBAL PERSPECTIVE



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THE ARIZONA DROUGHT CONTINGENCY PLAN: A TRIBAL PERSPECTIVE

INTRODUCTION

Historically, Native American tribes have not been included in important water discussions in Arizona, but that changed with the Drought Contingency Plan (DCP) — a multi-state agreement designed to secure the future of water in the Southwest.

“Tribes in Arizona, including the Gila River Indian Community and the Colorado River Indian Tribes, played a significant role in the new Drought Contingency Plan implementation,” said Rep. Raúl M. Grijalva (D-AZ). “Without tribal participation, the DCP would not be possible and I’m grateful that we were able to reach consensus that protects tribal use of this sacred resource.”

The crafting of the Colorado River Basin Drought Contingency Plan illustrates the inherent complexity of decision-making in crowded desert water policy. Throughout the process, stakeholders with conflicting interests and a shared sense of responsibility worked together to strike an agreement that protected Arizona’s water future. Tribes are key stakeholders in Arizona water policy and two contributed in significant ways to ensure that the parties would finally reach agreement.

This article focuses on water from Lake Mead, and does not examine considerations of groundwater, other surface water, or any other sources. It begins with a brief overview of the federal trust relationship with tribal governments and a background on the Central Arizona Project, which brings Colorado River water to central and southern Arizona. It then outlines the DCP negotiations from the regional level to the State of Arizona. Finally, the article examines Arizona tribes’ contributions to the DCP negotiations as well as the deal itself.

THE FEDERAL TRUST RELATIONSHIP WITH TRIBAL NATIONS

In the established legal relationship between the federal government and American Indian and Alaska Native tribal governments, the former acts as a trustee to the latter and thus has a fiduciary responsibility to tribes and their citizens for the provision and management of services. This relationship has a foundation in the U.S. Constitution and has been reinforced over centuries through acts of Congress, treaties, and judicial rulings. Water rights connected with Indian reservations became a legal question as non-Indian settlement expanded westward throughout the mid-to-late

1800s. In the 1908 case *Winters v. United States*, the U.S. Supreme Court held that the federal reservation of lands for a tribal homeland or other use implies a reservation of water “sufficient to fulfill the purposes of the reservation.”[1] Nevertheless, a tribe must obtain a court decree in order to have its water rights quantified and made enforceable. To date, only nine Arizona tribes have fully resolved their water rights claims. Finalizing a tribe’s water rights is a complex process that can take decades of litigation and negotiation involving tribes, the federal government, state agencies, water districts and water users.[2]

BACKGROUND OF CAP AND ARIZONA TRIBAL ALLOCATIONS

Colorado River water is shared by users in seven states and Mexico. The river “is managed and operated under numerous compacts, federal laws, court decisions and decrees, contracts, and regulatory guidelines collectively known as the ‘Law of the River.’”[3] For the purposes of allocation, the system is “divided” into Upper and Lower Basins. The Upper Basin comprises Colorado, New Mexico, Utah and Wyoming. The Lower Basin comprises Arizona, Nevada, California, and Mexico. Lake Mead is a massive reservoir near Las Vegas that stores water for the Lower Basin.

The Central Arizona Project (CAP) is a canal that conveys up to 1.6 million acre-feet of water annually from the Colorado River, on Arizona’s western border, to the most populated metropolitan areas in the state. The first CAP delivery was made in 1985, and the CAP now supplies 40% of the water for the greater Phoenix area and 60% of the water for the greater Tucson area.[4]

Construction of the CAP was paid for with federal loans. In order to secure California’s support for the federal legislation to finance the CAP, Arizona agreed that CAP water users would be “junior” (*i.e.*, lower) in priority to other Lower Basin users, meaning that CAP supplies would be reduced first if there were insufficient water to meet the demands of all Lower Basin users.[5]

At the time of the CAP’s inception, only a few Arizona tribes had resolved their water rights claims. Today, Arizona tribes have a right to nearly 600,000 acre-feet of CAP water per year and 772,000 acre-feet of Colorado River mainstem water (see Figures 1 and 2). Mainstem water is diverted and used directly from the river and not sent into the CAP system. Forty-six percent of the CAP supply is allocated for tribes, making CAP the largest single provider of Colorado River water to tribal water users in the Colorado River system.[6]

Figure 1. Tribal Allocations of CAP Water in Arizona

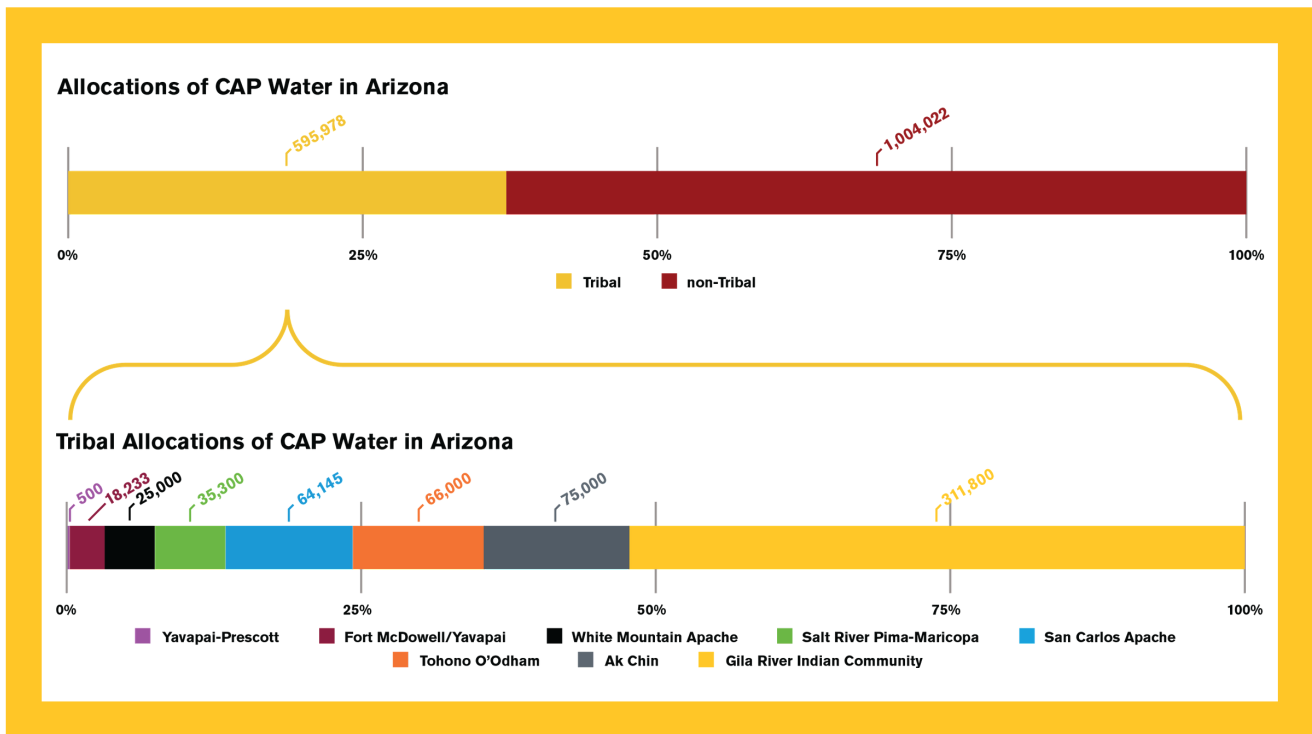
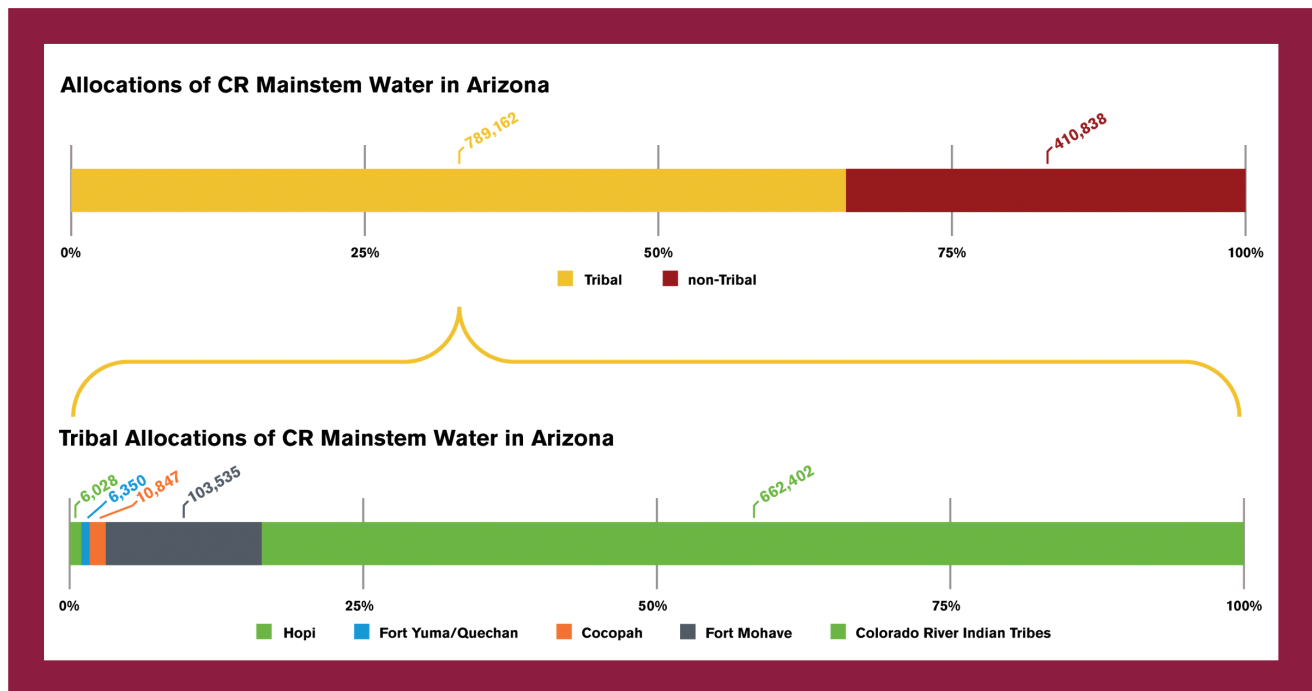


Figure 2. Tribal Allocations of CR Mainstem Water in Arizona



THE DCP IN ARIZONA

For decades, Colorado River Basin water managers have been concerned by a trend of declining elevations in Lake Mead. This trend is due in large part to a “structural deficit” — that is, water in the reservoir is over-allocated. Almost two decades of drought and increasing demand by water users have exacerbated the problem.

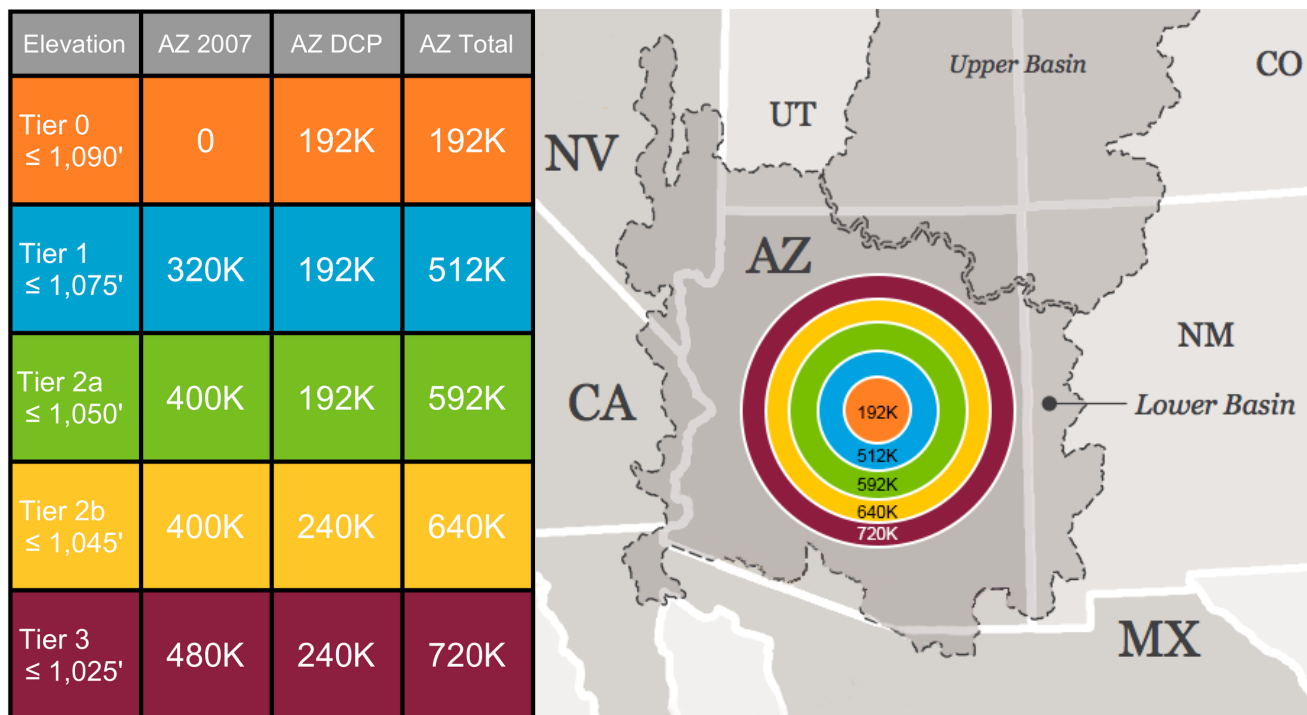
In 2007, Colorado River users signed a landmark agreement aimed at shoring up Lake Mead. The agreement, nicknamed the “Interim Guidelines,” specified voluntary cuts to Lower Basin users that would be triggered if Lake Mead declined to certain elevations. CAP contract holders were in line to take the greatest cuts because of their “junior” priority. At the time the Interim Guidelines were adopted, water managers knew that more rigorous measures would eventually be needed to protect Lake Mead and through an extensive negotiation process, they crafted the Drought Contingency Plan, which was signed into law by President Donald Trump on April 16, 2019.[7] The DCP consists of two parts, one applying to the Upper Basin and the other to the Lower Basin.

The goal of the Lower Basin DCP is to conserve water in Lake Mead to reduce the probability that water levels will reach “critical elevations that could cause draconian reductions in water deliveries”[8] (e.g., severe shortages that would impact millions of municipal users). The agreement consists of two parts. First, it prescribes significantly greater reductions in water deliveries than those agreed to in the Interim Guidelines. Figure 3 shows the cuts for each agreement and additional cuts specified in the DCP. Second, the agreement includes a comprehensive set of rules designed to incentivize conservation of water in Lake Mead. Without these conservation rules, the Lower Basin might have faced a scenario in which water users sought to withdraw all of the water they could from Lake Mead for use or storage elsewhere, prompting a catastrophic drop in the lake’s elevation.

Under Arizona law, legislative authorization is required for the state to enter an agreement related to Colorado River water supplies, a requirement that is unique among the seven Colorado Basin states.[9] This requirement meant that the DCP agreement needed to garner the support of the Arizona Legislature, the governor, and politically powerful stakeholders. Tribes — because of their large, high priority water rights — had a seat at the negotiating table, a voice in the discussion of how the state would manage and distribute the burden of its water conservation efforts.

The deal Arizona water users reached provides all impacted water users a degree of mitigation in the form of alternative water supplies or funding. Like the 2007 Interim Guidelines, the DCP is a stop gap and not a permanent fix for the structural deficit. The DCP will remain in place until 2026. In the meantime, negotiations for a new Colorado River management plan may soon be underway.

Figure 3. 2007 (Interim Guidelines) and 2019 (DCP) Reduction Tiers



ARIZONA TRIBES DIVE IN

Political discourse on water issues insists that "we're all in this together." And while that is the reality, it's also true that tribes in the Southwest have been left out of major water decisions in the past. Arizona water users were able to reach a deal on the DCP, in part, because Arizona tribes participated in and led negotiations on conservation efforts and water exchanges. Not all tribes participated in the DCP negotiations, but two tribes in particular stood out as crucial partners in the DCP negotiation: the Colorado River Indian Tribes and the Gila River Indian Community. Both had a seat on the DCP Steering Committee — the team of negotiators who drafted the DCP — and both tribes possess rights to large quantities of water, giving them considerable leverage in the political deal making that occurred behind the scenes of the DCP negotiations and enabling them to share the burdens of their municipal and agricultural neighbors in the state.

"There was a definite paradigm shift in what happened with the DCP," said Gov. Stephen Roe Lewis, who represented the Gila River Indian Community on the Steering Committee. "Tribes need to be at the table when important water decisions are being made. ... [Historically], tribes weren't part of the decision-making process. So, the results were forced upon us." [10] Things seemed to be going the same way with the DCP negotiations in Arizona until 2016, when the Gila River Indian Community inserted itself into the conversation.

GILA RIVER INDIAN COMMUNITY

The Gila River Indian Community (GRIC or the Community) sits on 580 square miles just south of the Phoenix metropolitan area and runs along the now-dry Gila River. The Community is comprised of Akimel O’otham (Pima) and Pee Posh (Maricopa) tribal members. It has a CAP allocation of 311,800 acre-feet per year, which is the largest single allocation of CAP water in the entire system.

“When you look at this Drought Contingency Plan, tribes weren’t there at the beginning. All the players ... knew about the potential shortages [back in] 2013, and we were not even told by federal authorities until 2015,” said Lewis in an interview. “The federal government, through the BOR (Bureau of Reclamation), they were already working on a plan without our input and that would’ve devastated a portion of our water and that’s why we had to get involved.”

Rather than let others decide their fate for them, tribes decided to become involved in the process and make decisions about water on their own terms. “We kind of forced ourselves into the discussion in 2016. We wanted a seat at the table,” said Lewis.

During the negotiations, Pinal County agricultural representatives proposed mitigating cuts by transferring higher priority water, including tribal supplies, to the lower priority users, such as Pinal County farmers. The Gila River Indian Community rejected this proposal and responded by laying out a set of negotiating principles, which it included in an October 18, 2018 letter[11]:

1. Mitigation supplies should not come from Lake Mead, since the purpose of the LBDCP (Lower Basin DCP) was to reduce water use from Lake Mead.
2. The LBDCP should be aimed at filling up Lake Mead “to the maximum extent possible” through “a robust program of System Conservation,” which remunerates water users for permanently leaving supplies in the lake.
3. The burdens of cuts and the benefits of mitigation should be shared equitably among all interested parties and water users.
4. No Tribal water rights would be given up as part of LBDCP.

- *GRIC will contribute more than 33,000 acre-feet per year for 25 years beginning in 2020.*

- *GRIC's contribution benefits the homebuilding community in Arizona, supporting growth and conservation efforts while avoiding threats to Tribal water rights.*

Lewis said the final Arizona DCP agreement adheres to all these principles. “We feel good about it or else our Council would not have approved,” he said.

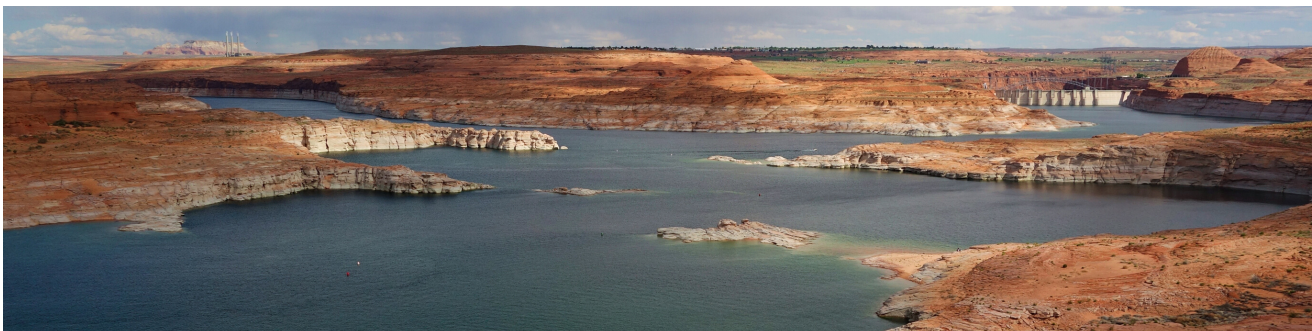
In addition to establishing some foundational principles of agreement, the tribe kicked in some of its own water to break a stalemate between water users. “The process was breaking down,” said Lewis. “You [had] a diverse group of stakeholders and they were just at loggerheads, and it was the tribes that stepped up.”

One group facing shortage impacts was the homebuilding industry, which for years has relied on excess CAP water as a supply for new housing. Before a new residential development can be platted in the CAP service territory (Maricopa, Pinal and Pima counties), a developer must demonstrate that a 100-year supply of water to serve the development is legally, physically and financially available. Homebuilders have long looked to excess CAP supplies as a source of water they are required to replenish when groundwater is pumped to supply developments.

On December 5, 2018, the Community announced that it would sell up to 33,185 acre-feet of water per year for 25 years (a total of nearly 830,000 acre-feet) beginning in 2020 to the Central Arizona Groundwater Replenishment District (CAGR), a major supplier of water for new homebuilding. “We believe our action today helps build momentum to have Arizona approve DCP and protect Lake Mead, but at the same time ensure that water supplies are available for an important sector of Arizona’s economy,” said Lewis in a press release.[12]

“The Community’s proposal and ultimate agreement ... was an unspoken, but important factor of DCP,” said Cheryl Lombard, the president and CEO of Valley Partnership, which represented the development industry on the DCP Steering Committee. “It provided certainty to the Valley [and Tucson] for ongoing growth with a stable, financially viable water agreement for CAGR.”

The tribe’s proposal provided certainty and security for GRIC, as well. “The important goal was to protect the [level of water in] Lake Mead. That stability was important to the Community,” said Lewis.



COLORADO RIVER INDIAN TRIBES

The Colorado River Indian Tribes (CRIT) is a community of Navajo, Hopi, Chemehuevi, and Mojave people. CRIT is a mainstem Colorado River water user (see Figure 2). CRIT's water rights were decreed by the U.S. Supreme Court in *Arizona v. California* in 1963. It has a right to 662,402 acre-feet of water per year from Arizona's water supply. The community, which runs along 56 miles of the lower Colorado River on the Arizona-California border, is an important actor in the DCP because it has the largest individual allocation of water flowing out of Lake Mead.

During the DCP negotiations, CRIT offered to store 50,000 acre-feet annually in Lake Mead over the course of three years, beginning in 2020. This was “to head off drought caused water shortages and help insure the state of Arizona in the Drought Contingency Planning,” according to a tribal press release.[13] The tribe agreed to store this water for below market price “for the benefit of the River and to move the process forward in Arizona for approval of the Drought Contingency Plan,” said CRIT Vice Chairman Keith Moses. [14, 15]

CRIT Chairman Dennis Patch said in a November 9, 2019 press release, “We have been working with the state for the past two years to help protect the River and to help the State of Arizona to deal with the drought and shortages. The proposal we delivered today puts real numbers to that offer that are significant to getting the necessary approvals for DCP.”[16]

Patch said CRIT would like to do more in the way of leasing its water, but its current settlement agreement does not allow it to do so. “We want to develop our full water rights and we also want federal legislation that permits us to lease water to Arizona,” said Patch at the ASU 2019 Congressional Conference.[17] “Right now, we only have the right to store water in Lake Mead.” Nonetheless, CRIT's offering contributed to the overall conservation efforts of the DCP. Ultimately, CRIT's goal is to prevent the Colorado River from drying out. “We've always lived on the river and we've always been farmers,” said Patch in an interview. “We've seen several rivers in Arizona go dry,” and stopping that from happening to the Colorado River is “our first priority.”

- *CRIT will store 50,000 acre-feet in Lake Mead over the course of three years, beginning in 2020.*
- *The Tribe agreed to store water at below market price “for the benefit of the River and to move the process forward in Arizona for approval of the Drought Contingency Plan,” said CRIT Vice Chairman Keith Moses.*

CONCLUSION

The multi-state Colorado River Basin Drought Contingency Plan was negotiated laboriously for years. In Arizona, two tribes made sure their voices were represented and their rights were protected while also finding ways to assist their neighbors and contribute to the state's conservation goals.

Tribes should participate in all water policy decisions that affect them. Tribes bring a unique perspective to water issues and some possess rights to large quantities of water, which means they can potentially play a key role in formulating solutions. When tribes' voices are excluded or forgotten, opportunities for innovative solutions from an indigenous perspective are lost. CRIT and GRIC provided solutions that removed barriers to the success of the DCP agreement. Their involvement in the DCP negotiations demonstrates what is possible when tribes are included. CRIT and GRIC assuaged the concerns of some key stakeholders and facilitated the finalization of the Arizona DCP agreement.

Sen. Martha McSally (R-AZ) stood behind the Arizona DCP when the multi-state agreement was presented for ratification in U.S. Congress. "It has never been more important for tribal, state and other stakeholders to work together to address shared challenges – like protecting the water supply for millions of people," she said. "The DCP Agreement serves as an example of the progress that can be made when stakeholders come together to tackle critical issues."

In years to come, the Arizona DCP may serve as an example of how water stakeholders can come together in an agreement for the greater good – in large part due to the leadership of tribal stakeholders.

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-Sen. Martha McSally (R-AZ)

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