

APPENDIX D: FEDERAL AGENCIES AND LAWS

APPENDIX D: FEDERAL AGENCIES AND LAWS

Federal agencies influence the use and management of water in Arizona. Federal agency authorities include the areas of flood control, water quality, and land and wildlife management. Many of the state's major water supply development projects were authorized and built by the federal government. Uses of the water from these projects are controlled by both federal and state laws. This appendix contains a brief summary of key federal agencies and laws that affect water resource management in Arizona.

D.1 Key Federal Agencies

Army Corps of Engineers (COE). The COE conducts flood control studies and dam, levee and channelization projects to protect communities from flood damage. The COE regulates the placement of dredged or fill material into water of the U.S. (CWA, Section 404). www.usace.army.mil

Bureau of Indian Affairs (BIA). The BIA is responsible for protecting Indian trust lands water rights. The agency has developed irrigation distribution systems in communities along the Colorado River and coordinated construction of Coolidge Dam with the Secretary of Interior. www.doi.gov/bureau-indian-affairs

Bureau of Land Management (BLM) and the National Park Service (NPS). These agencies manage over 17 million acres of land throughout the State. Management of these lands may involve federal reserved water rights, instream flow rights and land management activities that affect water runoff. The BLM manages the San Pedro Riparian National Conservation Area (SPRNCA). www.blm.gov, www.nps.gov

Bureau of Reclamation (BOR). The BOR administers the Colorado River Basin Project Act and contractual arrangements for the use of Colorado River Water. The BOR is responsible for construction of the major water supply development projects in Arizona (Hoover Dam and Power Plant, Glen Canyon Dam and Power Plant, Parker Dam and Power Plant, Davis Dam and Power Plant, the Salt River Project, Yuma Project and the Central Arizona Project). The BOR is also involved in regional planning activities, water conservation programs and water augmentation feasibility studies. www.usbr.gov

Environmental Protection Agency (EPA). The EPA has federal oversight over the implementation of surface water and drinking water quality programs. It has a regulatory role in governing some facilities that affect groundwater. This role involves oversight of state efforts regulating solid waste landfills, hazardous waste sites and underground storage tanks. The EPA also implements national programs on watershed management, toxic waste cleanup, and border-region environmental programs. www.epa.gov

Natural Resource Conservation Service (NRCS). The NRCS plays an active role in managing and mitigating agricultural non-point source pollution. NRCS conservation specialists assist individual operators through technical assistance and cost-sharing programs that help users develop best management practices to reduce water quality and quantity impacts. The NRCS is an important participant in implementation of the Arizona Drought Plan, particularly the operation of the local area impact assessment groups. www.nrcs.usda.gov

U.S. Fish and Wildlife Service (USFWS). The USFWS manages federal wildlife refuges, administers the Endangered Species Act, reviews environmental impact statements and Biological Assessments and issues Biological Opinions. www.fws.gov

U.S. Forest Service (USFS). The Forest Service manages watersheds through Forest Plans that include watershed management criteria to protect and enhance runoff. The Forest Service holds many surface water rights for various uses. www.fs.fed.us

U.S. Geological Survey (USGS). The USGS gages streamflows, and monitors the quantity and water quality of surface water and groundwater. It conducts scientific analysis of hydrologic resources and produces reports on Arizona water use by sector and source. www.usgs.gov

D.2 Colorado River Management

The “Law of the River” as described briefly below, is a collection of federal and state laws, interstate compacts, Supreme Court decisions and international treaties that govern the operation and use of the Colorado River. In the Lower Colorado River Basin, the United States Secretary of the Interior (Secretary) is the watermaster. Acting through the Bureau of Reclamation, the Secretary operates Colorado River dams and accounts for water use on an annual basis. Pursuant to Section V of the Boulder Canyon Project Act, the Secretary contracts with water users in the Lower Basin for water up to the total amount of each state’s apportionment.

Colorado River Compact – 1922

In 1921, the seven Colorado River Basin states authorized the appointment of commissioners to negotiate a compact for the apportionment of the water supply of the Colorado River. Although the states were unable to negotiate an allocation of water for each state, an agreement was signed in November 1922, the Colorado River Compact (Compact) that divided the Colorado River Basin into the Upper Basin and the Lower Basin.

The Compact apportioned to the Upper Basin (Colorado, New Mexico, Utah, and a portion of Arizona) and to the Lower Basin (Arizona, California, and Nevada) the exclusive beneficial consumptive use of 7.5 million acre-feet of water to each basin annually. Because the Colorado River Basin includes a portion of Mexico, the Compact recognized Mexico’s right to use River water. Water for this purpose was to be met from surplus water supplies in excess of the amounts apportioned to the Upper and Lower Basins. Any burden that might arise because of a water treaty with Mexico was to be shared equally by the two basins. The Compact recognized that the ability of the Upper Basin to meet the requirement to deliver 7.5 million acre-feet to the Lower Basin could be impacted by climatic factors, therefore the Compact only required the Upper Basin to restrict its use so that delivery to the Lower Basin would not be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years.

Boulder Canyon Project Act - 1928

The Boulder Canyon Project Act (Project Act) authorized construction of the Hoover Dam and Power Plant and the All-American Canal. It also authorized Arizona, California and Nevada to enter into an agreement whereby the 7.5 million acre-feet of water apportioned to the Lower Basin by the Colorado River Compact would be apportioned as follows: to California, 4.4 million acre-feet per year; to Arizona, 2.8 million acre-feet per year; and to Nevada, 0.3 million acre-feet per year.

Mexican Treaty – 1945

In 1945, a treaty between the United States and Mexico involving waters of the Colorado, Rio Grande and Tijuana Rivers was enacted to address, among other things, a fixed entitlement for Mexico of 1.5 million acre-feet annually from the Colorado River. The Treaty also provided an additional 200,000 acre-feet in years of supply surplus. In years of extraordinary drought, Mexico's entitlement is to be reduced in the same proportion as consumptive uses in the U.S. are reduced.

Minute 242 was adopted and executed in 1973 in response to Mexico's concerns regarding the quality of Colorado River water being delivered to the Mexicali Valley. Minute 242 obligates the United States to implement measures that will maintain the salinity of the Colorado River waters delivered to Mexico at nearly the same quality as that diverted at Imperial Dam for use within the United States. The Colorado River Basin Salinity Control Act was signed into law on June 24, 1974, providing for the physical works necessary to implement Minute 242 without permanent loss of water to the Colorado River Basin states.

Upper Colorado River Basin Compact - 1948

This Compact divided the water apportioned to the Upper Basin by the Colorado River Compact between the five states with territory in the Upper Basin. Arizona was allocated 50,000 acre-feet per year with the remainder of the Upper Basin entitlement divided according to the following percentages: Colorado, 51.75; New Mexico, 11.25; Utah, 23.00; and Wyoming, 14.00.

Arizona v. California - 1964

On August 13, 1952, the State of Arizona filed a complaint with the U.S. Supreme Court against California and seven agencies within that state to resolve the contention by California that the Central Arizona Project should not be authorized. At California's insistence, the U.S. Congress would not authorize the Central Arizona Project until Arizona's right to the necessary Colorado River entitlement was clarified.

The Decree, handed down in 1964, confirmed that Congress had already apportioned, through the Boulder Canyon Project Act, the entitlement of water to the three Lower Basin states as follows: Arizona, 2.8 million acre-feet; California, 4.4 million acre-feet; and Nevada, 300,000 acre-feet. Any surplus above 7.5 million acre-feet was apportioned 50 percent to California and 50 percent to Arizona, except that Nevada was given the right to contract for 4 percent of the excess, which would come out of Arizona's share. The Decree also confirmed each of the Lower Basin state's entitlements to the flow of the tributaries within their boundaries, supporting Arizona's utilization of water from its in-state rivers, separate from its entitlement to its full 2.8 million acre-feet of Colorado River water.

The Decree left shortage allocation to the discretion of the Secretary after providing for satisfaction of present perfected rights in the order of their priority dates. These rights were defined as rights existing and used prior to the effective date of the Boulder Canyon Project Act.

Colorado River Basin Project Act - 1968

The Colorado River Basin Project Act on September 30, 1968 authorized construction of the Central Arizona Project and other water development projects in the Upper Basin. A significant

concession was a provision that allowed existing California, Arizona, and Nevada Colorado River contractors to receive a priority over the Central Arizona project in times when the useable supply from the River was inadequate to provide 7.5 million acre-feet to the Lower Basin states, with California's priority limited to its 4.4 million acre-foot entitlement.

The Act directed the Secretary to propose criteria for the “coordinated long-range operation of the reservoirs” in the Upper Basin with the operation of the reservoirs in the Lower Basin. To accomplish this, the Act required the development of an Annual Operating Plan, in consultation with representatives of the seven Basin states.

Coordinated Operations and Shortage Criteria

In December 2007, Reclamation issued a Record of Decision (ROD) on interim operating criteria (2008-2026) including the coordinated operation of Lake Powell and Lake Mead and criteria for implementing shortage reductions in the Lower Basin. Historically, the reservoirs were operated independently; annual Lake Powell water releases were determined based on applicable law and relevant factors contained in the Long-Range Operating Criteria. The ROD adopted four key elements: 1) establishes rules for shortages; 2) allows coordinated operation of Lake Powell and Lake Mead to avoid Lower Basin shortages and avoid curtailment of Upper Basin water use; 3) establishes rules for surpluses; and 4) address ongoing drought by encouraging new initiatives for water conservation. If regional drought conditions continue, shortage operations could begin as early as 2011. The ROD could have implications for water supply availability in the planning area.

D.3 Federal Reserved Rights

In addition to the reserved water rights associated with Indian reservations under the “Winters” doctrine (described in Appendix G), federal reserved rights can be asserted on most federal, non-Indian lands. For example, surface water rights have been claimed in both the Gila River and Little Colorado River adjudications for national parks and monuments, military bases and national forests (Pearce, 2002). Federal reserved rights to groundwater have also been asserted. An Arizona Supreme Court Decision found that the federal reserved rights doctrine applied to groundwater as well as surface water. The decision found that a reserved right to groundwater could be found only where other waters are inadequate to accomplish the purpose of the reservation. *In Re: The General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739 (Ariz. 1999) (*Gila III*); *cert. denied* 120 Sup. Ct. 2705 (2000) (Pollack, 2003).

D.4 Summary of Key Federal Water Laws

The Clean Water Act (CWA) 33 U.S.C. Section 121 et seq. (1977)

The CWA of 1977 is an amendment to the Federal Water Pollution Control Act of 1972, which set the basic structure for regulating pollutant discharge to waters of the United States. This law gave the Environmental Protection Agency the authority to set effluent standards and continues the requirements to set water quality standards for all surface water contaminants. Under the CWA, it is unlawful to discharge any pollutant from a point source into navigable waters unless a National Pollutant Discharge Elimination Standard (NPDES) permit is obtained. The CWA provides a mechanism for EPA to delegate many of the permitting, administrative and enforcement aspects

of the law to states (e.g. Arizona Department of Environmental Quality) while retaining oversight responsibilities. NPDES permits are usually required for effluent or industrial wastewater being disposed of by discharge to waters of the state.

Impaired Waters

Section 303(d) of the Clean Water Act establishes a process for states to identify waters where implementing technology-based controls are inadequate to achieve water quality standards. States establish a priority ranking of these waters and, for the priority waters, develop total maximum daily loads (TMDLs). A TMDL identifies the amount of a specific pollutant or property of a pollutant, from point, nonpoint, and natural background sources, that may be discharged to a water body and still ensure that the water body attains water quality standards.

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) 42 U.S.C. Section 9601 et seq. (1980)

CERCLA, commonly referred to as the “Superfund” Program authorized the investigation and remediation of groundwater contaminated by releases of hazardous substances from waste sites and due to accidents, spills and other emergency releases of contaminants. EPA is required to annually update the National Priority List of Superfund sites. In Arizona, CERCLA establishes a comprehensive response program that is administered by ADEQ in cooperation with the EPA. The Department of Water Resources maintains an advisory role in this process (ADWR, 1999).

The Endangered Species Act (ESA) 7 U.S.C. 136; 16 U.S.C. 460 et seq. (1973)

The ESA provides a program for the conservation of threatened and endangered plants and animals and their habitats. This may involve aquatic and riparian habitat. All species of plants and animals, except pest insects, are eligible for listing as threatened or endangered. The Act is administered by the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration - Fisheries for marine species. Species are protected through partnerships with the states and Section 6 of the ESA encourages each State to develop and maintain conservation programs for resident listed species. Section 9 of the ESA makes it unlawful for a person to “take” a listed species which includes significant habitat modification or degradation. The ultimate goal of the law is to recover species so that they no longer need protection under the ESA (USFWS, 2005).

The Safe Drinking Water Act (SDWA) 43 U.S.C. Section 300f et seq. (1974)

The SDWA is the primary federal law regulating drinking water quality from all sources. The Act authorizes EPA to establish safe standards and requires all owners or operators of public water systems to comply with primary (health-related) maximum contaminant level standards. National secondary drinking water regulations set non-enforceable standards for the aesthetic quality of water such as taste, odor or color. ADEQ may adopt more stringent standards than those set by EPA.

Arsenic

In 2001, EPA lowered the allowable arsenic content in drinking water from 50 parts per billion to 10 ppb, effective January 23, 2006. This was a major issue for many of Arizona’s communities because Arizona’s aquifers have naturally high levels of arsenic. Approximately one-third of the states drinking water systems exceeded the standard at the time, including 287 small systems (serving fewer than 10,000 people). In response, ADEQ developed a strategy in conjunction with a coalition of business, academia, municipal government agencies and the scientific community to develop a compliance strategy called the Arsenic Master Plan. The plan is intended to identify effective low-cost methods to comply with the standard.