

SITING ENERGY and TRANSMISSION LINE PROJECTS IN ARIZONA

An Irreverent Primer
2024 Edition



Saguaros in Tucson, AZ.



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Table of Contents

I.	Introduction.....	1
II.	The Arizona Market for Renewables.....	4
III.	The Arizona Certificate of Environmental Compatibility.....	10
	A. Commission Background.....	10
	B. Getting Started on Your CEC.....	11
	C. Criteria and Potential “Reasonable Conditions.”.....	12
IV.	Local Zoning Issues.....	15
V.	A Brief Detour into Federal Environmental Law.....	17
	A. NEPA.....	17
	B. The Endangered Species Act.....	18
	C. The Clean Water Act.....	20
VI.	Tribal Lands.....	23
VII.	Federal Lands.....	27
VIII.	State Trust Lands.....	30
IX.	Water Management in Arizona.....	33
	A. Surface Water in Arizona.....	33
	B. Groundwater Use in Arizona.....	35
	C. Effluent.....	37
X.	Federal and State Wildlife Management.....	39
	A. Federal and State Wind Energy Development Wildlife Guidelines.....	39
	B. State Solar Energy Development Wildlife Guidelines.....	40
XI.	Arizona Environmental Permits.....	42
	A. Water Quality Permits.....	42
	1. AZPDES Permits.....	42
	2. Aquifer Protection Permits.....	43
	B. Air Quality Permits.....	43
XII.	Eminent Domain in the Utility Context.....	44
	A. Procedures for Condemning Interests in Land and Taking Possession.....	45
	1. General Procedures.....	45
	2. Immediate Possession.....	46
XIII.	Conclusion.....	47

Appendices

1. Arizona Corporation Commission—Biographies of Current Commissioners
2. Arizona Power Plant and Line Siting Committee—Biographies of Current Members
3. Map of Surface Management Responsibility in Arizona
4. Maps of Service Areas of Arizona Utilities
5. Using the Arizona Corporation Commission Docket
6. Map of Arizona’s Solar Energy Zones
7. Matrix of Potentially Required State and Federal Permits and Approvals

Figures

Figure 1. Arizona Solar Resources. While the entire state is sunny, the highlighted areas are extra sunny, flat, and not particularly environmentally sensitive.	6
Figure 2. Arizona wind resources. Prime wind resources correspond to Arizona’s mountain ranges, running from the northwest corner down to the southeast.	7
Figure 3. Map of SRP energy infrastructure in Arizona and neighboring states.	8
Figure 4. Arizona tribal lands.	24
Figure 5. Arizona State Trust lands.	32

Tables

Table 1. Recommended wildlife surveys, plans, and time frames under federal and state law for wind energy development	40
-----------------------------------------------------------------------------------------------------------------------------	----



1

I. Introduction.

With the renewable energy boom underway everywhere, Arizona offers an attractive market for renewable energy facilities, with lots of sunshine and even a bit of wind up north. And, despite what you may have heard about our, umm, colorful politics, historically Arizona has been largely supportive of renewable energy, at least with regard to utility-scale projects. Arizona also obviously offers proximity to other good markets, most notably California and Nevada. That’s the good news.

The less-good news is that the prevalence of federal and tribal lands can complicate efforts to site generating and transmission facilities, given the usual overlay of federal laws, such as the National Environmental Policy Act (“NEPA”). That said, if your point of reference is California, you’ll wonder why we think Arizona can be a challenge.

This brief primer—at various points *not* stupefyingly dull—provides an overview of the real-world siting process in Arizona. The first thing to know is that the Arizona Corporation Commission (“ACC” or “Commission”) exercises jurisdiction over large thermal generating facilities and transmission lines, the developers of which must demonstrate compatibility with Arizona’s natural, cultural, and economic environment. That demonstration, as described further below, involves a NEPA-like process with public comment and open hearings.

The second thing to know is that if your project does not involve either thermal generation or a gen-tie longer than a mile, you can stop reading now. We won’t blame you. None of the so-called jokes

yet to come are worth it. That's because of a 2023 statutory amendment passed to eliminate a docket clogged with very short (like, hundreds of feet) gen-tie lines.¹

The Commission is an independent creature of the state constitution, created primarily because at the time of statehood in 1912, the populace did not trust the territorial legislature to regulate the railroads. The Commission is comprised of five commissioners elected to staggered four-year terms in a statewide ballot, three during presidential election years and two in even-numbered off-years. Bolstered by sophisticated staff, the Commission historically has avoided the negative scrutiny that has periodically fallen on other parts of Arizona government.² The Commission's low profile ended in connection with the 2014 elections, when a pitched battle between rooftop solar advocates and electric utilities over net metering triggered a campaign finance flap that reverberates today, with the state's largest utility and one of the Commissioners for a time litigating the power of a single commissioner to compel disclosure of indirect campaign contributions.³

The Commission currently includes four Republicans (Chairman Jim O'Connor, Lea Marquez Peterson, Kevin Thompson, and Nick Myers) and one Democrat (Anna Tovar).

Chairman O'Connor is a finance professional with decades of experience in Arizona state and local politics. Commissioner Marquez Peterson is an entrepreneur who previously served as the head of the Tucson Hispanic Chamber of Commerce. Commissioner Thompson is a United States Air Force combat veteran with a degree in mechanical engineering. He previously served on the Mesa City Council. Commissioner Myers spent two decades working in the software engineering industry and then started and sold several small businesses. Commissioner Tovar, the lone Democrat, worked as an elementary school teacher before serving in the Arizona House of Representatives and as the Mayor of Tolleson.

While the Commission itself is sophisticated and well run, the legal landscape can be a bit tricky. Less than 20% of the land within Arizona is privately held. Even if one can find a suitable private parcel to site a generating facility, any lengthy transmission line is likely to encounter some combination of federal lands, tribal lands, and State Trust lands, many blessed with biological and cultural resources.⁴ The prevalence of federal and tribal lands, of course, makes Arizona projects relatively more likely to require some sort of federal approval that in turn mandates some level of NEPA review. Developers of Arizona projects spend a fair bit of time trying to avoid NEPA triggers.

¹ That much-needed legislation reflected a rare bit of harmony between the Republican legislature and Democratic Gov. Katie Hobbs, who took office in January 2023.

² Perhaps most notably, former Arizona Governor Evan Mecham was impeached in 1987 after a series of offensive actions and gaffes, including canceling Martin Luther King Day and complaining that he was being spied upon by lasers. See *Mecham's Latest Worry: Eavesdropping Laser Beams*, *L.A. TIMES*, Jan. 22, 1988.

³ See *Howard Fischer, Giant Utility Drops Lawsuit against ACC Commissioner to Stop Records Production*, *ARIZ. CAPITOL TIMES*, Mar. 11, 2017. The Commission's normally placid approach to governance also fell by the wayside in connection with the quick death of a docket opened to evaluate the prospects for retail competition in Arizona. After heavy pressure from utilities and utility investors, the docket was abruptly closed in a manner that troubled Commissioner Burns, who had called for additional evidence to be submitted before any decision was taken. See *In the Matter of the Commission's Inquiry into Retail Electric Competition*, Docket No. E-00000W-13-0135, <http://edocket.azcc.gov>.

⁴ Please see Appendix 3 for a map detailing surface management responsibilities in Arizona.

Also trickier in Arizona than in most places is recognizing those “waters of the United States” whose disturbance requires a Clean Water Act dredge-and-fill permit. Arizona has more than its share of potentially jurisdictional waters that are normally not, well, wet. The U.S. Supreme Court’s recent decision in *Sackett v. EPA*,⁵ provided only some clarity regarding this 50-year-old jurisdictional uncertainty.

Although Arizona’s regulatory environment is generally favorable to energy development, the sheer diversity of the state’s cultural and natural environments poses many traps for the unwary. We hope this Guide is a helpful introduction or reminder to practitioners and industry stakeholders of the many legal rules and issues in this area. That, or an attractive wedge to place under an uneven table leg.



Petroglyphs in Tucson, Arizona

⁵ *Sackett v. Env’t Prot. Agency*, 598 U.S. 651 (2023).



II. The Arizona Market for Renewables.

Although it has been apparent that Arizona is sunny and hot for some time (it lags behind only Nevada for solar potential),⁶ renewable energy development in the state did not catch fire until the 2000s. The Commission adopted a Renewable Energy Standard and Tariff (“REST”) in 2006.⁷ The REST rules require regulated electric utilities to develop an energy portfolio that includes an increasing amount of solar and other “environmentally friendly” sources.⁸ Despite periodic efforts by the Arizona Legislature to give itself a role in setting renewable energy standards, the Commission has held exclusive authority since the Court of Appeals upheld the Commission’s REST in *Miller v. Arizona Corporation Commission*, 227 Ariz. 21 (Ct. App. 2011).⁹ The REST requires regulated utilities to source 15% of their retail kilowatt-hour sales from renewable sources by 2025, increasing by 1% each year from 2020’s target of 10%; 30% of that must be from distributed generation (e.g., rooftop solar).

Market forces seem likely to continue favoring renewable development in Arizona, but the REST rules may not. At the ACC’s February 6, 2024, meeting, the Commission voted 4-1 (along party lines) to draft rules to repeal both the Renewable Energy rules and the Electric and Gas Efficiency rules and

⁶ Decision No. 69127, *In the Matter of the Proposed Rulemaking for the Renewable Energy Standard and Tariff Rules*, Docket No. RE-00000C-05-0030, Nov. 14, 2006, <https://www.eia.gov/state/analysis.php?sid=AZ#44>.

⁷ Decision No. 69127, *In the Matter of the Proposed Rulemaking for the Renewable Energy Standard and Tariff Rules*, Docket No. RE-00000C-05-0030, Nov. 14, 2006, <https://docket.images.azcc.gov/0000063561.pdf?i=1707946921419>.

⁸ Ariz. Admin. Code (“A.A.C.”) R14-2-1801 to -1816.

⁹ But stay tuned: those who support the Arizona Legislature’s playing a role in setting renewable standards got a boost from the Arizona Supreme Court in July 2020. In *Johnson Utilities, L.L.C. v. Arizona Corporation Commission*, 249 Ariz. 215 (2020), the Court strongly suggested that the Legislature has concurrent authority in the renewable standards area (albeit in dicta addressing the Commission’s unrelated authority to displace management of a regulated water and wastewater authority).

mandates. According to the ACC, mandates imposed by prior Commissions have cost almost \$3 billion through the corresponding REST and Energy Efficiency surcharges.¹⁰ Shortly after taking this stand for electricity consumers, the Commission approved on February 22, 2024, a 9.55% rate hike for the state's largest utility, Arizona Public Service.¹¹

Renewable energy provided around 16% of Arizona's net electricity generation as of 2022.¹² Although hydroelectric power was dominant for a long time, today, solar power accounts for approximately 10% of Arizona's net electricity generation (over 60% of renewable generation).¹³ A variety of entities—from power companies to consumers to tribes—have fueled this trend. For example, in 2017, the Kayenta Solar Facility, which was the first large-scale solar photovoltaic (“PV”) facility on the Navajo Nation, came online—it has 27 megawatts (“MW”) of capacity.¹⁴ Additionally, in 2019, the U.S. Department of Energy awarded a grant to the Aha Macav Power Service, authorized by the Fort Mojave Indian Tribe, to develop a PV array to deliver 2.3 MW of power.¹⁵ Construction of the 300-MW Eleven Mile Solar Center (a combined solar and battery energy storage system) in Pinal County began in 2023 and is expected to be completed by mid-2024.¹⁶ Among Eleven Mile's expected customers are Salt River Project (an Arizona electric and water utility) and Meta (Facebook).¹⁷ Another example of tribal involvement in renewable energy is the Gila River Indian Community's recently authorized solar-covered canal project, which will produce about 1 MW of electricity and reduce evaporation from the canal.¹⁸

Arizona also exports a significant amount of power. In 2022, Arizona supplied about 15% of its net generation to consumers outside the state.¹⁹ Current projects, such as the Ten West Link—a 125-mile 500-kilovolt (“kV”) transmission connection currently being built between Tonopah, Arizona, and Blythe, California—aim to improve system efficiency and energy transfers between Arizona and neighboring states.²⁰

¹⁰ ACC Staff will docket its draft rules in the following ACC dockets, where public comments can also be received: RG-00000A-24-0024 (Gas Utility EE), RE-00000A-24-0025 (Electric Utility EE), and RE-00000A-24-0026 (Renewable Energy).

¹¹ See ACC – ACC Votes on Arizona Public Service Company Rate Case, <https://www.azcc.gov/news/2024/02/23/acc-votes-on-arizona-public-service-company-rate-case> (last visited Feb. 27, 2024).

¹² U.S. ENERGY INFO. ADMIN., ARIZ. ENERGY STATE PROFILE, May 18, 2023, <https://www.eia.gov/state/print.php?sid=AZ>.

¹³ *Id.*

¹⁴ *Navajo Celebrate First Large-Scale Solar Farm on Nation*, NAVAJO-HOPI OBSERVER, Sept. 5, 2017, <https://www.nhnews.com/news/2017/sep/05/navajo-celebrate-first-large-scale-solar-farm-nati/>.

¹⁵ *DOE Announces \$16 Million for 14 Tribal Energy Infrastructure Deployment Projects*, U.S. DEP'T OF ENERGY Jul. 23, 2019, <https://www.energy.gov/articles/doe-announces-16-million-14-tribal-energy-infrastructure-deployment-projects>.

¹⁶ *Eleven Mile Solar Center*, ØRSTED, <https://elevenmilesolar.com/> (last visited Feb. 14, 2024).

¹⁷ Jeff Gifford, *Meta Secures Power for Mesa Data Center through Deal with SRP, Orsted*, PHX. BUS. J., Dec. 13, 2023, <https://www.bizjournals.com/phoenix/news/2023/12/13/meta-energy-eleven-mile-solar-center.html>.

¹⁸ *Gila River Indian Community Signs Historic Agreement For Solar-Over-Canal Project*, ARIZ. DEP'T WATER RES., Nov. 15, 2023, <https://www.azwater.gov/news/articles/2023-15-11-1>.

¹⁹ U.S. ENERGY INFO. ADMIN., ARIZ. STATE PROFILE & ENERGY ESTIMATES – ANALYSIS, <https://www.eia.gov/state/analysis.php?sid=AZ#44> (last visited Feb. 14, 2024).

²⁰ Ten West Link Project Information, <https://tenwestlink.com/project-info/>.

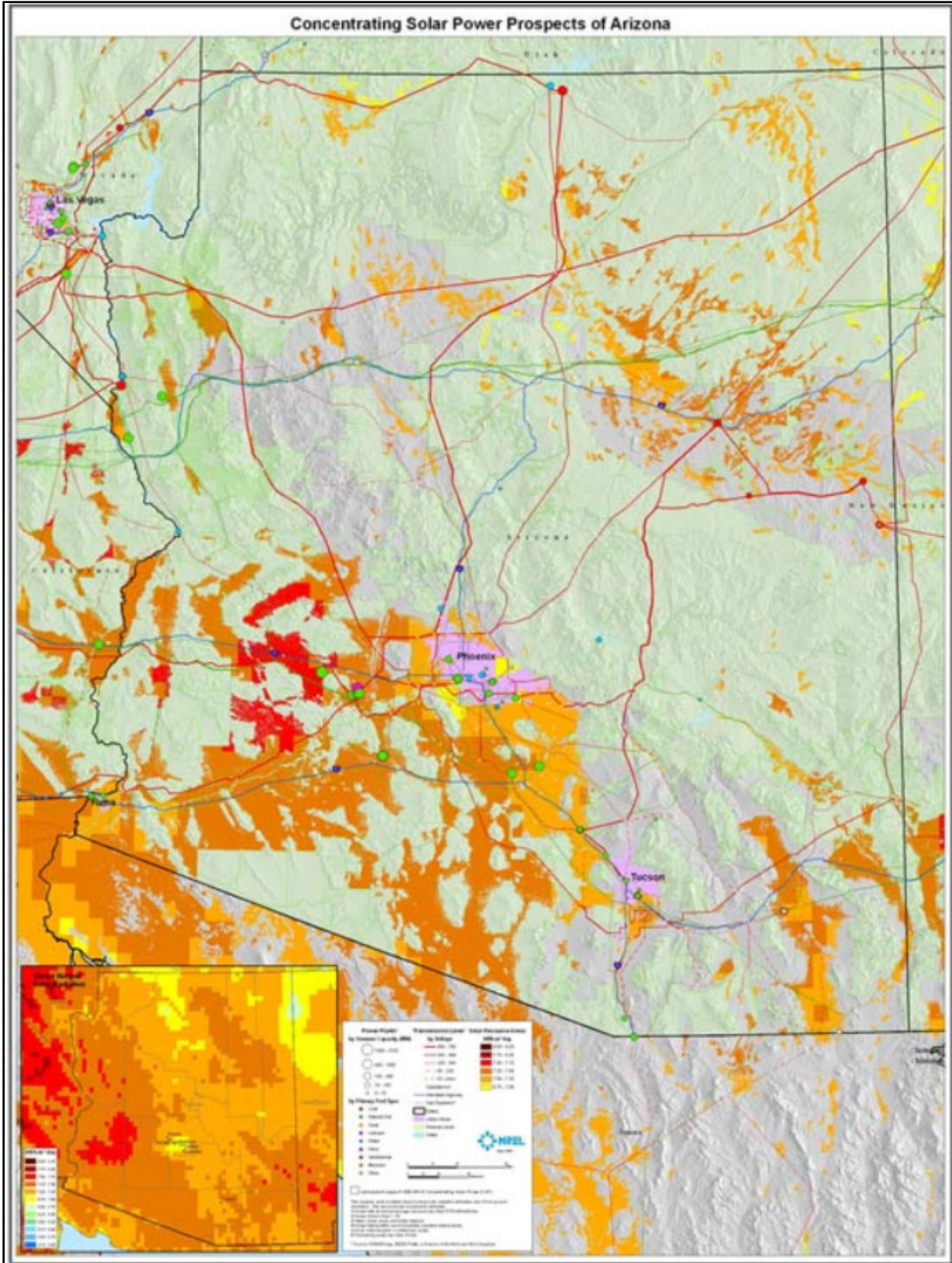


Figure 1. Arizona Solar Resources. While the entire state is sunny, the highlighted areas are extra sunny, flat, and not particularly environmentally sensitive.

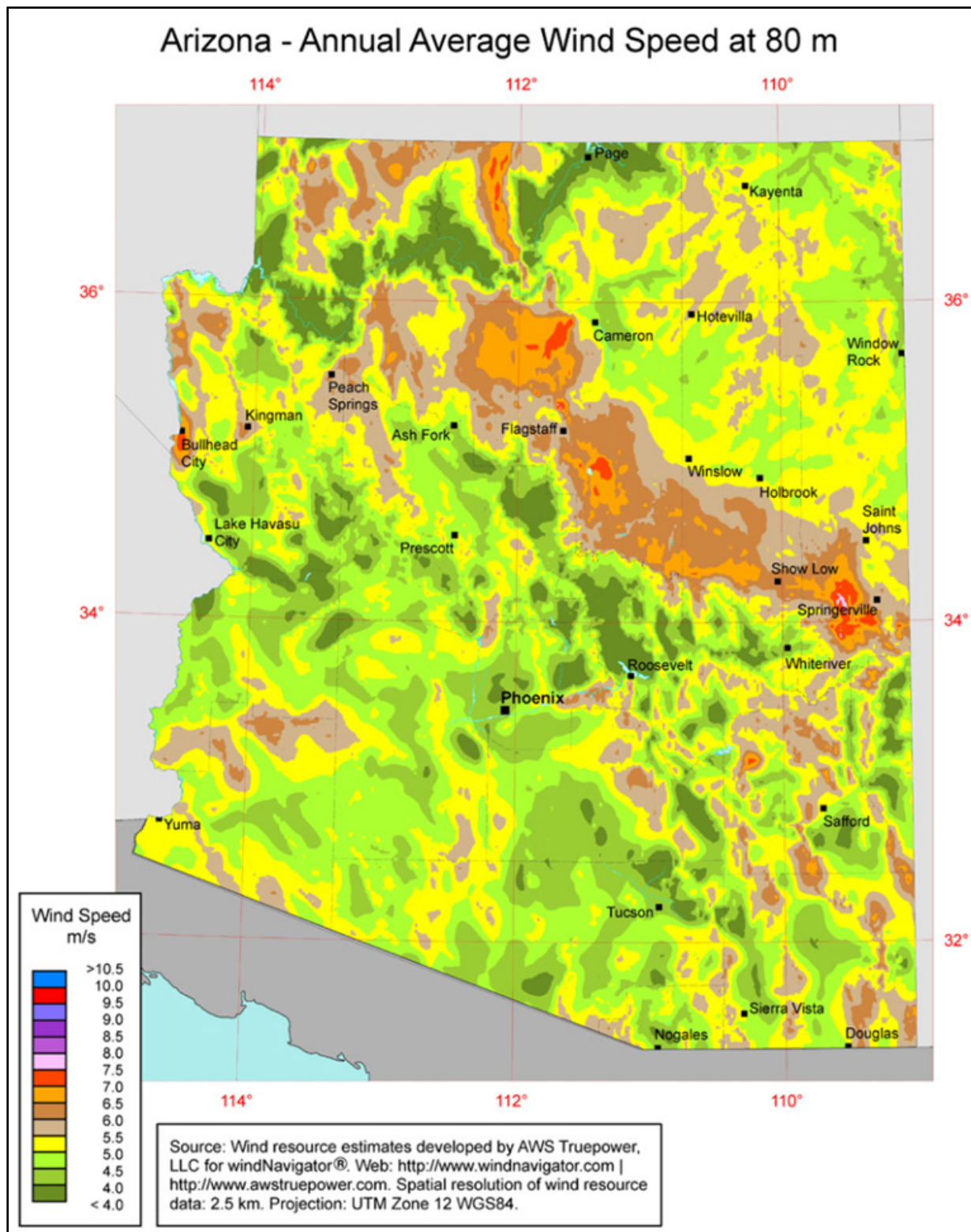


Figure 2. Arizona wind resources. Prime wind resources correspond to Arizona's mountain ranges, running from the northwest corner down to the southeast.

The dominant players in the Arizona energy market are Arizona Public Service Co. (“APS”), Tucson Electric Power (“TEP”), and Salt River Project (“SRP”). Maps of each utility’s service area and of the overall transmission infrastructure can be found in Appendix 4.

SRP is an umbrella term that refers to two independent entities covering both water and power. The Salt River Valley Water Users’ Association is an association of landowners formed to manage and distribute water from the Salt River Project, a federal reclamation project authorized in 1903 in accordance with the National Reclamation Act. The Association is one of Arizona’s largest water suppliers, mostly in the Phoenix area. SRP also operates a series of reservoirs, canals, and hydroelectric dams making up the Salt River Project itself.²¹

SRP’s power operations are conducted via the Salt River Project Agricultural Improvement and Power District, formed in 1937 as a political subdivision of the State of Arizona. SRP provides electricity to more than 1 million customers, mostly in the Phoenix area. SRP, which likes to keep everyone confused about what sort of legal creature it is, is technically not subject to ACC regulation. But even without the REST hanging over its head, SRP has long pursued renewable energy sources, and its board has actually adopted a more ambitious plan for nearly 50% of its energy to be carbon free by 2025, reducing its overall carbon intensity by 90%.²²

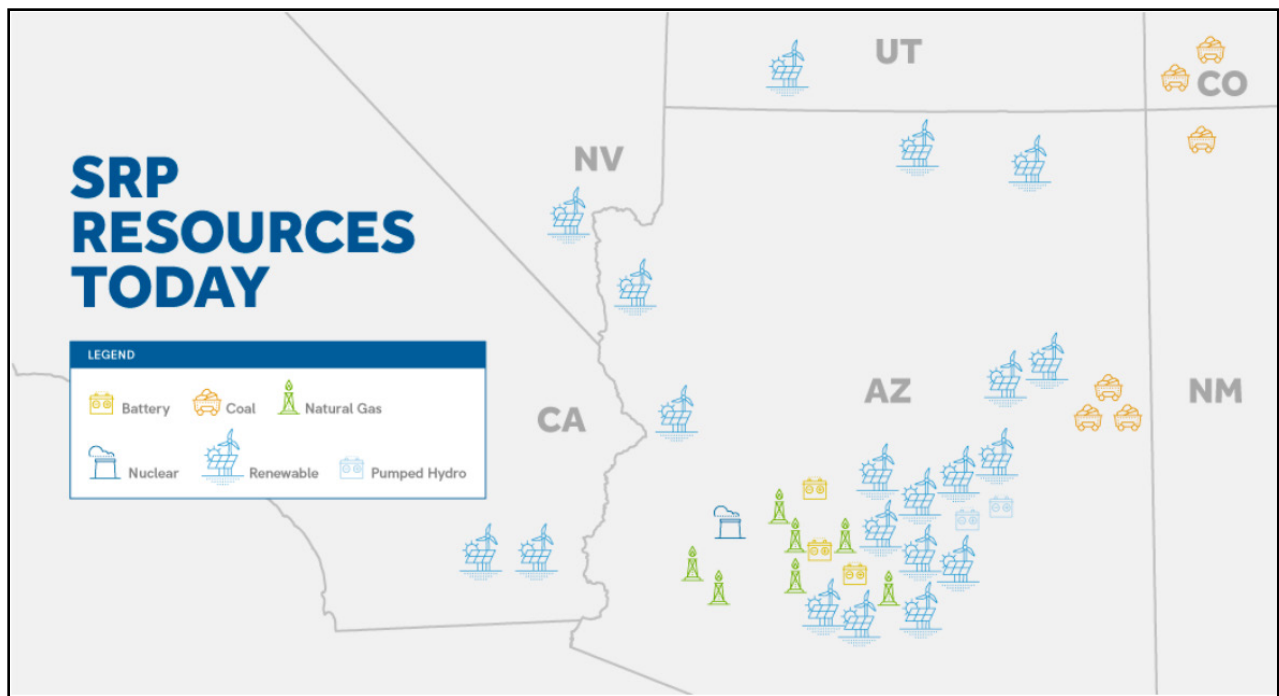


Figure 3. Map of SRP energy infrastructure in Arizona and neighboring states.

²¹ SRP – ABOUT US, <https://www.srpnet.com/about/about-srp#page-content> (last visited Feb. 14 , 2024).

²² SRP – GRID & WATER MANAGEMENT, <https://www.srpnet.com/grid-water-management/grid-management/renewable-energy>.

APS, a subsidiary of Pinnacle West Capital Corporation, is Arizona’s largest and oldest public utility. APS serves more than 1.4 million homes and businesses in 11 of the state’s 15 counties.²³ In 2020, APS announced a sweeping “decarbonization goal” to achieve 100% carbon-free electricity by 2050, with an estimate of 65% carbon free by 2030, separate from its obligations under the statewide REST rules.²⁴

TEP, an indirect subsidiary of Fortis (Canada’s largest investor-owned gas and electric utility holding company), is the state’s second-largest investor-owned utility, serving nearly 450,000 customers in the Tucson metropolitan area. According to its 2023 Integrated Resource Plan, TEP plans to reduce its carbon emissions by 80% by 2035 and have “net zero direct greenhouse gas emissions by 2050.”²⁵



Wind Turbines

Arizona’s dominant utilities (APS, SRP, TEP)—along with other utilities, electrical cooperatives, transmission regulators and governmental agencies, transmission facility owners and users, and others across the state and region—are part of a regional transmission planning group known as the Southwest Area Transmission (“SWAT”) Subregional Planning Group. The SWAT meets quarterly to promote and coordinate regional transmission planning in the Southwest. A SWAT map of major regional transmission and generation infrastructure can be found in Appendix 4, along with maps of APS, SRP, and TEP service areas and transmission infrastructure.

²³ APS – APS SERVICE AREA MAPS, <https://www.aps.com/en/Residential/Service-Plans/Service-Area-Maps> (last visited Feb . 14, 2024).

²⁴ APS – APS and Advanced Energy Economy announce Arizona clean energy future project, Feb. 12, 2020, <https://www.aps.com/en/About/Our-Company/Newsroom/Articles/APS-and-Advanced-Energy-Economy-announce-Arizona-Clean-Energy-Future-Project>. APS’s commitment includes a plan to “eliminate coal” from its portfolio by the end of 2031. See APS – APS Clean Energy Commitment, <https://www.aps.com/-/media/APS/APSCOM-PDFs/About/Our-Company/Energy-Resources/CleanEnergyCommitment.ashx?la=en&hash=EC0606653A170A6A83A716703CD62B44> (last visited Feb. 14, 2024).

²⁵ TEP – 2023 INTEGRATED RESOURCE PLAN, <https://www.tep.com/2023-irp/> (last visited Feb. 14, 2024).



Bobcat Kitten in Northern Arizona

3

III. The Arizona Certificate of Environmental Compatibility.

A. Commission Background.

Among other things, the ACC has jurisdiction over “public service corporations”²⁶ engaged in the transmission of power and electricity.²⁷ The Commission is composed of five popularly elected members who may serve no more than two consecutive four-year terms.²⁸ Arizona is one of only 13 states with elected, rather than appointed, utility regulators.

Perhaps the most important aspect of the Commission’s authority with respect to the development of energy infrastructure is the Certificate of Environmental Compatibility (“CEC”). The CEC is the Commission’s official go-ahead for thermal power plants and transmission lines to be built in Arizona, and unfortunately, the process isn’t terribly easy.

Let’s start with the “who” and “what”—who must obtain a CEC, and for which kinds of projects? Two broad categories of projects require a CEC: (1) large-scale thermal generating facilities with nameplate ratings of 100 MW or more; and (2) some aboveground transmission lines rated for at least

²⁶ ARIZ. CONST. art., 15 § 2 (“All corporations other than municipal engaged in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; or engaged in collecting, transporting, treating, purifying and disposing of sewage through a system, for profit; or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers, shall be deemed public service corporations.”).

²⁷ ARIZ. CONST. art. 15.

²⁸ ARIZ. CONST. art. 15, § 1(B).

115 kV.²⁹ Smaller-scale solar thermal plants, PV plants, and wind projects do not require a CEC, but a CEC may be required for interconnection or other related transmission lines.

In 2023, the Arizona Legislature changed the rules for which kinds of transmission lines are subject to the CEC process, clarifying a longstanding ambiguity in the statutes that created a lot of conflict and uncertainty. Originally, the statutes provided that a “transmission line,” for which a CEC was required, meant “a *series of new structures* erected above ground and supporting one or more conductors designed for the transmission of electric energy” at least 115 kV, including all “related” switchyards.³⁰

In April 2023, Governor Katie Hobbs signed a bill into law redefining “transmission line” to provide greater clarity. Under the new statute, only transmission lines that meet all four of the following requirements must go through the CEC process:

- Five or more new structures;
- Together spanning more than one mile in length as measured from the first structure outside of the substation, switchyard, or generating site to which the line connects to the fifth structure;
- Erected above ground; and
- Supporting one or more conductors designed for the transmission of electricity at nominal voltages of at least 115 kV.³¹

Also included are “all new switchyards to be used” in connection with the transmission line, but not any structures associated with substations, switchyards, or generating stations to which the line may be connected.³²

Obtaining a CEC requires a developer to demonstrate that the project will “balance, in the broad public interest, the need for an adequate, economical and reliable supply of electric power with the desire to minimize the effect thereof on the environment and ecology of this state.”³³ The next big question is the “how”—how do developers go about obtaining a CEC when it is required under state law?

B. Getting Started on Your CEC.

Before a developer can apply for a CEC, there are a couple of preliminary steps. For proposed generating facilities, at least 90 days before filing a CEC application developers must file a “plan” with the Commission detailing the information listed below.³⁴ A similar requirement applies to proposed transmission lines—every 10 years, developers must file a “ten year plan” with the Commission.³⁵ Here,

²⁹ ARIZONA REVISED STATUTES (“A.R.S.”) §§ 40-360.03, 40-360(9)–(10) (2023).

³⁰ A.R.S. § 40-360(10) (2022) (emphasis added).

³¹ A.R.S. § 40-360(10) (2023).

³² *Id.*

³³ A.R.S. § 40-360.07(B) (2023).

³⁴ A.R.S. § 40-360.02(B).

³⁵ A.R.S. § 40-360.02(A).

the same definitions of regulated power plants and “transmission lines” applicable to the general CEC requirement govern. Both kinds of plans must include at least the following information, “to the extent such information is available”:

- The size, proposed route, and/or location of each proposed plant or line;
- The purpose to be served by each plant or line;
- The estimated date by which each plant or line will be in operation;
- The average and maximum power output measured in megawatts of each plant to be installed;
- The expected capacity factor for each proposed plant;
- The type of fuel to be used for each proposed plant; and
- A power flow and stability analysis report showing the effect on the current Arizona Electric Transmission System.³⁶



Burrowing Owl

Even prior to filing one of these plans, however, one should and sometimes must have an informal pre-filing meeting with the Arizona Power Plant and Transmission Line Siting Committee (the “Committee”), a creature of statute. Parties are likewise free to discuss potential filings with members of the Commission and staff. But after the application is filed, the process becomes formalized and *ex parte* contact on substantive matters with the Commissioners, their staff, or Committee members is strictly forbidden.³⁷

C. Criteria and Potential “Reasonable Conditions.”

Next is the application itself. “The application shall be in a form prescribed by the commission^[38] and shall be accompanied by information with respect to the proposed type of facilities and description of the site, including the areas of jurisdiction affected and the estimated cost of the proposed facilities and site.”³⁹ CEC applications are initially evaluated by the Committee, made up of a diverse group of members prescribed by statute. The current chairman is Adam Stafford, an assistant attorney general in the Arizona Attorney General’s Office.

³⁶ *Id.* § 40-360.02(C)(1)–(7). “Arizona Electric Transmission System” is defined as “the existing electric transmission system serving this state and all transmission lines on file with the commission as of January 31 of the previous year.” A.R.S. § 40-360(5).

³⁷ A.A.C. R14-3-113(C).

³⁸ See the required formatting and components at A.A.C. R14-3-219.

³⁹ A.R.S. § 40-360.03.

The Committee process typically concludes with a multi-day hearing, sort of a cross between a bench trial and a legislative hearing, at which testimony is taken, cross-examination conducted, and intervenors and members of the public may speak.

After the big hearing, the Committee will make a recommendation regarding the CEC to the Commission, which will make the ultimate decision. Arizona law directs the Committee to consider the following factors in making its recommendation:

- Existing development plans at or in the vicinity of the site;
- Fish, wildlife, and plant life;
- Noise emission levels and interference with communication signals;
- Proposed availability of the site to the public for recreation purposes;
- Existing scenic areas, historic sites and structures, or archaeological sites;
- The area's total environment;
- The technical practicability of achieving the proposed objective and the previous experience with equipment and methods available for achieving the proposed objective;
- Costs, including potential increase in the cost of electric energy for consumers;
- Additional factors applicable under state or federal law governing the site;
- Special consideration to the protection of areas unique because of biological wealth or their status as habitats for rare or endangered species;
- Compliance with all air and water pollution control standards and regulations; and
- Compliance with local zoning under all applicable jurisdictions.⁴⁰

Based on these and possibly other relevant factors, the Committee may wholly reject, wholly approve, or, more commonly, partially approve the application with strings attached. The strings are known as "conditions" on the issuance of the CEC, and the Commission usually endorses whatever conditions the Committee recommends.⁴¹ Only "reasonable" conditions are permissible, but the range of acceptable conditions is strikingly broad. For example, in a decision awarding a CEC to Perrin Ranch Wind for transmission lines and substations, the Commission imposed 22 conditions, including the following:

- Comply with all existing applicable ordinances, master plans, and regulations of state and county entities, as well as federal law;
- Comply with federal environmental law and Arizona special species statutes;

⁴⁰ A.R.S. § 40-360.06(A)–(D).

⁴¹ A.R.S. § 40-360.06(A).

- Comply with instructions from the Arizona State Land Department regarding the treatment of sites listed on the State Register of Historic Places;
- Stop work upon the uncovering of human remains or funerary objects pending consultation with the Director of the Arizona State Museum;
- Notify and consult with the Director of the Arizona State Museum if any archaeological, paleontological, or historical site or object older than 50 years is discovered on state, county, or municipal land;
- Undertake construction activities consistent with the Arizona Native Plant Law;
- Provide copies of the CEC to appropriate local and state governments and regulatory agencies; and
- Provide notice of the project to neighboring land and homeowners.⁴²

Although the CEC process can be lengthy and complicated, it is frequently the most important step in developing an energy project in Arizona. Gathering the materials required for the CEC application and making the case for a project in front of the Commission can make other regulatory processes (such as the National Environmental Policy Act review, discussed later) somewhat simpler, since many of the issues considered are similar. The CEC process can also be an early opportunity to develop needed community support for a new energy project.

⁴² See Appendix 5, Ariz. Corp. Comm'n Decision No. 72268, Docket No. L-00000SS-11-0059-0159, Apr. 15, 2011, and related materials, including pre-filed testimony.



IV. Local Zoning Issues.

Project proponents on private and Arizona State Trust lands must consider local zoning issues during development. In this area, again, most Arizona jurisdictions are supportive and easy to deal with. Depending upon the existing land use prescriptions or zoning for a targeted parcel, all that may be required from a zoning approval standpoint is a minor amendment to a jurisdiction’s general or comprehensive plan and a conditional use permit, although rezoning a parcel might also be necessary.

Counties and municipalities throughout Arizona are actively trying to make it easier to develop renewable energy projects in their jurisdictions. For instance, Pinal County (essentially midway between Phoenix and Tucson) has seen considerable activity in the solar field and, to help streamline industrial-scale solar permitting, has added a Green Energy Production land use category to its Comprehensive Plan. This category designates areas “specifically for the location of large-scale photovoltaic solar panel power generation facilities.”⁴³

Within Maricopa County (Phoenix area), the Town of Gila Bend has been famously welcoming to renewable development,⁴⁴ establishing in 2012 the Gila Bend Transmission Initiative to enhance utility-scale solar in the Town’s vicinity. The County also has a Renewable Energy Systems Ordinance intended to “[p]romote implementation of small-scale renewable energy systems, while setting practical guidelines for such implementation that are respectful of the neighborhood context within which such systems may

⁴³ Pinal County Comprehensive Plan at 92, Nov. 20, 2019 (updated Jan. 21, 2021), [https://www.pinal.gov/DocumentCenter/View/627/Comprehensive-Plan-2020-PDF?bidId=.](https://www.pinal.gov/DocumentCenter/View/627/Comprehensive-Plan-2020-PDF?bidId=)

⁴⁴ See, e.g., Judith Lewis Mernit, *The fading Arizona town of Gila Bend bets big on solar*, HIGH COUNTRY NEWS, June 4, 2012, <http://www.hcn.org/issues/44.9/the-fading-arizona-town-of-gila-bend-bets-big-on-solar>. High Country News, which covers development in the West from a conservationist perspective, described Gila Bend and its environs as perhaps the “best place for Big Solar.”

occur.”⁴⁵ Under that ordinance, small-scale renewable energy systems are permitted as an accessory use within any zone, while utility-scale developments are restricted to special industrial zones and must get their water from “renewable water source[s].”⁴⁶

In Pima County (Tucson area), a Renewable Energy Incentive District (“REID”) Ordinance was enacted in 2012. The ordinance maps particular sites across the county where utility-scale solar development is encouraged and at which projects can enjoy a streamlined permitting and review process.⁴⁷ In northern Arizona, Navajo County established a similar Wind Energy Ordinance in 2010.⁴⁸

Lastly, Coconino County (Sedona and Flagstaff area) added a section titled “Utility Scale Renewable Energy Systems” to its comprehensive zoning ordinance in May of 2022, specifying requirements for renewable project applications, performance standards, and more.⁴⁹

These ordinances reflect Arizona’s positive attitude toward the development of renewable energy, especially solar and wind, throughout the state. They also make it practically easier and less expensive to develop energy projects here, which is important, given the Pandora’s Box that is federal environmental regulation as applied to energy development.



Humphrey's Peak Arizona

⁴⁵ Maricopa County Zoning Ordinance, art. 1206.1, Nov. 15, 2023, <https://www.maricopa.gov/DocumentCenter/View/4785/Maricopa-County-Zoning-Ordinance-PDF>.

⁴⁶ *Id.* art. 1206.2.3.

⁴⁷ Title 14 Renewable Energy Incentive District (REID), https://codelibrary.amlegal.com/codes/pimacounty/latest/pimacounty_az/0-0-0-9120.

⁴⁸ Ordinance No. 06-10 Wind Energy Generation Facility Ordinance, Oct. 6, 2010, <https://www.navajocountyaz.gov/402/Wind-Energy-Ordinance>.

⁴⁹ Coconino County Zoning Ordinance, adopted Nov. 12, 2019 (amended June 9, 2023, and Dec. 19, 2023), <https://www.coconino.az.gov/2208/Zoning-Ordinance#:~:text=In%20May%2C%202022%20a%20new,as%20wind%2C%20solar%20and%20biomass>.



Watson Lake, Arizona

5

V. A Brief Detour into Federal Environmental Law.

Space and a desire to prevent total boredom for the reader mean we cannot launch into a complete discussion of all potentially applicable federal environmental laws, but a few are worth noting. If, despite our best(-ish) efforts, you are already bored, you can turn immediately to Appendix 7, a more convenient planning chart that identifies a host of federal and state environmental laws that may be implicated by renewable energy and transmission line development in Arizona.

A. NEPA.

NEPA is a procedural statute that requires federal agencies to comprehensively evaluate the potential environmental impact of proposed “major federal actions.”⁵⁰ Actions that potentially can trigger NEPA review include crossing federal or tribal lands, interconnecting to a federal transmission line, or building something in a “water of the United States,” wet or not. (More on that later.)

Developers of renewable facilities with short gen-ties (i.e., the facilities connecting the source of power generation to the transmission system) can typically avoid NEPA triggers. The same usually goes for wholly intra-state facilities that do not intersect with federal or tribal lands. By contrast, because of the many possible federal triggers involved, sponsors of lengthy transmission lines usually face long and intense NEPA analysis. The required investigation can include reviewing possible impacts to habitat, wildlife, archaeological and historical resources, air quality, and availability of natural resources.⁵¹ Barring

⁵⁰ See 42 U.S.C. § 4332(C).

⁵¹ See 40 C.F.R. § 1502.16.

the availability of a categorical exclusion—unlikely for significant undertakings—a full-length study is required.

If you are lucky and have lived a good life, the NEPA review requirements for your project can be satisfied in a year or less through completion of a relatively quick and easy Environmental Assessment (“EA”) that produces a “Finding of No Significant Impact” (“FONSI,” for those old or modernly hip enough to recall *Happy Days*).⁵² A proper FONSI is the end of the analysis. If you are not so lucky or good—not that the authors are in any position to judge—then the next step is the much more costly and drawn-out Environmental Impact Statement (“EIS”), which one can rest assured will take at least twice as long and involve far fewer *Happy Days*.

NEPA can significantly complicate the siting process by generating substantial volumes of information about a proposed project. It can also require coordination between multiple state and federal agencies (and potentially interested tribes), as well as various consultants, to ensure that different aspects of the analysis are completed in a timely manner. In Arizona, the checkerboard nature of private and public land ownership and substantial prevalence of federal and tribal land, the prominent role of federal agencies such as the U.S. Bureau of Reclamation, and the joint ownership of major transmission lines by federal agencies bring many projects within NEPA’s grasp.

Since NEPA was enacted in 1969, each administration has promised to improve its unwieldy process administratively. Each administration has largely failed, in part because NEPA, in combination with the Administrative Procedures Act, allows private parties to sue the agency over an alleged bad NEPA evaluation. Last year Congress and the Biden Administration got smarter and amended the statute itself. On June 3, 2023, President Biden signed into law the Fiscal Responsibility Act of 2023 (“FRA”), which included amendments to NEPA.⁵³ Among other things, these amendments codify the requirement that EISs include discussion of “reasonably foreseeable” environmental effects of the proposed action, reasonably foreseeable adverse environmental effects that cannot be avoided, and a reasonable range of alternatives to the proposed action.⁵⁴ (Previously, the statute purported to cover *any* environmental impacts, reasonably foreseeable or not.) The FRA also imposed page limits (75 for EAs and 150–300 for EISs, depending on whether they are unusually complex) and time limits (1 year for EAs and 2 years for EISs),⁵⁵ with the option to sue under the new Section 107 for violations of the relevant time limits.⁵⁶

B. The Endangered Species Act.

For a state that is damn hot and pretty dry, Arizona enjoys a surprising amount of biodiversity. In combination with the amount of federal land, this requires a considerable focus on the Endangered

⁵² See generally 40 C.F.R. §§ 1501.3(a), 1501.5, 1501.6.

⁵³ The Fiscal Responsibility Act of 2023 amended § 102(2)(C) and added §§ 102(2)(D) through (F) and §§ 106 through 111.

⁵⁴ 42 U.S.C. § 4332(C).

⁵⁵ *Id.* § 4336a(e), (g).

⁵⁶ The final EIS for the Ten West Link project, for example, was nearly 350 pages long, not including the appendices.

Species Act (“ESA”). In the realm of facility siting, the ESA imposes NEPA-like requirements on federal agencies that are otherwise involved in projects and also independently govern private conduct.

Section 7 of the ESA requires that federal agencies consult with the U.S. Fish and Wildlife Service (“USFWS”) to ensure that any agency action does not threaten the continued existence of an endangered or threatened species or adversely impact designated critical habitat.⁵⁷ Section 9 prohibits unauthorized “taking” of listed species of fish, plants, or wildlife.⁵⁸ (“Taking” includes things like killing, moving, or even simply bothering protected species.) Arizona law also separately provides for the preservation and protection of a variety of native plant species.⁵⁹

You should know at least two more things about the ESA. First, the mandates of Section 7 apply only to federal agency actions (e.g., granting a permit).⁶⁰ A project whose development does not require a federal approval—such as those involving only state or private lands and facilities—is not subject to the consultation requirement (although it might require an incidental take permit under Section 10).⁶¹ Conversely, the Section 9 prohibition against unauthorized takings is universal, applying to government and private actors alike.⁶² Impacts to habitat alone do not normally qualify as a taking.



Burrowing Owl

If Section 7 applies, the relevant federal agency initiates the required consultation by either requesting a roster of listed species and critical habitat in the project area from the USFWS or else providing its own list to the USFWS.⁶³ The USFWS then has 30 days to provide the requested list or comment on the list provided.⁶⁴ If there are no listed species or critical habitat in the project area, the Section 7 consultation is over. If a listed species or critical habitat is present, the relevant federal agency must carefully analyze whether the project “may affect” the species or habitat.

Depending on the scope of the proposed project, the federal agency will conduct either a biological assessment (a broader analysis applicable to “major construction activities”) or a biological evaluation (a narrower analysis applicable to all other projects). Private developers typically assume the cost of completing these reviews under the direction of the federal agency. If the agency and the USFWS

⁵⁷ 16 U.S.C. § 1536(a)(2).

⁵⁸ *Id.* § 1538(a).

⁵⁹ A.R.S. § 3-901, *et seq.*

⁶⁰ 16 U.S.C. § 1536(a)(2).

⁶¹ *See id.*; 16 U.S.C. § 1539(a)(1)(B).

⁶² 16 U.S.C. § 1538(a) (“any person subject to the jurisdiction of the United States”).

⁶³ 50 C.F.R. § 402.12(c).

⁶⁴ *Id.* § 402.12(d).

agree the proposed project is unlikely to adversely affect listed species or critical habitat, the consultation—known as an informal consultation—is over, and the ESA’s requirements are satisfied.⁶⁵

If, however, the agency believes the proposed project will likely affect a listed species or critical habitat, or if the USFWS does not agree with the agency’s assessment that an adverse impact is unlikely, then formal consultation is required.⁶⁶ Formal consultation will result in a Biological Opinion from the USFWS as to whether there is a likely threat to the continued existence of listed species, or of destruction or adverse modification of critical habitat.⁶⁷ In cases involving a permit applicant, once a final Biological Opinion is submitted to the USFWS, the total consultation process cannot stretch longer than 150 days absent the applicant’s consent.⁶⁸ The Biological Opinion is due within 45 days after that.⁶⁹

While Section 9 generally prohibits takings of individual members of a species, the consultation process under Section 7 can authorize takings in an “incidental take statement” as long as the take does not jeopardize the continued existence of the species as a whole.⁷⁰ For projects that do not otherwise require federal approval, permission for takings is also available in the form of an “incidental take permit” under Section 10 of the ESA.⁷¹ This is, however, an extremely onerous process. As a result, project proponents should seriously consider the ultimate likelihood of a taking and consider modifying their plans to avoid such a result before pursuing an incidental take permit.

C. The Clean Water Act.

One might assume that a statute titled “The Clean Water Act” would be of little concern to those building things in the arid desert. One would be wrong. Most notable for its regulation of discharges of pollutants into actual bodies of water, the Clean Water Act (“CWA”) can also govern activities deep in the Arizona desert.

Of immediate concern in Arizona is Section 404 of the CWA, which can complicate the siting and construction of renewable energy facilities and related structures. Section 404 is administered by the U.S. Army Corps of Engineers (“Corps”), with U.S. Environmental Protection Agency (“EPA”) oversight. The CWA governs discharges and other disturbances to “waters of the United States.” Activities that will disturb areas designated as “waters of the United States”—such as excavating or filling in a hole within a regulated area—cannot proceed without a Section 404 permit from the Corps.⁷²

This is important because the need to obtain a Section 404 permit might be a project’s only NEPA hook and because the executive, legislative, and judicial branches are confused about what qualifies as

⁶⁵ *Id.* §§ 402.12(k), 402.13.

⁶⁶ *Id.* §§ 402.12(k), 402.14.

⁶⁷ *Id.* § 402.14(g), (h).

⁶⁸ *Id.* § 402.14(e).

⁶⁹ *Id.*

⁷⁰ 16 U.S.C. § 1536(b)(4).

⁷¹ *Id.* § 1539(a)(1)(B).

⁷² 33 U.S.C. § 1344(a).

a “water of the United States.” Virtually every component of the federal government has proudly contributed to this confusion.

Congress originally regulated only literally “navigable waters” (think steamboats and ships) to prevent impediments to interstate commerce—that is, large junk in rivers.⁷³ Over time, the CWA was amended to regulate chemical and biological pollution of waterways, as well, with Congress ultimately deciding to provide that the original, limited universe of “navigable waters” should now mean “waters of the United States.” Apparently fully exhausted by this one-line redefinition, Congress opted not to actually define the term, leaving it to the regulating executive branch agencies: the Corps and the EPA.

It’s a tale as old as time: Congress’s lack of specificity has led to decades of litigation. And in another classic move, the U.S. Supreme Court was, for many years, no help. In a fractured decision in *Rapanos v. United States*, the plurality, led by Justice Scalia, argued that “waters of the U.S.” includes only traditionally navigable waters (“TNWs”) like rivers, lakes, or bays, as well as other bodies of water like wetlands that have a “continuous surface connection” with those TNWs.⁷⁴ This rule would seem to leave out hydrologically critical but ephemeral streams like those common in Arizona. In a solo concurrence, Justice Kennedy suggested that “waters of the U.S.” should include not only TNWs, but also tributaries, washes, ditches, canals, and other features like wetlands that have a “significant nexus” to TNWs.⁷⁵ That significant nexus, Justice Kennedy continued, could be in the form of a physical, chemical, or biological connection.⁷⁶ Or, he did not add, barely, in the form of a butterfly flapping its wings in another state. A third opinion, written by Justice Stevens, argued that we should leave the difficult line-drawing to the agencies’ expertise.⁷⁷ That ain’t happening with the current Supreme Court.

In the wake of confusion as to which of the three opinions was the governing one, the agencies initially latched on to something pretty close to Justice Kennedy’s “significant nexus” test. This approach held until the Trump administration reversed course toward something more like Justice Scalia’s test. And more recently—as if our necks were not already sore enough from turning back and forth to watch the federal government play ping pong with the CWA—the Biden administration flipped back to the Kennedy test.

At last providing a little clarity, in May 2023 the Supreme Court issued its opinion in *Sackett v. EPA (Sackett II)*.⁷⁸ There, a more unified Court expressly rejected Justice Kennedy’s “significant nexus” test and adopted Justice Scalia’s approach.⁷⁹ The well-deserved death of the faux-scientific significant nexus test limits the scope of the CWA for wetlands (and will likely be interpreted more broadly to apply to other wet and sometimes-wet features). It will also remove a common trigger for NEPA or NEPA-equivalent review and for Section 7 consultation under the ESA. *Sackett* does not necessarily leave

⁷³ See C. Thomas, *Defining Waters of the United States: A Mean-Spirited Guide*, 30 ABA NAT. RES. & ENV’T (Summer 2015).

⁷⁴ *Rapanos v. United States*, 547 U.S. 715, 742 (2006) (Scalia, J., plurality opinion).

⁷⁵ *Id.* at 767 (Kennedy, J., concurring).

⁷⁶ *Id.* at 779.

⁷⁷ *Id.* at 787 (Stevens, J., dissenting).

⁷⁸ *Sackett v. Env’t Prot. Agency*, 598 U.S. 651 (2023).

⁷⁹ *Id.* at 684.

wetlands and ephemeral bodies of water wholly unregulated. Arizona, like many states, provides some state-level regulation of now-excluded bodies of water, including under the Surface Water Protection Program⁸⁰ and the Aquifer Protection Program.⁸¹

For those projects that do require a Section 404 permit, various nationwide permits are available. Nationwide permits are essentially pre-approvals covering certain categories of activities, and they are meant to speed up the permitting process. Nationwide Permits 51 and 57 should be of particular interest to parties developing renewable energy resources:

- Nationwide Permit No. 51 (Land-Based Renewable Energy Generation Facilities): covers “[d]ischarges of dredged or fill material into non-tidal waters of the United States for the construction, expansion, or modification of land-based renewable energy production facilities, including attendant features.”⁸²
- Nationwide Permit No. 57 (Electric Utility Line and Telecommunications Activities): covers “[a]ctivities required for the construction, maintenance, repair, and removal of electric utility lines, telecommunication lines, and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project.”⁸³

Under both Nationwide Permits, the permitted activity may not lead to “the loss of greater than 1/2-acre of non-tidal waters of the United States.”⁸⁴ If it would lead to that, an applicant would likely need to go through the individual Section 404 permitting process, which can take a long time and usually involves mitigation to offset any impacts. To invoke any Nationwide Permit, an applicant must usually provide pre-construction notification to the Corps and comply with the relevant limitations and general conditions of the applicable permit.⁸⁵



Patagonia Lake, Arizona

⁸⁰ Arizona Surface Water Protection Program, <https://azdeq.gov/SWPP>; A.R.S. § 49-221 (2023).

⁸¹ Arizona Aquifer Protection Program, <https://www.azdeq.gov/APP/ComplianceAssistance>.

⁸² U.S. Army Corps of Engineers, 2021 Nationwide Permits at 33–34, <https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll7/id/20099>.

⁸³ *See id.* at 40–43.

⁸⁴ *See id.* at 33, 40.

⁸⁵ *See id.* at 33, 42.



6

Antelope Canyon, located on the Navajo Nation tribal reservation in northeastern Arizona.

VI. Tribal Lands.

Some of the most suitable areas for energy development in Arizona are on tribal lands. This is particularly relevant with respect to the Navajo Nation and Hopi Reservations in the northeast corner of the state. The closure of the coal-fired Navajo Generating Station in 2019 further galvanized utility-scale solar developments as a replacement for lost jobs and revenues. Not only are there great solar resources (some say as much as 10 gigawatts!)⁸⁶ and large areas of developable lands, but there is also a significant amount of existing high-voltage transmission infrastructure criss-crossing tribal lands (largely owned and operated by the federal government). These transmission lines deliver electricity to power-hungry markets in southern Arizona, Nevada, and California.

This is not to say there are no challenges with developing projects on tribal lands. Leasing and contracting with tribes and tribal entities can be a highly complex process because of the unique legal status of Tribes—and their lands—in the American legal system. The law treats most reservation lands as being owned by the federal government in trust for Tribes. This triggers a number of federal laws and regulations that generally don't apply, or may apply differently, on privately owned lands. Use of tribal lands can also involve significant archaeological and cultural resource issues, employment rules, and other considerations that may be unfamiliar to a developer that has not previously undertaken a project on tribal lands. Further, as sovereign governments, Tribes can adopt resolutions or ordinances that might alter or invalidate contractual agreements with a Tribe. The only way to limit this risk is to include

⁸⁶ William Driscoll, *Navajo Power CEO sees 10 GW renewable potential across the Navajo Nation*, PV MAGAZINE, Apr. 22, 2020, <https://pv-magazine-usa.com/2020/04/22/navajo-power-ceo-sees-10-gw-renewable-potential-across-the-navajo-nation/>; see also SHERRALYN R. SNEEZER, SANDIA NAT; LAB'YS, SANDIA REPORT, AN ASSESSMENT OF THE POTENTIAL FOR UTILITY-SCALE SOLAR ENERGY DEVELOPMENT ON THE NAVAJO NATION, Jan. 2020, https://www.energy.gov/sites/default/files/2021-10/summer2019_sherralyn_sneezer_vfinal.pdf.

provisions that allow for termination or rent offsets in the event the Tribe changes the terms of the agreement.

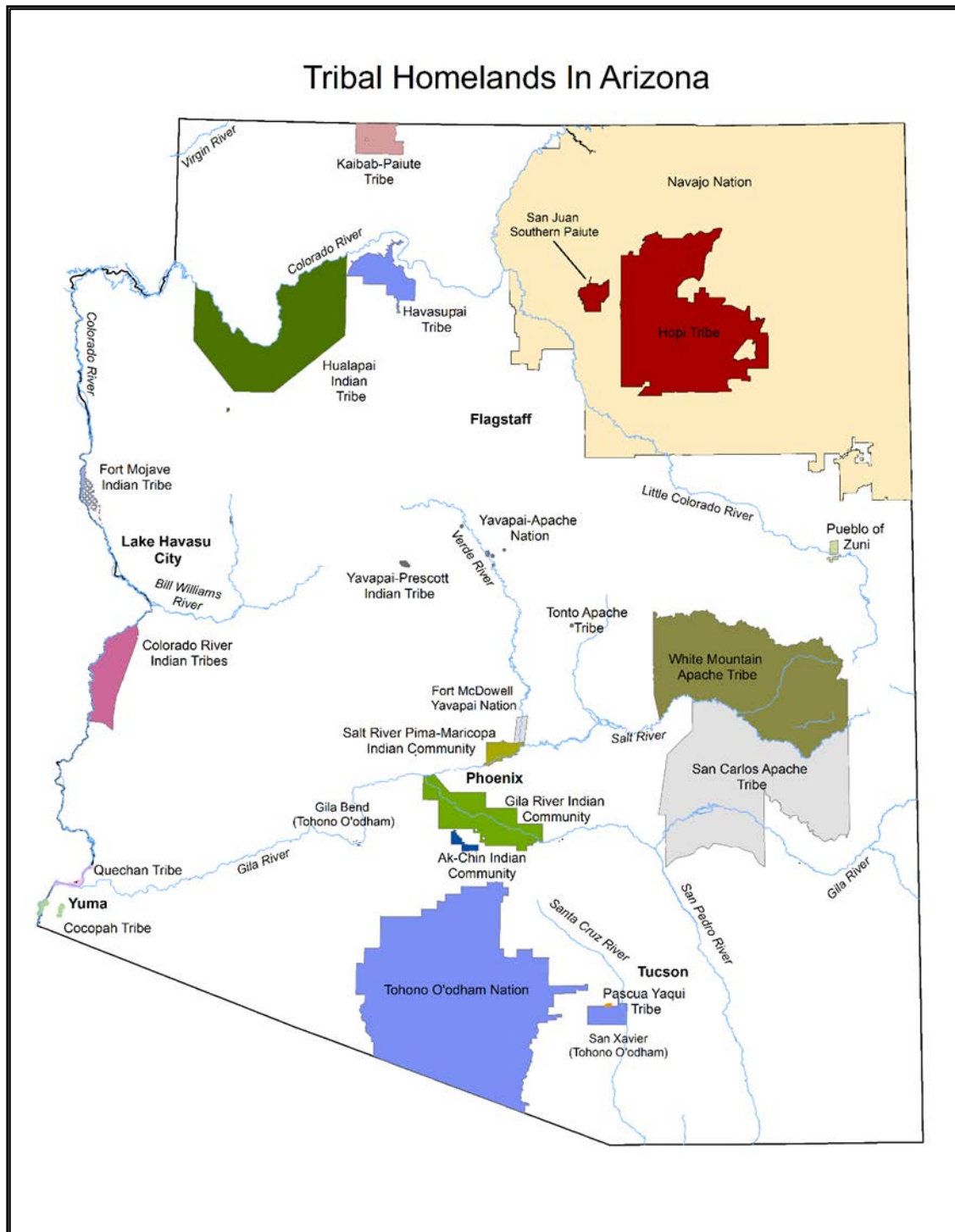


Figure 4. Arizona tribal lands.

Tribes also enjoy inherent sovereign immunity from suit by all but the federal government, which means that, absent a waiver, a Tribe is immune from private-party suit and from the enforcement of a

private-party award against it.⁸⁷ Indeed, immunity applies even if it means an adverse party will be left without a remedy in a contractual setting.⁸⁸ This presents additional risk with contracting with Tribes and some closely associated business entities.

As a result, the risk of contracting with a tribal entity depends greatly (among other things) upon the type of entity it is. The 1934 Indian Reorganization Act (“IRA”) provided for the formal organization of tribal governments pursuant to federal law. Section 16 of the IRA authorized Tribes to adopt constitutions and bylaws,⁸⁹ and Section 17 authorized the formation of tribal corporations.⁹⁰ While there are no restrictions against tribal governments entering into leases, dealing with a Section 17 corporation is less risky for a private party. These corporations generally waive sovereign immunity in their charter. Further, unlike Section 16 entities, a Section 17 corporation is considered a citizen of the state of its principal place of business for purposes of federal diversity jurisdiction.⁹¹

There are also issues concerning the exercise of jurisdiction over a Tribe—or the subject matter of a contract with a Tribe—which may limit (or even eliminate) the forums available to an injured party in the event of a dispute. Jurisdictional issues are particularly complicated when the agreement involves a lease of tribal trust lands, and slightly less so with lands privately owned by the Tribe itself or by individual tribal members. With few exceptions, issues related to Tribes and tribal lands cannot be addressed in Arizona state courts. Complex rules exist governing if and when an injured party can access the federal courts, particularly when a Tribe maintains its own tribal court system. Thus, the default forum for the resolution of tribal lease disputes is generally a tribal court. That said, if no tribal forum exists, state courts can often exercise jurisdiction. It is highly advisable to include appropriate choice-of-forum, choice-of-law, and consent clauses in leases and other contracts to (hopefully) resolve jurisdictional questions upfront.⁹²

Lastly, tribal leases are generally subject to approval by the U.S. Bureau of Indian Affairs (“BIA”), and procedural flaws in the approval process can negate a lease. Leases and right-of-way approvals by the BIA are also subject to NEPA. Occasionally, Tribes and the BIA have invoked alleged procedural flaws to compel negotiation of a new lease.⁹³

⁸⁷ See *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506 (1940).

⁸⁸ See *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998).

⁸⁹ 25 U.S.C. § 1523(a) (formerly 25 U.S.C. § 476).

⁹⁰ 25 U.S.C. § 1524 (formerly 25 U.S.C. § 477).

⁹¹ See generally WILLIAM C. CANBY, *AMERICAN INDIAN LAW IN A NUTSHELL* 151 (1981).

⁹² In determining the locus of a contract dispute with a tribe for purposes of choice-of-law analysis, the Ninth Circuit employs a version of the “significant contacts” test. See *R.J. Williams Co. v. Ft. Belknap Hous. Auth.*, 719 F.2d 979, 985 (9th Cir. 1983). Under this test, courts look to: (1) the place of contracting, (2) the place where the contract was negotiated, (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the place of the residence of the parties; the courts will evaluate each factor flexibly, according relative weight to each depending on its overall importance to the dispute. See *id.* at 985. As relevant to renewable energy development, “[w]hen a contract concerns a specific physical thing, such as land or a chattel, the location of the thing is regarded as highly significant.” *Id.* (citing RESTATEMENT (2D) OF CONFLICT OF LAWS § 188(2) (1971)).

⁹³ See, e.g., *OMG Apex, Inc. v. Acting W. Reg’l Dir.*, 43 I.B.I.A. 265 (2006) (pursuant to stipulation between the parties, voiding a lease agreement between the Shivwits Band of Paiute Indians and OMG Apex for land and water rights on the Shivwits Band reservation).

Needless to say, investing in a facility located on tribal lands requires exceedingly careful lawyering. Further consultation with experts on the issues described above, and other questions relevant to development on tribal lands, is advisable.



Antelope Canyon, located on the Navajo Nation tribal reservation in northeastern Arizona.



7

North Kaibab Trail, Grand Canyon National Park, Arizona

VII. Federal Lands.

The federal government has expressed a strong interest in developing renewable energy on federal lands in Arizona. While some projects have been proposed and constructed on National Forest System lands (administered by the U.S. Forest Service), most federal lands suitable for renewable energy development in Arizona are lands administered by the Bureau of Land Management (“BLM”), of which the state has plenty. And luckily for developers, the BLM has made many efforts to make it easier to develop renewable energy facilities on land it controls.

For instance, in early 2024, the BLM published a draft Programmatic Environmental Impact Statement (“PEIS”) for solar energy development on public lands in 11 western states, including Arizona.⁹⁴ The draft solar PEIS would update the current, narrower Western Solar Plan, established in 2012.⁹⁵ There is a similar PEIS for wind energy development, completed in 2005.⁹⁶ Both policies are meant to simplify federal regulatory compliance for utility-scale renewable energy projects on select federal lands—expediting otherwise lengthy and difficult environmental review processes like NEPA and the ESA.

⁹⁴ *BLM National NEPA Register - Documents*, BUREAU OF LAND MGMT., <https://eplanning.blm.gov/eplanning-ui/project/2022371/570> (last visited Feb. 14, 2024).

⁹⁵ 2012 SOLAR ENERGY DEV. PROGRAMMATIC EIS INFO. CTR., <https://solareis.anl.gov/> (last visited Feb. 14, 2024).

⁹⁶ WIND ENERGY DEV. PROGRAMMATIC EIS, <https://windeis.anl.gov/> (last visited Feb. 14, 2024).

A key component of the current Western Solar Plan is the designation of so-called solar energy zones (“SEZs”) in Arizona.⁹⁷ SEZs are areas that the BLM finds to be particularly suitable for solar energy and transmission development, both in terms of excellent solar resources and minimal impacts to the environment and wildlife.⁹⁸ SEZ designation is effectively the BLM’s pre-approval for solar development within the area’s boundaries. To facilitate development of these lands and avoid competing development interests, SEZs are withdrawn from the BLM lands otherwise available for mining claims. There are currently three SEZs in Arizona: Agua Caliente (in Yuma County), Gillespie (in Maricopa County), and Brenda (in La Paz County).⁹⁹

A map of the Arizona SEZs is provided in Appendix 6. The BLM originally intended to identify additional or expanded SEZs about every 5 years, but that never occurred.¹⁰⁰ The Western Solar Plan also allows for development of utility-scale solar projects on federal lands outside the SEZs, known as variance areas. But projects in these areas are approved on a case-by-case basis, as opposed to the blanket authorization within SEZs.

Another step BLM took to encourage solar development was the Arizona-specific Restoration Design Energy Project (“RDEP”), announced in 2013.¹⁰¹ The RDEP established the Agua Caliente SEZ and also created a new category of potential development areas called Renewable Energy Development Areas (“REDAs”), which were mostly brownfield sites and other areas of low resource conflict like retired farmland and abandoned mines.



Roaring Springs, Grand Canyon National Park, Arizona

⁹⁷ BUREAU OF LAND MGMT., APPROVED RESOURCE MANAGEMENT PLAN AMENDMENTS/RECORD OF DECISION (ROD) FOR SOLAR ENERGY DEVELOPMENT IN SIX SOUTHWESTERN STATES 2, Oct. 2012, https://solareis.anl.gov/documents/docs/Solar_PEIS_ROD.pdf.

⁹⁸ *Id.* at 2.

⁹⁹ See *Solar Energy Permitting and Program Resources, Solar Energy Zones - Arizona*, BUREAU OF LAND MGMT., <https://blmsolar.anl.gov/solar-peis/sez/az/> (last visited Feb. 14, 2024).

¹⁰⁰ *Solar Energy Permitting and Program Resources, Identification Protocol for New SEZs*, <https://blmsolar.anl.gov/solar-peis/sez/identification/> (last visited Feb. 14, 2024).

¹⁰¹ *Restoration Design Energy Project - RDEP*, BUREAU OF LAND MGMT., <https://eplanning.blm.gov/eplanning-ui/project/79922/510> (last visited Feb. 14, 2024).

Back to the present day, the recently published draft solar PEIS (updating the Western Solar Plan) is meant to further streamline NEPA and other federal reviews for developers of utility-scale solar projects on federal lands that BLM sees as having “fewer issues with critical resources or other critical uses.”¹⁰² This PEIS will encompass all the western states, whereas the Western Solar Plan was limited to Arizona, California, Colorado, Nevada, New Mexico, and Utah. By publishing the draft solar PEIS, BLM is soliciting public comment regarding the approach by which the agency will identify eligible federal lands, though BLM favors a “transmission proximity” approach, which would limit expedited solar development to areas within 10 miles on both sides of existing and planned transmission lines of at least 100-kV capacity.¹⁰³

¹⁰² *BLM National NEPA Register - Documents*, BUREAU OF LAND MGMT., <https://eplanning.blm.gov/eplanning-ui/project/2022371/570> (last visited Feb. 14, 2024).

¹⁰³ *Id.*



Mooney Falls, Arizona

8

VIII. State Trust Lands.

Federal lands aren't the only areas suitable for renewable energy development, at least in terms of resource availability and access. Arizona energy projects routinely involve working with the Arizona State Land Department ("ASLD"), which controls some 9.3 million acres of erratically distributed State Trust land.¹⁰⁴ More than 1 million acres of that land is near rapidly urbanizing areas, meaning it is close to existing transmission infrastructure and electricity consumers. As is generally the case throughout the West, the ASLD must maximize revenue from the sale or lease of trust lands to benefit public education and certain other public institutions.¹⁰⁵ The ASLD enjoys broad authority to sell or lease trust lands, with certain exceptions, upon application or on its own initiative.¹⁰⁶ Identified lands are then appraised,¹⁰⁷ and, with appropriate public notice, sold or leased "to the highest and best bidder . . . at public auction held at the county seat."¹⁰⁸ The ASLD's trust obligation, plus the relative ease of working with the ASLD, compared to federal agencies, can make State Trust lands an attractive development alternative to federal lands.

Renewable energy developers and investors frequently disregard State Trust lands, but this is a mistake. Unlike much private property in Arizona, trust lands are often held in large, contiguous parcels, some approaching hundreds of square miles each, and many are appropriate for solar development.

¹⁰⁴ See the ASLD parcel viewer, here: <http://gis.azland.gov/webapps/parcel/>.

¹⁰⁵ P. CULP ET AL., STATE TRUST LANDS IN THE WEST: FIDUCIARY DUTY IN A CHANGING LANDSCAPE, LINCOLN INST. OF LAND POL'Y, ch. 3 (2006).

¹⁰⁶ See A.R.S. §§ 37-233, 37-281.02.

¹⁰⁷ See A.R.S. § 37-132(A)(5).

¹⁰⁸ A.R.S. § 37-236(A).

Around 8.5 million acres of Arizona trust land is currently devoted to agricultural and grazing uses, producing negligible income.¹⁰⁹ More than 90% of the ASLD's recent annual revenue has been generated by sales or leases of small parcels (generally 2,000 acres or less) of land for commercial purposes.¹¹⁰

Although many near-urban trust lands are likely to be developed residentially in the very long term, rates of land absorption, natural resource constraints, and political considerations make it unlikely that ASLD will sell much of its overall portfolio for development in the foreseeable future. This has led to significant interest by the ASLD in alternative sources of revenue, including renewable energy. What's more, the ASLD has invested significant time and energy into developing model leases and other similar documentation to make State Trust lands more attractive to renewable energy developers.¹¹¹



Wind Turbines

¹⁰⁹ 2023 ARIZ STATE LAND DEP'T ANN. REP., <https://land.az.gov/sites/default/files/2023-08/FY%202023%20Annual%20Report.pdf>.

¹¹⁰ *Id.*; see also 2022 ARIZ. STATE LAND DEP'T ANN. REP., <https://land.az.gov/sites/default/files/2022-10/FY%202022%20Annual%20Report.pdf>.

¹¹¹ See, e.g., ARIZ. STATE. LAND DEP'T, FY 2024 STRATEGIC PLAN AND ANNUAL OBJECTIVES, Sept. 30, 2023, https://land.az.gov/sites/default/files/2023-10/ASLD_FY2024%20Strategic%20Plan%20Revised_09_30_2023.pdf.

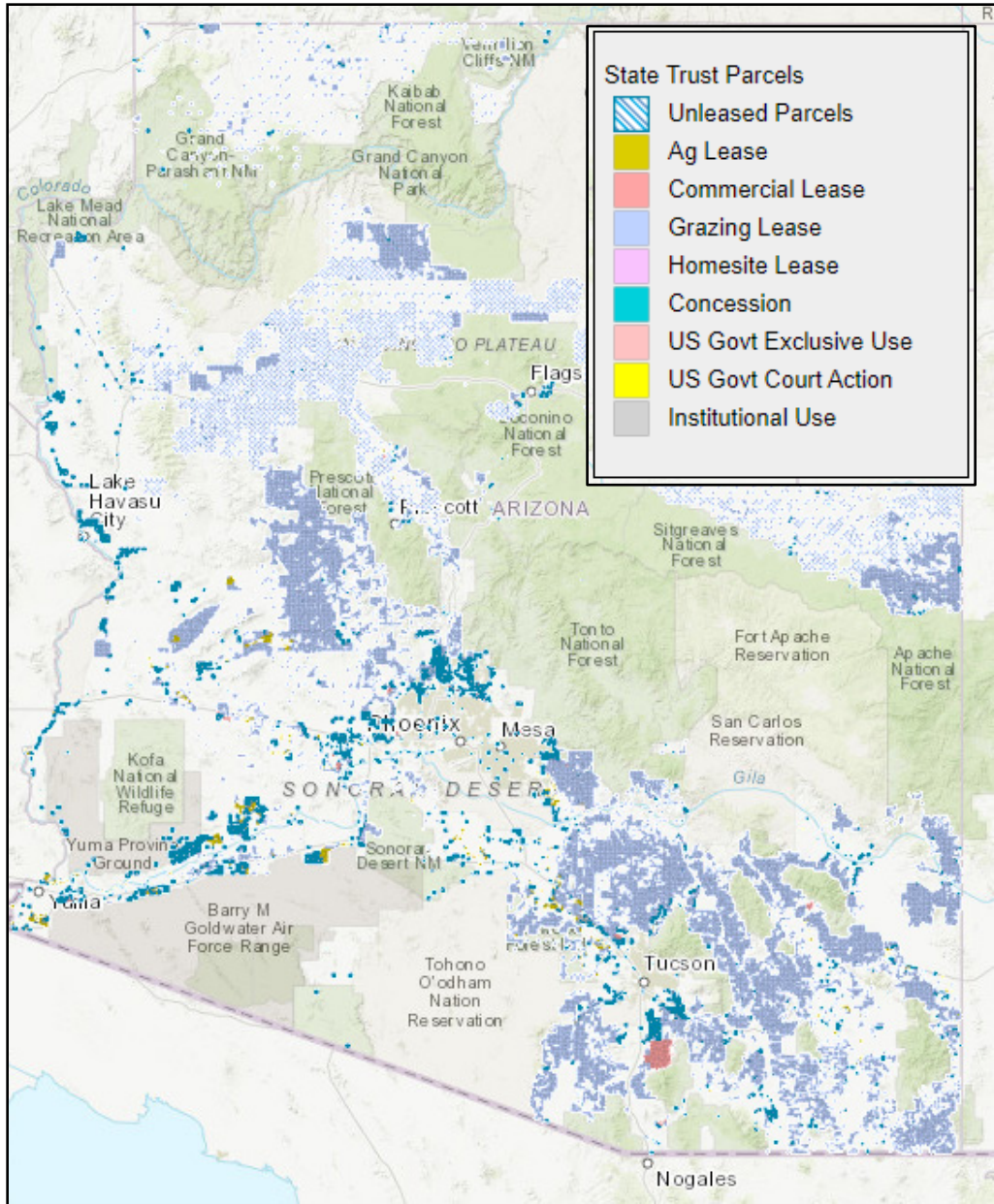


Figure 5. Arizona State Trust lands.



IX. Water Management in Arizona.

One could spend a lifetime learning the nuances of Arizona surface and groundwater law. Granted, it would be a bleak life, so we've done some of it for you. Access to water in some quantity will of course be a key consideration for any energy project. Especially when a project will require a large amount of water, developers will need to navigate complex statutory and common-law restrictions on the use of both surface and groundwater. Those restrictions, in turn, vary based on geographic location. Feel free to page ahead to the next section, which can't possibly be any less interesting than this one.

A. Surface Water in Arizona.

In Arizona, surface water is governed by the common law of prior appropriation—in essence, a rule of “first in time, first in right.”¹¹² Under the prior appropriation system, which applies in some form or other in all western states, the first user to divert water from a stream and put it to beneficial use obtains a right to continue such diversions with a priority senior to all subsequent diverters, even those who might be left high and dry by the continued diversion. While this might sound simple enough, when applied to rivers with hundreds or thousands of potential users, it can create legal issues of mind-numbing complexity.

Surface water rights are tracked and managed by the Arizona Department of Water Resources (“ADWR”) through an application and registration program, and they are subject to final determination by the Arizona courts.¹¹³ Surface water rights are generally treated as being “appurtenant” (i.e., legally

¹¹² See *Ariz. Copper Co. v. Gillespie*, 100 P. 465, 469–70 (Ariz. Terr. 1909), *aff'd*, 230 U.S. 46 (1913).

¹¹³ See generally A.R.S. §§ 45-151 *et seq.*

attached) to the lands on which they were historically used, so they are transferable only along with the lands with which they are associated. Changes in the type of use, point of diversion, or place of use are governed by a statutory transfer process and can be subject to potential objections by interested third parties.¹¹⁴ Importantly, however, surface water rights within the state’s numerous agricultural districts are generally more easily transferable, under the supervision of the district’s governing board.

Because surface water rights are based on historic diversions and uses that in many cases were barely documented, there is inherent uncertainty regarding the actual quantity and priority of many of these rights. In some watersheds within the state, courts have issued decrees of varying scope addressing the relative amounts and priorities of the water rights in portions of those watersheds.¹¹⁵ However, a final reckoning of the relative rights and priorities to most surface water within the state will require completion of Arizona’s two major general stream adjudications (“GSAs”)—judicial proceedings in which the nature, extent, and relative priority of all the water rights in a specific river system will (someday) be determined.¹¹⁶ But don’t hold your breath. The Gila River GSA, which covers much of the central and southern portions of the state, has been pending for over 40 years, and there is no end in sight. As a result, diverting surface flow is usually not the easiest means of access to water.

If you weren’t confused enough already, Colorado River water is treated differently from other kinds of surface water in Arizona. The Colorado River is governed by a compilation of interstate compacts, international treaties, contracts, federal and state laws and regulations, and court decisions that are collectively known as the “Law of the River.”¹¹⁷ Under the Law of the River, the State of Arizona has an entitlement to 2.8 million acre-feet of Colorado River water each year.¹¹⁸ And yet, because of a long history fascinating to probably nobody except the authors—a history that somehow involves the Arizona Navy¹¹⁹—Arizona is the most junior user on the River, meaning it takes cuts during a shortage before anyone else.¹²⁰ Colorado River water is delivered pursuant to federal water delivery contracts administered by the U.S. Bureau of Reclamation, which operates the major Colorado River storage and diversion dams, including Hoover Dam (Lake Mead) and Glen Canyon Dam (Lake Powell).

¹¹⁴ See *Application Guidelines – Application to Sever and Transfer*, ARIZ. DEP’T OF WATER RES., <https://infoshare.azwater.gov/docushare/dsweb/Get/Document-9895/Application%20to%20Sever%20and%20Transfer.pdf>; *Statement of Protest*, ARIZ. DEP’T OF WATER RES., <https://infoshare.azwater.gov/docushare/dsweb/Get/SWDoc-65043/Statement%20of%20Protest.pdf>.

¹¹⁵ See, e.g., Globe Equity No. 59 Decree, *United States v. Gila Valley Irrigation Dist.*, June 29, 1935, https://www.ose.state.nm.us/Basins/Colorado/AWSA/Legal_Documents/1935_GlobeEquityDecree.pdf.

¹¹⁶ See A.R.S. § 45-252. Surface water rights for two river systems in Arizona are currently being adjudicated: the Gila River and the Little Colorado River. See generally *Arizona General Stream Adjudication Bulletin*, JUD. BRANCH OF ARIZ. MARICOPA COUNTY, <http://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/Index.asp> (last visited Feb. 14, 2024). These two adjudications cover nearly half of the state, and the Gila River Adjudication alone includes nearly 30,000 parties.

¹¹⁷ *The Law of the River*, U.S. DEP’T OF THE INTERIOR, BUREAU OF RECLAMATION, LOWER COLO. REGION, <https://www.usbr.gov/lc/region/g1000/lawofrvr.html#:~:text=The%20Colorado%20River%20is%20managed,Colorado%20River%20among%20the%20seven> (last visited Feb. 14, 2024).

¹¹⁸ See *Arizona v. California*, 373 U.S. 546, 580–90 (1963).

¹¹⁹ See Rachel Leingang, *Tale of the ‘Arizona Navy’: Old Story Revived as State Competes with California for Water*, ARIZ. CAPITOL TIMES, June 29, 2015, <https://azcapitoltimes.com/news/2015/06/29/tale-of-the-arizona-navy-old-story-revived-as-state-competes-with-california-for-water/>.

¹²⁰ See 43 U.S.C. § 1521(b).

Within the central parts of the state, Colorado River water comes exclusively from the Central Arizona Project (“CAP”), a 336-mile-long canal that diverts water from the reservoir behind Parker Dam (Lake Havasu)—the site of the Arizona Navy’s only battle—and carries it to Phoenix, Pinal County, and Tucson. The CAP is operated by the Central Arizona Water Conservation District (“CAWCD”), a multi-county special taxing district. CAWCD delivers water under delivery contracts to a number of customers, primarily municipal users, Indian tribes, industrial users, and agricultural districts. Whereas Arizona is the most junior user on the Colorado River, the CAP is one of the most junior users in Arizona. This means that (at least in theory) deliveries of Colorado River water to the CAP must be reduced completely before more senior, on-River users like Yuma County agricultural districts receive reductions.

Colorado River law has always been a bit of a moving target, and that is true now more than ever. In 2023, the states in the Lower Colorado River Basin (Arizona, California, and Nevada) reached a temporary agreement to conserve 3 million acre-feet of water, on top of other shortage obligations, through 2026.¹²¹ On that note, be careful about saying “2026” around Colorado River practitioners, because it will likely evoke a mix of fear and exhaustion. Essentially all the shortage-related rules that currently govern the Colorado River will expire at the end of 2026, and nobody knows exactly what will happen next. The Basin states are hotly negotiating new regimes, hoping to avoid direct federal regulation and reach a deal before a possible change in administration.¹²² Meanwhile, the U.S. Bureau of Reclamation is charging ahead with its own regulatory process—a broad EIS under NEPA—as a backstop if the states can’t agree.¹²³ Suffice it to say that the “Law of the River” is feeling a lot more like the “law of the wild” right now.

B. Groundwater Use in Arizona.

Arizona considers groundwater to be legally distinct from surface water, so there is an entirely separate legal regime for groundwater.¹²⁴ The distinction is anything but clear. For instance, just because water is underground does not necessarily mean it’s groundwater. (If you really feel like some self-punishment, ask your favorite water lawyer about “subflow,” or see below.)

To make matters worse, state law distinguishes between groundwater, depending on where it’s located. Groundwater in major urban and agricultural areas is tightly regulated by statute, and other areas are subject only to narrow common-law rules. Arizona’s Groundwater Management Act of 1980 (“GMA”) established a detailed regulatory program to address concerns in areas of critical groundwater overdraft,

¹²¹ Press Release, U.S. Dep’t of the Interior, Biden-Harris Administration Announces Historic Consensus System Conservation proposal to Protect the Colorado River Basin, May 22, 2023, <https://www.doi.gov/pressreleases/biden-harris-administration-announces-historic-consensus-system-conservation-proposal>.

¹²² Christopher Flavelle, *Colorado River States Are Racing to Agree on Cuts Before Inauguration Day*, N.Y. TIMES, Jan. 6, 2024, <https://www.nytimes.com/2024/01/06/climate/colorado-river-negotiations.html>.

¹²³ *Colorado River Post 2026 Operations*, BUREAU OF RECLAMATION, <https://www.usbr.gov/ColoradoRiverBasin/post2026/index.html> (last visited Feb. 14, 2024).

¹²⁴ Recognizing the broad natural linkage between surface waters and groundwater, most states—but not Arizona, which is apparently not big on hydrological reality—have abandoned the separate regulation of surface water and groundwater. See generally *In re General Adjudication of All Rts. to Use Water in the Gila River Sys. & Source*, 857 P.2d 1236, 1240–41 (Ariz. 1993) (en banc) (*Gila II*).

mostly urban centers.¹²⁵ The GMA established four initial Active Management Areas (“AMAs”)¹²⁶ in four groundwater basins: Prescott, Phoenix, Pinal, and Tucson.¹²⁷ A fifth AMA, the Santa Cruz AMA, was later carved out of the Tucson AMA. The newest AMA, which covers the Douglas Groundwater Basin, was designated through voter petition on December 1, 2022.¹²⁸ The GMA also created two Irrigation Non-Expansion Areas (“INAs”) in the Harquahala Valley and Joseph City areas. The Hualapai Valley INA was established on December 19, 2022.¹²⁹ More recently, ADWR is considering creating another AMA for the Gila Bend area,¹³⁰ while some legislators are proposing more localized management regimes for rural agricultural areas.¹³¹

Managed by ADWR, each AMA has a lofty “Management Goal.” For Prescott, Phoenix, and Tucson, the Management Goal is achieving “safe yield” (pumping no more groundwater from the aquifer than what is naturally recharged annually).¹³² Other Management Goals include preserving agricultural economies and maintaining safe yield conditions.¹³³ Each AMA also has a “Management Plan” that addresses the types of water use, conservation requirements, and overall use limitations associated with a series of commercial, industrial, agricultural, and residential water uses within each AMA.¹³⁴ These include the amount of water available to individual permitted water users, such as golf courses, as well as the amount of water available under individual rights.¹³⁵

Within the AMAs, the use of groundwater by individual users is limited by a complicated system of groundwater rights and use permits. Under the GMA, virtually all preexisting uses of groundwater were granted “grandfathered rights” that allow for continuation of those uses in perpetuity.¹³⁶ A few of these rights, known as Type 2 rights, are freely transferable, making them extremely valuable. Most grandfathered rights, however, are limited to particular places and/or types of use, so one must be careful when considering a purchase of them.

Groundwater use permits can also be issued for a variety of uses within AMAs, including industrial and mining uses, where withdrawal of groundwater is necessary as an alternative to water service from a local provider or via a groundwater right.¹³⁷ The law also provides for groundwater recharge activities

¹²⁵ See A.R.S. § 45-401.

¹²⁶ See *generally Active Management Area*, ARIZ.GOV, <https://www.azwater.gov/ama/active-management-area-overview> (last visited Feb. 14, 2024).

¹²⁷ See A.R.S. § 45-411.

¹²⁸ See *Douglas AMA*, ARIZ.GOV, <https://www.azwater.gov/ama/douglas-ama> (last visited Feb. 14, 2024).

¹²⁹ See *Hualapai Valley INA*, ARIZ.GOV, <https://www.azwater.gov/ama/ina/hualapai-ina> (last visited Feb. 14, 2024).

¹³⁰ See *Gila Bend Groundwater Basin*, ARIZ.GOV, <https://www.azwater.gov/proposed-gila-bend-groundwater-basin-ama> (last visited Feb. 14, 2024).

¹³¹ See S.B. 1221, 56th Leg., Reg. Sess. (Ariz. 2024), <https://www.azleg.gov/legtext/56leg/2R/bills/SB1221P.pdf>.

¹³² *Supra*, note 128.

¹³³ *Id.*

¹³⁴ *Fifth Management Plan*, ARIZ.GOV, <https://www.azwater.gov/fifth-management-plan> (last visited Feb. 14, 2024).

¹³⁵ *Id.*

¹³⁶ See A.R.S. § 45-462.

¹³⁷ See A.R.S. §§ 45-511 to -528.

and associated “long-term storage credits” that allow users to store water underground. The credits can be used to replenish groundwater extracted elsewhere or saved to meet future demands.¹³⁸

By contrast, groundwater pumping in those parts of Arizona that lie outside the AMAs and INAs is governed only by the common-law doctrine of “reasonable use” (with some very narrow exceptions that will interest probably no one). This doctrine effectively allows a landowner to extract groundwater for any reasonable use on the land from which it is taken, without specific limits on the quantity that can be withdrawn.¹³⁹ In practice, this means there are no real restrictions on how rural groundwater users can use their water, or how much.

If, however, a project is located on State Trust lands or federal lands (or will withdraw water from those lands), additional restrictions apply. For instance, due to the state’s critical interest in protecting water resources, the ACC siting process frequently requires evaluation of water use impacts and/or imposes water use restrictions or mitigation requirements on energy facilities as part of CEC conditions. It is also important to note that, with few exceptions, Arizona does not permit the transport of groundwater from one groundwater basin to another groundwater basin, or from areas outside the state’s AMAs into the AMAs.¹⁴⁰

In addition, groundwater uses in the vicinity of surface water sources are potentially subject to Arizona’s tangled “subflow” doctrine, which addresses the hydrological interaction between surface water and groundwater. Essentially, this doctrine provides that groundwater that is closely enough associated with a surface stream (hydrologically speaking) is legally treated as surface water, meaning it is subject to the prior appropriation system described above.¹⁴¹ This continues to be the subject of extensive litigation in the state’s GSAs. The determination as to whether a particular well could in fact be pumping subflow is a relatively fact-intensive, nuanced issue that involves disturbing words and phrases like “the lateral extent of the saturated floodplain Holocene alluvium.”¹⁴² Fortunately, there are still a few consultants and legal experts who think this stuff is interesting, and who can tell you what they think it all means.

C. Effluent.

An increasingly important potential source of water for renewable energy facilities and other industrial users is municipal effluent. Effluent enjoys a unique legal status under Arizona law, qualifying as a “third category of water”—neither surface water nor groundwater—that is the legal property of the entity that generates it.¹⁴³ As a result, effluent can typically be made available to support industrial uses via agreements with the municipalities or private water/wastewater providers that produce it, frequently

¹³⁸ See generally A.R.S. § 45-801.01, *et seq.*

¹³⁹ See *Bristor v. Cheatham*, 75 Ariz. 227 (1953).

¹⁴⁰ See A.R.S. §§ 45-541 to -547.

¹⁴¹ See *Gila II*, 857 P.2d at 1241.

¹⁴² ADWR, Subflow Technical Report: San Pedro River Watershed 17, Mar. 29, 2002, <https://infoshare.azwater.gov/docushare/dsweb/Get/Document-10946/2002ADWRSubflowTechnicalReportwithAppendices.pdf>.

¹⁴³ See A.R.S. §§ 45-101(4), 139.02; see also *City of Phoenix v. Long*, 761 P.2d 133, 137 (Ariz. Ct. App. 1988).

irrespective of the more complex restrictions that govern the use of surface water or groundwater. The Arizona Department of Environmental Quality (“ADEQ”) is currently revising Arizona’s rules governing the use of recycled water, including reclaimed water and gray water.¹⁴⁴



Colorado River in Butler Valley, Arizona

¹⁴⁴ See *Advanced Water Purification (previously DPR)*, ARIZ. DEP’T OF ENV’T EQUAL., <https://azdeq.gov/awp-rulemaking> (last visited Feb. 14, 2024).



Burrowing Owl

10

X. Federal and State Wildlife Management.

If an energy project has some federal nexus, the lead federal agency would, at a minimum, consult with the USFWS under Section 7 of the ESA regarding potential impacts to listed species. Coordination with the USFWS is also recommended regarding the potential take of bald and golden eagles and migratory birds. For developments on State Trust lands, the ASLD would need to be informed regarding state-protected plant species. While not required for private lands, several local jurisdictions may have policies in place regarding consultation with the Arizona Game and Fish Department (“AZGFD”) during the local development permit process (e.g., zoning and conditional use permits).

A. Federal and State Wind Energy Development Wildlife Guidelines.

The USFWS and AZGFD have developed recommended guidelines for wind energy development, largely to reduce potential impacts to eagles, other birds, and bats. The USFWS suggests that wind projects follow guidelines in the USFWS’s Eagle Rule,¹⁴⁵ *Land-Based Wind Energy Guidelines*,¹⁴⁶ and *Eagle Conservation Plan Guidance*.¹⁴⁷ For its part, AZGFD recommends that wind projects track its *Guidelines for Reducing Impacts to Wildlife from Wind Energy Development in*

¹⁴⁵ See Eagle Permits; Revisions to Regulations for Eagle Incidental Take and Take of Eagle Nests, 81 Fed. Reg. 91,494, Dec. 12, 2016. The USFWS announced further proposed revisions to the Eagle Rule in September 2022, but those revisions have not yet been finalized. See Permits for Incidental Take of Eagles and Eagle Nests, 87 Fed. Reg. 59,598, Sept. 30, 2022.

¹⁴⁶ See U.S. FISH & WILDLIFE SERV., U.S. FISH & WILDLIFE SERV. LAND-BASED WIND ENERGY GUIDELINES, Mar. 23, 2012, <https://www.fws.gov/sites/default/files/documents/land-based-wind-energy-guidelines.pdf>.

¹⁴⁷ See U.S. FISH & WILDLIFE SERV., EAGLE CONSERVATION PLAN GUIDANCE, Apr. 2013, <https://www.fws.gov/sites/default/files/documents/eagle-conservation-plan-guidance.pdf>.

Arizona.¹⁴⁸ Table 1 below summarizes the various surveys and plans, as well as time frames, recommended by USFWS and AZGFD.

Table 1. Recommended wildlife surveys, plans, and time frames under federal and state law for wind energy development

Federal and State Recommended Wildlife Surveys, Plans, and Time Frames for Wind Energy Development	
Survey/Plan Type	Time Frame
Preliminary Site Screening/Evaluation/Characterization	Agency coordination regarding project development as early as possible
Preconstruction Survey Plan	Agency vetting of bird, eagle, and bat survey methodology/plan as early as possible
Eagle Use Surveys; results of surveys compiled into an Eagle Conservation Plan	Surveys completed for 2 full years
General avian (non-eagle large and small bird) use surveys; results of surveys compiled into a report and/or Bird and Bat Conservation Strategy	Non-eagle large bird surveys completed for 2 full years; small bird surveys for at least 1 full year
Eagle and other raptor species nest surveys; results of surveys compiled into a report; eagle results compiled into an Eagle Conservation Plan	Two full years of aerial nest surveys
Bat acoustic surveys	Surveys completed for 2 full years
Bird and Bat Conservation Strategy	Completed prior to project operation
Eagle Conservation Plan	Completed prior to project operation

B. State Solar Energy Development Wildlife Guidelines.

Although both the USFWS and AZGFD have developed wildlife protection guidelines for wind energy development, only AZGFD has guidelines for solar energy development in Arizona. Developers should consider the recommendations in the *Guidelines for Solar Development in Arizona*,¹⁴⁹ and formally coordinate with the agencies, as early as possible. The AZGFD rules mostly focus on assessing the potential impacts that a project might have on wildlife species, although there are no specific time frames for these assessments. They also include suggested measures to avoid, minimize, and mitigate any identified impacts, including:

- Consult with AZGFD early in the project conceptual process to identify any potential impacts to special-status species and other wildlife in the development area.
- Complete a preliminary site screening to assess the biological sensitivity of a project.
- Assess the degree to which a project may adversely affect/contribute to habitat loss, fragmentation, and connectivity, as well as changes in site hydrology.

¹⁴⁸ ARIZ. GAME & FISH DEP'T, GUIDELINES FOR REDUCING IMPACTS TO WILDLIFE FROM WIND ENERGY DEVELOPMENT IN ARIZONA (revised Oct. 15, 2012), <https://s3.amazonaws.com/azgfd-portal-wordpress/PortallImages/files/wildlife/planningFor/wildlifeFriendlyGuidelines/RevisedAZWindGuidelinesOctober2012.pdf>.

¹⁴⁹ ARIZ. GAME & FISH DEP'T, GUIDELINES FOR SOLAR DEVELOPMENT IN ARIZONA, Mar. 12, 2010, <https://s3.amazonaws.com/azgfd-portal-wordpress/PortallImages/files/wildlife/planningFor/wildlifeFriendlyGuidelines/FinalSolarGuidelines03122010.pdf>.

- Analyze project cumulative effects.
- Develop adequate mitigation plans for wildlife species and habitat loss.
- Avoid and minimize project impacts to hydrological resources (i.e., groundwater and surface water).
- Design facility infrastructure (e.g., transmission lines) to minimize wildlife impacts.
- Prevent and manage noxious or invasive plants during the life of the project; develop a revegetation plan that uses only native species.
- Prevent/minimize effects to public recreation and access to public lands.



Flowering Saguaros

11

XI. Arizona Environmental Permits.

Unlike traditional power-generating facilities, renewable energy facilities likely need not obtain major environmental permits from ADEQ (the state environmental regulatory agency) or the relevant county (the air quality authority in big counties). Just in case, they are discussed briefly below.

A. Water Quality Permits.

1. AZPDES Permits.

Arizona is authorized by EPA to operate the National Pollutant Discharge Elimination System (“NPDES”) program under the CWA, which governs discharges to surface waters in the state.¹⁵⁰ A general or individual Arizona Pollutant Discharge Elimination System (“AZPDES”) permit is a prerequisite for a discharge of “pollutants” into a “navigable” water body within Arizona. That may be true even if, as noted before, there is no water in it during part of the year (such as ephemeral washes and their tributaries). If you are constructing a PV solar or battery storage facility, it is unlikely you will need an AZPDES permit. If you are constructing one, call us. Or call us anyway; we’re lonely. A facility may also need to comply with general permit requirements for construction activities and stormwater runoff control.¹⁵¹ As with the Nationwide Permits under Section 404 of the CWA, there are so-called “general permits” that are easier to obtain and cover a broad category of activities.¹⁵²

¹⁵⁰ A.R.S. §§ 49-255 to -255.03.

¹⁵¹ A.A.C. R18-9-C901 to -C905.

¹⁵² See, e.g., Construction General Permit No. 2020-0001, Sept. 29, 2021, https://static.azdeq.gov/permits/azpdes/cgp_permit.pdf (general permit for “stormwater discharges associated with construction activity”).

2. Aquifer Protection Permits

Arizona’s Aquifer Protection Permit (“APP”) program, administered by ADEQ, requires a permit for discharges (even on the surface) that reasonably may cause pollutants to reach groundwater. An APP is also required if pollutants will be discharged onto the land surface or the vadose zone (science nerd–speak for the area between the aquifer and the surface) in a manner that makes it reasonably probable that the pollution will reach an aquifer.¹⁵³ It’s basically an AZPDES permit for groundwater. APPs are often required for certain energy facility structures, such as blow-down cooling towers and evaporation ponds, as well as on-site wastewater treatment facilities. APPs are generally less of a headache than AZPDES permits, in part because of the odd fact that discharge limitations for aquatic creatures in the surface are generally more stringent than standards for human drinking water. From a regulatory perspective, you are entitled to less protection than a water flea.

B. Air Quality Permits.

Renewable energy projects may separately fall under ADEQ’s air quality program if they meet certain requirements. Depending on the type of equipment projects used, as well as the level of emissions from that equipment,¹⁵⁴ they may need to obtain state air quality permits. Solar and wind projects sometimes require a permit (either an individual or general permit) for their process-support boilers and emergency-use engines. An individual air quality permit may also be required for biomass boilers and other combustion-related processes.



Sonoran Desert Arizona

¹⁵³ See A.R.S. §§ 49-241 to -252; A.A.C. R18-9-101 to -E323.

¹⁵⁴ See A.R.S. §§ 49-401 to -467. ADEQ issues air quality permits for facilities that meet or exceed certain emission levels or are located in a county without a local air permitting authority. Three counties in Arizona—Maricopa, Pima, and Pinal—have local air quality departments that issue permits for facilities located within their boundaries with emission levels below the threshold for a state permit.



Sunflowers in Flagstaff, Arizona

12

XII. Eminent Domain in the Utility Context.

If you're somehow still reading, buckle up—this might be the only interesting section in this Guide. For developers of energy infrastructure who may be facing uncooperative landowners, Arizona law is moderately helpful. Under the state constitution, private as well as public entities may condemn land for the purpose of building power transmission lines. Even so, private parties generally cannot take advantage of the immediate possession statutes, meaning that construction of a transmission line must await a trial to determine “just compensation.”

Arizona has three requirements for the taking of private property by condemnation: the proposed taking must be (1) authorized by law, (2) for a “public use,” and (3) “necessary” for that public use.¹⁵⁵ Both public bodies and private entities can exercise the power of eminent domain for certain specifically enumerated purposes.¹⁵⁶ One such purpose is to install “[e]lectric light and power transmission lines.”¹⁵⁷

The first element requires that the condemner have the legal authority to take the planned action, and the activity constituting the intended use must be one in which the condemner is legally authorized to engage. The Commission approval process described in Section III would suffice.

The second element requires the condemner to demonstrate that the taking is necessary for a “public use.”¹⁵⁸ Unlike under the U.S. Constitution, “public use” in Arizona is defined according to specific

¹⁵⁵ See ARIZ. CONST. art. 2, § 17; A.R.S. §§ 12-1112, 1131.

¹⁵⁶ See A.R.S. § 12-1111.

¹⁵⁷ A.R.S. § 12-1111(10).

¹⁵⁸ See *Bailey v. Myers*, 76 P.3d 898, 900–01 (Ariz. Ct. App. 2003); A.R.S. § 12-1112.

approved uses of the eminent domain power, as established by statute. An interesting wrinkle is that Arizona courts are forbidden from deferring to the Legislature on a question of whether a purportedly “public” use is “really public”¹⁵⁹ (which apparently doesn’t mean the use must be “very” or “exceptionally” public—only “truly” or “actually” public).

The Legislature has decided that condemnation for electric transmission lines is a public use, so rights-of-way are generally free from real dispute in terms of the “public use” question.¹⁶⁰ Additionally, Arizona courts have long followed the broad view of public use, defined to include use by the public, public benefit, public advantage or convenience, and promoting the general objects and purposes of a governmental entity. “Public use” historically has included electric transmission lines,¹⁶¹ and a 2006 voter initiative added “the use of land for the creation or functioning of utilities”¹⁶²

Lastly, a would-be condemner must show that the taking is “necessary” for the purported public use.¹⁶³ Whereas “public use” is a judicial question decided without deference to the Legislature, judicial review of the “necessity” requirement is quite narrow. Courts generally will not disturb a legislative or condemning agency’s determination of necessity “in the absence of fraud or arbitrary and capricious conduct.”¹⁶⁴ The findings of the Siting Committee and the Commission would be entitled to great deference here.

A. Procedures for Condemning Interests in Land and Taking Possession.

1. General Procedures.

The basic processes for exercising the right of eminent domain are set forth by statute.¹⁶⁵ At least 20 days before filing a complaint for condemnation, the condemning entity must deliver to the property owner of record a written offer to purchase the property or interest in the property and to pay just compensation for the property, as well as damages resulting from the severance of any remaining property.¹⁶⁶ The offer must be the condemning party’s good-faith estimate of just compensation, supported by at least one professional appraisal.¹⁶⁷ For property owners who won’t open their doors, posting the offer and appraisal in plain sight on the property will do.¹⁶⁸

¹⁵⁹ See ARIZ. CONST. art. 2, § 17 (“the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public”).

¹⁶⁰ See A.R.S. § 12-1136(5)(a)(ii).

¹⁶¹ See A.R.S. § 12-1111(10).

¹⁶² A.R.S. § 12-1136(5)(a)(ii).

¹⁶³ A.R.S. § 12-1112.

¹⁶⁴ *Bailey*, 76 P.3d at 901 n.1; see also *City of Phoenix v. Superior Ct.*, 671 P.2d 387, 389–90, 392 (Ariz. Ct. App. 1983) (en banc).

¹⁶⁵ See A.R.S. §§ 12-1111 to -1129.

¹⁶⁶ See A.R.S. § 12-1116(A).

¹⁶⁷ *Id.*

¹⁶⁸ See A.R.S. § 12-1116(A) & (B).

After that, the eminent domain complaint must include these elements:

- The name of the person asserting the public use for which the property is sought to be condemned, as plaintiff;
- The names of all owners and claimants of the property, as defendants;
- A statement of the right of plaintiff to take the property (i.e., an explanation of how each of the three elements above is met);
- If a right-of-way for a road, ditch, canal, or other purpose is sought, the location and general route, along with a map; and
- A description of each piece of land sought to be taken.¹⁶⁹

The rest of the case is typical civil litigation, with the added benefit that eminent domain actions are entitled to scheduling precedence.¹⁷⁰ The parties are entitled to a jury trial, with the amount to be paid to the landowner often the primary (or only) issue. The landowner is entitled to “just compensation” for land taken and for any severance damages regarding the remaining land. In the normal eminent domain case, the plaintiff does not acquire title to the interest acquired until the conclusion of the trial.

2. Immediate Possession.

Absent an agreement by a landowner, merchant power plant developers and private utilities cannot obtain possession of property necessary for construction of transmission lines until the “just compensation” trial is over. But if the party seeking condemnation is a public entity or SRP, they may obtain earlier possession by proving “public use” and “necessity,” leaving just compensation for later but posting a bond that approximates the expected compensation.¹⁷¹

The procedure here is to apply for an “order of immediate possession” at any time after filing the initial condemnation complaint. The court will set a hearing to determine public use, necessity, and the amount of the required bond.

Immediate possession will allow energy developers to begin construction earlier, saving time and money in the long run. If the court grants the order of immediate possession, landowners can seek review by filing a special action petition in the Court of Appeals. Review is discretionary, but trial courts can stay immediate possession pending the appellate court’s consideration of the petition and/or review.

If the trial court denies the request for immediate possession, the case proceeds in the normal fashion. If it grants the request, and there is no appellate review, the condemning authority can take possession of the property after posting the required bond. The case will then proceed to a jury trial to determine just compensation.

¹⁶⁹ See A.R.S. § 12-1117.

¹⁷⁰ See A.R.S. § 12-1121(B).

¹⁷¹ See *Hughes Tool Co. v. Superior Ct. of Pima Cnty.*, 370 P.2d 646, 650 (Ariz. 1962) (en banc).



13

White House Ruins, Anasazi ruins in Canyon de Chelly, Anasazi

XIII. Conclusion.

Congratulations—you made it. Arizona’s combination of patchwork land ownership and multiple federal and state agencies may present a challenge to developers of generating facilities and transmission lines, but you could do a lot worse. If project proponents engage with regulators early and often, state and federal agencies that favor development of renewable resources can help pave the way for a successful project.

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Chris Thomas: Long past his prime, Chris has practiced environmental counseling and litigation in Arizona for 38 years. You can kill a man and get less time. An Omaha native, he was the last one in his kindergarten class to learn how to tie his own shoes. He is a graduate of the University of Iowa College of Law, where he was neither summa cum laude nor editor-in-chief of the Iowa Law Review, and Drake University. An unlikely trophy husband, Chris lives in Phoenix with his much more accomplished wife Karen Peters, one of their three sons, and three dogs that pee in the house. Before becoming the shell of a man you see here, he was elected to the American College of Environmental Lawyers. He can be reached at (602) 351-8045 and cthomas@perkinscoie.com.



Andrea Driggs: Andrea, unlike her Perkins colleagues, is an actual smart person. She represents major infrastructure clients in Arizona, California, Nevada, and New Mexico. She holds a J.D. from UCLA, a master's degree in environmental epidemiology and policy from the University of London, and a B.S. from Arizona State University. Andrea lived for three years each in São Paulo and Shanghai and is fluent in Spanish and Portuguese. A former epidemiologist with Los Angeles County, Andrea's hobbies include telling her coworkers how they are likely to die. She can be reached at (602) 351-8328 and adriggs@perkinscoie.com.



Ben Longbottom: A brand new lawyer, Ben still has a chance at a decent career despite the mentoring he receives from the likes of the folks above. Ben went to Arizona State University's Sandra Day O'Connor College of Law, where he earned a Certificate in Law and Sustainability. Before that, he received a B.S. in Environmental Studies from Texas A&M University. His notable traits include an inexplicable interest in Arizona water law, having smarter and more successful friends, and desperately clinging to outdated forms of physical media. Ben can be reached at (602) 351-8098 and blongbottom@perkinscoie.com.



Founded in Seattle in 1912, Perkins Coie LLP has more than 1,200 lawyers in 21 offices across the United States and Asia. More than 100 Perkins lawyers practice in the environmental and natural resource areas.



Devin Petry: Devin is a Principal Project Manager at SWCA, and provides environmental project management and research and development expertise, with a focus on land use planning and facility siting. He has managed or contributed to the preparation of state Certificates of Environmental Compatibility; federal documents, including environmental impact statements, environmental assessments, and categorical exclusions; municipal/county permitting efforts, including rezoning, plan amendments, and use permits; and technical reports. Devin has managed numerous facility siting studies and analyses for electrical transmission and generation projects, including electrical saturation studies, sub-transmission siting studies, and high-voltage transmission siting studies. In these efforts, Devin has provided environmental expert witness testimony before planning and zoning commissions, boards of supervisors, and the Arizona Power Plant and Transmission Line Siting Committee. Devin can be reached at 602-274-3831 or devin.petry@swca.com.



Meggan Dugan, M.A.S.; Meggan is a Principal Project Manager at SWCA. Her experience centers on National Environmental Policy Act (NEPA), Bureau of Land Management (BLM) resource management plan revisions and amendments, technical/feasibility studies, ecology and wildlife biology, and advanced spatial analysis. She is experienced in permitting across the western U.S. and regularly works with a multitude of federal and state agencies, municipalities, and private developers. Meggan has managed projects and/or led technical teams for renewable energy development projects across the western U.S., including numerous confidential environmental impact statement (EIS)-level projects in Arizona, New Mexico, and Nevada. Meggan can be reached at 602-274-3831 or mdugan@swca.com.



Victoria Casteel: Victoria SWCA's Arizona Natural Resources Director and has 18 years of experience in project management, permitting, and environmental and water resources. Victoria has completed various state and federal environmental clearance documents and obtained permit approvals for a diverse group of clients, including Arizona Public Service Company, Maricopa County, Arizona Department of Transportation, BLM, Salt River Project, numerous city governments, and a variety of private developers. Victoria has attended the PSMJ Resources, Inc., Project Management Bootcamp and excels at managing complex projects. Victoria can be reached at 602-274-3831 or victoria.casteel@swca.com.

APPENDICES

APPENDIX 1

Arizona Corporation Commission

Article 15 of the Arizona Constitution establishes the Arizona Corporation Commission (“ACC” or “Commission”). Only seven states have constitutionally formed Commissions.¹ Arizona is one of only 13 states with elected, rather than appointed, Commissioners.²

The Commissioners function in an executive capacity; they adopt rules and regulations, thereby functioning in a legislative capacity; and they also act in a judicial capacity, sitting as a tribunal and making decisions in contested matters. The Commission is required by the Arizona Constitution to maintain its chief office in Phoenix and is required by law to conduct monthly meetings. The Commission consists of five members elected on a statewide basis every four years. The current Commission members are:³



Chairman Jim O'Connor (R)

Chairman Jim O'Connor brings a unique, needed skill set formerly absent at the ACC. Jim's 42 years' experience in finance with responsibility for regulatory compliance, investment portfolio management, and enterprise leadership makes him the only commissioner with that expertise.

Jim has a long history of public service volunteering for leadership positions in the Republican party. Further, Jim served for years on bylaw committees for the Arizona Republican Party, Maricopa County Republican Committee and Legislative District 23 in Scottsdale. He served as a member of the Electoral College in 2016.

Jim has also served for 12 years on the Board of Grace Line Ministries, a non-profit Christian mentoring organization. He enjoyed four years of enrichment studies at Phoenix Seminary and is a partner at Pinnacle Forum in Phoenix.

Jim assumed office on January 4, 2021, and his term ends on January 6, 2025. His seat will be up for reelection in fall 2024.

¹ See ACC – ACC Mission and Background, <https://azcc.gov/divisions#:~:text=Only%207%20states%20have%20constitutionally,13%20states%20with%20elected%20Commissioners> (last visited Feb. 14, 2024).

² See *id.*

³ Biographies and photographs courtesy of the ACC. See ACC – Home, <https://azcc.gov/home> (last visited Feb. 14, 2024).



Commissioner Lea Márquez Peterson (R)

Lea has been an entrepreneur in Arizona for many years and supports Arizona's small business community and economic development. She was selected as the 2022 Hispanic Businesswoman of the Year by the United States Hispanic Chamber.

She served as the President/CEO of the Tucson Hispanic Chamber from 2009 until November of 2018 and the Executive Director of Greater Tucson Leadership (GTL) from 2005 to 2009. While Lea was serving as President/CEO of the Tucson Hispanic Chamber in 2013, the Tucson Hispanic Chamber was recognized by the U.S. Hispanic Chamber of Commerce as the Hispanic Chamber of the Year.

From 2005 to 2009 Lea owned and operated a Business Brokerage Firm and from 1998 to 2005, she built and operated a chain of six gasoline stations/convenience stores with 50 employees in the Tucson region.

In her capacity as Commissioner, Lea serves on the board of EPRI, the Electric Power Research Institute. Additionally, she serves as co-Vice Chair of the Water Committee and on the nuclear power subcommittee for the National Association of Regulated Utility Commissioners. She also serves on the Advisory Council to the Center for Public Utilities at New Mexico State University.

Lea has been appointed to serve on the Arizona Judicial Council, which advises the Arizona Supreme Court and the Arizona Finance Authority, the state's bonding authority. She chairs the Tenet Health Board of Directors of Carondelet's St Mary's and St Joseph's Hospitals in Tucson and is the former Chair of the Pima Association of Governments' Economic Vitality Committee. She serves on the Board of the Pima County Workforce Investment Board and is the past President of the National Association of Women Business Owners in Tucson. She also chairs the Board of the national Small Business Development Council for the U.S. Small Business Administration.

She received her undergraduate degrees in Marketing and Entrepreneurship from the University of Arizona, and her Master of Business Administration from Pepperdine University. She resides in Tucson and is married with two children.

Lea was initially appointed to the ACC by then-Arizona Governor Doug Ducey in May 2019. Then, in November 2020, she was elected to the ACC. Her current term ends on January 6, 2025, and her seat will be up for reelection in fall 2024.



Commissioner Kevin Thompson (R)

Kevin Thompson has over 25 years of utility and regulatory experience, including serving as a twice-elected Councilman for the City of Mesa. Kevin is a combat veteran of the United States Air Force, serving in Operation Desert Storm. He is a small business owner that focuses on helping clients grow and expand their businesses and bring economic development to Arizona.

Kevin was a cofounder of the Mesa Veterans Resource Center, an East Valley resource for veterans that helps with employment access, resume building, VA healthcare and benefits training, mental health counseling, and more.

Kevin's commitment to economic development brought in over \$8B in capital investment and the creation of over 5,000 jobs to Mesa's District 6 and the region, making it the fastest growing area in the Southeast Valley. He passionately fought to end human trafficking, working with the City Attorney and police department to establish ordinances to actively shut down those trafficking our most vulnerable. As a veteran, he chaired the mayor's challenge to end veteran homelessness and formed public-private partnerships to provide wraparound services for those that served our country.

In his capacity as a Councilmember, Kevin was directly responsible for setting the utility rates for the City's utilities (natural gas, electric, and water & sewer) and fighting on behalf of the citizens for just and reasonable rates. He represented the City serving as President of the Arizona Municipal Water User's Association (AMWUA), a multi-city organization formed to facilitate water resource planning and water policy development at a regional level. During his tenure, he advocated for the Central Arizona Water Conservation District to designate a portion of taxes to be used for federal repayment of the construction cost that built the CAP infrastructure, ensured citizens had a voice on the Governor's Water Augmentation Innovation & Conservation Council, and supported the Groundwater Withdrawal Fee extension to conserve, augment, and monitor groundwater withdrawal.

Kevin was the Manager, New Business Development for Southwest Gas for over 12 years, responsible for all new business engineering including the sale, design, and installation of billions of dollars of natural gas pipelines for residential, multi-family, retail, and commercial development. During the economic downturn of 2008 when economic development all but ceased nationwide, he transitioned to the government affairs office where he focused on local government relations for 5 years. In this role he worked with the Arizona Department of Emergency and Military Affairs on Emergency Management, Utility Emergency Response, and natural disaster response planning.

Kevin holds a Bachelor of Science in Mechanical Engineering from the University of Nevada, Las Vegas. He is the recipient of multiple awards and recognitions, including the United Food Bank Service Award, recognition as a Champion for the Southeast Business Group, and the Mesa Veteran Appreciation Award, to name a few. Kevin and his wife, Donna, have been married for over 33 years and have two children.

Kevin assumed office on January 4, 2021, and his term ends on January 6, 2025. His seat will be up for reelection in fall 2024.



Commissioner Nick Myers (R)

Commissioner Nick Myers Nick ran a campaign on wanting to bring back regulatory stability, keeping rates low, and keeping utilities resilient and reliable. In his view, this can be accomplished by removing unnecessary mandates and subsidies, modifying rules before forcing policy on utilities (in other words, stop changing the rules in the middle of the game), and putting statewide policymaking back into the legislature where it belongs.

Nick spent almost 20 years in the software engineering industry. He then branched out into small business where he and his family started and sold several businesses.

Nick's involvement with the commission started when he had a major dispute with a utility. This led to Nick being a community advocate in a multi-year process that was very successful. Following that, he became a Policy Advisor for Commissioner Justin Olson until being elected as a commissioner himself.

Nick's engineering mindset, technical background, utility and policy work, and business experience bring a rare combination of skills to the commission. Nick understands what it takes to make businesses successful. He understands the dangers of ideology-driven decisions and has the ability to see all sides of an issue to make the best decisions.

Nick, his wife and three children live in Pinal County. Nick appreciates the faith the residents of Arizona have placed in him in electing the first ever Commissioner from Pinal County and looks forward to serving all Arizonans.

Nick assumed office on January 2, 2023, and his term ends on January 4, 2027. His seat will be up for reelection in fall 2026.



Commissioner Anna Tovar (D)

Anna Tovar and her husband have been married for over 20 years and have two wonderful sons. She is proud of her roots in Tolleson, Arizona, proud to be a product of the public school system and proud to have given back as a teacher, mentor, and leader in her community.

Anna was a teacher for five years for the Tolleson Elementary School District, served on the Tolleson City Council for seven and a half years, and was Vice Mayor for two years until she joined the House of Representatives and served as Minority Whip.

In 2013, she entered the Senate where she served as the District 19 representative advocating for Avondale, Tolleson, West Phoenix and the entire state.

While at the Senate, she served as the Senate Minority Leader, was Latino Caucus Chair, and served as a committee member of the Senate Judiciary, Senate Appropriations, Joint Legislative Budget Committee and the Joint Committee on Capital Review. As Senator Tovar, she developed a well-earned reputation as a legislator who fought for the dignity of underserved people.

Upon completing her time at the Senate, she went on to work as a Campaign Director for The Leukemia & Lymphoma Society. She raised funds to find a cure for cancer and to assist cancer patients. In 2011, she championed the effort to restore funding for nearly 100 patients on the bone marrow transplant list, saving many lives. As a two-time cancer survivor, Anna remains determined to find a cure.

Throughout her time at the state, she knew one day she would return to her hometown Tolleson to resume her service as a local elected official. In 2016, Anna was elected as Mayor of Tolleson, Arizona. She is the first female to hold this prestigious office. During her time as Mayor, Anna has worked to ensure all citizens of Tolleson have an opportunity for a quality education and good paying jobs. She has supported local businesses and sustainable economic development as a principal cornerstone of her governance and focused on developing regional partnerships and collaborating with local and state elected officials to advocate for all residents.

Anna is working to restore transparency and integrity to the Corporation Commission. Before making any decision at the Commission, Anna will always ask herself: will it be good for my residents and the long-term future of our community? Anna's first priority is the consumer, and she welcomes comment from the public. Please contact her office with thoughts, suggestions, and concerns.

Anna assumed office on January 4, 2021, and her term ends on January 6, 2025. Her seat will be up for reelection in fall 2024.

APPENDIX 2

Arizona Power Plant and Line Siting Committee

In 1971, the Arizona Legislature required that the Arizona Corporation Commission (“ACC” or “Commission”) establish a power plant and line siting committee. The Committee provides an independent forum to evaluate applications to build thermal generating facilities of 100 megawatts or more and transmission projects of 115,000 volts or more. The Committee was created to “provide adequate opportunity for individuals, groups interested in conservation and the protection of the environment, local governments, and other public bodies to participate in timely fashion in the decision to locate a specific major facility at a specific site.”¹

The Committee consists of 11 members.² Five positions are filled by officials from state agencies and six are filled by the ACC. The current members of the Committee are:

Adam Stafford

Mr. Stafford is the designee for the Arizona Attorney General, and by statute serves as Committee Chair. Mr. Stafford is currently an Assistant Attorney General at the Arizona Attorney General’s Office. Previously, he served as a senior attorney at Western Resource Advocates and as a policy advisor to a former Commissioner of the ACC.

Leonard Drago

Mr. Drago is the designee for the Director of the Arizona Department of Environmental Quality (“ADEQ”). He has worked as an ADEQ ombudsman and tribal and Maricopa County liaison, the Deputy Director of ADEQ’s Air Quality Division, and was formerly at Intel in an environmental role.

David French

Mr. French is the designee for the Arizona Department of Water Resources (“DWR”). He works as a compliance enforcement coordinator at DWR and previously worked with various companies in roles involving the removal of unexploded ordnance.

Nicole Hill

Ms. Hill is the designee for the Director of the Energy Office of the Arizona Department of Commerce. She works as the Arizona Climate Program Director for the Nature Conservancy and previously owned her own environmental consulting firm.

Gabby Saucedo Mercer

Ms. Saucedo Mercer serves as the designee of the Chairman of the ACC. She previously worked for a defense electronics firm.

¹ 1971 Ariz. Sess, Laws Ch. 67, § 1.

² See A.R.S. § 40-360.01 (establishing the general makeup of the committee).

Jon Gold

Mr. Gold was appointed by the Commission as a representative of the general public. He is a retired U.S. Army colonel and previously served as a strategic intelligence officer, a certified counterterrorism instructor, and a special security officer. Gold's term expires on May 1, 2025.

Scott Somers

Mr. Somers, a U.S. Air Force veteran, was appointed by the Commission to represent incorporated cities and towns. He is also on the city council for the City of Mesa, a position he previously held from 2006 to 2015. His term expires on May 1, 2025.

Margaret "Toby" Little

Ms. Little was appointed by the Commission to represent the general public. She previously served as an electrical engineer for the Commission and a mathematics professor at Central Arizona college. Her term expires on May 1, 2025.

David Kryder

Mr. Kryder was appointed by the Commission to represent agricultural interests. He previously worked as a small claims hearing officer with the Pima County Justice Court and an adjunct faculty member with the Pima Community College. His term expires on May 1, 2025.

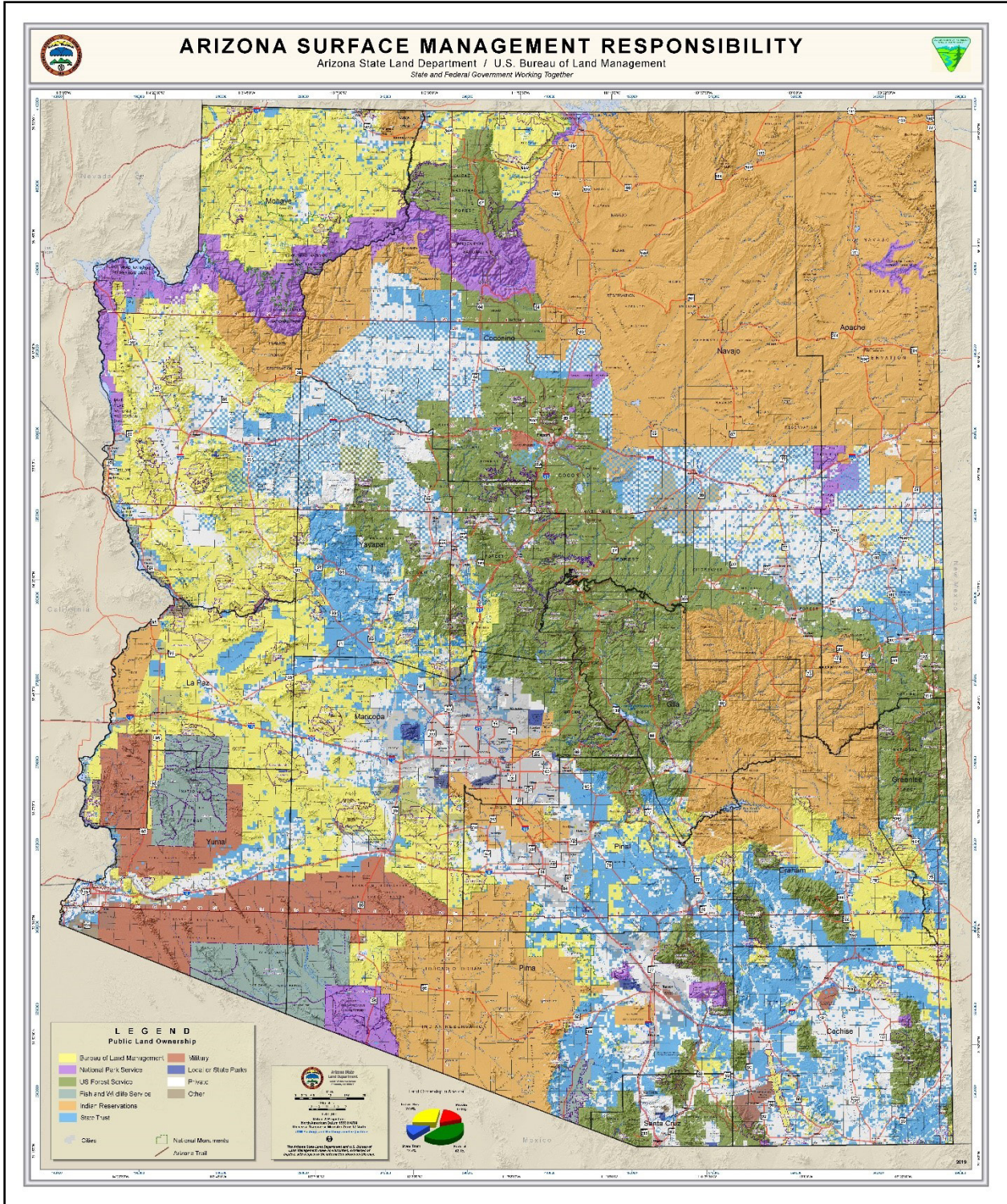
Roman Fontes

Mr. Fontes was appointed by the Commission to represent counties. He is also a senior investment officer with the Western Area Power Administration, a part of the U.S. Department of Energy. His term expires on May 1, 2025.

David Richins

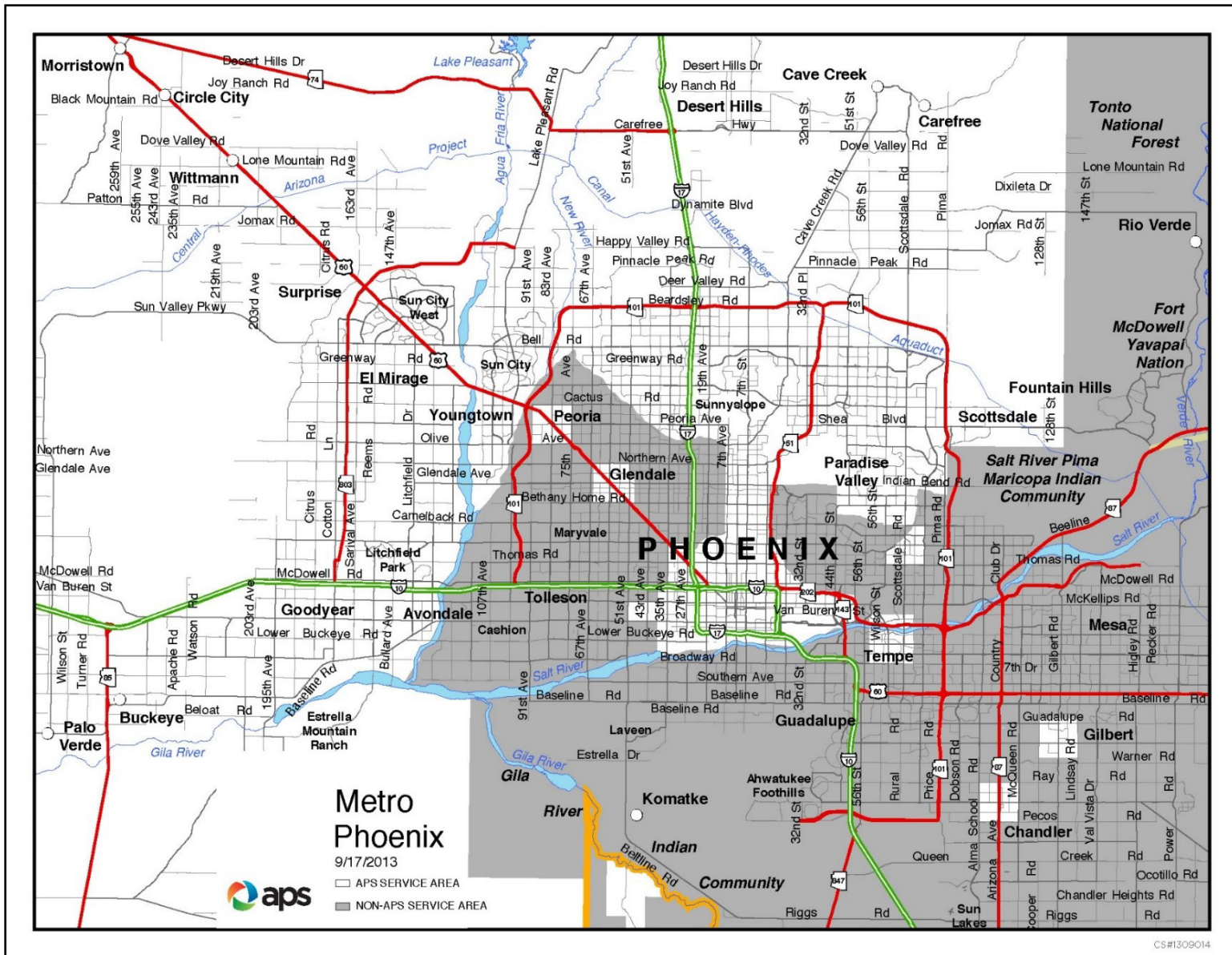
Mr. Richins was appointed by the Commission to represent the general public. He is a senior manager at Resolution Copper, and previously served as president and chief executive officer of United Food Bank. His term expires on May 1, 2025.

APPENDIX 3

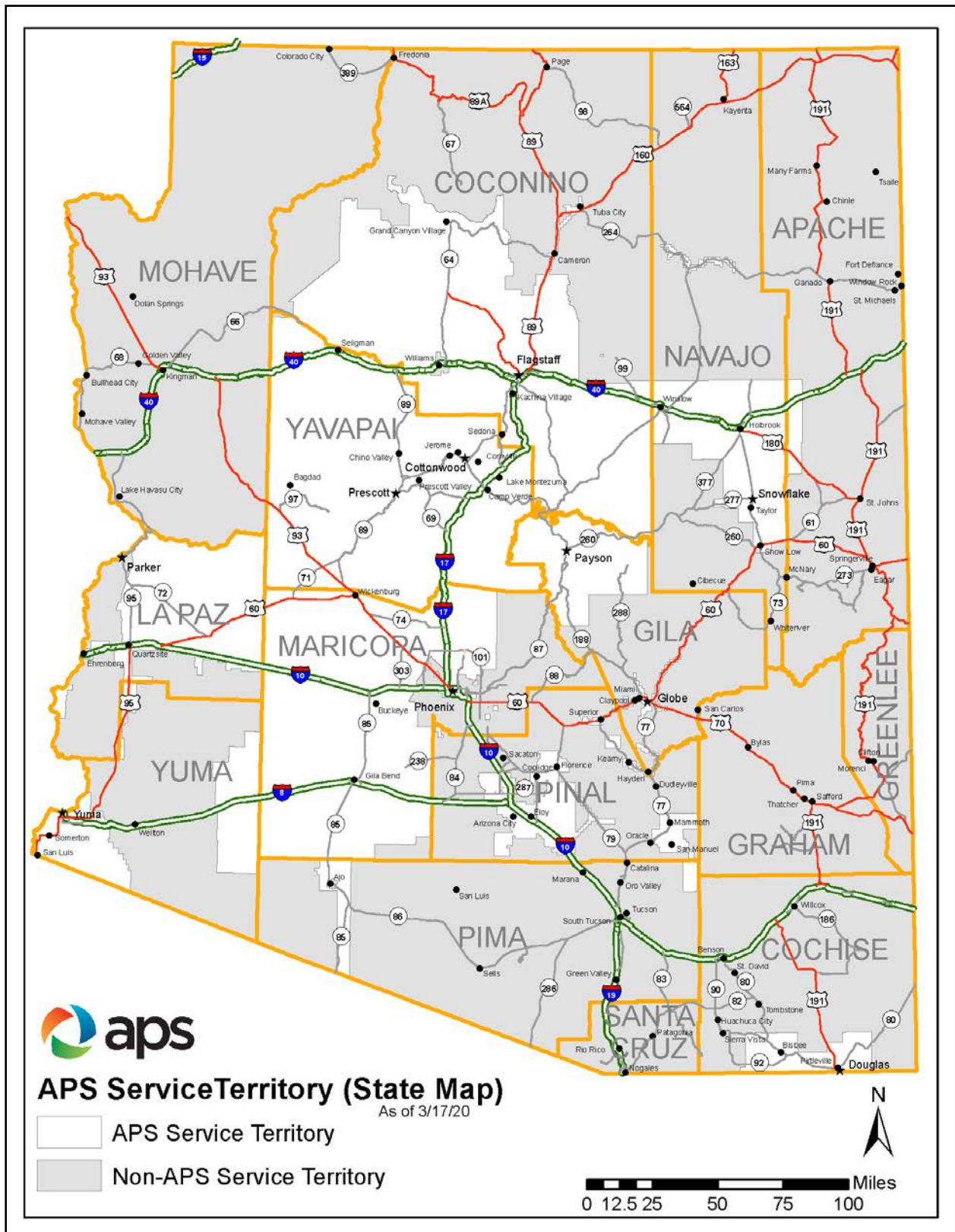


Map of land ownership and regulatory responsibility in Arizona.

APPENDIX 4

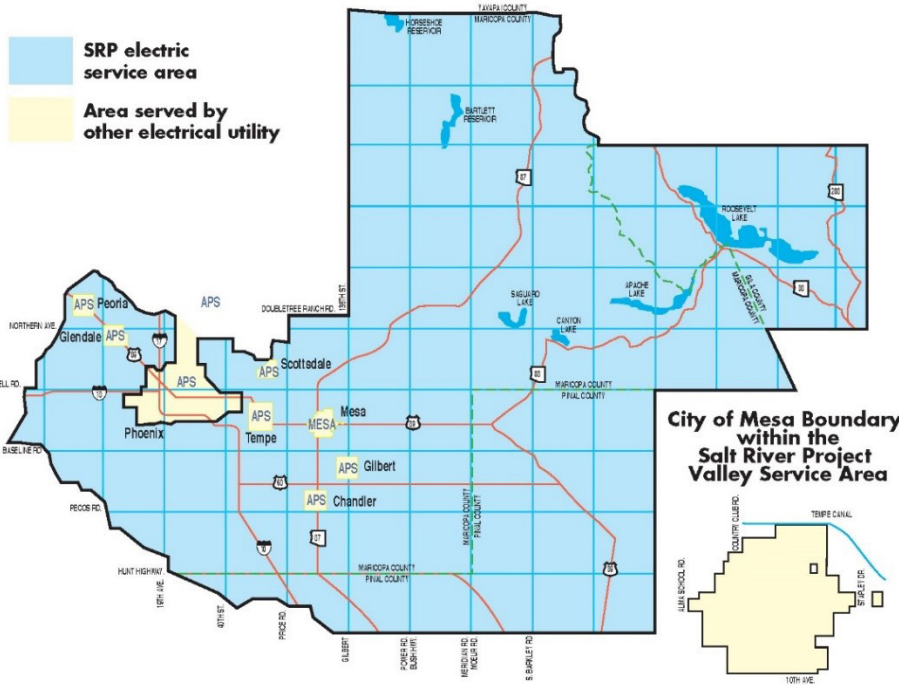


APS local service area map.

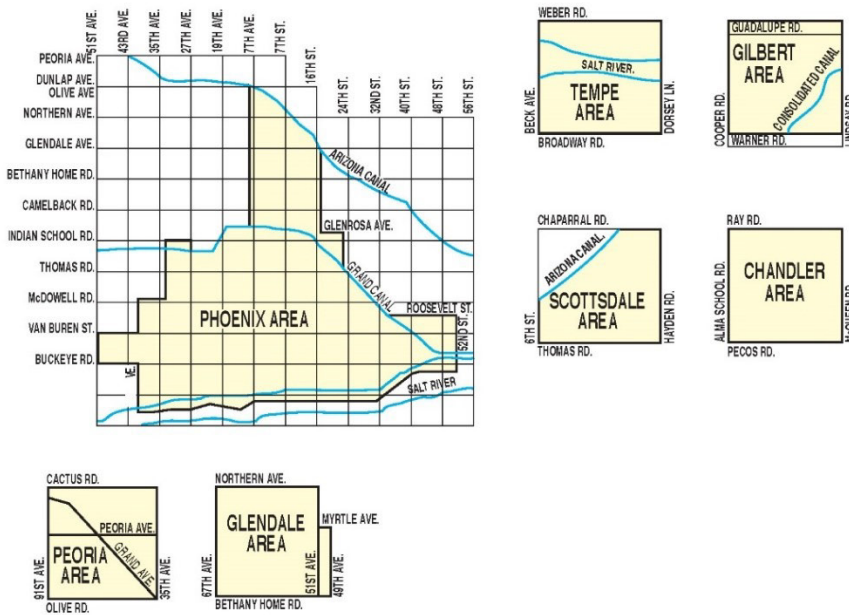


APS statewide service area map.

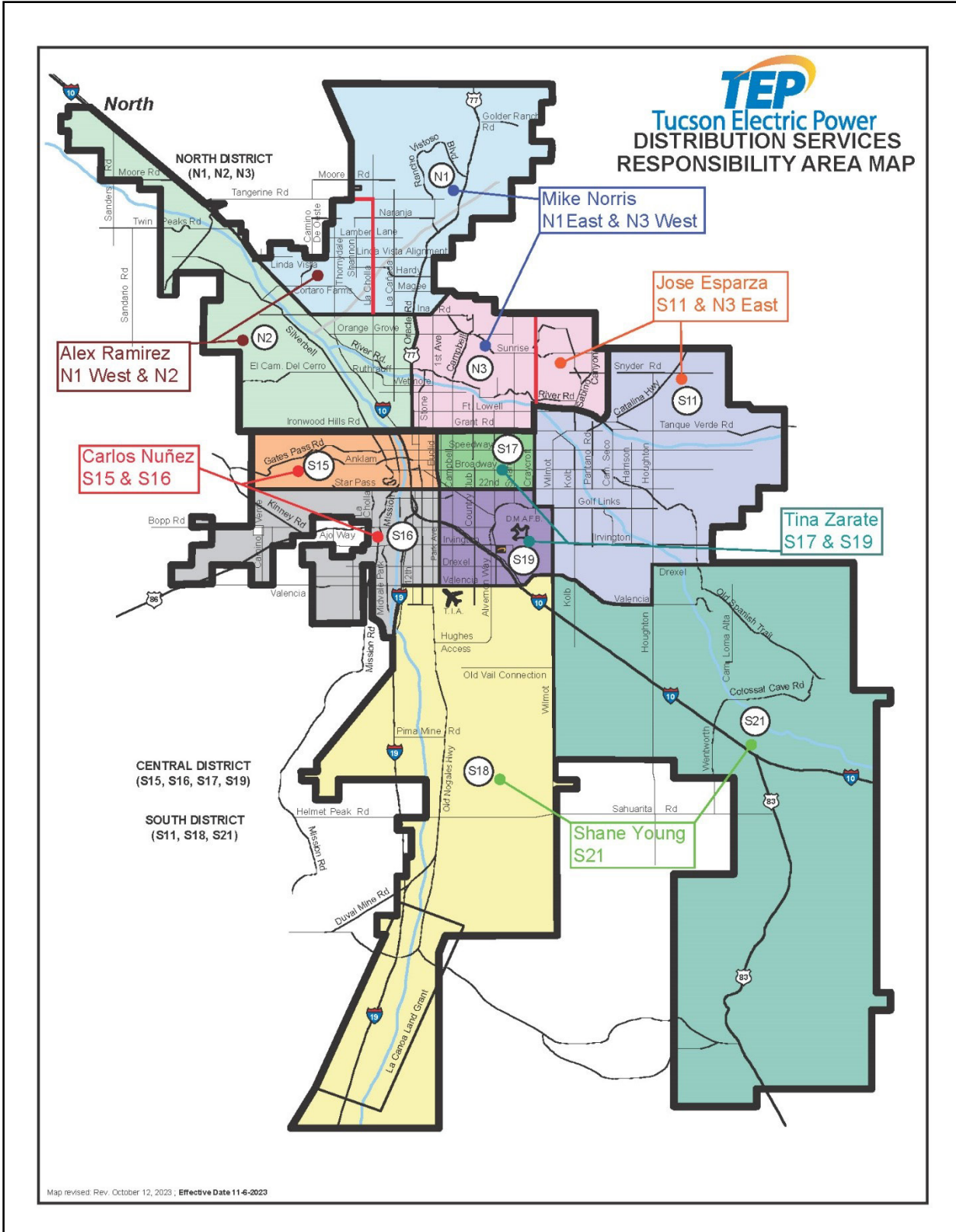
SRP electric service area



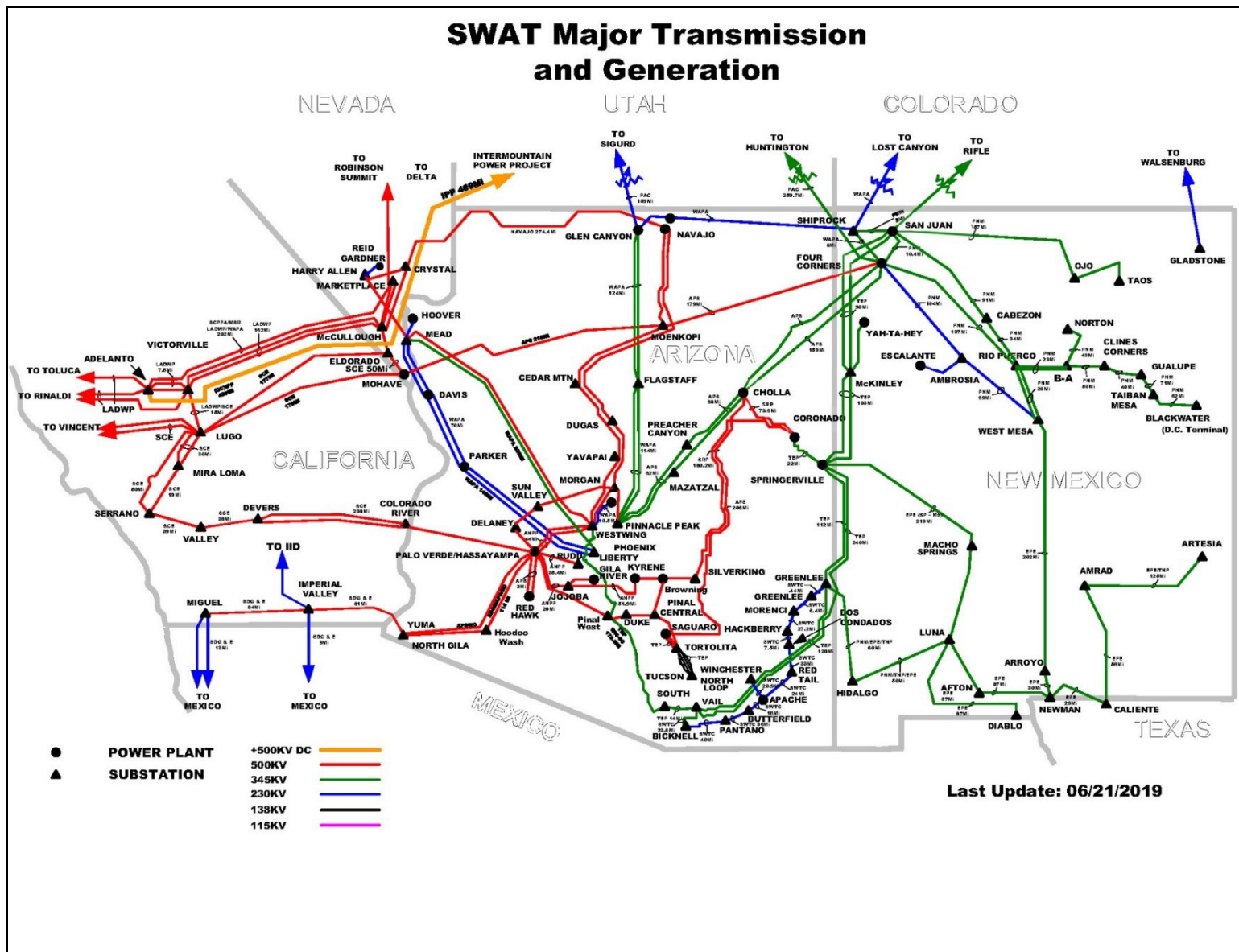
APS Boundaries within the Salt River Project Valley Service Area



SRP local service area map.



TEP local service area map.



SWAT major transmission and generation infrastructure map.

APPENDIX 5

The Arizona Corporation Commission (“ACC”) site allows you to search various dockets [here](#).

ACC

eDocket | Search | Calendar | eFiling | Reports | FAQs

Company Name/Number, Respondent, Docket, Year-Matter, Barcode, Decision

Home > Search > Docket Search

Docket Search

Company, DBA, or Respondent Name:

Docket Number (X-XXXXXX-NN-NNNN) or Year-Matter (NN-NNNN)

Date Starting From:
 Date Ending:

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After the initial search, you can then access and review various documents, decisions, the case schedule, linked dockets, etc. For instance:

ACC

eDocket | Search | Calendar | eFiling | Reports | FAQs

Company Name/Number, Respondent, Docket, Year-Matter, Barcode, Decision

Home > Search > Docket Search > Docket Details

Docket Details

L-0000055-11-0059-00159

Docket Documents Decisions and Votes Case Schedule Staff Assigned Service List Linked Dockets

Document List Report

Filing Date	Description	Filed By	Filed For	Document Details	PDF
11/29/2012	Compliance to a Decision Decision # 72267	Jeffrey W. Johnson	Arizona Public Service Company		
12/01/2011	Compliance to a Decision Decision 72267	Jeffrey W. Johnson	Arizona Public Service Company		
08/12/2011	Compliance to a Decision Decision 72267	Jeffrey W. Johnson	Arizona Public Service Company		
07/19/2011	Consumer Comments - In Support	Matt Gomes	Perrin Ranch Wind, LLC		
07/18/2011	Compliance to a Decision Decision 72268	Matthew L. Rojas	Perrin Ranch Wind, LLC		
05/31/2011	Correspondence - Miscellaneous	James R. Lara			
04/25/2011	Transcript OM-296 Open Meeting 4/12/11 Agenda Items Nos. 6 and 7	Arizona Reporting Service, Inc. - Court Reporters			
04/15/2011	Notice of Filing - Miscellaneous inactive Emails through 4/15/11	John Foreman, Chairman, Siting Committee - A.G.'s Office			
04/15/2011	Notice of Filing - Miscellaneous inactive Emails through 4/15/11	John Foreman, Chairman, Siting Committee - A.G.'s Office			

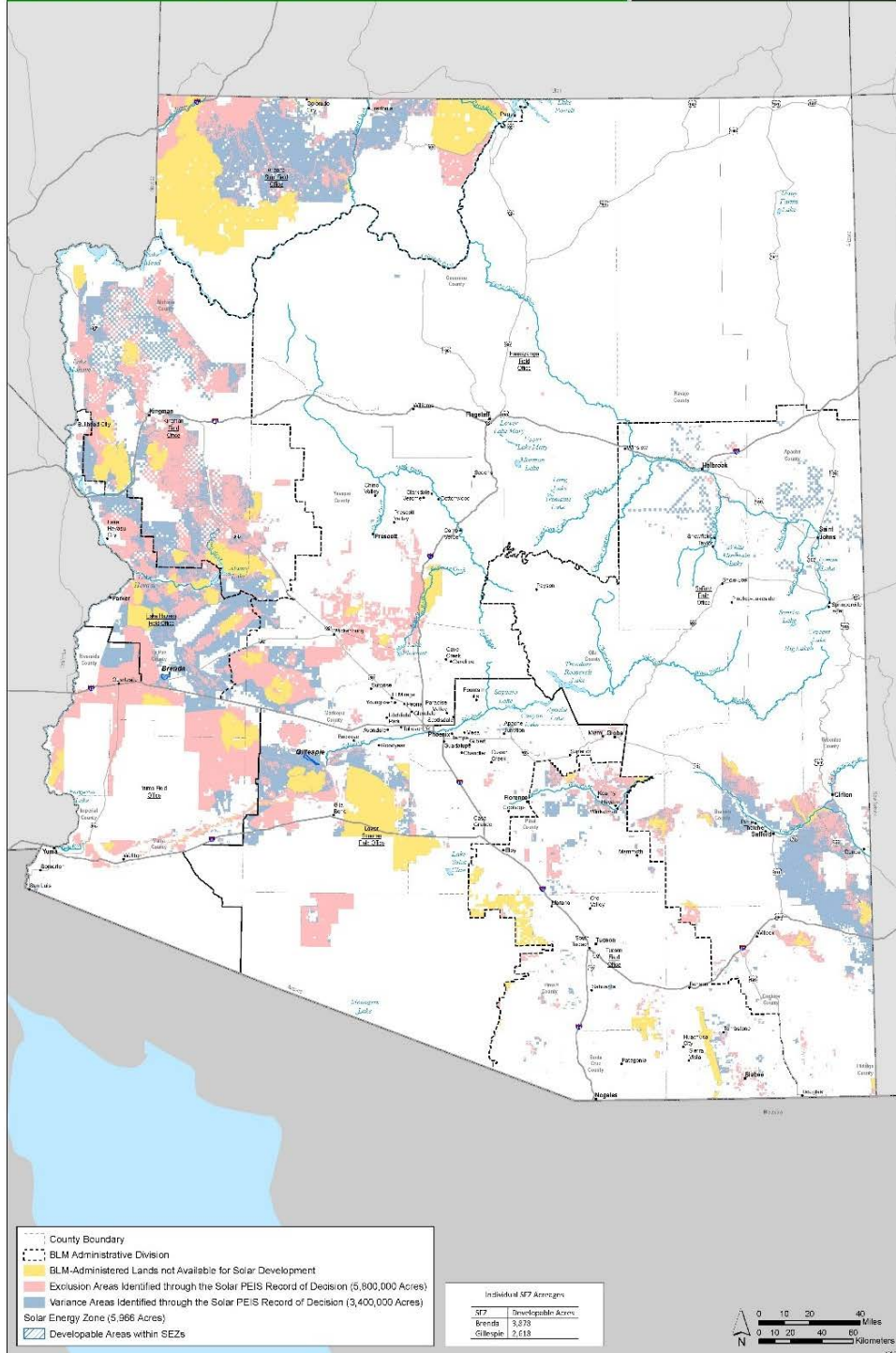
APPENDIX 6

Land Use Allocations in Arizona as a Result of the Solar PEIS Record of Decision

Date from Solar PEIS, July 2012



Property of the U.S. Department of Energy and its former Used Investigation of their
 First Programmatic Environmental Impact Statement for Solar Energy Development in Six Southwestern States.



Solar Programmatic Environmental Impact Statement (“PEIS”) land designations.

APPENDIX 7

Potentially Required Permits and Approvals

This chart summarizes major federal and state environmental requirements that may apply to Arizona renewable energy and transmission line projects. It does not include permits and approvals related to aviation; telecommunications; county land use, zoning, or building requirements; or permits related to construction, such as stormwater, dust control, or transportation-related permits.

FEDERAL REQUIREMENTS			
Authority/ Requirement	Regulating Entity	Legal Requirements	Notes on Requirements
National Environmental Policy Act (“NEPA”) (42 United States Code [“U.S.C.”] § 4321 <i>et seq.</i>)	Federal agency providing a federal nexus (e.g., federal permit, funding)	Requires federal agencies to complete an environmental review prior to undertaking a “major federal action” that may “significantly” affect the quality of the human environment. <ul style="list-style-type: none"> The nature of the review depends in part on the proposed action. If a “categorical exclusion” applies, then the review is concluded. If a relatively less burdensome “environmental assessment” results in a “finding of no significant impact,” the review is concluded. If not, then a more exhaustive “environmental impact statement” is required. 	<ul style="list-style-type: none"> The Council on Environmental Quality guidelines at 40 Code of Federal Regulations (“C.F.R.”) §§ 1500–08 apply to all federal agencies, which in turn have their own guidance. The agency decision is ultimately embodied in a “record of decision.” Crossing either federal or tribal land typically triggers NEPA review.
Clean Water Act, Section 404 (33 U.S.C. § 1344)	U.S. Army Corps of Engineers (“Corps”)	<ul style="list-style-type: none"> Prohibits unpermitted discharge of dredge or fill material into waters of the United States. 	<ul style="list-style-type: none"> Uncertainty is frequently the biggest problem here. Seeking a jurisdictional delineation from the Corps can be time-consuming. Most developers rely on the analysis of their own expert consultant for defining non-obvious waters. Nationwide permits may be available if no substantial disturbance of covered waters.
Clean Water Act, Section 401 (33 U.S.C. § 1341)	Arizona Department of Environmental Quality (“ADEQ”)	<ul style="list-style-type: none"> State certification of compliance with water quality requirements and standards. 	<ul style="list-style-type: none"> If 404 permit is required, state 401 certification will also be required.

FEDERAL REQUIREMENTS			
Authority/ Requirement	Regulating Entity	Legal Requirements	Notes on Requirements
Section 106, National Historic Preservation Act (54 U.S.C. § 306108)	Arizona State Historic Preservation Office Arizona State Land Department (“ASLD”)	<ul style="list-style-type: none"> • Must “take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.” • An undertaking is any federal or federally assisted project (including any project where a federal permit is required). • The lead federal agency must consult with the State Historic Preservation Officer to determine the effect of the project. 	<ul style="list-style-type: none"> • Federal nexus is required. • ASLD is responsible for managing cultural resources on State Trust land. • Importantly in the West, requirements may apply not only to old buildings and the like, but also “traditional cultural properties” in the form of historically or culturally significant landscapes.
Oil Pollution Act, Section 311 (33 U.S.C. § 1321) (33 U.S.C. § 2701 <i>et seq.</i>) (40 C.F.R. § 112 <i>et seq.</i>)	U.S. Environmental Protection Agency	<ul style="list-style-type: none"> • Spill Prevention Control and Countermeasure Plan required for oil-storing or consuming facilities of a certain size that might reasonably be expected to discharge oil into or upon navigable waters of the United States. or adjoining shorelines or that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States. 	<ul style="list-style-type: none"> • Can apply to substations, depending on location and oil use/storage.
Migratory Bird Treaty Act (16 U.S.C. § 703 <i>et seq.</i>)	U.S. Fish and Wildlife Service (“USFWS” or “Service”)	<ul style="list-style-type: none"> • Unless permitted by regulations, unlawful “take” (comprehensive term including hunting, killing, capturing, sell, transport, etc.) of “any migratory bird, any part, nest, or egg of any such bird, or any product . . . composed in whole or part, of any such bird or any part, nest, or egg thereof.” 	<ul style="list-style-type: none"> • Required if migratory birds, their eggs, or active nests could be harmed by facility construction or implementation.

FEDERAL REQUIREMENTS

Authority/ Requirement	Regulating Entity	Legal Requirements	Notes on Requirements
Bald and Golden Eagle Protection Act (16 U.S.C. § 668 <i>et seq.</i>)	USFWS	<ul style="list-style-type: none"> • Unlawful to “at any time or in any manner” “[t]ake, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import” any bald or golden eagle, alive or dead, “or any part, nest, or egg thereof,” unless it is in compliance with a valid permit. • “Take” is also defined by statute to include “disturb,” which is defined by agency rule. 	<ul style="list-style-type: none"> • Required if eagles, their eggs, or nests could be harmed by facility construction or implementation. • Permits are available for taking of an “inactive” golden eagle nest during a resource development or recovery action. • Permits also available where take is necessary to protect an interest in a particular locality (subject to other requirements). • Regulations recommend “coordinat[ing] with the Service as early as possible for advice on whether a permit is needed.” • Provides for civil penalties regardless of intent, but act must be “knowing” or “with wanton disregard” for consequences for criminal penalties to apply; some circuits have held that conduct need not be a “direct” take—e.g., failure to install inexpensive protective equipment on power poles could result in liability. <i>See United States v. Moon Lake Elec. Ass’n</i>, 45 F. Supp. 2d 1070 (D. Colo. 1999).

FEDERAL REQUIREMENTS PRESUMED NOT TO APPLY

Authority/ Requirement	Regulating Entity	Legal Requirements	Notes on Requirements
Clean Water Act, Section 402 (33 U.S.C. § 1342)	ADEQ	<ul style="list-style-type: none"> Discharge of pollutant to waters of the United States requires permit. 	<ul style="list-style-type: none"> Presumed not to apply (other than storm water permit for construction).
Clean Air Act (and related state requirements) (42 U.S.C. § 7401 <i>et seq.</i>) (Arizona Revised Statutes ["A.R.S."] § 49-401 <i>et seq.</i>)	ADEQ or delegated County authorities	<ul style="list-style-type: none"> Air pollutant emission sources may require operating permits, compliance with the State Implementation Plan, etc. 	<ul style="list-style-type: none"> Critical issue for conventional power generation but typically not for renewable facilities and gen-ties, other than minor permits needed for construction. General permits available for certain categories of sources (rock crusher, concrete batch plant, generators). Generators may be exempt from permit requirements, depending on size.

ARIZONA STATE REQUIREMENTS

Authority/ Requirement	Regulating Entity	Legal Requirements	Notes on Requirements
Clean Water Act, Section 402 (33 U.S.C. § 1342)	ADEQ	<ul style="list-style-type: none"> • Discharge of pollutant to waters of the United States requires permit. 	<ul style="list-style-type: none"> • Presumed not to apply (other than stormwater permit for construction).
Ten-Year Plan (A.R.S. § 40-360.02)	Arizona Corporation Commission (“ACC” or “Commission”)	<ul style="list-style-type: none"> • Every person contemplating construction of any transmission line (defined as five or more new aboveground structures, together spanning more than 1 mile in length, supporting at least 115-kilovolt [“kV”] voltages) within the state during any 10-year period shall file a 10-year plan with the Commission on or before January 31 of each year. A.R.S. § 40-360.02(A). • At the Commission’s discretion, absent a showing of good cause, failure to comply may result in a refusal to consider an application. A.R.S. § 40-360.02(F). 	<ul style="list-style-type: none"> • Plan must include, as available, and along with other information, “a power flow and stability analysis report showing the effect on the current Arizona electric transmission system.” • “Transmission owners shall provide the technical reports, analysis or basis for projects that are included for serving customer load growth in their service territories.” A.R.S. § 40-360.02(C). • See A.R.S. § 40-360.02(C) for other contents of plan that are required as available.

ARIZONA STATE REQUIREMENTS

Authority/ Requirement	Regulating Entity	Legal Requirements	Notes on Requirements
Certificate of Environmental Compatibility (“CEC”) (A.R.S. § 40-360 <i>et seq.</i>) (Arizona Administrative Code [“A.A.C.”] § R14-3-201 <i>et seq.</i>)	ACC Power Plant & Transmission Line Siting Committee	<ul style="list-style-type: none"> • Every person planning to construct a “Plant” or “Transmission Line” must first obtain a certificate of environmental compatibility. A.R.S. § 40-360.03. • “Plant” is a thermal electric, nuclear, or hydroelectric generating facility of 100 megawatts [“MW”] or more. “Transmission line” is defined as “five or more new structures” that “span more than one mile in length,” above ground, designed to transmit 115 kV or more. <i>Id.</i> at § 40-360. • A transmission line “does not include structures located on the substation, switchyard or generating site to which the line connects.” <i>Id.</i> • CEC applications are first considered by the Line Siting Committee and thereafter by the Commission itself. 	<ul style="list-style-type: none"> • Factors to be considered by committee are in A.R.S. § 40-360.06 and include anticipated environmental, economic, and social impacts. • Photovoltaic solar facilities are not “thermal electric” and accordingly require no CEC. Concentrating solar facilities do. • Gen-ties of 115 kV or above that otherwise meet the requirements for transmission lines will trigger the CEC requirement for photovoltaic (“PV”) solar facilities, though.
ASLD Rights-of-Way and Permits (A.R.S. §§ 41-861 to 41-864)	ASLD	<ul style="list-style-type: none"> • Required for long-term use of Arizona State Trust land. 	<ul style="list-style-type: none"> • Conditions for acquiring a right-of-way include archaeological, native plant, and Clean Water Act clearances. • Will trigger cultural resource protection statutes applicable to state agencies, including evaluation of effects on cultural properties.

ARIZONA STATE REQUIREMENTS

Authority/ Requirement	Regulating Entity	Legal Requirements	Notes on Requirements
State wildlife laws (A.R.S. §§ 17-236, - 304, -309) (A.A.C. § R12-4- 110)	Arizona Game and Fish Department	<ul style="list-style-type: none"> • Unlawful to “take, possess, transport, release, buy, sell or offer or expose for sale” wildlife except as expressly permitted. • Unlawful to “take or injure any bird or harass any bird upon its nest, or remove the nests or eggs of any bird . . . except as authorized by commission order.” • No state or federal lands can be closed to hunting or fishing without the consent of the Arizona Game and Fish Commission, and no person may lock a gate blocking access to state lands. 	<ul style="list-style-type: none"> • Some unlawful “takings” of protected wildlife have been interpreted as strict liability offenses. <i>See State v. Slayton</i>, 154 P.3d 1057 (Ariz. Ct. App. 2007). • Some provisions of Title 17 “expressly or impliedly reference culpable mental states,” however, and those provisions are not strict liability offenses. <i>See State v. Hamberlin</i>, 515 P.3d 159 (Ariz. Ct. App. 2022).

ARIZONA STATE REQUIREMENTS

Authority/ Requirement	Regulating Entity	Legal Requirements	Notes on Requirements
Arizona Cultural Resource Statutes (A.R.S. § 11-593) (A.R.S. § 41-841 <i>et seq.</i>) (A.R.S. § 41-865)	Arizona State Museum (“ASM”) ASLD	<ul style="list-style-type: none"> • Human remains on private land: must notify the ASM and nearest peace officer if “human remains” or “funerary objects” are found; intentional disturbance is prohibited. • Resources on state land: must notify the ASM of archaeological, paleontological, or historical sites or objects more than 50 years old discovered on state land (includes human remains and funerary objects); disturbance may be allowed with permission, sometimes requiring notice to tribes and others. • Other prohibited activities: <ul style="list-style-type: none"> ○ Knowing excavation upon any historic or prehistoric ruin, burial ground, archaeological or vertebrate paleontological site, or site, including fossilized footprints, inscriptions made by human agency or any other archaeological, paleontological, or historical feature without a permit; ○ Knowing collection of certain archaeological or vertebrate specimens without a permit; and ○ Alteration of historic sites or objects. 	<ul style="list-style-type: none"> • Guidelines provide that in case of uncertainty as to whether skeletal remains are human, consult with the ASM required. • ASLD has processes for cultural resources management and archaeological review for state lands, including Class III inspection of project area and areas related to project (if existing study does not make inspection unnecessary). • Permit required for survey on state lands; reporting standards govern cultural resource surveys on state lands.

ARIZONA STATE REQUIREMENTS

Authority/ Requirement	Regulating Entity	Legal Requirements	Notes on Requirements
Native Plant Law, Notice of Intent to Clear Land (A.R.S. § 3-904)	Arizona Department of Agriculture ("AZDA") ASLD	<ul style="list-style-type: none"> • Plants on private land may be cleared as long as the plants are not offered for sale or transported from the land. Plants may be sold or given away with a permit or notice to the AZDA. • Before clearing land, an owner must give prior notice to the AZDA.¹ Timing and type of notice required depends on size of project: <ul style="list-style-type: none"> ○ Less than 1 acre: 20 days' oral or written notice. ○ Greater than 1 but less than 40 acres: 30 days' written notice. ○ 40 acres or more: 60 days' written notice. • Use of State Trust land resulting in land clearing, shaping, or grading or any surface disturbance activity requires a native plant survey prior to construction.² 	

¹ See AZDA – Notice of Intent to Clear Land, Jan. 2023, https://agriculture.az.gov/sites/default/files/2023.02%20-%20NP%20-%20Intent_to_Clear_%20Land.pdf.

² See A.A.C. R3-3-1101 (incorporating into the definition of "protected native plant" the plants listed in Appendix A of Title 3, Ch. 3, of the A.A.C., available at <https://agriculture.az.gov/sites/default/files/Native%20Plant%20Rules%20-%20AZ%20Dept%20of%20Ag.pdf>); AZDA – Native Plant Inventory Form, Jan. 2023, https://agriculture.az.gov/sites/default/files/2023.01%20-%20NP%20-%20Inventory_Form.pdf; AZDA – Native Plants, <https://agriculture.az.gov/plantsproduce/native-plants#:~:text=Upon%20request%20of%20the%20applicant,the%20corners%20of%20the%20property> (last visited Feb. 14, 2024).