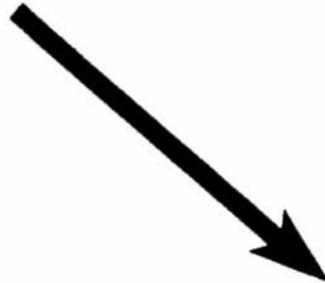


SUMMARY OF 1992 WATER EXCHANGE ACT

PREPARED BY THE ARIZONA DEPARTMENT OF WATER RESOURCES -- MAY 1994



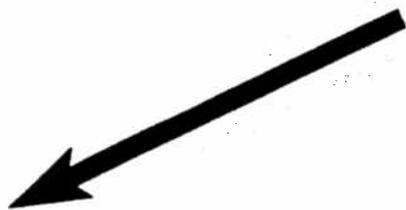
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GROUNDWATER



CAP & SURFACE WATER



SUMMARY OF 1992 WATER EXCHANGE ACT

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SUMMARY OF 1992 WATER EXCHANGE ACT

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MAY 1994***

**** * ****

This summary provides general information only and is not intended to replace the formal language of the Act and its accompanying statutes. The Arizona Department of Water Resources (DWR) encourages informal pre-filing conferences to help members of the public to comply with the requirements of the 1992 Water Exchange Act (Exchange Act).

**** * ****

INTRODUCTION

The Exchange Act became effective September 30, 1992, and has been amended in 1993 and 1994. This new chapter 4 of Title 45, Arizona Revised Statutes, administered by the Arizona Department of Water Resources, provides five functions:

(1) authorizes and regulates the exchange of any type of water for any type of water, subject to certain conditions;

(2) establishes four classifications of exchanges, including exempt, enrolled, permitted, and noticed exchanges, with different registration and reporting requirements, and different conditions for conducting the exchange, for each class;

(3) clarifies how existing water laws apply to withdrawal, diversion, measurement, transportation, use and reporting of water a person gives and receives in any exchange, generally establishing a "giver rule," thus ending much of the pre-exchange law uncertainty regarding the legality of existing or planned exchanges;

(4) sets up recording and annual reporting requirements for enrolled, permitted and noticed water exchange activities, additional to those required by existing water laws for the individual waters in the exchanges; and

(5) gives the Director the authority to inspect, audit, and investigate exchanges, and to issue cease and desist orders and recommend substantial civil penalties after determination of a violation by administrative hearing.

Where to find the new law

The body of the Exchange Act may be found in the Arizona Revised Statutes, volume 14A, at A.R.S. § 45-1001 et seq. The Exchange Act also amends A.R.S. § 45-141 by adding a new subsection E. A.R.S. § 45-141(E) now clarifies that giving surface water in a water exchange does not constitute abandonment or forfeiture of the surface water right due to nonuse.

The 1994 amendments to the Exchange Act extend the A.R.S. § 45-1021 deadlines for enrollment of existing exchanges one year. They also make it possible to obtain six month extensions of the twelve month payback requirements of A.R.S. § 45-1002(B).

OVERVIEW OF THE FOUR CLASSIFICATIONS OF
EXCHANGES AND THEIR CHARACTERISTICS

The Exchange Act creates four classifications of exchanges that may be conducted pursuant to A.R.S. § 45-1002(A), subject to various conditions. The four classifications are: exempt, enrolled, permitted and noticed. A.R.S. § 45-1002(A) states that a person may not withdraw, divert or use water received through an exchange unless the exchange satisfies the requirements and conditions of at least one of the four classifications.

What follows is a grid comparing the basic characteristics of each of the four exchange classifications, including the amount of water that may be exchanged, type of water, whether annual exchange reports are necessary, and whether the class includes existing exchange contracts, new contracts, or both.

WATER EXCHANGE CLASSIFICATIONS & CHARACTERISTICS

	EXEMPT	ENROLLED	PERMITTED	NOTICED
Amount of water exchanged	≤50 AF or any am't if all effluent	>50 af	>50 AF	>50 AF
Type of water exchanged	All	All	Surface water, except Colorado River	Groundwater, effluent, or Colorado River
Water Exchange Contract Status	Existing or new	Existing only	Usually new	Usually new
Annual Exchange Report	No	Yes	Yes	Yes
Giver of water must receive the water promised in return within twelve months	Yes, unless Director grants six month extension	Yes, unless 1) enrolled contract explicitly allows longer payback, or 2) an extension is granted	Yes, unless Director grants six month extension	Yes, unless Director grants six month extension
90% of Am't of water received must be paid back with water (or 50% or less with approval of Director)	No	No	Yes	Yes

Exempt exchanges

"Exempt" exchanges [i.e., those consisting of fifty acre feet or less of any waters per year, or only involving effluent, pursuant to A.R.S. § 45-1002(A)(1) and (2)] are not totally exempt from regulation. These exchanges need not be enrolled, permitted or noticed, and no annual exchange report need be filed. However, as in all exchanges, each party to the exchange must receive the water promised in trade within twelve months of giving water under A.R.S. § 45-1002(B) [the "twelve month rule"]. In addition, the A.R.S. § 45-1003(A) restrictions on use of any water received in an exchange apply (the "giver rule"). These universal restrictions are described below, in a separate section of this summary.

Enrolled exchanges

Persons who exchange water pursuant to properly "enrolled" exchange contracts (i.e., generally, those exchanges conducted pursuant to water exchange contracts in effect prior to January 1, 1992) are not grandfathered beyond application of the new law. In fact, enrolled exchanges not only fall within the universal restrictions on all exchanges described in the preceding paragraph, but also require filing of an annual exchange report pursuant to A.R.S. § 45-1004.

Permitted exchanges

Each person who seeks to give surface water, other than Colorado River water, in an exchange that is not exempt or enrolled must first apply for a "water exchange permit." The permit is granted by the Director after a public objection process to determine whether several statutory requirements and conditions have been met. These requirements and conditions, designed to protect other water users, are in addition to the restrictions that apply to all exchanges.

Noticed exchanges

A person seeking to engage in an exchange that is not exempt, enrolled or permitted must first file a "notice of water exchange" with the Department. There is no public objection process. However, the exchange may not begin until several conditions, similar to the water exchange permit conditions, have been met.

In a later section of this summary, the four classifications of exchanges will be examined more thoroughly.

APPLICABLE TO ALL WATER EXCHANGES; DEFINITION OF WATER EXCHANGE, THE "TWELVE MONTH RULE" AND THE "GIVER RULE"

A.R.S. § 45-1002 states that a person may withdraw, divert or use water received through a water exchange only if the exchange is exempt or made pursuant to an enrolled, permitted or noticed exchange contract. The requirements discussed in this section apply to all water exchanges, regardless of classification.

What is a "water exchange" and what if a trade is not a "water exchange?"

Under A.R.S. § 45-1001(6), "water exchange" is defined as:

"...a trade between one or more persons, or between one or more persons and one or more Indian communities, of any water for any other water, if each party has a right or claim to use the water it gives in trade. This definition applies whether or not water is traded in equal amounts or other consideration is included in the trade."

This definition establishes that a water exchange must be water for water, although it need not be an equal trade. Each party must have a right to use the water it gives. If the trade does not fit within the A.R.S. § 45-1001(6) definition, it is not a "water exchange."

What if two cities engage in a water trade that is not a "water exchange," as defined in the new law? For example, suppose the trade is water for money only (not water for water), or one party does not have a right to use the water that person gives in the trade.

Because the water trade does not fit within the definition of "water exchange," the trade is not regulated by the Exchange Act. The parties to the trade may be violating any number of other water laws, and cannot rely on the "giver rule" (discussed below) or other provisions of the Exchange Act to legitimize use of water to which they do not hold a right.

The "twelve month rule"

Regardless of the classification of water exchange, A.R.S. § 45-1002(B) requires that a party who gives water in a water exchange must receive the water promised in return within twelve months, unless the exchange is made pursuant to an enrolled exchange contract that expressly allows a longer pay-back period. Further, a 1994 amendment to the Exchange Act provides that a party may apply to the Director for up to a six month extension of the pay-back period.

What if parties to an historic water exchange contract have always orally agreed to allow a longer pay-back time, but did not reflect this in their written contract? For example, SRP may have an existing written agreement to send spill water to an Indian

Community in return for the Indian Community's groundwater, with no mention of when pay-back is to occur. By oral agreement the parties have always understood that the groundwater would be given to SRP during dry times, often many years after SRP had delivered spill water to the Indian Community.

All or part of an enrolled contract may be oral, so long as the oral part of the contract is reduced to writing by December 31, 1994. A.R.S. § 45-1021(A)(1), as amended in SB 1371 (1994). This means that if an existing water exchange contract contains nothing in writing concerning the length of time allowed to complete an exchange, the parties could reduce their oral agreement to writing by December 31, 1994, and enroll the writing along with the contract. In this manner an oral agreement for a pay-back period longer than 12 months is reduced to writing and legitimized. DWR may require some proof of the historic (pre-1992) practice beyond the written assertion in 1994.

A 1994 amendment to the Exchange Act gives the Director the discretionary power to grant up to a six month extension to the twelve month pay-back period under certain conditions. The applicant for an extension must demonstrate that the water to be received by the applicant in an exchange 1) cannot be delivered to the applicant or 2) cannot be beneficially used by the applicant, within the twelve month pay-back period. If this is demonstrated, the Director may then grant the extension if the Director finds the proposed extension is consistent with efficient water management and does not impair vested water rights. A.R.S. § 45-1002(B)(2).

The "giver rule"

Regardless of the classification of water exchange, A.R.S. § 45-1003(A) establishes a statutory "giver rule" by prescribing the following three restrictions applicable to a person receiving water through an exchange:

(1) Each party to an exchange must hold a legal right to use the water that party gives in the exchange. Each party may divert, withdraw and use the water it receives without holding a legal right to use the water, other than the contractual right to use the water afforded by the exchange contract.

(2) Each party to an exchange may use the water received only in the same manner that party could have used the water it gave in the exchange.

(3) Each party to an exchange must comply with all laws relating to the water that party gave in the exchange.

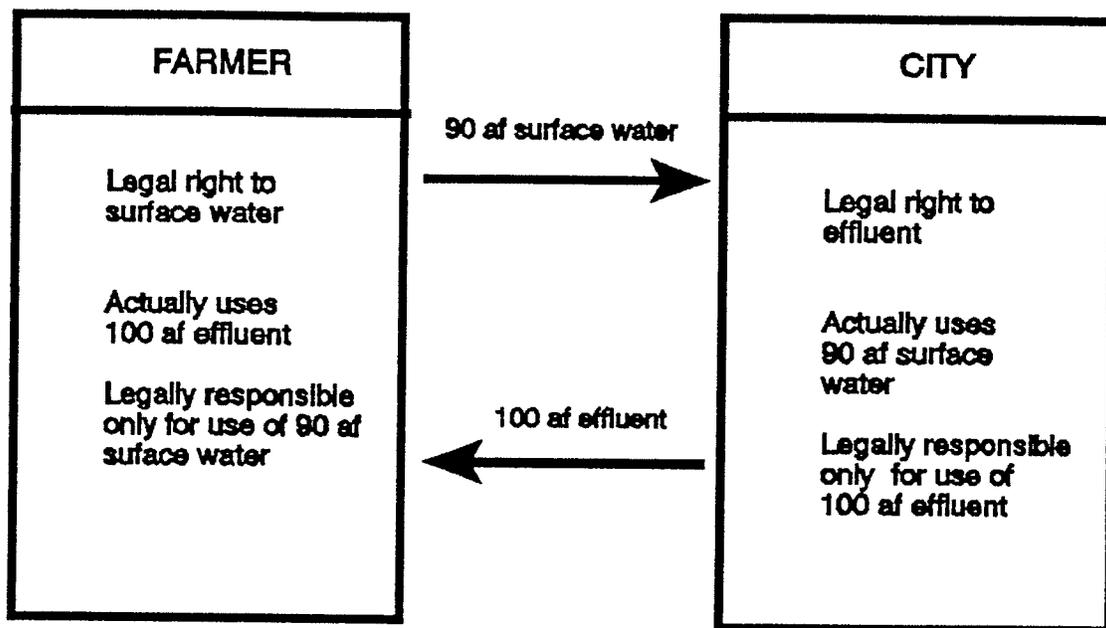
Note that subsection B of A.R.S. § 45-1003 merely explains in more detail how a person who gives groundwater in an exchange must account for the groundwater in order to ensure that the person complies with laws restricting transportation of groundwater and payment of damages. This subsection does not deviate from the "giver rule" in any way.

Subsection C of A.R.S. § 45-1003 provides the one minor deviation from the "giver rule," applicable only to trades involving groundwater. For all purposes except measurement of the groundwater in an exchange, the "giver rule" still applies. However, § 45-1003(C) shifts the A.R.S. § 45-604 responsibility for measuring groundwater pumping to the party who actually does the pumping. In such a case, the party who actually pumps the

groundwater is responsible for measuring how much groundwater is pumped, but reports using whatever source that party gave in the exchange.

At this point, an example may help illustrate how the "giver rule" works.

Example 1: The "giver rule"



Suppose City has 100 af of effluent that it could legally have used to water its parks, but finds it more economical to trade the effluent to Farmer, near the city's treatment plant, in return for 90 af of Farmer's surface water, from the farmer's point of diversion near a city park. Farmer could legally have used its 90

af of surface water on its farm, but prefers to use City's 100 af of effluent.

First, is this a water exchange? Yes, City and Farmer are trading water for water, and each has a legal right or claim to use the water it gives in the exchange. The waters need not be traded in equal amounts. So, the trade is a "water exchange."

Second, how do the parties account for the water each gives and receives in the trade? In the exchange, City will physically use surface water, but need not have a surface water right for that water **received** in the exchange. A.R.S. § 45-1003(A)(1). City must only show a legal right to use the effluent it **gave**, and must report and be legally responsible only for the use of the 100 af of effluent it gave. Farmer must show only that it had the legal right to use the surface water it gave to the City. Farmer will report and be legally responsible only for using the 90 af of surface water it gave. A.R.S. § 45-1003(A)(3).

As you can see, each party to the exchange is only responsible for complying with all laws regarding the amount and type of water that party **gave** in the exchange, despite the fact that it received and used a different type, and in this case even a different amount, of water.

Altering Example 1 slightly, suppose City trades 100 af of **groundwater** to Farmer instead of effluent? In this case, the one minor deviation from the "giver rule" applies. A.R.S. § 45-1003(C) requires that the person who actually pumps groundwater in an AMA or INA pursuant to an exchange (be it the giver or receiver of the groundwater) must **measure** the groundwater withdrawn, pursuant to A.R.S. § 45-604. If Farmer actually pumps a well to receive the groundwater given by City in the exchange, Farmer must measure the groundwater Farmer withdraws. However, consistent with the "giver

rule," Farmer would still only report use of 90 af of surface water, because 90 af of surface water is what Farmer gave in the exchange. City would still report use of the 100 af of groundwater City gave in the exchange. City would still pay the withdrawal fees and otherwise be responsible for following all laws applicable to the groundwater it gave in the exchange. The only difference (due to the presence of groundwater in the exchange) would be that Farmer would be responsible for measuring the groundwater, if Farmer did the pumping.

WORKING WITH THE FOUR CLASSIFICATIONS OF WATER EXCHANGES:
EXEMPT, ENROLLED, PERMITTED AND NOTICED

Introduction to this Section

The purpose of this section is to help you become familiar with and differentiate between the major requirements and conditions of each of the four classifications of water exchanges.

Before examining the four classifications, it is important to remember that any analysis must begin with the definition of "water exchange" to determine whether the transaction is subject to the Exchange Act. If it is within the definition, the next question is whether the water exchange satisfies the "twelve month rule" and "giver rule," required for all exchanges, as discussed in the previous section. Finally, the exchange must meet the requirements of one of the following four classifications.

A.R.S. § 45-1002(A) is the starting point for this discussion. There it states that a person may withdraw, divert or use water received through a water exchange **only** if the exchange falls within one of the following four classifications:

(1) **EXEMPT**, i.e., the exchange is exempted from the need for enrollment, permitting or noticing, OR

(2) **ENROLLED**, i.e., the exchange is made pursuant to a water exchange contract enrolled under A.R.S. § 45-1021, in a manner consistent with A.R.S. § 45-1002(A)(3), OR

(3) **PERMITTED**, i.e., the exchange involves non-Colorado River surface water and the party seeking to give surface water has obtained a water exchange permit under A.R.S. § 45-1041, OR

(4) **NOTICED**, i.e., the exchange is made pursuant to a notice of water exchange filed under A.R.S. § 45-1051.

It would be helpful at this time to re-read the overview of the four classifications of exchanges at the beginning of this summary and keep that section's grid (at page 4) describing the basic characteristics of the four classifications close at hand, as you read the following.

EXEMPT WATER EXCHANGES--A.R.S. § 45-1002(A) (1) and (2)

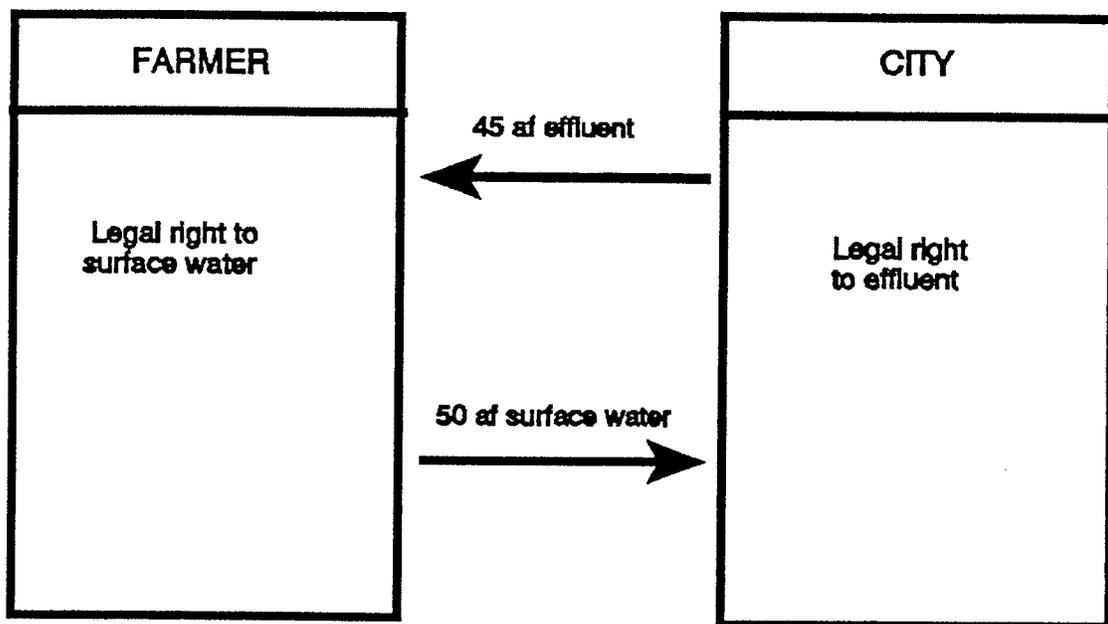
Summary

A.R.S. § 45-1002(A)(1) and (2) set forth two situations in which a person may withdraw, divert or use water received in a water exchange without proceeding under an enrolled, permitted or noticed exchange contract, and without filing an annual exchange report under A.R.S. § 45-1004. The two "exempt" types of exchanges are:

(a) water exchanges in which 50 af of water or less is traded in a twelve month period (or may be traded pursuant to any associated water exchange contract).

(b) exchanges of any amount involving only effluent.
Note that these two exemptions apply to a new or existing exchange.

Example 2: Exempt because 50 af or less exchanged is a twelve month period



Suppose City desires to trade 45 af of its effluent to Farmer for 50 af of Farmer's surface water, within a twelve month period. Assume the trade meets the requirements applicable to all water exchanges, discussed earlier in this summary. Is this a valid exchange?

Yes. This exchange would be classified as "exempt" under A.R.S. § 45-1002(A)(1), because it involves the exchange of fifty

af or less per twelve month period. Of course, all water exchanges, even if exempt, must comply with the restrictions applicable to all exchanges, discussed in the previous section. "Exempt" here means exempt only from the need to exchange pursuant to an enrolled, permitted or noticed exchange contract, and exempt from filing an annual exchange report.

What 50 af or less really means

In Example 2, the total amount of water involved in the exchange each year is 95 af. However, the 50 af per twelve month period maximum is a limit on the amount of water given by each party to the exchange, not on the total amount of water involved. So, the example falls just within the 50 af or less maximum, because neither party gives more than 50 af in a year.

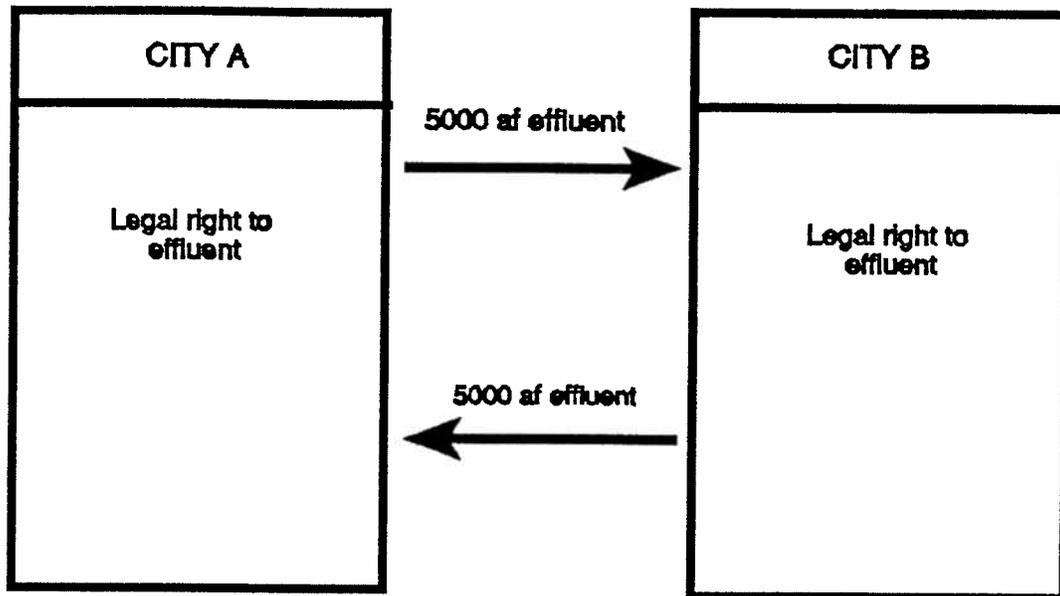
Suppose, however, the parties to the exchange in Example 2 conducted their 50 af or less per annum exchange pursuant to a water exchange contract that allowed a maximum of 100 af per annum to be exchanged by each party? Despite the fact that in any given year the parties exchanged only 50 af, the exchange is never exempt. This is because the 50 af maximum applies not only to the individual water exchanges that parties may conduct, but also to any associated exchange contract. A.R.S. § 45-1002(A)(1).

Further, if two or more water exchanges or associated exchange contracts allow the same use at the same location, the aggregate quantity of the exchanges or contracts may not exceed 50 af per annum. A.R.S. § 45-1002(A)(1).

Finally, note that the 50 af maximum applies to "any twelve month period," not necessarily calendar years. For example, an exchange may exceed 50 af during a calendar year, but stay within the maximum during a September through August twelve month period.

That exchange would be exempt for the September through August twelve month period, unless it is made pursuant to an exchange contract that allows a greater amount to be exchanged during that period. If the exchange contract allows up to 500 af to be exchanged over a ten year period, for example, with no annual or monthly limit, the exchange would not be exempt, because more than 50 af could be exchanged in any twelve month period by contract.

Example 3: Exempt because only effluent involved in exchange



Suppose City A exchanges 5000 af per annum of its treated effluent each year with City B, in return for 5000 af of City B's more conveniently located effluent. This exchange would be exempt under A.R.S. § 45-1002(A)(2) from the need to be enrolled, permitted or noticed, and no annual exchange report need be filed.

This exemption is simpler to administer than the 50 af exemption. If an exchange, and any water exchange contract under which it operates, only involves effluent, the exchange is exempt, regardless of the amount exchanged in the twelve month period. Note also that if the cities in the above example exchange only effluent for a twelve month period, but the exchange is conducted under a water exchange contract that also includes other types of water, this exemption does not apply.

ENROLLED WATER EXCHANGES--A.R.S. § 45-1021

Generally, a nonexempt exchange made pursuant to a water exchange contract already in existence on or before January 1, 1992 need not be permitted or noticed (under A.R.S. §§ 45-1041 or 45-1051, respectively) if the contract is properly enrolled at the Department pursuant to A.R.S. § 45-1021 prior to the December 31, 1994 deadline. A.R.S. § 45-1002(A)(3). Again, the analysis begins with whether the transaction is a "water exchange." If so, the next step is to determine whether the exchange is exempt. If not, then the question is whether the exchange has been or can be enrolled.

The advantage of enrolling a nonexempt exchange contract is that the exchange need not meet the requirements and conditions of permitted and noticed exchanges. Any party to an enrolled exchange must, however, file an annual exchange report pursuant to A.R.S. § 45-1004.

A.R.S. § 45-1021(A) sets forth the requirements necessary for an exchange contract to be properly enrolled. Note especially the requirement that a water exchange must actually have taken place pursuant to the contract sometime after January 1, 1982, unless the contract involves CAP water for which a subcontract was not offered prior to 1992. Also note that an oral contract may be enrolled if

reduced to writing before December 31, 1994.

As stated above, the deadline for enrolling contracts is December 31, 1994. A.R.S. § 45-1021(A)(3). If the statement of water exchange contract fails to meet the requirements for proper enrollment, DWR cannot accept it, and we have ninety days to return it to the sender, specifying the defects. The sender then has sixty days to revise and return it to us. We cannot accept a revised statement after June 30, 1995. A.R.S. § 45-1021(B).

It is important to remember that satisfying the specific requirements listed in A.R.S. § 45-1021(A) is not sufficient basis for conducting an exchange pursuant to an enrolled contract. Quantification of the historic maximum amount of water that may be exchanged pursuant to the enrolled contract is also required. A.R.S. § 45-1002(A)(3)(a) states that a person may receive exchange water pursuant to an enrolled contract only up to the maximum amount historically exchanged pursuant to the contract in a year prior to 1992 or the specific maximum allowed in the contract, whichever is greater. This limit does not apply to exchanges involving CAP waters not offered for subcontract prior to 1992.

Statement of Water Exchange Contract forms are available at the DWR Operations Division and at the Tucson, Pinal and Prescott AMA offices. The fee for filing the Statement is \$100.00.

WATER EXCHANGE PERMITS--A.R.S. § 45-1041

Permit requirements

A person who seeks to give surface water, other than Colorado River water, in a water exchange that is not exempt or enrolled must first apply to DWR for a water exchange permit. The permit process is designed primarily to protect other holders of surface

water rights, but also includes requirements that protect surrounding groundwater users. Again, even if a person is giving surface water in a water transaction, a permit is not necessary unless the transaction involves a "water exchange" that is neither exempt nor enrolled.

The applicant must demonstrate that all of the following requirements are met before a water exchange permit will be issued:

- (a) The exchange will be made pursuant to a written contract.
- (b) The exchange will not affect vested rights to water.
- (c) Each party to the exchange contract has a right to the water the party will give in the water exchange (note that this is already required for all water exchanges, by definition, even if exempt or enrolled).
- (d) Generally, each party to the water exchange contract must receive in return at least **ninety percent** of the quantity of water that the party gives in the water exchange. However, if the Director finds that a more lopsided exchange is "beneficial to water management in the state," each party must receive in return at least **fifty percent** of the quantity of water that the party gives in the water exchange (or **less** if otherwise authorized by law). **[Remember, all water exchanges, by definition, must be "water for water," however unequal the amounts. This 90%/50% limit on the inequality of the exchange only applies to permitted and noticed water exchanges.]**
- (e) If the water exchange involves any new or increased pumping by the applicant from a well within an active management area (AMA),

- (1) and the applicant is not a city, town, private water company or irrigation district, the applicant must demonstrate that the new or increased pumping will not unreasonably increase damage to surrounding land or other water users (a well impact analysis must be done, similar to that required for well permits in A.R.S. § 45-598), or
- (2) if the applicant is a city, town, private water company or irrigation district with a service area located partly or wholly in the AMA, the applicant must demonstrate that any new or increased pumping by the applicant within the applicant's service area pursuant to the exchange is consistent with the management plan and achievement of the management goal for the AMA.

Note that only the party or parties to a water exchange that seek to give surface water (other than Colorado River water) in the exchange, need obtain a permit. If more than one party to an exchange proposes to give surface water, DWR will accept one joint application, signed by all the proposed surface water givers.

Specific Use permits and General Use permits

There are two kinds of water exchange permits, specific use and general use. Any person may apply for a specific use permit, i.e., a permit specific to each proposed exchange, which allows the parties to trade specific sources of water in specific quantities for use in specific locations.

A general use permit, on the other hand, is only available for

exchanges between political subdivisions of the state (e.g., cities, irrigation districts, or CAWCD), OR between a political subdivision and private water company or Indian community. The general use permit is not specific to one proposed exchange of waters. Rather, it allows the holders to engage in a number of possible exchanges which are described in the application and permit in a general fashion.

General use permits allow more flexibility for governmental entities that engage in numerous, routine exchanges with other similar entities, often changing on short notice due to climatological or other reasons, but staying within a general framework. In order to protect other water users, the applicants for a general use permit are required to describe the kinds of water that will be exchanged, the general geographical areas from which water will be withdrawn or diverted, and the legal right to acquire and use the water that each party may give in the possible exchanges. This general description of the possible exchanges that may take place pursuant to the permit faces the same public notice and objection process as a specific use permit application.

Also, each time the holders engage in a water exchange pursuant to a general use water exchange permit, they must first file a General Use Permit Exchange Notification form with DWR. This form notifies the Director of the amounts of water to be exchanged and the specific uses to which each source of water will be applied. Although this notification is not publicly noticed and a permit is not required for each exchange, it does provide DWR with specific information that may uncover a violation of the conditions of the general use permit. All permits, general or specific, will include the A.R.S. § 45-1041(A) requirements for water exchange permits, described above, as standard conditions.

Exchange permits: Forms, duration and fees

The following forms are available at DWR Operations Division, and at the Tucson, Pinal and Prescott AMA offices: (1) the Application For Water Exchange Permit form, which is used for both specific use and general use permits, and (2) the General Use Permit Exchange Notification form. The filing fee for a specific use or general use permit application is \$150.00, and there is an additional \$100.00 permit issuance fee.

A permit may be granted for up to fifty years, at the director's discretion. Any application for a modification or renewal of a permit will undergo the same public process as an initial permit application, and be judged anew under the same requirements.

Exchange permits: The public notice, objection hearing and appeal process

The public notice, objection and appeal process for a water exchange permit application is similar to the process for an Underground Storage and Recovery Project application (A.R.S. § 45-806). After completeness and correctness determinations are made, the application is noticed by publication in a newspaper, and first class mail notice is sent to "each person who has made a written request to the Director for a mailed copy of the notice." A.R.S. § 45-1042(B). Such a list is currently being compiled and will be updated as requests come in.

See A.R.S. §§ 45-1042 and 45-1044 for the remainder of the process, which includes the right to file an objection, a hearing at the Director's discretion, and administrative and judicial appeal of a decision denying an objection or an application for a permit.

Revocation of a permit for false reports or nonuse

The Director has the authority to revoke a water exchange permit under A.R.S. § 45-1046 for any of the following reasons:

(a) A false statement in an application, or in an annual report or other required report filed by a person using water pursuant to the provisions of the permit.

(b) A material violation of the terms and conditions of the permit.

(c) Failure to exchange water pursuant to the permit for five consecutive years, unless the permit holder's nonuse was for reasons beyond the holder's control. Also, the Director may give up to five years extension after the first five years of the permit, if necessary to construct facilities for the exchange.

An Example of a Permitted exchange

An example of a water exchange requiring a specific use water exchange permit is Example 1 at page 10 of this summary, where City seeks to exchange 100 af/yr of effluent for 90 af/yr of Farmer's surface water. This exchange would not be exempt because it exceeds 50 AF. Because it was not in effect prior to 1992 it could not be enrolled. Because it involves surface water, the giver of surface water, that is Farmer, would be required to obtain a water exchange permit.

The permit issuance requirements of A.R.S. § 45-1041(A) would apply and Farmer would need to demonstrate that the water exchange would be made pursuant to a written contract, would not affect

vested rights to water and that each party to the contract has a right to the water the party will give in the exchange. Because no pumping is involved in the exchange, Farmer would not need to worry about impact on surrounding wells.

Further, Farmer would need to demonstrate that each party to the water exchange contract would receive at least 90 per cent of the quantity of water that the party gives in the water exchange. This would be easy with a 100 af for 90 af exchange. But suppose the exchange had been 100 acre-feet of effluent for 50 acre-feet of surface water. In that case, the farmer would need to request the Director of Water Resources to make a determination that the water exchange is beneficial to water management in this state.

The parties would not qualify for a general use water exchange permit, even though one of the parties is a political subdivision, because the farmer is not a political subdivision, private water company or Indian community. Therefore, a specific use water exchange permit would be necessary.

Suppose City wishes to trade 100 af of **groundwater** (instead of effluent) to Farmer in return for 90 acre-feet of Farmer's surface water. This exchange would also require a permit and A.R.S. § 45-1041(A) would apply exactly the same as in Example 1, above, except that Farmer would also need to demonstrate that any new or increased pumping by Farmer from a well within an AMA pursuant to the water exchange would not unreasonably increase damage to surrounding land or other water users. A.R.S. § 45-1041(A)(4).

Now reverse the groundwater example, making City the giver of surface water in this exchange in return for **Farmer's** groundwater. City would then file the application for a water exchange permit. Instead of the more rigorous well impact requirement that Farmer faced because the exchange involved well pumping, City would be

required to demonstrate only that any new or increased pumping by City within its service area would be consistent with the management plan and achievement of the management goal for the AMA. A.R.S. §45-1041(A)(5).

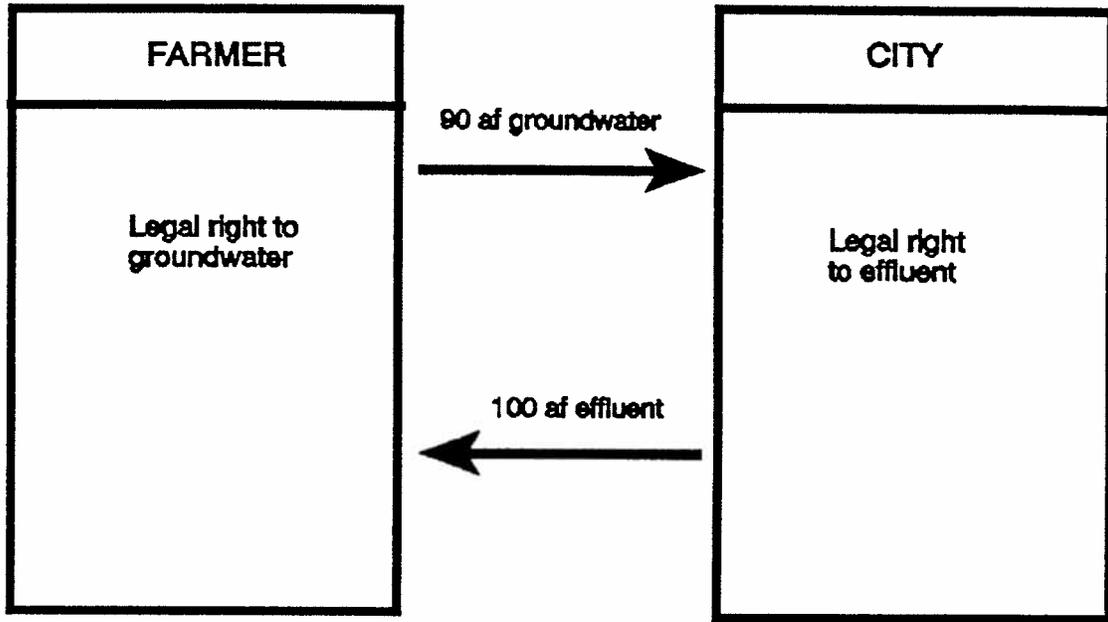
NOTICE OF WATER EXCHANGE--A.R.S. § 45-1051

Nature of noticed water exchanges

One last classification of water exchanges acts as a catch-all for any water exchange that is neither exempt, nor made pursuant to an enrolled water exchange contract or a water exchange permit. A.R.S. § 45-1051 requires that a person who seeks to engage in such a water exchange, to which neither A.R.S. § 45-1002(A)(1), (2), (3) nor (4) applies, first needs to file a Notice of Water Exchange. Note in the grid at page 4, that the major distinction between permitted and noticed exchanges is the type of water exchanged. If non-Colorado River surface water is exchanged, then the exchange must be permitted.

Also note that the grid at page 4 of this summary states that noticed exchanges are "usually" new, not existing. There will be cases in which parties to water exchanges will neglect to enroll the exchange or in which the exchange fails to meet the legal requirements for enrollment. In these cases, the parties will need to file a notice and comply with the conditions for initiation of the exchange listed in A.R.S. § 45-1052, before legally continuing the water exchange.

Example 4: Noticed water exchange



Suppose City proposes to give 100 af/yr of its effluent to Farmer in exchange for 90 af/yr of Farmer's groundwater.

In this case, the exchange would not be exempt, because it exceeds 50 af in a twelve month period and the water is not all effluent. The exchange contract cannot be enrolled, because it is a new water exchange contract. It does not require a permit, because neither party is giving non-Colorado river surface water in the exchange. Therefore, the water exchange requires filing of a notice.

What information is required in a Notice of Water Exchange?

The Notice of Water Exchange form is available at the DWR Operations Division and at the Tucson, Prescott and Pinal AMA Offices. The fee for filing a Notice of Water Exchange is \$100.00. A Notice must contain all of the information required by A.R.S. § 45-1051(A) or the Department cannot accept the notice and the exchange cannot be initiated.

The A.R.S. § 45-1051(A) information requirements for a Notice of Water Exchange are almost identical to the information required for issuance of a specific use water exchange permit. See A.R.S. § 45-1043(A)(1). Therefore, the Notice of Water Exchange looks much like an Application for a Water Exchange Permit. The notice must include, among other things, the name of any AMA or INA from which groundwater will be withdrawn pursuant to the notice, the points of withdrawal of any groundwater or stored water to be exchanged pursuant to the notice, the uses to which any exchanged water may be applied during the term of the contract and a copy of the water exchange contract pursuant to which the water exchange will be conducted.

If the Director determines that the Notice of Water Exchange does not contain all of the information required by A.R.S. § 45-1051(A), including information demonstrating that the exchange meets all of the conditions for initiation of a noticed water exchange, the Director will not accept the Notice of Water Exchange and the exchange may not legally be initiated. Acceptance of the notice by the Director of Water Resources will occur when the Director determines that the notice contains all of the information required by the A.R.S. § 45-1051(A), including the following:

(a) A completed Notice of Water Exchange filed and signed by all participants in the water exchange.

(b) A copy of the water exchange contract.

(c) The name of any AMA or INA from which groundwater would be withdrawn pursuant to the notice.

(d) The points of withdrawal of any groundwater or water stored underground to be withdrawn pursuant to the exchange.

(e) The legal description of the lands on which the water would be used pursuant to the notice.

(f) The total amount of water that may be used pursuant to the notice.

(g) The duration of the water exchange contract.

(h) The uses to which any exchanged water would be applied during the term of the contract.

In addition, pursuant to A.R.S. § 45-1051(A)(9), the parties will need to provide sufficient information to indicate that the A.R.S. § 45-1052 conditions for initiation of their water exchange would be satisfied. Specifically, that all of the following apply:

(a) The water exchange would be made pursuant to a written contract.

(b) The exchange would not affect vested rights to water.

(c) Each participant has a legal right to the water the party will give in the exchange.

(d) Any new or increased groundwater pumping by a service

area provider within an AMA would be consistent with management plan and goal.

(e) Any new or increased pumping by a person that is not a service area provider from a well within an AMA would not unreasonably increase damage to surrounding land or other water users (thus requiring a well impact study).

(f) Finally, each of the parties needs to show that it receives at least 90 percent of the quantity of water that the participant gives in the water exchange, or that the director should approve a more lopsided exchange on the basis that it is beneficial to water management in this state.

ENFORCEMENT PROVISIONS

Article 5 of the Exchange Act gives the Director administrative enforcement authority similar to that contained in the 1980 Groundwater Management Act and the Underground Water Storage Act. A.R.S. § 45-1061 provides for inspection of exchange facilities and audits to ascertain compliance with the Exchange Act.

Under A.R.S. § 45-1062, the Director may order a person to appear at a civil administrative hearing to show cause why the person should not be ordered to cease and desist from a suspected violation of the Act. After a hearing, the Director may issue a cease and desist order and an order directing that positive steps be taken to abate any harm or damage arising from the violation. In addition, the Director may recommend imposition by a Superior Court of a civil penalty of up to \$1,000.00 per violation per day for a violation directly related to the illegal withdrawal, diversion or use of water pursuant to a water exchange.

CONCLUSION

If you have questions or comments regarding the 1992 Water Exchange Act, please contact the nearest DWR Active Management Area office, at the following locations:

Phoenix Active Management Area

500 North Third Street

Phoenix, Arizona 85004

Telephone: (602) 417-2465

Pinal Active Management Area

Dennis Kimberlin, Area Director

1000 East Racine

Casa Grande, Arizona 85222

Telephone: (520) 836-4857

Prescott Active Management Area

Phil Foster, Area Director

2200 East Hillside Road

Prescott, Arizona 86301

Telephone: (520) 778-7202

Santa Cruz Active Management Area

Placido Dos Santos, Area Director

857 West Bell Road, Suite 3

Nogales, Arizona 85621

Telephone: (520) 761-1814

Tucson Active Management Area

Kathy Jacobs, Area Director

400 West Congress

Suite 518

Tucson, Arizona 85701-1374

Telephone: (520) 628-6758