

TOHONO O'ODHAM NATION
WATER CODE

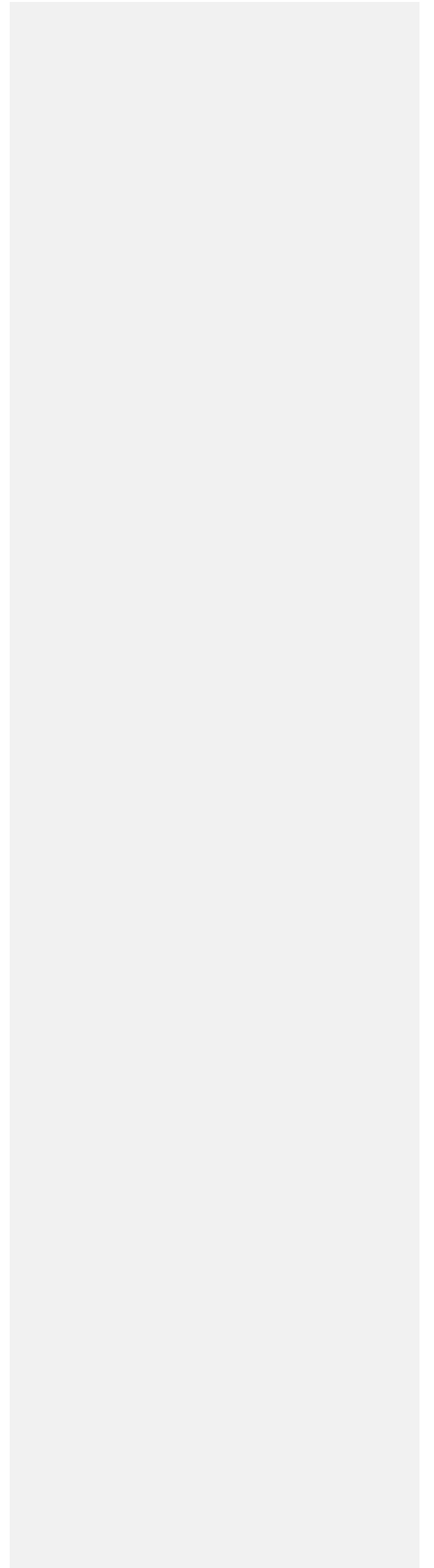


TABLE OF CONTENTS

TOHONO O’ODHAM NATION WATER CODE

	Page
PREAMBLE	1
Article 1 GENERAL PROVISIONS	1
Section 3101 Findings.....	1
Section 3102 Purposes	2
Section 3103 Definitions.....	2
Article 2 ADMINISTRATION.....	8
Section 3201 Water Resources Department and Director	8
Section 3202 Duties and Responsibilities of Director	9
Section 3203 Regulations; Notice, Public Comment and Adoption	11
Section 3204 District Water Advisory Committee	12
Article 3 RIGHTS TO USE THE NATION'S WATER.....	12
Section 3301 Nation's Control of Water.....	12
Section 3302 Reserved or Withdrawn Water.....	12
Section 3303 Water Use.....	13
Section 3304 Permits for Existing Uses.....	14
Section 3305 Permits	17
Section 3306 Permit Applications and Procedures	18
Section 3307 Approval of Permit Applications; Licenses to Perfect	19
Section 3308 Issuance of Permits	20
Section 3309 Assignment of Permits or Licenses to Perfect	21
Section 3310 Revocation or Suspension of Permits or Licenses to Perfect	21
Article 4 ALLOCATION AND USES OF SAWRSA WATER	22
Section 3401 Allocation of SAWRSA Water.....	22
Section 3402 Uses of SAWRSA Water	24
Article 5 WATER SHORTAGES.....	25

Comment [m1]: Comment: Recommend keeping IAWRC and making Nation’s Code an addendum
Response: The SAWRSA Amendment require that the Interim Allottee Water Rights Code provision be incorporated into a comprehensive Nation’s water code. This same requirement appears in the Interim Allottee Water Rights Code that is now in effect

Comment [tz2]: Comment: The San Xavier District and the San Xavier Allottees Association continue to believe that all that is required by SAWRSA is a free-standing San Xavier District water code applying only to the use and allocation of SAWRSA Water
Response: See above response

	Section 3501	Water Shortages Other Than of SAWRSA Water	26
	Section 3502	SAWRSA Water Shortage Sharing	27
Article 6	WELLS	.....	28
	Section 3601	Regulation of Wells	28
	Section 3602	Registration of Existing Wells	31
	Section 3603	Well Construction Standards and Regulation of Well Drillers.....	32
Article 7	WATER MANAGEMENT	.....	32
	Section 3701	Water Management Areas.....	32
	Section 3702	Water Management Plans	33
Article 8	UNDERGROUND STORAGE AND RECOVERY OF CENTRAL ARIZONA PROJECT WATER	.....	34
	Section 3801	Underground Storage and Recovery of CAP Water Within the Nation.....	34
	Section 3802	Underground Storage of CAP Water Within the San Xavier District.....	34
	Section 3803	Underground Water Storage and Savings Under Arizona State Law.....	36
Article 9	INSPECTIONS, INVESTIGATIONS, AND ENFORCEMENT	.....	37
	Section 3901	Inspections and Investigations	37
	Section 3902	Orders to Comply	38
	Section 3903	Penalties for Violations	38
Article 10	APPEALS, SOVEREIGN IMMUNITY, SEVERABILITY AND EFFECTIVE DATE	.....	39
	Section 31001	Appeals	39
	Section 31002	Limited Waiver of Sovereign Immunity.....	39
	Section 31003	Repeal of Title I of the Interim Allottee Water Rights Code.....	39
	Section 31004	Severability	39
	Section 31005	Effective Date	39

**TOHONO O'ODHAM NATION
WATER CODE**

PREAMBLE

All waters which originate in or flow in, into or through the Tohono O'odham Nation, or which are stored in or by the Tohono O'odham Nation, whether found on the surface or underground, are a sacred and valuable public resource of the Tohono O'odham Nation to be protected for the present and future use of the Tohono O'odham Nation as a whole.

Comment [tz3]: Comment: We suggest that the Preamble include an introduction to the Code that explains the purpose of the Code in traditional terms with reference to traditional water management practices and the need for new systems and controls on water use and allocation.
Note: The preamble should be brief. Without specific language being proposed, it is not clear what additions could or should be made to the preamble.
Response: incorporated provisions from Constitution's Article XVII – Water

ARTICLE 1 - GENERAL PROVISIONS

Section 3101 Findings

The Legislative Council finds and declares that:

- (A) The Nation's Water is a life giving public resource and is vital to the cultural, spiritual, economic, and political interests of the O'odham.
- (B) All rights of the Nation to its water resources, whether founded on federal, state or international law or the Nation's law shall be protected and preserved. Nothing in this Code shall be construed to be a waiver or limitation on these rights of the Nation.
- (C) The Nation has inherent sovereign power to control and manage the Nation's Water and to regulate the use of the Nation's Water subject to the Constitution, laws, ordinances, and customs of the Nation, and applicable federal law.
- (D) The development of education and training opportunities for tribal members in water and related land resources management is essential to protect the economic well-being and self governance of the Nation.
- (E) Groundwater and surface water exist in a natural interrelationship and shall be managed as an integrated hydrologic system to promote the protection of both water quantity and quality.
- (F) The water resources described in clauses (i) and (ii) of section 307(a)(1)(G) of the SAWRSA Amendments shall be subject to any federal water use rights of Persons who have a legal interest in land pursuant to the Indian General Allotment Act of February 8, 1887, Ch. 119, 24 stat. 390, and shall be apportioned pursuant to clauses (i) and (ii) of section 307(a)(1)(G) of the SAWRSA Amendments and shall be protected by the Nation's laws.

Comment [tz4]: Comment: Will water priority be for economical development? Opposition to this approach.
Response: This language is designed to provide Nation's members with education and training about the Nation's water resources.

Comment [tz5]: Comment: This text misstates the legal significance of 25 USC §381 by implying that §381 conferred property rights upon allottees. 25 USC §381 is not the basis for allottee property rights in water.
Response: Revised in accordance with comment.

(G) Through the adoption and implementation of this Code, the Legislative Council will fulfill and comply with the provisions of section 308 of Title III of the Arizona Water Settlements Act, Pub. L. 108-451, the Southern Arizona Water Rights Settlement Amendments Act of 2004.

(H) This Code shall not be construed or applied in any manner inconsistent with the provisions of the Southern Arizona Water Rights Settlement Amendments Act of 2004, Title III of Pub. L. 108-451, 118 Stat. 3478 et seq.

Comment [tz6]: Comment: Section 3101(H) should be edited to clarify the Nation's intent not to apply the Code in a manner inconsistent with SAWRSA Amendments
Response: Revised in accordance with comment

(I) Rights to use SAWRSA Water acquired pursuant to the Interim Allottee Water Rights Code are fully recognized, protected and confirmed by this Code. All actions taken, approvals issued, decisions made, and regulations promulgated by the Department pursuant to and in accordance with the Interim Allottee Water Rights Code shall remain in effect under the terms of this Code. All applications, Declarations, proceedings and processes pending before the Department pursuant to the Interim Allottee Water Rights Code on the Effective Date as set forth in section 31005, shall be transferred for administration under this Code. No Person shall be prejudiced as a result of the transfer of administration.

Section 3102 Purposes

The purposes of this Code are to:

- (A) provide for and define the manner in which the Nation's Water shall be allocated, developed, used and preserved;
- (B) protect and promote the health, safety, and welfare of the Nation and its members;
- (C) provide for the fair and orderly resolution of disputes over the Nation's Water;
- (D) govern the administration and management of the Nation's Water;
- (E) implement the provisions of the Southern Arizona Water Rights Settlement Act of 1982, Pub. L. 97-293, as amended by Title III of the Arizona Water Settlements Act, Pub. L. 108-451, the Southern Arizona Water Rights Settlement Amendments Act of 2004, with respect to the use of SAWRSA Water within the San Xavier Reservation;
- (F) establish procedures and methods whereby a Person may use the Nation's Water;

(G) Establish procedures and methods whereby the Nation, Allottees, the San Xavier District and other Persons within the San Xavier Reservation may acquire rights to use SAWRSA Water as is provided for in this Code and the SAWRSA Amendments, and provide for the protection of the rights to use SAWRSA Water as permitted under the terms of this Code and the SAWRSA Amendments.

Comment [tz7]: Comment: All references in the Code to San Xavier as a place should be to the "San Xavier Reservation " All references to San Xavier as a political entity should be to the "San Xavier District "
Response: The Nation's Code has been modified to refer to San Xavier Reservation when referring to a location and to the San Xavier District as a political entity

Comment [tz8]: Comment: last phrase in Interim Code §3101(C)(5), which was dropped from the Nation's Code §3102(G), should be restored so that Nation's Code §3102(G) reads: (new language)
Response: revised in accordance with comment

Section 3103 Definitions

In this Code, unless the context otherwise requires:

- (1) "Acre" means an area of land equal to 160 square rods, 4,840 square yards, or 43,560 square feet.
- (2) "Acre-Foot" means the quantity of water required to cover one Acre to a depth of one foot. One Acre-Foot equals 43,560 cubic feet or 325,851 gallons.
- (3) "Additional Groundwater" means Groundwater that may be pumped within the San Xavier Reservation or eastern Schuk Toak District as authorized in section 308(h) of the SAWRSA Amendments and in accordance with section 8.7 of the Tohono O'odham Settlement Agreement.
- (4) "Affected Person" means any Person directly affected by a Final Decision of the Director pursuant to this Code.
- (5) "Allottee" means an individual who holds a beneficial real property interest in an Indian allotment that is located within the San Xavier Reservation and held in trust by the United States.
- (6) "Aquifer" means a water-bearing rock or any unconsolidated or semi-consolidated water-bearing sediment.
- (7) "A.R.S." means the Arizona Revised Statutes.
- (8) "Attorney General" means the Tohono O'odham Nation's Attorney General.
- (9) "Beneficial Use" means the use, storage, or impoundment of the Nation's Water in such quantity, not to exceed any established Duty of Water, as is necessary for productive and efficient use. Beneficial Use includes, but is not limited to, domestic use, municipal use, agricultural use, stock watering use, industrial use, in stream flow and riparian use, mining-related uses, water marketing, recreational use, cultural use, religious use, power generation, pollution control and environmental compliance, resource development, wildlife habitat management, underground storage, and commercial use. No presumption of preferences shall be given to the order in which Beneficial Uses are listed above.
- (10) "Catchment" or "Charco" means a manmade structure primarily created to impound water.
- (11) "Central Arizona Project" or "CAP" means the project by that name authorized under Title III of the Colorado River Basin Project Act (82 Stat. 887; 43 U.S.C. § 1521, et seq.).

Comment [tz9]: Note: Additional Groundwater is not simply calculated by determining the amount of water that was ordered but which the Secretary was unable to deliver. This definition more specifically refers to the applicable provision of the Settlement Agreement and also simply refers to section 308(h) as opposed to attempting to describe what that specific section of the SAWRSA Amendments provides.

Comment [tz10]: Comment: definition for beneficial use should be amended to remove the quantity and duty of water concepts from the definition.
Response: terms "storage or impoundment" added. Definition of Duty of Water revised.

Comment [tz11]: Note: inserted to be consistent with revision made to term "Permit"

Comment [tz12]: Comment: The definition of "Beneficial Use" in the proposed code should be amended to remove the quantity and duty of water concepts from the definition.
Response: See revision to 3103 (27)

Comment [tz13]: Comment: definition very broad. Response: term "primarily created to" included

- (12) “Chairperson” means the Chairman or Chairwoman of the Tohono O’odham Nation.
- (13) “Code” means the Tohono O’odham Nation Water Code.
- (14) “Community” means a group of people residing in the same locality and under the same governmental subdivision of a District.
- (15) “Constitution” means the Constitution of the Tohono O’odham Nation approved on March 6, 1986 by the Acting Deputy Assistant Secretary-Indian Affairs (Operations).
- (16) “Declaration of Existing Use” or “Declaration” means a statement filed pursuant to section 3304(A) of this Code.
- (17) “Deferred Pumping Storage Credit” means a pumping credit recoverable as authorized by the SAWRSA Amendments § 308(f)(1)(B) and 308(f)(2)(B).
- (18) “Deficiency Year” means a year in which the Secretary is unable to fulfill the water delivery obligations of the Secretary under sections 304(a), 305 and 306(a) of the SAWRSA Amendments.
- (19) “Department” means the Water Resources Department of the Nation.
- (20) “Direct Storage Credit” means a storage credit resulting from a project authorized in section 308(e) of the SAWRSA Amendments that cannot be lawfully transferred or otherwise disposed of to Persons for recovery outside the Nation’s Lands.
- (21) “Director” means the Director of the Water Resources Department.
- (22) “District” means any one of the eleven governmental subdivisions of the Nation established under the Constitution of the Nation.
- (23) “District Water Advisory Committee” means the Advisory Committee referred to in section 3204 of this Code.
- (24) “District Council” means the governing body of a District.
- (25) “Diversion” means the use of any Surface Water for a Beneficial Use by means other than by a Charco or Catchment.
- (26) “Drilling Permit” means an authorization issued by the Director after compliance with all applicable provisions of Article 6 to drill and construct a Well on the Nation’s Lands.
- (27) “Duty of Water” means the maximum annual quantity of water reasonably required for

Comment [tz14]: Note: definition of “community” can be stricken since this term is not used in the Code.

Comment [tz15]: Comment: A new definition should be added to the Nation’s Code as §3103(17). “Contingent Permittee” means any user or Permittee of the Nation who is using any part of the San Xavier “first right of beneficial use” SAWRSA CAP Water outside of the San Xavier Reservation. Response: already addressed in 3308(C).

Comment [tz16]: Note: helpful to insert this term because it relates, in part, to the circumstances during which time Deferred Pumping Storage Credits, Direct Storage Credits and Additional Groundwater may be used.

Comment [tz17]: Note: pertinent both to the first right of beneficial use at San Xavier and also in the context of shortages

Comment [tz18]: Note: clarifies duty of water relates only to irrigation uses.

the production of irrigated crops considering the water needs of the plants, the nature of the soils, the location of the irrigated lands and other relevant factors, all as determined by the Director.

- (28) "Effective Date" means the date set forth in Section 31004 of this Code.
- (29) "eastern Schuk Toak District" means that portion of the Schuk Toak District that is located in the Tucson Active Management Area as established in A.R.S. § 45-411 and as modified by A.R.S. § 45-411.02.
- (30) "Effluent" means water that has been used for any purpose and thereafter collected and treated to a quality that complies with applicable water quality standards. Such water remains Effluent until it acquires the characteristic of Groundwater or Surface Water.
- (31) "Emergency" means an occurrence or condition calling for immediate action to avert imminent danger to water quantity or quality, or to public health, safety or welfare, crops, livestock, or other cultural or natural resources.
- (32) "Exempt Catchment" or "Exempt Charco" means a Catchment or Charco with a design storage capacity of 15 Acre-Feet or less and used primarily for domestic, livestock or agricultural purposes.
- (33) "Exempt Well" means a well equipped with a pump with a rated capacity of 35 gallons per minute or less, which is used to withdraw no more than 20 Acre-Feet of Groundwater per year.
- (34) "Existing Well" means a well drilled on the Nation's Lands prior to the Effective Date and which was not capped or abandoned on the Effective Date.
- (35) "Existing Use" means the Beneficial Use of water that existed on the Effective Date. Existing Use also means the maximum entitlement held by a Person pursuant to a contract between the Nation and that Person notwithstanding that Person has not used the maximum contractual entitlement as of the Effective Date.
- (36) "Final Decision" means any decision, order or action by the Director in which a Person's legal rights, duties, or privileges are affected and for which no further administrative relief is available.
- (37) "Groundwater" means all recoverable water naturally occurring below the surface of the ground.
- (38) "Groundwater Basin" means an area which, as determined by the Director based on known facts, encloses a hydrologically distinct body or related bodies of Groundwater and which is described horizontally by surface description.

Comment [tz19]: Comment: Although "Effective Date" is defined in the Nation's Code, Art. 10, §31004, it would be useful to define "Effective Date," stating the actual Effective Date (when it is known), in §3103.
Response: The effective date is cross-referenced in this subsection.

Comment [tz20]: Note: Term "eastern Schuk Toak" as referred to in Tohono O'odham Settlement Agreement and 2004 Act.

Comment [kl21]: Note: definition reinserted & redefined and also added to definition of "Nation's Water," suggested definition: "Effluent means water that has been used for any purpose and thereafter collected and treated to a quality that complies with applicable water quality standards. ..."; adding a new subsection (2) to the definition of "Nation's Water" in Sec. 3103 (45) as follows: "(2) Effluent existing on the Nation's Lands."

Comment [tz22]: Comment: Code gives significant powers to the Director of the Nation's Water Resources Department to act in cases of "emergency."
Response: the Director needs to have broad authority to address the type of situations described in the definition of Emergency.

Comment [tz23]: Comment: definitions should be revised as appropriate to clarify that catchments or charcos used to manage stormwater or process water regulated by the federal Clean Water Act under either general or individual permits should be exempt from the proposed Code's permit requirements.
Response: The Nation's water regulatory system necessarily needs a record of these types of facilities at mine sites, not in the context of regulating water quality or other environmental compliance activities, rather to have an accurate picture of the quantities of water being impounded and used for various mining-related purposes.
Comment: How would a member measure a charco?
Response: most charcos are less than 15 ac-ft and Director must issue permit for existing use once applicant submits necessary info. Water Department will offer guidance about how to measure.

Comment [tz24]: Note: definition "exempt use" deleted; never referred to in Code.

Comment [tz25]: Note: Edited for clarity.

Comment [tz26]: Comment: The Nation's Code definitions need to be redrafted so that an Exempt Well and a SAWRSA Exempt Well have a capacity of 35 gpm or less, and a Nonexempt Well has a capacity of more than 35 gpm.
Response: revision made according to comment.

Comment [tz27]: Comment: suggested edits to reflect section 3304(A)(11) comments.
Response: Language added.

Comment [tz28]: Comment: "natural conditions" vague.
Response: revised according to comment.

(39) "Identified Actual Use" means the quantity of SAWRSA CAP Water ordered for delivery in any calendar year for uses made pursuant to Permits or licenses to perfect Permits within the San Xavier Reservation.

(40) "Judicial Court" means the Tohono O'odham Judicial Court.

(41) "Legislative Council" means the Tohono O'odham Legislative Council.

(42) "Marketable Long-Term Storage Credit" means a long-term storage credit acquired by the Nation pursuant to Title 45, Chapter 3.1, A.R.S.

(43) "Nation" means the Tohono O'odham Nation.

(44) "Nation's Lands" means all land within the exterior boundaries of:

- (a) the Sells Tohono O'odham Reservation established by the Executive order of February 1, 1917, and the Act of February 21, 1931 (46 Stat. 1202, chapter 267);
- (b) the San Xavier Reservation established by the Executive Order of July 1, 1874;
- (c) the Gila Bend Indian Reservation established by the Executive order of December 12, 1882, and modified by the Executive order of June 17, 1909;
- (d) the Florence Village established by Public Law 95-361 (92 Stat. 595); and
- (e) such other lands as may have been or may hereafter be added thereto by purchase, gift, act of Congress or otherwise.

(45) "Nation's Water" means: 1) all waters which originate in or flow in, into or through the Nation's Lands, or which are stored within the Nation's Lands, whether found on the surface or underground; 2) Effluent existing on the Nation's Lands; and 3) all Central Arizona Project water to which the Nation has a right, whether or not located within the Nation's Lands.

(46) "Nonexempt Catchment" or "Nonexempt Charco" means a Catchment or Charco (a) with a design capacity greater than 15 Acre-Feet; or (b) with a design capacity of 15 Acre-Feet or less and used primarily for other than domestic, livestock or agricultural purposes.

(47) "Nonexempt Well" means a Well equipped with a pump with a rated capacity of more than 35 gallons per minute and which is used to withdraw Groundwater.

(48) "Permit" means an authorization issued by the Director pursuant to sections 3304 or 3305 of this Code to make use of, store or impound any amount of the Nation's Water.

Comment [j29]: Comment: It needs to be clear that new applicants who plan to use part of the 35,000 AF are included in Identified Actual Use. New applicants need to be identified as an Identified Actual User.
Response: Existing language protects first right of beneficial use.

Comment [j30]: Comment: Request for a definition of License to Perfect.
Response: This is addressed in text of Code.

Comment [tz31]: Note: If a Charco can hold more than 15 acre-ft, it will have to go through permitting procedure. If less than 15 acre-ft and used for domestic, livestock or agricultural purposes, then doesn't need to go through full regulatory process.

Comment [tz32]: Comment: discrepancy between the definition of Permit in 3101(47) and 3305.
Response: definition 3101(47) expanded to make consistent with 3305

- (49) "Permitted Use" means any water use for which a Permit has been issued.
- (50) "Person" means any individual, governmental body, corporation, or other entity, including but not limited to any tribal member, community, livestock association, Allottee, firm, association, organization, partnership, business trust, corporation, company, the United States of America and all agencies thereof, the State of Arizona and all political subdivisions, municipal corporations, organizations and agencies thereof, and the Nation and all Districts, political subdivisions, enterprises, organizations, and agencies thereof.
- (51) "Priority" means the order of preference of Permitted Uses from a common source of supply in times of shortage.
- (52) "Recusal" means being removed as a decision-maker in a particular adjudicative proceeding.
- (53) "San Xavier District" means the District of that name, one of eleven political subdivisions of the Nation established under the Constitution of the Nation.
- (54) "San Xavier Reservation" means the San Xavier Indian Reservation established by the Executive Order of July 1, 1874 encompassing the ancient Community of Wa:k O'odham and which comprises the San Xavier District of the Tohono O'odham Nation.
- (55) "SAWRSA" means the Southern Arizona Water Rights Settlement Act of 1982, Pub. L. 97-293.
- (56) "SAWRSA Amendments" means Title III of the Arizona Water Settlements Act, Pub. L. 108-451, the Southern Arizona Water Rights Settlement Amendments Act of 2004.
- (57) "SAWRSA CAP Water" means SAWRSA Water delivered through the main project works of the Central Arizona Project.
- (58) "SAWRSA Exempt Well" means a Well located within the San Xavier Reservation or the eastern Schuk Toak District with a maximum pumping capacity of not more than 35 gallons per minute, which water is used for supply, services or activities of households or private residences; landscaping; livestock watering; or the irrigation of not more than two (2) Acres where agricultural or other commodities are produced either for sale, human consumption or livestock or poultry feed.
- (59) "SAWRSA Groundwater" means the Groundwater that may be withdrawn within the San Xavier Reservation and the eastern Schuk Toak District pursuant to the SAWRSA Amendments § 308(f)(1)(A) and § 308(f)(2)(A).

Comment [kl33]: Note: suggestion to add the terms "community, livestock association" between terms "tribal member" and "Allottee" incorporated.

Comment [tz34]: Comment: This definition of "Safe Yield" is acceptable if applied to the Nation's lands outside of the San Xavier Reservation, but must not be applied in conjunction with Nation's Code Section 3701.
Response: Deleted Safe Yield definition.

Comment [tz35]: Comment: definition of "safe yield" should be deleted, not used elsewhere in Code.
Response: Definition deleted.

(60) "SAWRSA Water" means (a) water to be delivered by the Secretary pursuant to sections 304(a) and 306(a) of the SAWRSA Amendments; (b) water to be delivered by the Secretary under sections 305(a) and 305(b) of the SAWRSA Amendments; (c) SAWRSA Groundwater; (d) Direct Storage Credits; (e) Deferred Pumping Storage Credits; and (f) Additional Groundwater.

(61) "SAWRSA Well" means any Well located within the San Xavier Reservation or the eastern Schuk Toak District that is not a SAWRSA Exempt Well.

(62) "Secretary" means the Secretary of the United States Department of the Interior.

(63) "Stream" means a distinct body of water flowing on the surface in a well defined natural channel, with a bed and banks, whether perennial, intermittent or ephemeral.

(64) "Substantial Evidence" means such evidence as a reasonable person would accept as adequate to support a conclusion.

(65) "Surface Water" means water on the surface of the ground from all sources, flowing or occurring in Streams, springs, lakes, Catchments or Charcos, but does not include SAWRSA CAP Water.

(66) "Tohono O'odham Settlement Agreement" means the agreement, restated from the Agreement dated April 30, 2003 and revised to eliminate any conflicts with Public Law 108-451, 118 stat. 3478 (including all the exhibits of and attachments to the Agreement).

(67) "Water Management Area" means an area within the Nation's Lands defined by the Director in accordance with this Code.

(68) "Water Management Plan" means a plan developed pursuant to this Code to regulate, monitor or protect the Nation's Water within an established Water Management Area.

(69) "Water Resources Committee" means the standing committee of the Legislative Council.

(70) "Well" means a man-made opening in the earth created, constructed, or used primarily to withdraw, monitor, test or access Groundwater or other subsurface water.

(71) "Well Permit" means documentation issued by the Director to a Person who owns or controls a Well within the Nation's Lands that confirms the Well was drilled and constructed according to the requirements of Article 6 of this Code or properly registered as an Existing Well according to the requirements of Article 6 of this Code.

Comment [tz36]: Comment: there should be three additional categories added to this definition: "d) unmarketable direct groundwater storage credits that may be withdrawn from SAWRSA Wells under the SAWRSA Amendments §308(e) and §§308(f)(1)(C); e) marketable direct groundwater storage credits that may be withdrawn from SAWRSA Wells under the SAWRSA Amendments §308(e) and §§308(f)(1)(C); and f) additional groundwater that may be withdrawn from SAWRSA Wells under the SAWRSA Amendments §308(h)."

Response: expands on existing definition of SAWRSA Water by adding a reference to Direct Storage Credits, by referring directly to the definition of SAWRSA Groundwater, and also adding the references to section 305.

Comment [tz37]: Comment: definition is overly broad and should only apply to water actually flowing or occurring in streams, lakes, or similar surface water features.
Response: deleted reference to "whether or not flowing"

Comment [tz38]: Note: definition taken directly from Tohono O'odham Settlement Agreement.

Comment [tz39]: Comment: definition too broad.
Response: definition of well revised in response to comments.

ARTICLE 2 - ADMINISTRATION

Section 3201 Water Resources Department and Director

- (A) The Water Resources Department was created in the Interim Allottees Water Rights Code and is a distinct Department of the Nation, which shall be funded with monies from the trust fund reauthorized by § 315 of the SAWRSA Amendments for so long as such funds are available. The Department shall be subject to executive oversight by the Nation's Chairperson and to legislative oversight by the Water Resources Committee.
- (B) The Department shall be under the direction, supervision and control of the Director. The Director shall be appointed in accordance with Section 2(e) of Article VII of the Constitution. The Director's conditions of employment and rate of compensation shall be determined in accordance with personnel policies and wage scales of the Nation. The Director must submit to and pass a background check of character, experience, and qualifications, and must be able to carry out the duties of the office. Subject to applicable personnel policies, the Director may appoint an Assistant Director who shall have the powers and duties of the Director in the Director's absence.

Comment [tz40]: Comment: Director's authority is broad.

Response: Most authorities already included in the Interim Allottee Water Rights Code.

Comment: Can Legislative Council overrule the Director?

Response: General legislative committee oversight, cannot overrule Director.

Section 3202 Duties and Responsibilities of Director

- (A) The Director is authorized and directed to manage and supervise the use of the Nation's Water in accordance with the provisions of this Code, regulations adopted pursuant to the Code and other applicable law. The Director is authorized to:
- (1) issue Permits authorizing the continuation of Existing Uses or use of the Nation's Water for which no prior Permit has been issued;
 - (2) adopt such regulations as may be necessary to administer the provisions of this Code;
 - (3) conduct such administrative proceedings as are necessary and appropriate in the implementation, enforcement and administration of this Code;
 - (4) manage, supervise and administer the Department and its employees and contractors, to include the preparation and control of budgets for the Department and development and implementation of internal policies and procedures;
 - (5) carry out data collection activities, water sampling, surveys, research, and investigations into all aspects of water, including but not limited to water availability, use, quality, and quantity;
 - (6) prepare plans and establish programs for the development, management, conservation, protection, and use of the Nation's Water;

Comment [m41]: Comment: It should be clear that the Assistant Director appointment needs to comply with personnel policies.

Response: added "subject to applicable personnel policies"

Comment [j42]: Comment: The Director should cause a review (and possible revision) of the Water Code to occur once every five years.

Response: Revisions will be up to the Legislative Council.

Comment [tz43]: Comment: authority not necessary to fully manage and regulate the Nation's water.

Response: These powers do not interfere with or attempt to supplant the authority and jurisdiction of U.S. EPA or other agencies that have primary jurisdiction over water quality and environmental compliance issues.

Comment [tz44]: Comment: How will the Department assist with water quality issues? What about recent problem with Vamori Wash and pesticide?

Response: Department will continue to monitor water quality. Have not seen the reoccurrence of banned pesticide use in Vamori Wash. Department would be available to Districts to discuss water quality issues.

- (7) act in an Emergency to avert imminent danger to water quantity or quality, or to public health, safety or welfare, including crops, livestock, or other cultural or natural resources.
- (8) subject to applicable personnel policies, hire such employees as the Director deems necessary to make the operation of the Department efficient and effective, including persons to monitor and implement the Nation's water management plans including those authorized pursuant to § 308(d) of the SAWRSA Amendments;
- (9) develop and negotiate agreements, memoranda of understanding, or contracts with any Person or Persons to carry out the provisions and purposes of this Code;
- (10) establish a Duty of Water applicable to Permitted Uses for irrigation purposes;
- (11) establish a fee structure for the administration of Permits, Declarations and applications that authorize or seek to use, store or impound in excess of 20 Acre-Foot per year of the Nation's Water; and
- (12) consult and cooperate with, advise or negotiate with any federal, state, or local jurisdictional authority regarding matters related to the Nation's Water.

Comment [tz45]: Note: Language makes it clear that the Duty of Water is applicable only to irrigation.

Comment [tz46]: Note: edited in response to concerns regarding permit fees. No fees for less than 20 acre-feet.

(B) In addition to other duties required to be performed by the Director, the Director shall:

- (1) maintain a primary office and establish other offices as the Director deems necessary;
- (2) prepare Water Management Plans for each Water Management Area established pursuant to this Code and submit each plan to the Chairperson and the Water Resources Committee;
- (3) develop an educational program, provide training on the provisions of and implementation of this Code and the SAWRSA Amendments and on other water and related land resources management;
- (4) administer this Code in a cooperative and positive manner that recognizes and respects the traditional knowledge, customs, and beliefs of the Tohono O'odham and assist Persons to comply with the provisions of the Code;
- (5) provide technical and administrative assistance, in both English and the O'odham language, to any person concerning the requirements of and compliance with the Code;

Comment [tz47]: Comment: Will the Department develop water conservation plans and include the next generation in the planning process?
Response: Yes, Department can develop a youth-oriented program.

Comment [tz48]: Comment: How will a regular O'odham member understand the Code?
Response: The Department will work with members to implement the Code and explain permitting and other requirements.

Comment [tz49]: Note: Language edited to respond to public suggestion that Department provide assistance to members.

(6) inventory and keep current data on all Permitted Uses within the Nation's Lands;

(7) administer the ordering, receipt of deliveries and use of SAWRSA CAP Water;

(8) monitor and require the annual reporting of withdrawals of SAWRSA Groundwater and withdrawals from Non-Exempt Wells located within the Nation's Lands;

(9) assert claims for, collect and disburse compensation payable by the Secretary on account of the non-delivery of SAWRSA CAP Water ordered but which the Secretary is unable to acquire and deliver, all in accordance with § 305(d) of the SAWRSA Amendments;

(10) maintain separate accounts for the San Xavier Reservation and the Schuk Toak District reflecting the accrual and use through recovery of Deferred Pumping Storage Credits and Direct Storage Credits within the Reservation and the District. The Director shall provide a report to the San Xavier District and the Schuk Toak District, on a semi-annual basis, of the balances of each type of credit in the San Xavier Reservation or the Schuk Toak District account together with a summary of the activity in the account during the preceding six-month period;

(11) include in every Final Decision a statement that the Final Decision may be appealed as provided in section 31002; and

(12) develop an administrative policy, subject to the Water Resources Committee's review and the Chairperson's approval, concerning the dissemination of data or other information in the Department's possession that was developed as a result of the Department's activities, including information collected or prepared in accordance with subsection 3202(A)(5), 3202(A)(6), Article 7 of this Code or otherwise collected or prepared in relation to the Nation's Water.

(C) To carry out the provisions of the Code, the Director may:

(1) inspect books, records, meters, gauges, well logs, Wells, water delivery facilities or any other relevant information or physical condition that may affect the Nation's Waters;

(2) obtain testimony or the production of relevant information by request or by a subpoena issued by the Judicial Court if the Director reasonably believes the information is necessary to carry out the provisions of the Code;

(3) enter upon lands and other property within the Nation's Lands in accordance with section 3901 or, if necessary, obtain an appropriate order from the Judicial Court to permit such entry for the purpose of conducting investigations, studies or monitoring activities, and ensuring compliance with the Code and any regulations

Comment [tz50]: Comment: Information from inventory should be shared with Districts.
Response: Information previously distributed to Legislative Council representatives. Disclosure will be subject to policy adopted by Department.

Comment: Department should present to the Districts information regarding members' water use.

Comment [m51]: Note: Department is authorized to adopt a policy for information sharing, but districts should also provide water resource information to Department.

Comment [tz52]: Comment: A new §3202(B)(9) should be added to the Nation's Code regarding storage credit accounts.
Response: This language was added.

Comment [tz53]: Comment: request to require director to "enter into an agreement with the San Xavier District authorizing the District to provide the information and accomplish the tasks contemplated by this subsection and to implement any management plan developed pursuant to §308(d) of the SAWRSA Amendments."
Response: The proposed language need not be in the Nation's Code since section 307(a)(1)(E)(iii)(I)(ee) already requires the consent of the Nation for the San Xavier District to complete the water resource study at San Xavier and to prepare the water management plan referred to in section 308(d).

Comment [tz54]: Comment: request new section "to ensure that every Final Decision of the Director states the right to appeal as provided in section 31001."
Response: This notice provision was added in (B)(11).

Comment [m55]: Comment: Why isn't this mandatory?
Response: These are authorities that the Director would only exercise when necessary.

promulgated hereunder;

- (4) install or require the installation of measuring devices and conduct tests including but not limited to tests or measurements of capacity, output, water quality or other parameters of any Charco, Catchment, Diversion, Well or water delivery system.
- (5) issue, deny, revoke, and suspend Permitted Uses pursuant to the provisions of the Code; and
- (6) take such actions as are authorized in Article 9 of this Code that may be necessary to enforce the provisions of the Code, any rule or regulation promulgated pursuant to the Code, any condition or limitation applicable to any Permitted Use and any order, plan, determination, policy or guideline developed or issued pursuant to the Code.

(D) The Director shall not participate in making any decision in which the Director has a direct economic interest or other conflict of interest. If the Director enters a Recusal in a matter due to a conflict, the Director's designee shall act in the Director's place for the purpose of making the decision on that matter.

Section 3203 Regulations; Notice, Public Comment and Adoption

(A) Before adoption of any regulations, the Director shall provide notice and a brief summary of the proposed regulations. The notice shall be mailed or e-mailed to the Chairperson, to each member of the Water Resources Committee, to each District, and to each Person registered on the records of the Department to receive such notices of regulations.

(B) The notice of the proposed regulations required by subsection (A) shall generally describe the subject matter of the proposed regulations and state that copies of the proposed regulations are available for review at the Department, and at each District office. The notice shall invite written comments and give a deadline for their submission of not less than 30 days after the date of the notice. The Director may hold public hearings on proposed regulations to take additional public comment on the proposed regulations. Regulations shall become effective on the date as ordered by the Director but in no event sooner than 30 days after the final date for submission of comments or 30 days following any public hearing unless the date is extended by the Director. Copies of all final regulations shall be filed and made available for public inspection in the Director's office and at each District office. Copies of any regulations may be obtained at no cost.

(C) If the Director finds that immediate adoption of a regulation is necessary to address an Emergency and that complying with the notice and comment requirements of this Code would be contrary to the public interest of the Nation, the Director may dispense with such requirements and immediately adopt the regulation as an Emergency regulation.

Comment [tz56]: Comment: the code should not become effective until regulations implementing the various aspects of the code are adopted
Response: Implementation of the Nation's Code cannot await development of implementing regulations since if there was no Code there would be no authority to propose and issue regulations

Comment [tz57]: Comment: §3203(A) has been substituted for the rulemaking notice provisions of Interim Code §3301(C)(1) The language of Interim Code §3301(C)(1) should be used for Nation's Code §3203(A) instead of the new language for the reason that the Interim Code §3301(C)(1) language provides better notice than the new provision, although notice by mail to the Nation's Chairperson should be included
Response: Notice to the San Xavier District and Persons requesting notice from the Department should be sufficient to provide notice to the Allottee's Association at San Xavier

Comment [tz58]: Comment: What about posting public notices?
Response: Notices go to Districts and anyone who registers to receive notices

Comment [j59]: Comment: request that this mail or e-mail also go to all 92 communities
Response: Notices go to Districts and anyone who registers to receive notices

Comment [tz60]: Comment: §3203(B) should include the San Xavier Allottees Association as a location where copies of proposed regulations and amendments to existing regulations will be available for review as in Interim Code §3301(C)(2)
Response: Proposed regulations are to be available at the Department and at each District office If the Allottee's Association wants to post proposed and existing regulations at its office, it can obtain them from the San Xavier District

Comment [tz61]: Comment: suggested language: "An Emergency regulation or order shall specify the area affected by the emergency and shall not apply to any area larger than the area actually affected by the Emergency "
Response: Suggested language is not necessary in that the emergency regulations will, by their nature, set forth the type of the emergency which, in turn, will provide information concerning the area that is affected by the emergency regulation

The Director's finding of an Emergency and a brief explanation of the finding shall be incorporated in the Emergency regulation. An Emergency regulation shall be effective upon the date of its adoption by the Director. Notice of the Emergency regulation may be published, but such publication is solely to inform the public of its adoption, and nothing in this Code shall be construed to prevent the implementation of the Emergency regulation upon its adoption by the Director. An Emergency regulation shall not remain in effect more than 180 days after adoption unless reissued by the Director in compliance with section 3203(A) and (B).

Section 3204 District Water Advisory Committee

A District Water Advisory Committee has been established pursuant to Bylaws approved by the Legislative Council. The Bylaws authorize the District Water Advisory Committee to provide advice and recommendations to the Water Resources Committee and to the Department.

Comment [tz62]: Comment: DWAC should have a greater role in the Water Code
 Comment: Is the DWAC still necessary now that there is a proposed Water Code? If not, get rid DWAC
 Response: DWAC's role as an advisory committee is established in its Bylaws. This section repeats authorities listed in the Bylaws

Comment [tz63]: Comment: 3205 We recommend the inclusion of a new §3205, titled "Assistance to Applicants and Filers"
 Response: Assistance has been added in section 3202(B)(5), and existing subsections (B)(3) and (4) address this same type of concern

ARTICLE 3 - RIGHTS TO USE THE NATION'S WATER

Section 3301 Nation's Control of Water

The Nation's Water is subject to the control, management and regulation by the Nation, subject to applicable federal law. All rights to use or to undertake activities that affect the Nation's Water by any Person may be obtained and continued only through compliance with the provisions of this Code. All rights to use the Nation's Water as provided for in this Code are revocable and subject to limitation and revision by the Nation. The right to use the Nation's Water shall not be interpreted or construed to constitute a private property interest of the Person holding the right to use the Nation's Water.

Comment [tz64]: Comment: new 3206 to read: Notwithstanding §3202(A)(11), no fees shall be charged for filing or assisting to prepare a Declaration of Existing Use, or for filing or assisting to prepare an application for an Exempt Well, or an application for an Exempt Charco or Exempt Catchment
 Response: 3202 (A)(11) modified in previous drafts. The modification permits the Director to impose fees only on applications that seek to use, store or impound in excess of 20 acre-feet. This provision will essentially mean that almost no applicants will be subject to a fee. Section 3103(33) was modified accordingly

Section 3302 Reserved or Withdrawn Water

(A) Subject to subsection (C), the Legislative Council may reserve or withdraw from Beneficial Use any of the Nation's Water for which no Permitted Use exists pursuant to Article 3 of this Code. Water may be reserved or withdrawn upon a finding of the Legislative Council that such reservation or withdrawal is necessary for purposes that include, but are not limited to:

Comment [kl65]: Note: This language is consistent with Article XVII, Section 1 of the Constitution

(1) preserving the integrity of the Nation's Water through the prevention of uses of the Nation's Water from any distinct source in amounts that exceed the natural replenishment of that source;

Comment [tz66]: Comment: strong opposition to §3302 and recommend that it be deleted in its entirety
 Comment: The Legislative Council should not have the ability to set aside any of the 35,000 ac-ft as reserved water. This issue is addressed in the new language added to this subsection (A) and in subsection (C)
 Response: The Nation has a first right of use to unused water under the SAWRSA Amendments, also Section 3302(C) addresses the concern

(2) protecting riparian habitat;

Comment [tz67]: Comment: Reservations of the Nation's Water by the Legislative Council will effectively place a moratorium on new uses
 Response: The Legislative Council has this inherent authority

(3) preventing interference with or diminution of any Permitted Use authorized pursuant to the Code;

Comment [tz68]: Note: Language added in response to comment from public hearing about the meaning of preserving the integrity of the Nation's water

- (4) preventing or mitigating the degradation or alteration of the quality of any of the Nation's Water;
- (5) promoting the economic well being of the Nation;
- (6) leasing, exchanging, or otherwise disposing of the Nation's Water, including any Marketable Long-Term Storage Credits; and
- (7) any other purpose necessary to protect water quantity or quality, public health, safety or welfare, crops, livestock, or other cultural or natural resources.

Comment [m69]: Note: This language was added to parallel the definition for "Emergency"

- (B) Any of the Nation's Water reserved or withdrawn by the Legislative Council shall not be available for Beneficial Uses except pursuant to such conditions, restrictions or limitations as established by the Legislative Council.
- (C) Notwithstanding the provisions of subsection (A), the Legislative Council may not reserve or withdraw from Beneficial Use any of the water subject to the first right of beneficial use set forth in Section 307(a)(1)(G)(i) of the SAWRSA Amendments which water is allocated in Section 3401(A) of this Code to the San Xavier District, Allottees, and other Persons within the San Xavier Reservation.

Section 3303 Water Use

- (A) Persons may make Beneficial Use of the Nation's Water only in the quantities and at times set forth in a Permit issued by the Director. Permits are subject to adjustments that may be imposed during declared water shortages or Emergencies.
- (B) Beneficial Use shall not exceed any Duty of Water established by the Director for the particular type and location of use.
- (C) The Director shall create and maintain a registry of Permits that sets forth the number assigned to each Permit, the name of the Permit holder, the source of the Nation's Water to which the Permit applies, the quantity of the Nation's Water that may be used pursuant to the Permit, the use or uses to which the Nation's Water may be applied pursuant to the Permit, and the location of the lands on which the Nation's Water will be used under the Permit. The Director shall create and maintain separate registries of Permits to withdraw and use SAWRSA Groundwater within the San Xavier Reservation and the eastern Schuk Toak District and Permits to use SAWRSA CAP Water.
- (D) Except as specifically provided for in a Permit, no amount of the Nation's Water may be used outside the Nation's Lands for any purpose. Unless authorized by the terms of a Permit no Person that holds a Permit may allow any other Person to use the Nation's Water described in the Permit for any purpose. No amount of the Nation's Water for

Comment [k170]: Comment: section 3303(D) is redundant to sec 3402(H)
Response: 3303(D) is applicable to all uses; 3402(I) specifically relates to SAWRSA water

Comment: subsections 3303(D) and 3402(H) language re: Permitted Use is too restrictive
Response: Restrictions in 3303(D) are necessary

Comment: Does section 3303(D) apply to Well Permits?
Response: No, does not apply

Comment [j71]: Comment: Does use from a natural catchment need a Permit?
Response: Yes, but the Permit will protect the continued use by the applying "Person," which can include the association or group of people who have historically used the catchment

Comment [m72]: Comment: This provision needs to allow water delivery from wells on Nation to communities in Mexico
Response: The beginning of this subsection allows the Director to add this language to a permit

which a Permit has been issued may be used on any lands or for any use not authorized and approved in the Permit.

(E) No provision of this Code shall prevent the Nation, pursuant to binding action of the Legislative Council, from making any use of the Nation's Water for which no Permitted Use has previously been issued without compliance with this Code; provided, however, that

Comment [tz73]: Note: This provision was incorporated from the Interim Code and clarifies that the Legislative Council can create exemptions and make a specific use of unused water (E)(2) provides for the termination of use in order to protect the first right of beneficial use at San Xavier

(1) any such Legislative Council action shall be consistent with the allocations set forth in section 307(a)(1)(G)(i) and (ii) of the SAWRSA Amendments; and

(2) to the extent the Nation uses any unused portion of the 35,000 Acre-Feet per year of SAWRSA CAP water allocated in section 3401(A)(1) of this Code, such uses shall terminate to the extent necessary to fulfill Identified Actual Uses of any portion of the 35,000 Acre-Feet per year within the San Xavier Reservation.

Section 3304 Permits for Existing Uses

(A) A Person who, on the Effective Date, is using any of the Nation's Water shall file a Declaration of Existing Use with the Director. If a Declaration of Existing Use has been filed for a use pursuant to the Interim Allottee Water Rights Code, no Declaration of Existing Use for that same use is required or permitted pursuant to this section. Declarations of Existing Use shall set forth, to the extent such information is reasonably available:

Comment [tz74]: Comment: waive or exempt applicable permit requirements or other related considerations when the need to contain water within a mine site or the construction and operation of groundwater wells is necessary to comply with applicable environmental controls
Response: Notwithstanding the fact that CTC may have some rights to use water pursuant to their mining or water leases does not mean those uses should not be made of record pursuant to the Nation's Code
Comment: should be amended to include permits for water rights under contracts with the Nation predating the adoption of the code
Response: The right to use water on the Nation's Lands pursuant to contract is a separate issue from issuing Permits for any Existing Uses made of water pursuant to those contracts

- (1) the name and address of the Person filing the Declaration of Existing Use;
- (2) the location of any Well, Catchment, Charco, Diversion, or any other existing works to make Beneficial Use of the Nation's Water;
- (3) the purpose or purposes for which the Nation's Water is used;
- (4) the location or legal description of the land on which the Nation's Water is used;
- (5) the depth, diameter and pumping capacity of any Well used to withdraw Groundwater;
- (6) whether any metering device or other method exists to measure withdrawals from the Well;
- (7) the date the Well was drilled and the date Groundwater was first withdrawn from that Well;
- (8) the capacity, width, length and depth of any Charco or Catchment and the date the

Comment [tz75]: Comment: Information required for Declarations of Existing Use too extensive
Response: This information is designed to provide enough information to protect the permit applicant's right to use his or her water

Comment [kl76]: Comment: phrase should be defined to make clear that well owners do not have to spend money to obtain info requested
Response: The qualification that information is required only if it is "reasonably available" covers this issue

Comment [tz77]: Comment: How will Code affect livestock owners?
Response: Once a Permit for Existing Use has been issued by the Department, then Department will protect the permit holder's use of the Charco Department has no intent to interfere with the way livestock owners raise their livestock

Comment: If a Charco is used by multiple parties, how will one person file a Declaration of Existing Use?
Response: A community or livestock association may file the declaration

Charco or Catchment was constructed;

- (9) a description of the constructed works and capacity of any Diversion, the capacity and location of any delivery system utilized to put the diverted water to use, the date on which the Diversion and delivery system were constructed, and the date on which Surface Water was first diverted for Beneficial Use;
- (10) a description of any delivery system constructed to put SAWRSA CAP Water to use, the capacity and location of the delivery system and the date SAWRSA CAP Water was first delivered through the system;
- (11) the maximum quantity of the Nation's Water used by the applicant for the claimed Existing Use during the five years predating the Effective Date; and
- (12) any other information the Director deems is reasonably necessary to fully evaluate the Declaration of Existing Use.

(B) All information set forth in a Declaration of Existing Use shall be verified by the applicant's notarized signature, and must be filed with the Director not later than October 1, 2010. An individual signing a Declaration of Existing Use on behalf of another Person shall certify that the signer has authority to represent the Person in whose name the Permit will be issued.

(C) Not later than 90 days after the Effective Date, the Director shall give notice of the deadline for filing Declarations of Existing Use. The notice shall be broadcast three times per week for four consecutive weeks on a radio station broadcast within the Nation's Lands and published at least twice during the same four consecutive week period in a local newspaper circulated within the Nation's Lands. The notice shall state that each Person making any Existing Use of any of the Nation's Water shall file a Declaration of Existing Use with the Director on or before October 1, 2010. The Director shall also provide the notice to each District, to the Chairperson, to each member of the Legislative Council, and to each Person who has filed a request with the Director to receive such notice. The Director may give and provide the notice by other means designed to give reasonable notice to all Persons within the Nation's Lands, including the posting of the notice in Communities and other locations where residents of the Nation's Lands can be found.

(D) The notice shall include a statement that failure to file a Declaration of Existing Use pursuant to the Code will result in the loss of any right to continue an Existing Use for which no Declaration is filed.

(E) Any Person who files a Declaration of Existing Use in accordance with this section shall have a conditional right to continue such water use pending a decision by the Director on the Declaration of Existing Use as provided for in section 3304(I) or section 3304(J).

Comment [tz78]: Comment: This section is problematic if the purpose of the specification is to allow the Nation to define the amount of an existing use subject to Section 3304 and distinguish that amount from new uses that are subject to Section 3305 ASARCO should not have to apply for a permit under Section 3305 each time it seeks to use more of its pre-existing right until the entire 10,000 acre-foot are realized. See ASARCO's suggested edit to section 3103(34)

Response: Revision to (I) makes clear that the Director may issue a permit for the contractual entitlement to water, not just the water already being used

Comment [kl79]: Comment: this section should be more clear as to what is meant by such Declarations being filed under oath and that Declarations need to be notarized
Response: Oath requirement was deleted. If potential applicant is unclear, Department or Director should be able to explain. Declaration signed before notary is legitimate and necessary requirement for filing Declaration

Comment: Suggest that SX Cooperative SX Allottees Association be included in list to receive notice re: filings of Declarations
Response: This is already addressed; a Person can ask the Director to receive notices under (C)

Comment [m80]: Note: This language was added to ensure that an individual filing a Declaration is really representing the applicant

Comment [tz81]: Comment: These provisions suggest that the failure to file a timely Declaration of Existing Use will eliminate a person's right to continue any use of the Nation's Water and/or the loss of any claimed or existing right to use the Nation's Water
Response: revision makes clear that only existing uses for which no declaration is filed may not continue

Comment: Certain provisions of Sections 3304 and 3602, specifically sections 3405(D) and (F), requiring declarations of existing use and permits for wells, may unlawfully divest ASARCO's rights under SAWRSA Amendments
Response: See edits to (I)

(F) Any Person who fails to file a Declaration of Existing Use within the time period set forth in section 3304(B) shall have no right to continue any Existing Use for which no Declaration is filed. Any such continued water use shall be a violation of this Code.

(G) Upon receipt of a Declaration of Existing Use, the Director shall endorse on the Declaration the date of receipt and keep a record of the Declaration. Within 30 calendar days after receipt of the Declaration, the Director shall determine whether the Declaration sets forth all information required by section 3304(A). If the Director determines that all required information is not on the Declaration, the Director shall make a written request that the Person that filed the Declaration submit the information not provided. In the event the required information is not submitted within 30 days of the Director's request, or within such greater time as the Director may allow, the Director may deny the Declaration and notify the Person that filed the Declaration of the denial by letter sent certified mail, return receipt requested, to the address set forth on the application. Such denial shall constitute a Final Decision of the Director.

Comment [tz82]: Comment: Concern with deficient declaration
Response: Subsection 3304(G) requires that the Director request missing information. This presumes that the Director will make contact with the Person who filed the declaration.

Comment [kl83]: Note: This sentence was amended to require a Director to make written request for additional information from the person that filed Declaration.

Comment [tz84]: Note: revision gives Director discretion to allow someone more than 30 days to come up with information that is required. Change from "shall" to "may" gives the Director discretion.

(H) Upon a finding by the Director that the Declaration of Existing Use sets forth the information required by section 3304(A), except for any such information the Director determines is not reasonably available, the Director shall note on the Declaration that it is complete and assign a number to the Declaration. The Director, on a monthly basis, commencing ten (10) days following the end of the month during which the first Declaration is filed, shall give notice of those Declarations found to be complete in the preceding month. The notice shall describe each complete Declaration in summary fashion to include the number assigned to the Declaration, the name of the Person that submitted the Declaration, the quantity of water claimed, the purpose and location of the claimed use, and the source of the water claimed. The notice shall be mailed or e-mailed to the Chairperson, to each member of the Water Resources Committee, to each District, and to each Person registered on the records of the Department to receive notices of Declarations of Existing Use. Copies of Declarations for which a notice has been issued shall be available for inspection at the Department. Copies of such Declarations may be obtained from the Director. The notice shall state that within 30 days of the date of the notice, the Nation or an Affected Person, including any directly affected District, may file objections to the Declaration with the Director.

(I) The Director shall investigate each Declaration of Existing Use including objections filed to the Declaration. In the event one or more objections to the Declaration are filed, or the Director otherwise orders, the Director may conduct a hearing to consider evidence on whether the Declaration should be granted or denied. Notice of a hearing shall be mailed not less than 30 days prior to the date of the hearing to the Person that filed the Declaration and to any Person that has filed an objection to the Declaration. The Director may continue the hearing for good cause shown and provide notice of the new hearing date to each Person that was provided notice of the initial hearing date. A notice of hearing shall state the date, time and location of the hearing, and indicate that the Director shall consider testimony under oath and documentary evidence on whether the

Comment [kl85]: Comment: suggest that the hearing referred to in this section should be mandatory whenever any objection is filed with respect to Declaration
Response: The Director should have discretion concerning whether or not a hearing should be conducted.

Declaration shall be approved or denied. At the conclusion of the Director’s investigation, including any hearing conducted, the Director shall render a decision on the Declaration. Upon finding that the Declaration sets forth the required information that is reasonably available, and that the Existing Use has been made, the Director shall approve a Permit for that Existing Use. Upon finding that the information in the Declaration is not accurate or that the Existing Use has not been made, the Director shall deny a Permit for the Existing Use. The Director may issue a Permit for an Existing Use in an amount less than set forth in a Declaration upon a finding that an Existing Use was for less than the amount set forth in the Declaration. The Director may issue a Permit for an Existing Use in an amount greater than set forth in a Declaration upon a finding that the applicant holds a contractual entitlement from the Nation for an amount greater than the quantity set forth in the Declaration. The Director’s decision with respect to the Declaration shall constitute a Final Decision of the Director. The Director shall send a notice of the Final Decision to each Person that was provided notice of a hearing date.

(J) Notwithstanding any other provision of section 3304, the Director shall issue a Permit for an Existing Use from an Exempt Well, Exempt Charco or Exempt Catchment unless the Director finds there is Substantial Evidence that any matter set forth in the Declaration is not accurate. If the Director makes such a finding, the Declaration shall become subject to all provisions of section 3304.

Comment [tz86]: Comment: This subsection should be removed and should be replaced with a section that defines those structures or activities that are exempt from the permit requirements under the proposed code
 Response: One of the primary reasons to require Declarations of Existing Use for all uses of the Nation’s water is to develop a complete inventory of all ongoing water uses on the Nation’s Lands

Section 3305 Permits

(A) Except as provided in section 3304(E) and provided that the Nation is not required to obtain a Permit to use Nation’s Water, no Person may use any amount of the Nation’s Water without first obtaining a Permit in accordance with this Code. A Permit is required to undertake any of the following activities:

Comment [tz87]: Comment: Lack of flexibility in water and well permit requirements
 Response: This is a very general comment and does not specify what inflexibility exists and what could be done to provide greater flexibility

- (1) to withdraw and use Groundwater;
- (2) to use, impound or store any Surface Water, including through Diversions, Charcos, or Catchments;
- (3) to use, impound or store underground SAWRSA Water; or
- (4) to dedicate or use the Nation’s Water for instream flows or riparian habitat enhancement or maintenance.

Comment [kl88]: Comment: Suggest that this section should have a provision similar to section 3304(J) concerning Existing Use Permits
 Response: Do not believe such a provision works in the context of new Permits since that process includes the license to perfect provisions

(B) The Director may issue Permits only for uses of the Nation’s Water that are Beneficial Uses. Beneficial Use shall constitute the measure and limit of any Permitted Use. The Director shall not issue a Permit that authorizes the use of the Nation’s Water in an amount that exceeds Beneficial Use under the circumstances.

Comment [tz89]: Comment: This language is repetitive of and redundant with the provisions in Section 3305(A) and should be removed
 Response: provisions in Section 3305(B) were deleted and replaced with references to Beneficial Use

Comment [kl90]: Comment: suggest that this section overlaps with section 3305(A) and should be stricken
 Response: provisions in Section 3305(B) were deleted and replaced with references to Beneficial Use

Section 3306 Permit Applications and Procedures

- (A) Applications for Permits shall be submitted on forms developed by the Director. The forms shall require, in addition to any other information deemed necessary by the Director, the following information:
- (1) the name and address of the applicant;
 - (2) the quantity and type of the Nation's Water for which a Permit is sought;
 - (3) the purpose or purposes for which the applicant intends to use the Nation's Water;
 - (4) a description of the location of any lands upon which the proposed use of the Nation's Water will be made together with evidence the applicant has a right to use the land for the proposed use;
 - (5) a description and the location of any works, including Wells, existing or to be constructed that are necessary to put the Nation's Water to the proposed use;
 - (6) a general schedule and plan of how the Nation's Water will be put to a Beneficial Use; and
 - (7) any other information the Director deems is reasonably necessary to fully evaluate the application for a Permit.

(B) Upon receipt of an application, the Director shall endorse on the application the date of receipt and keep a record of the application. Within 15 working days after receipt of the application, the Director shall determine whether the application sets forth all required information. If the Director determines that the application does not contain all the information required, the Director may request additional information from the applicant. In the event the applicant fails to submit the required information within 30 days of the Director's request or within such greater time as the Director may allow, the Director may deny the application and notify the applicant of the denial by letter sent certified mail, return receipt requested, to the address listed on the application. Such denial shall constitute a Final Decision of the Director. The denial shall not prevent the applicant from filing a new Permit application.

(C) Within 15 working days after the Director finds that an application sets forth all required information except for any such information the Director determines is not reasonably available, the Director shall give notice of the application. The notice shall describe each application in summary fashion to include the source of water, the quantity, purpose and location of the proposed use and the name of the applicant. The notice shall be mailed or e-mailed to the Chairperson, to each member of the Water Resources Committee, to each District, and to each Person registered on the records of the Department to receive notices of Permit applications. The Director may also require the posting of a notice on the land

Comment [tz91]: Comment: Suggest a time limit for Director to review and decide applications
Response: (B) and (C) need to be read together to give the Director 30 days to give notice

Note: edits -- phrase regarding the information being accurate should not be in the noted locations since the accuracy of the information is one of the deliberative functions of the Director Remaining changes conform with the discretionary language concerning extending time as added to the section regarding Declarations

Comment [kl92]: Comment: suggested last sentence of this section should be revised to track language used in last sentence of section 3306(D)
Response: This requirement was added to section 3202(B)(11)

Comment [tz93]: Note: This change gives the Director discretion to not require information that is not reasonably available, making it consistent with section 3304(H)

upon which the proposed water use is to be made. Copies of applications for which notice has been issued shall be available for inspection at the Department. Copies of any such application may be obtained from the Department at no charge. The notice shall state that within 30 days following the date of the notice, the Nation or an Affected Person, including any directly affected District, may file objections to the application with the Director.

- (D) In the event one or more objections are filed to the Permit application, or the Director otherwise orders, the Director may conduct a hearing to consider evidence on whether the Permit application should be granted or denied. Notice of a hearing shall be mailed not less than 30 days prior to the date of the hearing to the applicant and to any Person that filed an objection to the application. The Director may continue the hearing for good cause shown and provide notice to the applicant and to each Person that filed an objection of the new hearing date. A notice of hearing shall state the date, time and location of the hearing and indicate that the Director shall consider testimony under oath and documentary evidence relevant to whether the Permit application should be approved or denied. Not later than 30 days following the conclusion of any hearing, or if no hearing is conducted, not later than 30 days following the expiration of the period within which to file objections, the Director shall render a decision on the Permit application. The decision shall be in writing and shall set forth the factual findings and any legal conclusions in support of the decision. Notice of the decision shall be mailed to the applicant and to each Person that filed an objection. The decision shall specifically state that it constitutes a Final Decision of the Director.

Section 3307 Approval of Permit Applications; Licenses to Perfect

- (A) The Director may approve Permit applications only upon finding that:
- (1) the proposed use does not include the use of any of the Nation's Water that has been reserved or withdrawn pursuant to section 3302;
 - (2) the proposed use of the Nation's Water is a Beneficial Use;
 - (3) The proposed use will not, when considered together with existing Permitted Uses, deplete a distinct source of the Nation's Water in an amount or at a rate that exceeds the amount or the rate at which the distinct source is naturally replenished;
 - (3) the proposed use will not unreasonably interfere with or prevent the exercise of an existing Permitted Use;
 - (4) the applicant has a schedule and plan to take such actions as are necessary to put the Nation's Water to a Beneficial Use;

Comment [tz94]: Note: new (A)(3) will give the Director discretion to deny an application for a permit if the proposed use will result in the overdrafting of a distinct source of the Nation's water

Comment [tz95]: Comment: Because no priority system is established between different Permit holders' rights to access the Nation's Water, it will be very difficult to make the determination in subsection (3) that the proposed use will not interfere with any Existing Use or any other use for which the Director has issued a Permit
Response: The comment suggests that to justify the denial of a Permit application, any interference with existing Permitted Uses must be unreasonable. The Director will have discretion to determine if there is unreasonable interference with any Existing Use or other Permitted Use

Note: Edits to original (A)(3) more specifically define the Director's discretion to deny a use because it interferes or prevents the exercise of an Existing Use

- (5) the applicant is authorized to use the land on which the Nation’s Water will be used for the purpose or purposes stated in the application;
- (6) the applicant has the intent and ability to use the Nation’s Water;
- (7) the proposed use will not significantly threaten wildlife, riparian habitat or other natural resources or interfere with public recreational opportunities;
- (8) the proposed use will not endanger public health; and
- (9) the applicant has paid all applicable fees.

Comment [tz96]: Comment: What are the applicable fees?
Response: No fees set at this time

(B) If a Permit application is approved, the Director shall issue to the applicant a license to perfect the proposed use of the Nation’s Water. The license to perfect may vary from the quantities or other conditions set forth in the Permit application if the Director’s decision so provides. The license to perfect authorizes the applicant to construct any works or perform any other necessary actions to put the Nation’s Water to an actual Beneficial Use in accordance with the license to perfect. A license to perfect a Permit application shall be valid for five years from the date issued. The Director, upon a showing of good cause by the applicant, may extend this initial five-year effective period for a term not to exceed one additional year. Any application to extend the initial five-year period shall be made not later than 180 days prior to the expiration of the initial five-year period. If the Nation’s Water is not put to an actual Beneficial Use during the period within which the license to perfect is effective, the Permit application and license to perfect lapse and are of no further force and effect.

Comment [tz97]: Comment: Suggest a time limit for Director to review and decide applications
Response: The time limits for deciding applications is addressed section 3306(D)

Comment [tz98]: Comment: Because of the cyclical nature of mining, actual Beneficial Use of water for mining-related uses at an operation may increase or decrease depending upon market conditions and production rates
Response: The time limits set forth to perfect a Permit are established in the Code to prevent an applicant from tying up a quantity of the Nation’s Water pursuant to a license to perfect for an unreasonable period of time

Section 3308 Issuance of Permits

- (A) When an applicant for a Permit has put the Nation’s Water to an actual Beneficial Use in accordance with the license to perfect, the applicant shall file with the Director an affidavit stating that the Nation’s Water referred to in the license to perfect has been put to an actual Beneficial Use.
- (B) Upon receipt of an affidavit referred to in section 3308(A), the Director shall perform the necessary investigation to determine if the matters in the affidavit are correct. Upon finding that the Nation’s Water referred to in the license to perfect has been put to a Beneficial Use in accordance with the license to perfect, the Director shall issue to the applicant a Permit to use the amount of the Nation’s Water the applicant has put to an actual Beneficial Use. The Director may issue a Permit subject to appropriate terms, conditions, restrictions and limitations as determined by the Director.
- (C) Any Permit issued by the Director to authorize the use of any unused portion of the 35,000 Acre-feet per year of SAWRSA CAP Water described in subsection 3401(A) to any Person not described in that subsection shall contain a condition, stated on the face of

the Permit, that the use authorized by the Permit shall terminate to the extent necessary to fulfill Identified Actual Uses of any portion of the 35,000 Acre-feet per year within the San Xavier Reservation.

Comment [tz99]: Comment: Should there be a definition of Actual Use?
Response: "Identified Actual Use" is defined

Section 3309 Assignment of Permits or Licenses to Perfect

Permits and licenses to perfect may be assigned or transferred to other Persons only in accordance with the requirements of this section. No assignment or transfer of any Permit or license to perfect, or any interest therein, shall be valid except to a Person or Persons:

Comment [tz100]: Comment: The ability to assign permits or licenses to perfect should be revised to allow users of the Nation's Water to assign their permits for new uses and/or locations
Response: If the Code permitted assignments for new uses and/or locations, the entire regulatory framework established by the Code could be circumvented

- (A) that intends to devote the Nation's Water described in the Permit or license to perfect to the use or uses and to the land for which the Permit or license to perfect was originally issued; and
- (B) that meet all requirements of the original Permit or License to Perfect; and
- (C) that have received written approval of the assignment from the Director.

Comment [tz101]: Note: Technical drafting correction to make it clear that an assignee must meet all the requirements of the original permit if there is one, and if not, with the license to perfect

Section 3310 Modifications of Permits or Licenses to Perfect.

- (A) The Director may approve applications to modify Permits or licenses to perfect in order to change the use, the point of use, the method of application, or location of Diversion of any of the Nation's Water covered by an existing Permit or license to perfect only upon finding that:
 - (1) That the proposed modification does not increase the amount of the Nation's Water that may be used under the existing Permit or license to perfect;
 - (2) That the modification of the Permit or license to perfect will result in a Beneficial Use of the Nation's Water;
 - (3) That the proposed modification will not, when considered together with existing Permitted Uses and licenses to perfect, deplete a distinct source of the Nation's Water in an amount or at a rate that exceeds the amount or the rate at which the distinct source is replenished either naturally or by artificial means;
 - (4) The proposed modification will not unreasonably interfere with or prevent the exercise of existing Permitted Uses or licenses to perfect;
 - (5) The applicant has a schedule and plan to take such actions as are necessary to make the proposed modifications in the use of the Nation's Water;
 - (6) The applicant is authorized to use the land on which the modified use of the Nation's Water will be used for the purpose or purposes stated in the application;

Comment [m102]: Note: This section was added in response to a public comment to add provisions to amend permits. Subsection (A) parallels subsection 3307(A)

- (7) The applicant has the intent and ability to make the modification in the use of the Nation's Water and to put such water to a Beneficial Use;
 - (8) The proposed modification in the use of the Nation's Water will not significantly threaten wildlife, riparian habitat or other natural resources or interfere with public recreational opportunities or endanger the public health.
- (B) In the event the Director approves an application to modify a Permit or license to perfect pursuant to this section, the Director shall issue to the applicant a new Permit or license to perfect to reflect the modification in the existing Permit or license to perfect and in conjunction with the issuance of the modified Permit or license to perfect the Director shall set forth the time frame within which the change of use, the point of use, the method of application, or location of Diversion are to be implemented. Upon completing any necessary work to make the change in use, point of use, method of application, or location of Diversion of the Nation's Water, the applicant shall give notice to the Director that all modification work has been accomplished. Upon confirmation that the modification has been made, the Director shall notify the applicant, in writing, that the modified Permit or license to perfect is thereafter effective, that the original Permit or license to perfect is of no further force and effect and that the necessary changes in the records of the Department reflect that the modification has been made.

Section 3311 Revocation or Suspension of Permits or Licenses to Perfect

- (A) The Director may revoke or suspend a Permit or license to perfect, in whole or in part, permanently or temporarily, as follows:
- (1) for any materially false statement in an application to obtain or modify the Permit;
 - (2) for any materially false statement in any affidavit filed pursuant to section 3308;
 - (3) for a material violation by the Permit or license to perfect holder of any provision of the Code, any regulation promulgated pursuant to the Code, any order issued by the Director, or any condition set forth in the Permit or license to perfect;
 - (4) for nonuse of the Nation's Water described in the Permit for a period of five consecutive years, unless there is a showing of good cause by the Permit holder why the water described in the Permit has not been used and that the water described in the Permit will again be put to use in a reasonable period of time;
 - (5) for material damage to the quality of the Nation's Water arising out of the activities of the Permit or license to perfect holder; provided that any chemical or biological degradation of surface or groundwater quality caused by the lawful use

Comment [m103]: Comment: this section should be amended to clarify that it confers authority to revoke or suspend a permit only to the extent that doing so would not conflict with the user's rights under the Act and related or prior agreements
 Response: All users will be subject to Permit requirements, although this Code does take into account existing contracts and agreements

Comment [tz104]: Comment: It should be noted that the San Xavier Cooperative Farm will need to maintain numerous Wells for the purpose of providing a well water supply during times of CAP outages and Shortages These Wells should not be subject to loss of Permits for non-use every five years because any given Well may not be used in any given five year period
 Response: Section 3311(A)(4) authorizes the Director to revoke or suspend a Permit in whole or in part for non-use of the Water described in the Permit for 5 consecutive years There is an exception to that, however, in that the Permit holder can make a showing of good cause why the Water has not been used during that 5 year period and that the Water represented by the Permit will be used within a reasonable period

Comment [tz105]: Comment: It is unclear from the proposed code how much damage constitutes "material damage"
 Response: The term "material damage" vests the Director with authority to determine whether the damage to water quality is sufficient enough to warrant the revocation or suspension of the Permit

Comment [m106]: Comment: there should be an exception to this related to any degradation of existing surface or groundwater quality due to the use of SAWRSA CAP water itself
 Response: The language in this subsection was amended to address this issue

of SAWRSA CAP water shall not be a basis for the revocation or suspension of any Permit or license to perfect; or

(6) upon the written consent of the Permit or license to perfect holder.

- (B) The Director shall provide written notice of intent to revoke or suspend a Permit or license to perfect by certified mail, return receipt requested, to the last known address of the Permit or license to perfect holder and to the District in which the use of water described in the Permit or license to perfect is or will be located. Such notice shall provide a detailed statement and explanation of the basis and justification for the proposed revocation or suspension. If the Permit or license to perfect holder cannot be so served with notice, the Permit or license to perfect holder may be served by publication in a newspaper of general circulation in the Nation's Lands. The Permit or license to perfect holder shall have 30 days from the day the notice is delivered, or from the date of the publication, to request a hearing before the Director. If a hearing is requested, the Director shall schedule a hearing within 30 days of the request unless the Permit or license to perfect holder requests an extension not to exceed 30 days absent compelling circumstances shown by the Permit or license to perfect holder. At the hearing, the Permit or license to perfect holder may present witnesses and other evidence to rebut the basis and justification of the Director's proposed action. Within 15 days of the completion of the hearing the Director shall issue a Final Decision concerning the proposed action. A Permit or license to perfect may be revoked or suspended only if the Director finds that the Permit or license to perfect holder has failed to present Substantial Evidence in the record to rebut the basis set forth in the Director's written notice justifying the revocation or suspension of the Permit or license to perfect. Within five working days of the date of the Final Decision, the Director shall give notice of the Final Decision to the Permit or license to perfect holder and any other Person who was a party to the proceeding.
- (C) The Director may, in the event of an Emergency, temporarily suspend a Permit or license to perfect without prior notice. As soon as practicable following the suspension of any Permit or license to perfect under this subsection, the Director shall comply with the provision of section 3310(B).

ARTICLE 4 - ALLOCATION AND USES OF SAWRSA WATER

Section 3401 Allocation of SAWRSA Water

- (A) First Right of Beneficial Use. Pursuant to subsection 307(a)(1)(G)(i) of the SAWRSA Amendments, a first right of Beneficial Use is hereby allocated to the San Xavier District and Allottees and other Persons within the San Xavier Reservation for the following water:

Comment [tz107]: Comment: Should be an attachment to the Water Code Does not pertain to the rest of the Nation
Response: Requirement of SAWRSA to incorporate Interim Code into Nation's Water Code

Comment [tz108]: Comment: this section should be amended to incorporate the prefatory clarification in Section 307(a)(1)(G), that the priority of allocation and usage are subject to ASARCO's well site business lease No H54-16-72
Response: This section accurately cites the first right of beneficial use established in SAWRSA ASARCO's uses are specifically identified

Comment [tz109]: Comment: There should be a definition for First Right of Beneficial Use
Response: The first right of beneficial use is stated in SAWRSA and repeated in this Code

- (1) 35,000 Acre-Feet per year of SAWRSA CAP Water deliverable under subsections 304(a)(1) and 306(a)(1) of the SAWRSA Amendments including the use of the allocation as specified in subsection 307(a)(1)(G)(i)(I)(aa) and (bb);
- (2) 10,000 Acre-Feet per year of SAWRSA Groundwater withdrawn within the San Xavier Reservation;
- (3) all Groundwater withdrawn from SAWRSA Exempt Wells within the San Xavier Reservation;
- (4) all Deferred Pumping Storage Credits accrued within the San Xavier Reservation; and
- (5) all Direct Storage Credits accrued within the San Xavier Reservation..

Comment [tz110]: Comment: If District and Nation not using all of the allocated CAP Water, then other outside entities will pose a threat to the SAWRSA CAP allocation.
 Response: The Nation is storing unused water to generate credits and prevent off-reservation users from obtaining this water without compensating the Nation. The Nation does not lose its SAWRSA CAP allocation even if it is not all used in any year.

(B) Pursuant to subsection 307(a)(1)(G)(ii) of the SAWRSA Amendments and in accordance with subsection 309(b)(2) of the SAWRSA Amendments, the Nation hereby reserves:

- (1) the right to use or provide for the use by any Person of any portion of the 35,000 Acre-feet per year described in subsection (A)(1) for any period during which there is no Identified Actual Use within the San Xavier Reservation. Any use of any portion of this 35,000 Acre-Feet per year for which there is no Identified Actual Use within the San Xavier Reservation, whether such use is by the Nation or by any Person authorized by the Nation, shall be terminated by the Nation to the extent additional Permitted Identified Actual Uses of the 35,000 Acre-Feet per year are made within the San Xavier Reservation, that displace uses made by the Nation or any Person of that SAWRSA CAP Water;
- (2) a first right to use or provide for the use of the remaining 15,000 Acre-Feet of SAWRSA CAP Water deliverable under subsections 304(a)(1) and 306(a)(1) of the SAWRSA Amendments for any purpose and duration authorized by the SAWRSA Amendments within or outside the Nation's Lands; and
- (3) the exclusive right, subject to subsection 308(e) of the SAWRSA Amendments, to transfer or otherwise dispose of all Marketable Long-Term Storage Credits that may be lawfully transferred or otherwise disposed of to Persons for recovery outside the Nation's Reservation.

Comment [tz111]: Comment: How will districts other than San Xavier and eastern Schuk Toak get access to CAP Water?
 Response: There is currently no CAP delivery system to other districts.

(C) The Nation acknowledges and agrees that the first right of Beneficial Use as provided in subsection 307(a)(1)(G)(i) of the SAWRSA Amendments to Allottees, the San Xavier District and other Persons within the San Xavier Reservation exists. The Nation shall not take any action or adopt any legislation that would in any way deny this first right of Beneficial Use.

Section 3402 Uses of SAWRSA Water

(A) Except as otherwise provided in this Code, all uses of SAWRSA Water are subject to the requirements, provisions and conditions of this Code applicable to other water uses within the Nation's Lands.

(B) The Director shall not issue Permits to withdraw and use SAWRSA Groundwater from SAWRSA Wells in a quantity that exceeds 10,000 Acre-Feet per year within the San Xavier Reservation. The Director shall not issue Permits to withdraw and use SAWRSA Groundwater from SAWRSA Wells in a quantity that exceeds 3200 Acre-Feet per year within the eastern Schuk Toak District. Provided, notwithstanding the limitation on the pumping of SAWRSA Groundwater within the San Xavier Reservation and eastern Schuk Toak District, the Director may issue Permits to pump Deferred Pumping Storage Credits or Direct Storage Credits within the San Xavier Reservation or the eastern Schuk Toak District in accordance with subsection 3402(C). The Director may also issue permits to withdraw Additional Groundwater but only in accordance with the applicable provisions of Article 5.

(C) The Director may issue Permits to withdraw Deferred Pumping Storage Credits or Direct Storage Credits only within the San Xavier Reservation or the eastern Schuk Toak District. Permits authorizing the withdrawal of Deferred Pumping Storage Credits or Direct Storage Credits shall be subject to annual adjustment by the Director with respect to the quantity that may be withdrawn pursuant to each Permit. No later than November 15th of each year, a Person holding a Permit to withdraw Deferred Pumping Storage Credits or Direct Storage Credits shall notify the Director, in writing, of the quantity and type of credit the Person requests to withdraw in the ensuing year. Upon receipt of the written requests, the Director shall determine whether the written requests exceed the quantity available for withdrawal in each District's Deferred Pumping Storage Credit account or Direct Storage Credit account. If the written requests exceed the quantity available for withdrawal in any account, the Director shall meet with the Persons that filed requests to withdraw credits from such account and adjust the quantities of credits that may be withdrawn from the account so that its credit balance will not be exceeded in the ensuing year. The Director shall notify each Person, by certified mail, of any adjustment made to the Person's written request. The notification shall advise the Person that it constitutes a Final Decision of the Director.

(D) The Director shall establish separate Deferred Pumping Storage Credit accounts for the San Xavier Reservation and the eastern Schuk Toak District. To initiate the account in the San Xavier Reservation, the Director shall credit 50,000 Acre-Feet to the San Xavier account. To initiate the account in the eastern Schuk Toak, the Director shall credit 16,000 Acre-Feet to the eastern Schuk Toak District account. At the end of each year commencing with the year 2007, the Director shall record a credit or a debit, in Acre-Feet, to each Deferred Pumping Storage Credit account. The Director shall credit the San Xavier account with the difference between 10,000 Acre-Feet and the number of Acre-

Comment [tz112]: Comment: All references to "Direct Storage Credits" in the Interim Code should be restored to the comparable sections of the Nation's Code, including particularly the full text of Interim Code §3401(B)(6)
Response: The current version of the Nation's Code adds references to Direct Storage Credits in essentially the same locations as was contained in the Interim Code. In addition, section 3402(E) contains Direct Storage Credit accounts to be maintained by the Director for both San Xavier and Schuk Toak

Comment [j113]: Comment: If the Director does not process a claim for shortage against the Secretary, a damaged individual should be able to process a claim against the Secretary
Response: The claim process appears in section 3402(F)

Comment [tz114]: Note: This language was moved from section 3402(D)

Comment [tz115]: Note: Subsection (B) is addressed elsewhere. Subsection (C) is now (F)

Comment [tz116]: Note: This language was added to reflect limitations on the use of Deferred Pumping Storage Credits or Direct Storage Credits and to protect against overpumping

Comment [tz117]: Comment: Interim Code §3401(B)(6) requires the Director to establish a Direct Storage Credit account for the San Xavier Reservation. That provision has been deleted from the Nation's Code, but should be included in the Nation's Code as one of the subsections of §3402
Response: As noted above, section 3202(B)(10) relates to an account relating to Direct Storage credits for San Xavier and section 3402(D) and (E) relate to Deferred Pumping Storage Credit accounts and Direct Storage Credit accounts, respectively, for both San Xavier and eastern Schuk Toak

Feet of SAWRSA Groundwater withdrawn from SAWRSA Wells within the San Xavier Reservation that year that was less than 10,000. The Director shall debit the San Xavier account with the number of Acre-Feet of SAWRSA Groundwater in excess of 10,000 that is withdrawn from SAWRSA Wells within the San Xavier Reservation during that year. The total quantity of water permitted to be recovered as Deferred Pumping Storage Credits within the San Xavier Reservation shall not exceed 50,000 Acre-Feet for any 10-year period or 10,000 Acre-Feet in any one year. The Director shall credit the eastern Schuk Toak account with the difference between 3,200 Acre-Feet and the number of Acre-Feet of SAWRSA Groundwater withdrawn from the SAWRSA Wells within the eastern Schuk Toak District that year that was less than 3,200. The Director shall debit the eastern Schuk Toak account with the number of Acre-Feet of SAWRSA Groundwater in excess of 3,200 that is withdrawn from SAWRSA Wells within the eastern Schuk Toak District during that year. The total quantity of water permitted to be recovered as Deferred Pumping Storage Credits within the eastern Schuk Toak District shall not exceed 16,000 Acre-Feet for any 10-year period or 3,200 Acre-Feet in any year.

(E) The Director shall establish separate Direct Storage Credit accounts for the San Xavier Reservation and the eastern Schuk Toak District. Beginning with the year 2007, and for each year thereafter, the Director shall credit the San Xavier Reservation or the eastern Schuk Toak District account with the quantity of SAWRSA CAP water stored underground within the San Xavier Reservation or the eastern Schuk Toak District at underground storage and recovery projects established in the San Xavier Reservation or the eastern Schuk Toak District pursuant to section 308(e) of the SAWRSA Amendments. The Director shall debit the San Xavier Reservation or eastern Schuk Toak District account, beginning with the year 2007, and for each year thereafter, with the number of Direct Storage Credits withdrawn from within the San Xavier Reservation or the eastern Schuk Toak District during the year.

(F) Compensation payable by the Secretary due to shortages in deliveries of SAWRSA CAP Water shall be disbursed to the San Xavier Cooperative Association, the Nation, or any other Person consistent with subsection 305(d) of the SAWRSA Amendments. Provided, however, that any compensation payable for the non-delivery of SAWRSA CAP Water to Asarco shall be paid to the San Xavier District. The Director, together with a representative of the San Xavier Cooperative Association, shall confer and consult with the Secretary in the calculation and disbursement of any compensation to be paid pursuant to subsection 305(d) of the SAWRSA Amendments. Except for SAWRSA CAP Water ordered by Asarco, payments of compensation under subsection 305(d) of the SAWRSA Amendments shall be made, in accordance with this section, to the Person, including the Nation and the San Xavier District, that ordered the water to the extent the ordered amount is not delivered by the Secretary.

(G) A Person holding a Permit to use a SAWRSA Well shall install a device or develop a means whereby withdrawals from the SAWRSA Well are measured with reasonable accuracy. The means utilized or the device installed for such measurements are subject

Comment [m118]: Note: In response to a comment, this provision from the Interim Code was added to this Code. It is necessary to ensure Direct Storage Credit accounts are kept

Comment [tz119]: Comment: A new §3403(A), Compensation Payable by the Secretary, should be added to the Nation's Code to read (significant edits Please see San Xavier's written comments)
Response: The San Xavier comments with respect to what was section 3403 of the Nation's Code and which is now 3402(F) relate to compensation for non-delivery of SAWRSA CAP Water. The noted provision suggested by San Xavier are not workable since any claims for compensation would have to be pursued by the Nation on behalf of allottees or others who did not receive the water that was ordered. See current subsection 3402(F)

Comment [tz120]: Comment: §3402(C) should provide a process for Persons who have claims under SAWRSA §305(d) for compensation from the Cooperative Fund for non-delivery of SAWRSA CAP Water to make claims through the Nation to the Secretary. It should also provide a remedy for the failure of the Nation to vigorously prosecute such claims
Response: This provision used to be in section 3402(C) but has been moved and revised. The revisions provide a procedure where claims for compensation are pursued by the Director, with assistance from a representative of the San Xavier Co-op

Comment [tz121]: Comment: §3402(F) should be replaced with Interim Code §3401(B)(7) to fully identify all categories of groundwater to be accounted for on the San Xavier Reservation
Response: What is now section 3402(G) of the revised Nation's Code omits reference to marketable long-term storage credits since those types of credits will not be withdrawn from within the San Xavier Reservation, rather they will be withdrawn in places distant from the Reservation since such drawdowns should not be allowed on or near the Reservation

Comment [tz122]: Comment: This subsection conflicts with §3202(C)(4), which authorizes the Director to require the installation of meters on any Well
Response: No inconsistency actually exists since 3202(C)(4) merely gives the Director authority to require measuring devices, whereas 3402(G) makes the installation of these measuring devices on SAWRSA Wells mandatory. The next section, 3402(H) makes it clear that no water measuring devices are required on SAWRSA Exempt Wells

Comment [tz123]: Note: This provision was amended to add Direct Storage Credits

to the approval of the Director as to the accuracy of the measurements of the withdrawals. Not later than March 1st of each year, the holder of a Permit to use a SAWRSA Well shall report to the Director, on forms developed by the Director, the quantities of SAWRSA Groundwater, Direct Storage Credits, Deferred Storage Credits, or Additional Groundwater withdrawn from the SAWRSA Well in the preceding calendar year.

(H) No water metering devices or other means shall be required to measure withdrawals from SAWRSA Exempt Wells.

(I) No SAWRSA Water under a Permit or license to perfect may be used outside the Nation's Lands. No Person that holds a Permit to use SAWRSA Water may allow any other Person to put the SAWRSA Water covered by that Permit to any use. SAWRSA Water for which a Permit has been issued may not be used on any lands or for any use not authorized and approved by the Permit.

Comment [tz124]: Comment: This subsection is redundant with new subsection 3303(D) Both subsections make water Permits too restrictive
Response: The two subsections do deal with the same issue concerning restrictions on uses of Permitted Water, however, the reference in 3303(D) relates to all sources of the Nation's Water, whereas 3402(I) relates only to Permits to use SAWRSA Water
If a piece of allotted land has a Permit to use SAWRSA Water, then it should not be necessary to use Water covered by a separate Permit

ARTICLE 5 - WATER SHORTAGES

Section 3501 SAWRSA CAP Water Shortages

(A) This article applies to shortages in the deliveries of SAWRSA CAP water by the Secretary during Deficiency Years.

(B) During Deficiency Years, uses of SAWRSA CAP Water on the Nation's Lands shall have absolute priority over uses of SAWRSA CAP Water outside the Nation's Lands. The Nation shall reduce the quantity of SAWRSA CAP Water used for underground storage or other purposes outside the Nation's Lands in order to avoid any reduction in the quantity of SAWRSA CAP Water delivered during a Deficiency Year for uses on the Nation's Lands.

(C) If, during a Deficiency Year, the Nation's reduction in uses of SAWRSA CAP Water outside the Nation's Lands is sufficient to avoid any shortage in the delivery of SAWRSA CAP Water for uses within the Nation's Lands, the Director shall allocate the available SAWRSA CAP Water to first meet all of the demands for use of SAWRSA CAP Water within the Nation's Lands, with any remaining SAWRSA CAP Water to be allocated to the Nation for uses outside the Nation's Lands. The Director shall prepare a final allocation order to reflect the allocations of SAWRSA CAP Water during the Deficiency Year. The final allocation order shall constitute a final decision of the Director.

(D) If, during a Deficiency Year, the Nation's reduction in uses of SAWRSA CAP Water outside the Nation's Lands is insufficient to fully avoid a shortage in the delivery of SAWRSA CAP Water for uses within the Nation's Lands, the Director shall attempt to achieve a consensus, in accordance with Section 3502, concerning the allocation of the available SAWRSA CAP

Comment [j125]: Comment: The Code should identify that SAWRSA water may be put to use outside the Tucson Active Management Area
Response: This subsection does not apply to any uses by the Nation, which is not required to obtain a Permit, for example, to lease water or to generate marketable storage credits outside the Tucson AMA

Comment [tz126]: Note: This article was substantially rewritten

Comment [tz127]: Comment: This subsection includes a very significant and unacceptable change from the Interim Code Interim Code §3601(B)(1) states an absolute priority in a SAWRSA CAP Water shortage situation for San Xavier Reservation and Eastern Schuk Toak District Permitted Uses over all other SAWRSA CAP Water uses
Response: These comments are directed at a draft of the Nation's Code that has been very significantly revised

Water for uses within the Nation's Lands during the Deficiency Year. If no consensus is reached, shortages will be addressed in accordance with the provisions of Section 3503.

Section 3502 Consensus; Meetings and Consultation

(A) The Director, upon receiving notice from the Secretary that a future year will be a Deficiency Year, shall schedule and provide notice of a meeting to discuss with Affected Persons the estimated quantities of SAWRSA CAP Water to be delivered by the Secretary during the Deficiency Year; the projected orders for SAWRSA CAP Water to be made for uses within the Nation's Lands during the Deficiency Year; the available alternative water supplies that could be used to replace SAWRSA CAP Water the Secretary is unable to deliver during the Deficiency Year; and any other matter deemed by the Director to be relevant to the water supply and demand issues and impacts that could arise during the Deficiency Year. The Director may adjourn and reconvene the meeting as necessary and appropriate under the circumstances.

(B) The Director shall provide written notice of the meeting required in subsection 3502(A) to the San Xavier District, Schuk Toak District, San Xavier Cooperative Association, San Xavier Allottees Association, Tohono O'odham Utility Authority, Tohono O'odham Farming Authority, the Chairperson, Water Resources Committee, and any other Person the Director believes may be an Affected Person in relation to shortages in the delivery of SAWRSA CAP Water. The written notice of the meeting required in subsection 3502(A) shall set forth the time and place of the meeting and also provide that any Affected Person may submit written comments or proposals concerning the allocation and use of SAWRSA CAP Water during the Deficiency Year not later than 5 days prior to the time set for the meeting. The Director shall make written comments submitted prior to the meeting available to all Affected Persons.

(C) At the meeting required by subsection 3502(A), the Director shall discuss any written comments or proposals received in accordance with subsection 3502(B) and receive additional input concerning the allocation and use of SAWRSA CAP Water and other sources of water available to the Nation for use during the Deficiency Year. In addition to any other data or information to be provided at the meeting, the Director shall specify the quantities of SAWRSA Groundwater, Deferred Pumping Storage Credits, Direct Storage Credits and Additional Groundwater that will be available in the San Xavier Reservation and the eastern Schuk Toak District during the Deficiency Year, and the location, pumping capacity, storage and conveyance facilities associated with SAWRSA Wells available within the San Xavier Reservation and the eastern Schuk Toak District to fulfill the water demands within the Reservation or the District if those demands may not be fulfilled with SAWRSA CAP water during the Deficiency Year.

(D) At the meeting required by subsection 3502(A), the Director shall attempt to develop a consensus with Affected Persons as to the allocation and use of SAWRSA CAP Water, SAWRSA Groundwater, Deferred Pumping Storage Credits, Direct Storage Credits, and Additional Groundwater during the Deficiency Year.

(E) In the event a consensus is reached at the meeting required by this section concerning the

allocation and use of SAWRSA CAP Water, SAWRSA Groundwater, Deferred Pumping Storage Credits, Direct Storage Credits and Additional Groundwater during the Deficiency Year, the Director shall issue a final allocation order applicable to the use of SAWRSA CAP Water and other alternative water supplies during the Deficiency Year. The final allocation order shall identify each user and the quantity of SAWRSA CAP Water, SAWRSA Groundwater, Deferred Pumping Storage Credits, Direct Storage Credits and Additional Groundwater each user may use during the Deficiency Year. The final allocation order issued by the Director pursuant to this subsection constitutes a Final Decision of the Director.

Section 3503 Allocation Orders When No Consensus Exists

(A) In the event no consensus is reached at the meeting required by subsection 3502(A) concerning the allocation of the available SAWRSA CAP Water, SAWRSA Groundwater, Deferred Pumping Storage Credits, Direct Storage Credits, and Additional Groundwater during the Deficiency Year, the Director shall develop an allocation order in accordance with the provision of this section setting forth the quantities and sources of water that may be used during the Deficiency Year by each Person that holds a Permit to use SAWRSA CAP Water and by the Nation. The allocation order referred to in this subsection shall allocate the SAWRSA CAP Water available during the Deficiency Year only to Persons and the Nation that actually used SAWRSA CAP Water within the Nation's Lands during the last year that was not a Deficiency Year.

(B) To determine the allocation of SAWRSA CAP Water during a Deficiency Year, the Director shall first determine the total quantity of SAWRSA CAP Water used within the Nation's Lands during the last year that was not a Deficiency Year. The Director shall then determine the quantity of SAWRSA CAP Water used within the Nation's Lands in that year by each Person and the Nation. The Director shall allocate SAWRSA CAP Water available during the Deficiency Year to each Person and the Nation in the same proportion as the proportion of SAWRSA CAP Water used by each such Person and the Nation was to the total SAWRSA CAP Water used within the Nation's Lands during the last year that was not a Deficiency Year.

(C) In addition to the allocation of SAWRSA CAP Water during the Deficiency Year as provided in section 3503(B), the Director's allocation order shall also allocate SAWRSA Groundwater, Deferred Pumping Storage Credits, Direct Storage Credits or Additional Groundwater that may be used in lieu of SAWRSA CAP Water during the Deficiency Year by a Person that has a Permit to use SAWRSA CAP Water or by the Nation.

(D) The Director shall give written notice of the proposed allocation order to those same Persons that received notice of the meeting as required by section 3502(B). The notice shall provide that any Affected Party may submit comments, objections or suggestions in response to the Director's proposed allocation order within 20 days of the date of notice. Within 20 days of the close of this comment period, the Director may conduct another meeting with Affected Parties concerning the proposed allocation order and the comments, objections or suggestions submitted. Within 10 days after any such meeting, or within 10 days of the end of the comment

period if the Director conducts no such meeting, the Director shall issue a final allocation order for the Deficiency Year. This final allocation order constitutes a Final Decision of the Director.

(E) The SAWRSA CAP Water order of the Nation for the applicable Deficiency Year shall be in accordance with the Director’s final allocation order except to the extent that order has been modified on appeal by the Judicial Court.

ARTICLE 6 – WELLS

Section 3601 Regulation of Wells

(A) No Person may drill, construct, deepen, replace, or otherwise modify a Well in the Nation’s Lands without a Drilling Permit issued by the Director pursuant to this Article. Provided, however, a Drilling Permit is not required for any work that does not alter the specifications of the Well or any installed equipment as reflected in the records of the Department.

(B) A Person required by subsection 3601(A) to obtain a Drilling Permit shall make application to the Director for a Drilling Permit before commencing any work to drill, construct, deepen, replace or otherwise modify a well. Applications for a Drilling Permit shall include, as applicable:

- (1) the name and mailing address of the Person filing the application;
- (2) the legal description or general location of the land upon which the Well or proposed Well is to be drilled, constructed, deepened, replaced, or otherwise modified and the name and mailing address of the owner, beneficial owner, lessee, or land assignment holder for that land;
- (3) the legal description or specific location of the Well or proposed Well referred to in the application;
- (4) the planned drilling method, depth, diameter, type of casing, sanitary seal, and screen interval information of the proposed new Well;
- (5) the legal description or general location of any land upon which the Groundwater to be withdrawn from the Well or proposed Well is to be used and the proposed uses to which the Groundwater will be applied;
- (6) the date upon which the work on the Well or proposed Well is to commence and the projected date upon which the work will be completed;
- (7) the name and license number of the licensed Well driller that will do the work

Comment [tz128]: Comment: The water well regulation section of the Code needs to include a clearly stated exception to the broad proscriptions of §3601(A) that allows a well owner to replace pumps and equipment on wells, and clean out and otherwise maintain wells, without obtaining a Drilling Permit
Response: This issue has been resolved by providing in section 3601(A) that a drilling permit is not required for any work that does not alter the specifications of the well that are on record with the Department

Comment [tz129]: Comment: How will the regulation of wells affects commercial development? What if the District wants to drill a well?
Response: Commercial use is treated like any other use A district would need to follow the same process

Comment: What recourse does a member have if the Director denies a drilling permit?
Response: A person who is affected by a “final decision” of the Director can appeal that decision under Section 31002

Comment: How does the requirement for a well permit affect TOUA rates?
Response: TOUA will have to file for drilling permit for any new wells and will have to register current wells with Department TOUA charges for service, not water

Comment: A drilling permit should not be required for basic well maintenance
Response: Section 3601(A) was edited to address this issue

Comment [m130]: Note: This sentence was reworded for clarity

described in the application;

- (8) the drilling, completion, and pump specifications of the Well to be deepened, or modified, to the extent such information is reasonably available;
- (9) a description of the modifications to be made to the Well, including a description of the methods or work to be employed to make such modifications; and
- (10) such other relevant information as the Director may require.

(C) Upon receipt of an application for a Drilling Permit, the Director shall note the time of receipt and determine if the application contains all information required by section 3601(B). If the application does not set forth the information required, the Director shall request that the applicant submit the required information within 20 days of the Director's request. If the applicant fails to submit the required information within the 20-day period or such longer period as the Director may allow, the Director may deny the application and shall notify the applicant of the denial within 14 days. If the Director determines that an application contains all required information and that the applicant has been issued a license to perfect pursuant to section 3307 or a Permit issued pursuant to section 3304 or section 3305 to use the Groundwater to be withdrawn from the Well, the Director, within 14 days of making the findings required in this sentence, shall issue to the applicant a Drilling Permit to drill, construct, deepen, replace or modify the Well as described in the application.

Comment [tz131]: Comment: §3601(C) should be redrafted to include a requirement that the Director process and grant or deny all permit applications within 14 days of submission
Response: In the current draft, the Director is required to make a decision whether to issue drilling permit within 14 days

Comment [m132]: Comment: Suggest including deadline for Director's decision on Drilling Permit
Response: Deadlines were added to this subsection

(D) Upon issuance of a Drilling Permit, the applicant may commence the work authorized in the Drilling Permit. All work authorized under the Drilling Permit shall be performed by a Well driller licensed pursuant to section 3603(D) and shall be completed within one year of the date of the Drilling Permit or within such longer period as the Director may allow upon request by the holder of the Drilling Permit.

Comment [j133]: Comment: requested public notice of the issuance of a Drilling Permit
Response: Notice is provided when a Person applies for a Permit to use water

(E) The licensed Well driller shall maintain a complete and accurate log of a Well drilled or deepened. Within 14 days of the completion of the work authorized in the Drilling Permit, the licensed Well driller shall file with the Director a report to include the information in the drilling log, and a description of the casing and screen installed in the well, and any other relevant information as required by the Director. The Director shall develop the form of report to be utilized by licensed Well drillers for this purpose.

Comment [tz134]: Comment: This subsection should be redrafted to require a well driller to file the required report within 10 calendar days unless otherwise specified
Response: Fourteen days is a fairly quick turnaround and that this time frame should not be shortened

Comment [m135]: Comment: Suggest shorter deadline for well driller's completion report
Response: The deadline has been changed from 30 to 14 days

(F) Within 14 days of installing pumping equipment, the licensed Well driller or other Person responsible for the installation shall file a report with the Director, on a form provided by the Director, setting forth:

Comment [tz136]: Comment: This subsection should be redrafted to include a 5-day deadline for the well driller to file the required report
Response: It is believed that 14 days is a fairly quick turnaround and that this time frame should not be shortened

- (1) a description of the equipment installed in the Well;
- (2) the test pumping capacity of the Well measured through a method approved by

the Director;

- (3) the static water level in the Well prior to any pumping capacity test on the Well;
- (4) the extent of drawdown of the water level in the Well immediately after completion of the pumping capacity test on the Well; and
- (5) such other relevant information as the Director may require.

(G) If the Drilling Permit authorized the modification of a Well, the licensed Well driller, or the Person responsible for the modification of equipment in the Well, within 30 days of the completion of the work, shall file a report with the Director describing the specific work performed to modify the Well. The report shall include the information required by subsections 3601(E) or (F) to the extent applicable to the modification.

(H) Any Person intending to discontinue use of a Well within the Nation's Lands shall comply with the requirements established in regulations adopted by the Director pursuant to section 3603. The Director may order the owner of a Well to secure a Well that has been determined by the Director to pose a risk to health, safety, or water quality. The Director is further authorized, after providing a Well owner with advance written notice, to secure any such Well in the event the Well owner is unknown or the owner fails to comply with the Director's order to secure the Well. The regulations adopted by the Director shall provide the owner with notice and an opportunity to be heard concerning any order to secure a Well. The Director shall maintain a list of Wells within the Nation's Lands that are no longer used and that have been secured and remove such Wells from the registry of Wells maintained by the Director pursuant to section 3601(J).

(I) Upon the filing of the report or reports required by this section and a determination by the Director that the work performed on the Well was as required in the Drilling Permit, the Director shall assign a registration number to the Well if it has no such number, and issue a Well Permit or modified Well Permit to the Person that was issued the Drilling Permit.

(J) The Director shall create and maintain a registry of Wells for which Well Permits have been issued. The registry shall include such information as the Director determines is necessary to develop and maintain a thorough and accurate compilation of data concerning the location, characteristics and capacity of all Wells within the Nation's Lands.

Section 3602 Registration of Existing Wells

(A) On or before October 1, 2010 a Person that owns or controls an Existing Well within the Nation's Lands shall register the Well on a form provided by the Director.

(B) The form for the registration of an Existing Well shall require the following information,

Comment [tz137]: Comment: This subsection should be redrafted to make clear that a report is not required to be filed for pump replacement or ordinary well maintenance
Response: No drilling permit would be required if the work being done does not change any of the specifications of the well as it existed previously

Comment [tz138]: Comment: A well pump should be excluded from permit requirement
Ordinary maintenance should also be excluded
Response: Section 3601(A) was edited to address this issue No Drilling Permit will be required any work that does not alter the specifications of the Well or any installed equipment

Comment [tz139]: Comment: Concern is expressed that the Director will be capping or otherwise destroying a well without the consent of either the owner or the District in which the well is located
Response: The revised subsection permits the Director to order a well owner to secure the well if it poses a risk to health, safety or water quality, and allows the Director to do that if the owner does not comply or the identity of the owner is unknown
Revised provisions contain authorizations for the Director to develop regulations concerning securing wells and provisions concerning due process protections

Comment [tz140]: Comment: Water Code or implementing regulations should be clear that new abandonment rules do not retroactively apply to wells closed prior to the effective date of the Water Code
Comment: Maybe should edit here to prevent a ...

Comment [tz141]: Comment: There should be a definition of Abandonment? Does it mean removing the casing and filling with concrete, or just covering with a steel cap?
Response: The term "abandon" was deleted

Comment [tz142]: Comment: A sentence should be added providing that the registry of wells be open and accessible for public inspection and reference
Response: This issue should be addressed in the administrative regulations the Director is authorized to develop with regard to review of the Departme ...

Comment [tz143]: Comment: Owners of existing Wells must register them by October 1, 2010, including Exempt Wells §3602(A) and (B) are redundant and unnecessary and should be eliminated to simplify the Code §§3602(C), (D) and (E) should be combined with the requirement to file a ...

Comment [tz144]: Comment: the terms "to the extent such information is reasonably available" should be defined to make clear that the Director cannot require a well owner to spend financial resources to obtain data required by this provision
Response: Whether an applicant should have to ...

Comment [tz145]: Comment: Information required is too extensive and difficult to get
Response: This provision only requires information that is "reasonably available "

to the extent such information is reasonably available:

- (1) the legal description or specific location of the Existing Well and the name and mailing address of the owner, beneficial owner, lessee, or land assignment holder of the land upon which the Existing Well is located;
 - (2) the depth, diameter, pumping capacity, type of casing, sanitary seal, and screen interval information of the Existing well;
 - (3) the legal description or general location of the land upon which the Groundwater withdrawn from the Existing Well is used and a description of the uses of that Groundwater;
 - (4) the date upon which the Existing Well was drilled;
 - (5) any well log and other drilling information concerning the Existing Well; and
 - (6) any additional relevant information as the Director may require.
- (C) If the Director determines that the Existing Well registration sets forth the required information to the extent that it is reasonably available, the Director shall assign a registration number to each Existing Well registered in accordance with this section. Upon the assignment of the registration number, the Director shall issue a Well Permit to the Person that filed the Existing Well registration. The Director shall include all Existing Wells for which a Well Permit is issued in the registry of wells provided for in subsection 3601(J).
- (D) A Person to which a Well Permit is issued may transfer or assign the Well Permit to another Person. Prior to any such transfer or assignment, the holder of the Well Permit shall notify the Director of the transfer or assignment of the Well Permit. The Director shall develop a form to be used to provide the Director notice of a transfer or assignment of a Well Permit. Upon receipt of a notice that a Well Permit has been transferred or assigned, the Director shall change the records of the Department to reflect the transfer or assignment.
- (E) Not later than 90 days after the Effective Date, the Director shall give notice of the deadline for the registration of Existing Wells. The notice to register Existing Wells shall be given in the same manner and in conjunction with the notice provided for in the case of Declarations of Existing Use as set forth in subsection 3304(C). The notice shall include a statement that failure to register an Existing Well pursuant to the Code may result in the issuance of an Order directing that the Existing Well shall not be used for any purpose until such time as it has been registered in accordance with this section.

Comment [tz146]: Comment: Is the Well Permit automatically assigned, or is the new Well owner required to apply for and obtain a new Well Permit before he can use the Well? What happens to a Well Permit when the owners of an allotment change due to death and inheritance?
Response: Changes to 3602(D) have been developed. These changes essentially require one assigning or transferring a well permit to notify the Director and upon such notification, the Director is to change the records of the Department to reflect that change

Comment [tz147]: Comment: Where is the information already gathered by the Department regarding Existing Wells?
Response: In Water Department's database

Section 3603 Well Construction Standards and Regulation of Well Drillers

- (A) The Director, pursuant to section 3203, shall adopt rules and regulations that establish standards for the drilling and construction of new Wells, replacement Wells and the deepening of Wells. These rules and regulations shall also establish standards for the installation of equipment in any Well, and the methods to be utilized in securing, sealing or capping Wells that are open and not in use.
- (B) All work in relation to the drilling, construction, replacement, deepening, securing, sealing, capping and equipping of Wells shall comply with the rules and regulations adopted by the Director.
- (C) The rules and regulations adopted by the Director concerning Wells shall also set forth penalties that may be imposed on any Person that violates any provision of those rules and regulations.
- (D) No Person may drill, construct, replace, deepen, or modify a Well unless that Person has obtained a Well driller's license from the Director. The Director shall establish rules and regulations setting forth the qualifications to be met before a Person may obtain a Well driller's license. The Director may require a licensed Well driller to post a bond or other adequate security to assure compliance with all applicable laws, rules, regulations and standards concerning the drilling, constructing, replacing, deepening, or modifying of any Well by a licensed Well driller.

ARTICLE 7 – WATER MANAGEMENT

Section 3701 Water Management Areas

The Director shall divide the Nation's Lands into Water Management Areas based on hydrologic considerations including Surface Water drainage areas and designated Groundwater Basins. Water Management Areas may be created on the basis of existing data and redrawn as appropriate based on new hydrologic data or to more effectively implement the Water Management objectives of this Code.

Section 3702 Water Management Plans

- (A) Except as provided in subsection 3702(D), the Director shall prepare, in consultation with each affected District, a proposed Water Management Plan for each Water Management Area established pursuant to this Code. When two or more Districts are within a single Water Management Area, the Water Management Plan shall, to the extent permissible under this Code, accommodate each District's preferences.
- (B) A Water Management Plan shall become effective upon its approval by the Legislative Council and may be amended through a process that complies with the procedural requirements of this section.

Comment [tz148]: Comment: A new §3604, San Xavier Reservation Groundwater Protection Program, should be added to the Nation's Code
 Response: Provisions nearly identical to what is suggested by the San Xavier comment are contained in section 4108 of Title II that was part of the Interim Allottee Water Rights Code Title II will remain effective

Comment [tz149]: Comment: The authority of the Director under this provision and §3103(52) must be limited so that the Director cannot limit San Xavier's "first right of beneficial use" to groundwater on the San Xavier Reservation to less than SAWRSA allows, even though groundwater pumping on the San Xavier Reservation may exceed Safe Yield
 Response: Based on the provisions of SAWRSA Amendments and the Code itself, any specific reference to the first right of beneficial use in this context does not need to be made

Comment [tz150]: Comment: How will management plans be developed?
 Response: Department will work with communities, in combination with information gathered by the survey, to develop management plans
 Comment: Will outside entities be allowed to participate in the development of Water Management Plans? For example, USDA permitted to submit comments?
 Response: The Department will solicit information from all users within each Water Management Area and also refer to other available data

Comment [tz151]: Comment: The Nation's Code should require that Water Management Plans be approved by the District Council of each District affected by each Water Management Plan, as well as the Legislative Council, after public hearings
 Response: The ultimate goal is for each district to develop its own water management plan, but the Tohono O'odham Constitution vests authority in the Legislative Council to decide disputes between two districts Article IX, Section 5

Comment [m152]: Note: This provision was simplified to allow flexibility in developing Water Management Plans, which will vary from area to area

- (C) Each Water Management Plan shall be consistent with this Code and other laws of the Nation, and may include the following provisions for each Water Management Area:
- (1) inventorying the existing quantity and quality of the water resources available for use;
 - (2) inventorying the existing uses of water;
 - (3) developing water conservation programs;
 - (4) developing procedures and methods to protect water quality;
 - (5) developing and instituting restrictions on the use of water to prevent the overuse of a source or sources of water; and
 - (6) other relevant matters the Director deems necessary.

Comment [tz153]: Comment: Given the absence of objective criteria for defining water quality, the references to addressing water quality in Water Management Plans should be removed
 Response: Water quality is included in the considerations to be made in a Water Management Plan. This does not mean the Nation's Code will be used to regulate water quality where that function is being accomplished by another governmental agency

(D) The San Xavier Reservation shall be and is declared a Water Management Area. The San Xavier District, with oversight from the Director, shall prepare a Water Management Plan for the San Xavier Water Management Area, as required by SAWRSA Amendments Section 308(d)(2), that shall comply with the provisions of this Code and with the provisions of the SAWRSA Amendments.

Comment [m154]: Note: This reference was added in response to a public comment

(E) The eastern Schuk Toak District shall be and is declared a Water Management Area. The Director shall prepare a Water Management Plan for the eastern Schuk Toak Water Management Area, as required by SAWRSA Amendments Section 308(d)(2), that shall comply with the provisions of this Code and with the provisions of the SAWRSA Amendments.

Comment [tz155]: Note: This reference was added in response to a public comment

ARTICLE 8 –UNDERGROUND STORAGE AND RECOVERY OF CENTRAL ARIZONA PROJECT WATER

Section 3801 Underground Storage and Recovery of CAP Water Within the Nation

- (A) Except as provided in subsection 3802, the Nation shall have the exclusive right to construct and operate, or authorize the construction and operation of facilities or projects:
- (1) to store CAP water underground within the Nation's Lands; or
 - (2) to recover CAP water stored within the Nation's Lands.

(B) Any facility or project proposed for the underground storage or recovery of stored CAP water within the Nation's Lands shall be evaluated by the Director in consultation with

Comment [j156]: Note: this reference was added as a result of a public comment

the Attorney General. Upon completion of the evaluation, the Director and the Attorney General shall report and make recommendations to the Legislative Council and the Chairperson in relation to the financial, technical, legal and other relevant factors concerning the proposed facility or project. No such proposed project or facility may be constructed or in any way implemented absent approval by the Legislative Council.

(C) The Attorney General, with technical assistance from the Director, may negotiate agreements with the Secretary to permit the Secretary to construct or utilize facilities or projects within the Nation's Lands to store underground or recover stored CAP water to which the United States has a right in order to fulfill the obligations of the Secretary:

- (1) to deliver CAP water to which the Nation is entitled pursuant to sections 304(a) and 306(a) of the SAWRSA Amendment during times of declared shortages on the Colorado River or other occurrences affecting water deliveries to the Nation as described in section 305(a)(2) of the SAWRSA Amendments, or
- (2) during times of scheduled or other outages in the CAP delivery system.

(D) The Nation shall consult with any affected District before an agreement negotiated with the Secretary pursuant to this section is presented to the Legislative Council for final approval by resolution.

Section 3802 **Underground Storage of CAP Water Within the San Xavier Reservation**

(A) The San Xavier District, Allottees or other Persons within the San Xavier Reservation may apply to the Director for a permit to store CAP water underground within the San Xavier District as provided for in subsection 307(a)(1)(G)(i)(I)(bb) of the SAWRSA Amendments.

(B) Applications to store CAP water underground pursuant to this section shall set forth:

- (1) a description of the purpose or purposes for which the CAP water is to be stored;
- (2) the location and a description of the facility or project at which the storage will occur;
- (3) the method by which the CAP water will be delivered to the site of the proposed storage, the quantity of CAP water to be stored on an annual basis and the total amount of CAP water to be stored over the life of the proposed facility or project;

Comment [tz157]: Comment: The first comment suggests that any agreement between the Nation and the Secretary with respect to developing a storage and recovery project on the Nation should, in addition to being approved by the Legislative Council, require approval of the District Council of the District within which the facility is to be located
Response: Legislative Council approval is sufficient

Comment [tz158]: Comment: The process of approving such a facility would duplicate what the San Xavier development review process would require and suggests that a finding that this review process has been completed should be a condition for the issuance of any approval for the facility
Response: the Director needs the authority to independently review all applications including any information developed as part of a district review process

Comment [tz159]: Comment: Code does not address or account for San Xavier's direct recharge credits with arroyos project
Response: Accounting for Direct Storage Credits will be pursuant to an agreement with the Secretary entered in accordance with Section 3801

(4) the estimated cost of developing or constructing the facility or project to be used to store the CAP water and the estimated time necessary to develop or construct the facility or project;

(5) a description of the area projected to be impacted by the stored CAP water, both laterally and vertically, and the qualitative impacts of the stored CAP water on the land and water resources within such area; and

(6) any other information deemed relevant by the Director to enable the Director to fully evaluate the application.

(C) Upon receipt of an application submitted pursuant to subsection 3802(B), the Director shall meet with the applicant to review and discuss the application and any conditions that might be imposed on the construction, development or operation of the proposed facility or project. The Director may request that the applicant provide further information regarding the application either before or at the meeting so that the application contains sufficient information to permit the Director to make a fully informed decision concerning the application.

(D) When the Director determines that the application contains sufficient information to permit the Director to make a fully informed decision concerning the application, the Director shall provide notice of and a complete copy of the application to the San Xavier District through the San Xavier District Chairman and Council, to the San Xavier District Water Rights Office, and to the San Xavier Allottees Association. The San Xavier District, the San Xavier Allottees Association, or any allottee may present comments, questions or objections concerning the application to the Director within 30 days of the date of the notice. The Director, upon receipt of any such comments, questions or objections, shall conduct a meeting with the applicant and those that submitted comments, questions or objections. The Director, following the meeting provided for in this subsection, shall complete the review of the application and either approve or reject it.

(E) The Director may approve an application submitted under subsection 3802(B) if the Director determines that:

(1) the applicant has the financial and technical resources to develop, construct and operate the facility or project described in the application;

(2) the applicant has the right and means to obtain, deliver and use the CAP water for storage at the facility or project described in the application;

(3) the storage of the CAP water as described in the application will benefit the applicant or the San Xavier Reservation in general;

Comment [tz160]: Comment: Duplicates San Xavier's internal process for development review
Response: The District does receive notice of the application and can comment. The Water Resources Department is responsible for gathering "sufficient information" to make decisions concerning applications throughout the Nation's Lands

(4) the storage will not cause unreasonable harm to existing land or water resources that will be impacted by the storage of the CAP water; and

(5) the applicant has or will comply with any other regulatory requirements or limitations that apply to the development, construction or operation of the facility or project where the storage of CAP water is to occur.

(F) The Director may reject the application upon finding that one or more of the requirements set forth in subsection 3802(E) can not or have not been met. If the application is rejected the Director shall issue an order listing the reason or reasons for the rejection. If the application is approved, the Director shall issue an order listing any conditions to be met by the applicant in developing, constructing and operating the facility or project to store the water. An order rejecting or approving an application shall be a Final Decision of the Director. Notice of the Director's order shall be mailed to the applicant and any other Person that submitted written comments, questions or objections to the application.

Comment [m161]: Note: Judicial review of final decisions is required in Code

Section 3803 Underground Water Storage and Savings Under Arizona State Law

(A) The Nation shall have the exclusive right to use CAP water for underground storage or groundwater savings under Arizona state law as set forth in Chapter 3.1, Title 45, A.R.S., as amended.

(B) The Nation shall have the exclusive right to all Marketable Long Term Storage Credits that accrue from CAP water used for underground storage or groundwater savings under Arizona state law described in subsection 3803(A).

(C) The Nation may not use CAP water for underground storage, groundwater savings or accrue, market or otherwise dispose of Marketable Long Term Storage Credits under Arizona law unless such action is approved by a resolution of the Legislative Council.

(D) The Nation, as authorized by the Legislative Council, may develop, construct and operate facilities or projects within the Nation's Lands for the storage of CAP water. Subject to approval by the Legislative Council, the Director may apply to the Arizona Department of Water Resources for one or more facilities permits issued under Arizona state law for any facility or project existing or to be developed and constructed on the Nation's Lands for the underground storage of CAP water by either the Nation or by any Person, subject to such conditions and limitations as may be imposed by the Legislative Council.

ARTICLE 9 – INSPECTIONS, INVESTIGATIONS, AND ENFORCEMENT

Section 3901 Inspections and Investigations

(A) The Director or authorized representatives of the Director may conduct inspections and investigations of any lands upon which any of the Nation's Water is used together with

Comment [tz162]: Comment: The authority granted to the Director under Section 3901 is overbroad and could result in unreasonable inspections
Response: The Code requires that the Director give reasonable notice of any entry onto lands for inspection or investigation purposes. Only exception: Emergency

any facilities, including, but not limited to, Wells, Diversions, Catchments or Charcos that are used to put the Nation's Water to a Beneficial Use.

- (B) To conduct inspections or investigations, the Director or authorized representatives of the Director may enter upon any land within the Nation's Lands after giving reasonable notice to the Person that controls or holds a beneficial interest in the lands upon which the inspection or investigation is to be conducted. Notice of any inspection or investigation shall also be given to any Person with a Permitted Use on the lands upon which the inspection or investigation is to be conducted if that Person is not the Person that controls or holds a beneficial interest in the lands to be inspected or investigated.
- (C) Inspections and investigations may be conducted to obtain data concerning characteristics and specifications of facilities utilized to effect a Permitted Use including, but not limited to:
 - (1) the size, nature and configuration of any structure that impounds any of the Nation's Water in a Catchment or Charco;
 - (2) the size, nature and configuration of any works utilized to effect a Diversion including the capacity of any structure to convey water to any point of use; and
 - (3) the depth, diameter and type of casing, the maximum pumping capacity and the static and pumping water levels of any Well.
- (D) The Director or authorized representatives of the Director may enter upon any lands within the Nation's Lands without notice if the Director determines that an Emergency exists or that a violation of the Code is occurring on the lands to be entered.

Section 3902 Orders to Comply

- (A) If the Director determines that any Person is or may be in violation or has violated any provision of the Code or any Permit, license to perfect, rule, regulation or order of the Director issued pursuant to the Code, the Director may issue an order to any Person believed to be or have been in violation directing that the Person appear before the Director and demonstrate that no violation exists or has existed.
- (B) If the Director determines, after providing the Person that received the order an opportunity to be heard, that the Person is in violation of the Code or any Permit, license to perfect, rule, regulation or order of the Director issued pursuant to the Code, the Director shall issue an order that the Person cease any violation and comply with the Code, Permit, license to perfect, rule, regulation or prior order of the Director. The Director's order shall specifically set forth what action the Person shall take to comply with the order and the timeframe within which compliance is required. An order issued pursuant to this subsection is a Final Decision of the Director.

Comment [tz163]: Comment: These provisions should be revised to (1) provide notice and an opportunity to cure an alleged violation before issuing an order to participate in a hearing; and (2) provide for an opportunity to appeal the Director's order imposing penalties and compliance steps to a quasi-judicial body
Response: Notice and an opportunity to appear are provided. With respect to appeals, the Judicial Court is the only body within the Nation to which such an appeal can be taken

Comment [tz164]: Comment: provisions concerning an evidentiary hearing should be included
Response: Current provision makes reference to providing anyone who is believed to be in violation an opportunity to be heard and minimum due process requirements would require that the person be entitled to put on evidence and call witnesses to demonstrate that no violation had occurred

Comment [m165]: Comment: An evidentiary hearing should be permitted
Response: This sentence allows a Person who may be in violation to appear and provide evidence that there was no violation

- (C) If the Person that is issued a Final Decision pursuant to subsection (B) continues the violation referred to in the Final Decision, the Director may seek a temporary restraining order or preliminary or permanent injunctive relief from the Judicial Court to enforce the Final Decision.

Comment [tz166]: Comment: How do you hold the Director accountable?
Response: Article 10 Appeals process.

Section 3903 Penalties for Violations

- (A) Except as provided in subsection (B), any Person found to be in violation of the Code or any Permit, license to perfect, rule, regulation or order of the Director issued pursuant to the Code, as provided in subsection 3902(B), may be assessed a civil penalty of up to one thousand dollars (\$1,000.00) for each day the violation continues following the issuance of a Final Decision by the Director pursuant to that section.
- (B) If the Director determines, pursuant to subsection 3902(B), that the violation was willful or that the violation constitutes an illegal use or disposition of any of the Nation's Water, a civil penalty of up to \$10,000.00 per day may be assessed by the Director for each day the violation continues following the issuance of a Final Decision by the Director pursuant to that subsection.
- (C) The Director may bring an action in Judicial Court against any Person assessed a civil penalty to obtain an enforceable judgment in the amount of the civil penalty assessed by the Director. A Final Decision of the Director finding a violation pursuant to subsection 3902(B) shall be conclusive evidence of the violation unless judicial review of the Final Decision remains pending.

Comment [tz167]: Comment: Fines are too high and ordinary O'odham will not be able to pay the fines. Fines were never part of the initial Water Code discussion at the DWAC.
Response: Fines are only a last resort. The Director has discretion whether to actually impose a fine or not. The higher amount could be used to penalize larger business operations.

ARTICLE 10 – APPEALS, SOVEREIGN IMMUNITY, AND EFFECTIVE DATE

Section 31001 Limited Waiver of Sovereign Immunity

- (A) The Nation hereby waives its sovereign immunity only for the express and sole purpose of complying with clause (iii) of section 308(b)(4)(D) of the SAWRSA Amendments and solely for claims of declaratory and injunctive relief, judicial review by the Judicial Court of Final Decisions of the Director pursuant to section 31002, and for actions seeking only declaratory or injunctive relief with respect to disputes arising out of this Code.
- (B) This waiver of sovereign immunity does not apply to any actions or remedies against the Nation not expressly authorized in this section; the Nation's immunity is not waived with regard to the award of any damages, costs of suit, including attorney's fees, or other monetary relief. In all such cases the immunity of the Nation is expressly preserved.

Comment [tz168]: Comment: in every reference to a final decision of the Director, a reference to the appeal process should be made.
Response: this is not necessary since the appeal rights are set forth in the definition of "Final Decision."

Section 31002 Appeals

(A) Any Affected Person may obtain judicial review of a Final Decision of the Director exclusively in the Judicial Court; provided that the Judicial Court shall uphold the Director unless the Judicial Court determines the Final Decision was

- (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (2) contrary to constitutional right, power, privilege, or immunity;
- (3) in excess of jurisdiction, authority, or limitations set forth in applicable law, or of a right established by law;
- (4) substantially without observance of procedure required by law; or
- (5) unsupported by Substantial Evidence in a case based on the Department's record.

(B) In making the foregoing determinations, the Judicial Court shall review the whole record of the Department or those parts of it cited by a party. The Judicial Court may allow the parties to supplement the record but shall not permit trial de novo.

Section 31003 Repeal of Title I of the Interim Allottee Water Rights Code

Title I of the Interim Allottee Water Rights Code, as codified at 25 T.O.C. Chapter 3, is repealed and superseded by this Code as of the Effective Date; provided that 25 T.O.C. Chapter 4, Implementation Provisions Regarding SAWRSA, shall remain in effect.

Section 31004 Effective Date

This Code shall become effective on the first date of the month following enactment by the Legislative Council.

Comment [m169]: Note: "Limited Waiver of Sovereign Immunity" was moved to the beginning of this article

Comment [tz170]: Comment: Should be language indicating that even though Title I of the Interim Code is repealed, its spirit, language, and intent is carried over to the Nation's Code?
Response: Section 3101(I) addresses the transition from the Interim Allottees Code to the Nation's Code

Comment [m171]: Note: Severability is now addressed in the Nation's General Severability law

Comment [tz172]: Comment: The Nation's Code cannot supersede the Interim Code until the Nation's Code has been reviewed and finally approved by the Interior Secretary
Note: language requiring approval by the Secretary was initially added, however, it was then removed after closer examination of SAWRSA subsection 308(c)

Comment [tz173]: Comment: Request for additional time to review the Water Code with San Xavier District