

# Fact Sheet

## Legal Issues

Planning for future water needs requires an understanding of not only the physical availability of water supplies, but the legal availability as well. Regional water planning is subject to “laws relating to impact on existing rights” (NMSA 72-14-44C(7)) and planners have no authority over allocation or ownership of water rights. However, legal issues can place limits on the water supply in certain circumstances and must therefore be fully understood and incorporated into actions or recommendations included in the Southwest New Mexico Regional Water Plan.

### Water Rights in New Mexico

The right to use water in New Mexico is based on the following principles of State water law:

- The State of New Mexico has sole authority to grant or recognize rights to use waters of New Mexico.
- The granting of rights to use New Mexico groundwaters and surface waters is based on beneficial use. Examples of beneficial use include agricultural, municipal, domestic, and industrial uses, among others.
- The first person to put water to beneficial use has a prior right, and must continue to use the right in order to maintain it.

The agency responsible for managing water rights in New Mexico is the Office of the State Engineer (OSE). To withdraw groundwater or divert surface water, a user must have a water right or obtain a water permit from the OSE. Water permits list (1) how much water a user can withdraw within any given year, (2) the location and type of well or surface water diversion that will be used to withdraw the water, and (3) the beneficial use of the water.

The Southwest region has 10 OSE-declared groundwater basins (Figure 1). Once an underground basin is declared, the OSE requires a permit for new groundwater withdrawals and may also impose additional administrative criteria that further limit usage, especially in declining or mined aquifers.

Water rights may be transferred, sold, or leased, but such transactions are subject to protest, cannot impair existing water rights, and must not be contrary

to public welfare or conservation. If water rights are not used during four consecutive years, they may be lost (after notice from the OSE).

### Major Legal Issues in Southwest New Mexico Region

A number of unique issues facing the Southwest region are described below.

The *Globe Equity Decree* of 1935 was the result of a settlement among water users in the Upper Gila River of Arizona and the Virden Valley in New Mexico. Article VIII(2) of the Decree allows Upper Valley Users (UVUs) to take apportioned water from the river, up to a maximum seasonal actual consumptive use limit of 120,000 acre-feet, for use on the 40,000 acres irrigated by the UVUs. In essence, this provision directs a court-appointed Water Commissioner to apportion for diversion to the UVUs the amount of water being stored in San Carlos reservoir, which acts as a buffer against curtailment of the UVUs’ junior right. The decree also limits each UVU to a diversion of 6 are-feet per year per acre.

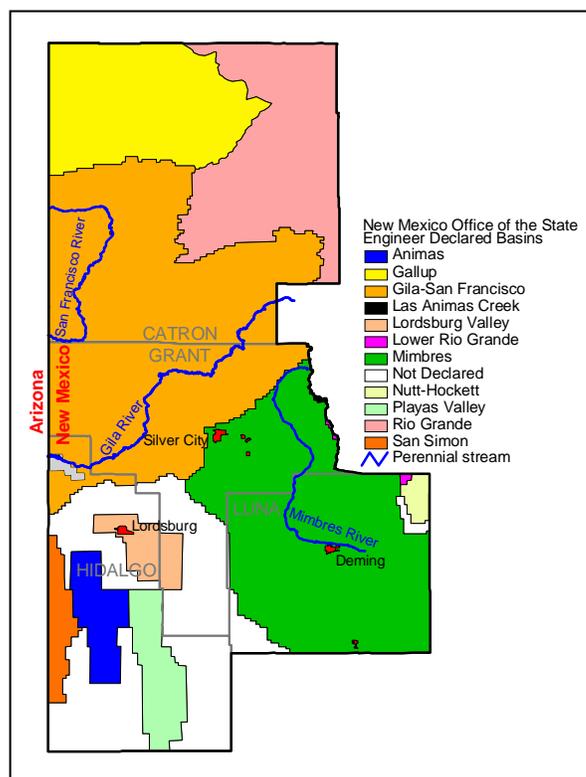


Figure 1. Major Rivers and Groundwater Basins

Over the last 15 years, litigation concerning the Decree has become intense, as the San Carlos Apache and Gila River Indian Community tribes in Arizona have sought to increase river flows to their lands. Last year the federal court stayed further proceedings due to the proposed Arizona Water Rights Settlements Act (described below), which would address the disputed matters.

Title II of the proposed *Arizona Water Rights Settlements Act* approves the Gila Settlement Agreement, which settles the complaint filed by the San Carlos Apache Tribe, the Gila River Indian Community, and the San Carlos Irrigation and Drainage District in *U.S. v. Gila River Irrigation Dist, et al.*, which seeks judicial relief from the groundwater pumping by UVUs in the upper portion of the Gila River in Arizona and the Virden Valley in New Mexico that was authorized under the 1935 Globe Equity Decree. The basic agreement is that if the Upper Valley Defendants (UVDs) reduce current irrigation by 3,000 acres, the UVDs may pump up to 6 acre-feet of groundwater per irrigated acre, regardless of priority of the settling Plaintiffs. As a result, the Agreement reduces or extinguishes UVD rights in two ways: (1) by generally prohibiting irrigation of lands that have not been irrigated since 1997 and (2) by further reducing UVD-irrigated lands by 3,000 acres or about 8% of the total, including about 240 acres in the Virden Valley. Although the Agreement does not include settlement with the San Carlos Apache Tribe, it does limit the amount of irrigation reductions that can be required in such a settlement to 3,000 irrigated acres.

In a 1964 decree commonly referred to as the *Gila River Apportionment*, the U.S. Supreme Court, in *Arizona v. California*, 376 U.S. 340 (1964), adopted a stipulation by the states of Arizona and New Mexico decreeing an equitable apportionment of Gila River waters between the two states.

In 1968, the *Central Arizona Project* (CAP) was authorized by the Colorado River Basin Project Act (43 U.S.C. 1524). Section 304 of the Act directs the Secretary of the Interior to contract with water users in New Mexico for water from the Gila River, its tributaries, and underground water sources. In any period of 10 consecutive years, the amounts that can be contracted must permit consumptive use of water in New Mexico of up to 180,000 acre-feet over and above the consumptive uses provided for by Article IV of the Gila River Apportionment Decree (*Arizona v. California*, 376 U.S. 340 (1964)). The Act authorizes the construction of "Hooker Dam or suitable alternative" as a unit of the CAP to allow New Mexico to consume the average annual amount of 18,000 acre-feet.

In exchange for New Mexico's diversion, Section 304 also directs the Secretary to deliver CAP water to water users in Arizona in sufficient quantities to fully replace any diminution of Gila River System water by water users in New Mexico.

To date, New Mexico has not made much progress in developing its part of the CAP. A 1987 Bureau of Reclamation study concluded that insufficient demand existed at that time to justify building the project. The pending Arizona Water Rights Settlements Act (described above) may force New Mexico to either move forward with the project or see its prospects dim. The pending legislation settles the major CAP issues and only makes passing reference to the New Mexico project. At the same time, the most likely exchange party, the Gila River Indian Community, may have no incentive to agree to an exchange once its settlement is finalized.

To make the proposed Arizona Water Settlements Act consistent with and advance the purposes of Section 304 of the 1968 Act, the State of New Mexico is preparing substantial amendments to the bill.

