- RUN DRY: THE HISTORY AND FUTURE OF ARIZONA WATER LAW

Water....

- Property?
- More?

Bring a gun to a water discussion.

Property Conceptions

- Riparian
- Prior Appropriation

Prior Appropriation

Arizona has adopted the doctrine of prior appropriation to govern the use of surface water. This doctrine is based on the tenet of “first in time, first in right” which means that the person who first puts the water to a beneficial use acquires a right that is better than later appropriators of the water.

Beneficial use is the “basis, measure and limit to the use of water” A.R.S. § 45-141(B)

Surface Water Decrees

Decreed surface water rights are those that have been determined through judicial action in a

state or federal court. Major court determinations in Arizona include the Kent, Benson-Allison,

Norviel, Concho and Globe Equity decrees.

The Kent Decree (

Hurley v. Abbott

1910) established rights to the Salt and Verde rivers for diversion

by downstream landowners based on diversions occurring at that time from Granite Reef and Joint

Head diversion dams. These lands are generally the Salt River Project service area, along with

Rights to the

lower Agua Fria River, the Salt River and the Gila River below the confluence were determined

in the Benson-Allison Decree in 1917 for the Buckeye Irrigation District and a portion of the

Gila River Indian Reservation

The Norviel Decree, which is comprised of four judicial actions

(between 1914 and 1923) determined rights of landowners to divert surface water in and around

St. Johns to the headwaters of the Little Colorado River.

The Concho Decree (1927) determined

the relative rights to use surface water from Concho Springs and Concho creek in Apache County.

In 1935 the U.S. District Court entered a consent decree (Globe Equity No. 59) for all diversions

of the mainstem of the Gila River from confluence with the Salt River to the headwaters in New

Mexico, including the Gila River and San Carlos Apache reservations, and non-Indian landowners

below and above Coolidge Dam.

The United States Supreme Court's decision in Winters v. United States, 207 U.S. 564 (1908)

established that when the federal government creates an Indian reservation, it impliedly reserves for

the reservation a right to an amount of water sufficient to effectuate the purposes of the reservation

(this doctrine is know as the "Winters Doctrine").

Reserved Rights

This concept of “federal reserved rights” has been claimed for other federal lands. Federal Reserved right claims have been filed in the Gila and Little Colorado River adjudications for national parks and monuments, national forests and for military bases.

The Code contains regulatory provisions applicable statewide, such as well drilling requirements

and restrictions on groundwater transportation. It also contains provisions applicable only in

certain designated areas of the state. The most intensive regulation of groundwater is in the

five areas of the state designated as active management areas (AMAs), where the

Active Management Areas

The magnitude of overdraft in certain areas of the state led to the designation of four initial AMAs:

the Prescott, Phoenix, Pinal and Tucson AMAs. In 1994, a southern portion of the Tucson AMA

was separately designated as the Santa Cruz AMA.

Outside of the AMAs, groundwater may generally be withdrawn and used for any reasonable and

beneficial use, subject to the statewide provisions described above. In areas designated as INAs,

however, additional restrictions and requirements apply

In 1973, the Arizona Legislature enacted a statewide water adequacy statute as a consumer

protection measure. A.R.S. § 45-108. The law was passed in response to incidences of land fraud

involving the sale of subdivision lots that were later found to have insufficient water supplies. This

law required developers to obtain a determination from the State Land

in 1980, the provisions of A.R.S. § 45-108 were amended and now apply only to subdivisions

located outside AMAs.

Adequate Water

Legislation adopted in June 2007 (SB 1575) authorizes a county board of supervisors to adopt a

provision by unanimous vote that requires a new subdivision to have an adequate water supply

in order for the subdivision to be approved by the platting authority.

Adequate Water

If the

county does not adopt the provision, the legislation allows a city or town to adopt a local adequacy

ordinance that requires a demonstration of adequacy before the final plat can be approved.

Adequate Water

As of

August, 2010 Cochise County, Yuma County, the Town of Patagonia and the Town of Clarkdale

had adopted the provisions of SB 1575.

INA's

Irrigation Non-Expansion Areas

There are three INAs: Douglas, Joseph City and Harquahala. In an INA, irrigation is restricted to

lands that were irrigated during the five-year period preceding designation of the INA. A.R.S. §

45-434. This restriction is intended to protect the remaining groundwater supply.

Colorado River Water

The development of Colorado River water law is described in the “Law of the River”, which

includes a number of Congressional acts, Supreme Court decisions and multi state compacts, as

well as an international treaty

.

The “Law of the River” includes: the 1922 Colorado River Compact, which apportioned 7.5

million acre-feet (maf) per year to the Upper Basin States and 7.5 maf per year to the Lower

Basin States; the Boulder Canyon Project Act of 1928, which authorized construction of Hoover

Dam and established the individual lower basin state apportionments;

he 1944 Water Treaty with

Mexico, which guaranteed delivery to Mexico of 1.5 maf per year; the Upper Colorado River

Compact of 1948 that divided the water apportioned to the Upper Basin between the five states

with territory in the Upper Basin (including Arizona);

the Colorado River Storage Project Act of 1956, which authorized several dams including Glen Canyon Dam in Arizona

the United States

Supreme Court's decision in

Arizona v. California

(1964) that confirmed Arizona's apportionment

under the Boulder Canyon Project Act and assigned any surplus;

Upper Basin, 7.5 million acre·ft/year (293 m³/s) total		
Colorado	51.75%*	3.86 million acre·ft/year (150.7 m³/s)
Utah	23.00%*	1.71 million acre·ft/year (67.0 m³/s)
Wyoming	14.00%*	1.04 million acre·ft/year (40.8 m³/s)
New Mexico	11.25%*	0.84 million acre·ft/year (32.8 m³/s)
Arizona	0.70%	0.05 million acre·ft/year (2.0 m³/s)
*Percentages with a star are a percentage of the total *after* Arizona's 0.05 million are deducted. Arizona's percentage is of the total.		
Lower Basin, 7.5 million acre·ft/year (293 m³/s) total		
California	58.70%	4.40 million acre·ft/year (172 m³/s)
Arizona	37.30%	2.80 million acre·ft/year (109 m³/s)
Nevada	4.00%	0.30 million acre·ft/year (12 m³/s)

Central Arizona Project

the Colorado River Basin Project

Act (CRBPA) of 1968 which authorized the Central Arizona Project (CAP)


Flagstaff
Bill Williams River
Prescott
Show Low
Payson
Phoenix
Yuma
CAP
Tucson
N
E

CAP Recharge

CAP Water Usage

CAP INDIAN WATER RIGHTS SETTLEMENTS

Fully Resolved Claims:

- Ak-Chin Indian Community
- Salt River Pima Maricopa Indian Community
- Fort McDowell Indian Community
- Yavapai Prescott Apache Tribe
- Pueblo of Zuni
- San Carlos Apache Nation (Salt, Black, and San Pedro River claims only)
- Gila River Indian Community
- Tohono O'odham (San Xavier, Schuck Toak, and Gila Bend Districts only)
- White Mountain Apache

Adjudicated Rights in Arizona v. California:

- Cocopah Indian Tribe
- Colorado River Indian Tribes
- Fort Mohave Indian Tribe
- Fort Yuma/QuechanTribe

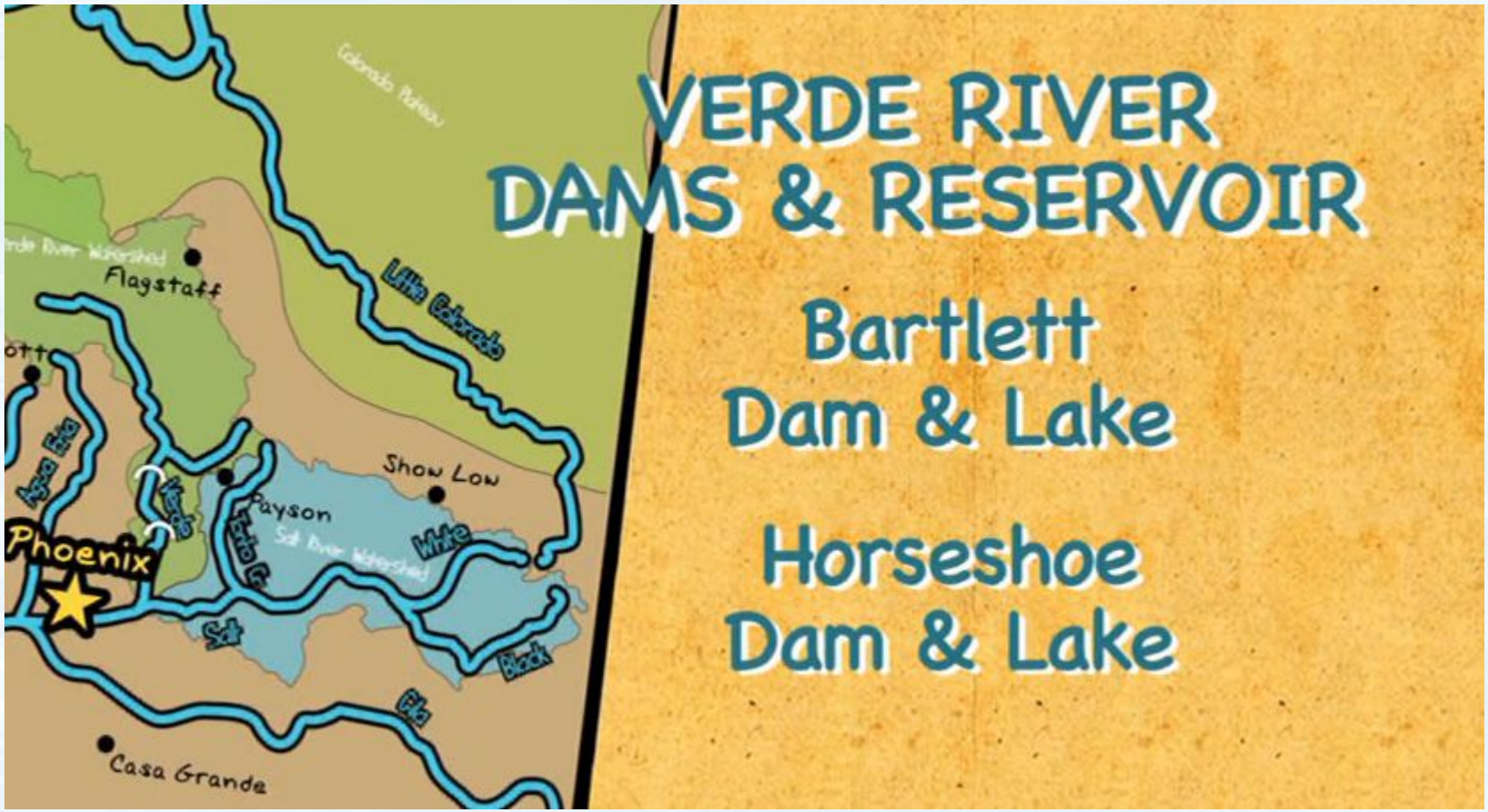
Salt River Project

SALT RIVER DAMS

Mormon Flat

Horse Mesa

Stewart Mountain


VERDE RIVER
DAMS & RESERVOIR
Bartlett
Dam & Lake
Horseshoe
Dam & Lake
Flagstaff
Little Colorado
Show Low
Payson
Phoenix
Salt
Gila
Casa Grande

and the Coordinated

Operations and Shortage Criteria adopted in 2007 (see Appendix D).

Ratification and text of the

1944 Lake Mead Delivery Contract, the Colorado River Compact and the Upper Colorado River

Basin Contract are found at A.R.S. §§ 45-1301 to 1331

Central Arizona Water Conservation District

Under provisions of the CRBPA, Arizona authorized the Central Arizona Water Conservation

District (CAWCD) in 1971 to provide a means for Arizona to repay the federal government for the

reimbursable costs of construction and to manage and operate the CAP. The CAP transports about

half of Arizona's Colorado River water entitlement of 2.8 million acre-feet per year

The CAP brings Colorado River water through a 336–mile system of aqueducts, pumping plants

and siphons designed to carry 1.5 million acre-feet of water each year from Lake Havasu through

Phoenix to south of Tucson. One reservoir, Lake Pleasant, located in the Phoenix AMA, provides

storage. CAP delivers untreated water to cities and water utilities, industrial users,

Arizona Department of Water Resources

The director of the Department is authorized to “consult, advise and cooperate with the secretary of

the interior of the United States” on behalf of the state of Arizona in several areas

Arizona Water Banking Authority

The Arizona Water Banking Authority (AWBA) was created in 1996 to protect Arizona's Colorado River interests and to provide for interstate banking opportunities. A.R.S. § 45-2401 et.seq

Effluent

Effluent is defined in A.R.S. § 45-101(4) as "water that has been collected in a sanitary sewer for

subsequent treatment in a facility that is regulated pursuant to title 49, chapter 2. Such water remains

effluent until it acquires the characteristics of groundwater or surface water."

The determination

that effluent is a separate kind of water was a result of an Arizona Supreme Court Decision in

1989,

Arizona Pub. Serv. Co. v. Long,

160 Ariz. 429, 773 P.2d 988 (1989), in

which the court held

that, until it is returned to the ground as surface water or groundwater, effluent is

ater, if

- 100% effluent is used to serve a use within an AMA, the use is not subject to regulations applicable
- to groundwater, such as conservation requirements and groundwater transportation laws

Underground Water Storage

Underground water storage or

recharge is a means of storing excess renewable water supplies

(surface water, including CAP and Colorado River water, and effluent) for future use.

n 1994, the Legislature enacted the Underground Water Storage, Savings, and

Replenishment Act, which further defined the recharge program

Water exchanges

The 1992 Water Exchange Act authorizes and regulates water exchanges with certain exceptions.

A.R.S. § 45-1001 et seq. “Water exchange” is defined as “a trade between one or more persons, or

between one or more persons and one or more Indian communities, of any water for any other water,

if each party has a right or claim to use the water it gives in trade. This definition

“giver rule”, which

generally provides that a person who receives water pursuant to an exchange: (1) may use the

water without holding a right to that water; and (2) may use the water only in the same manner in

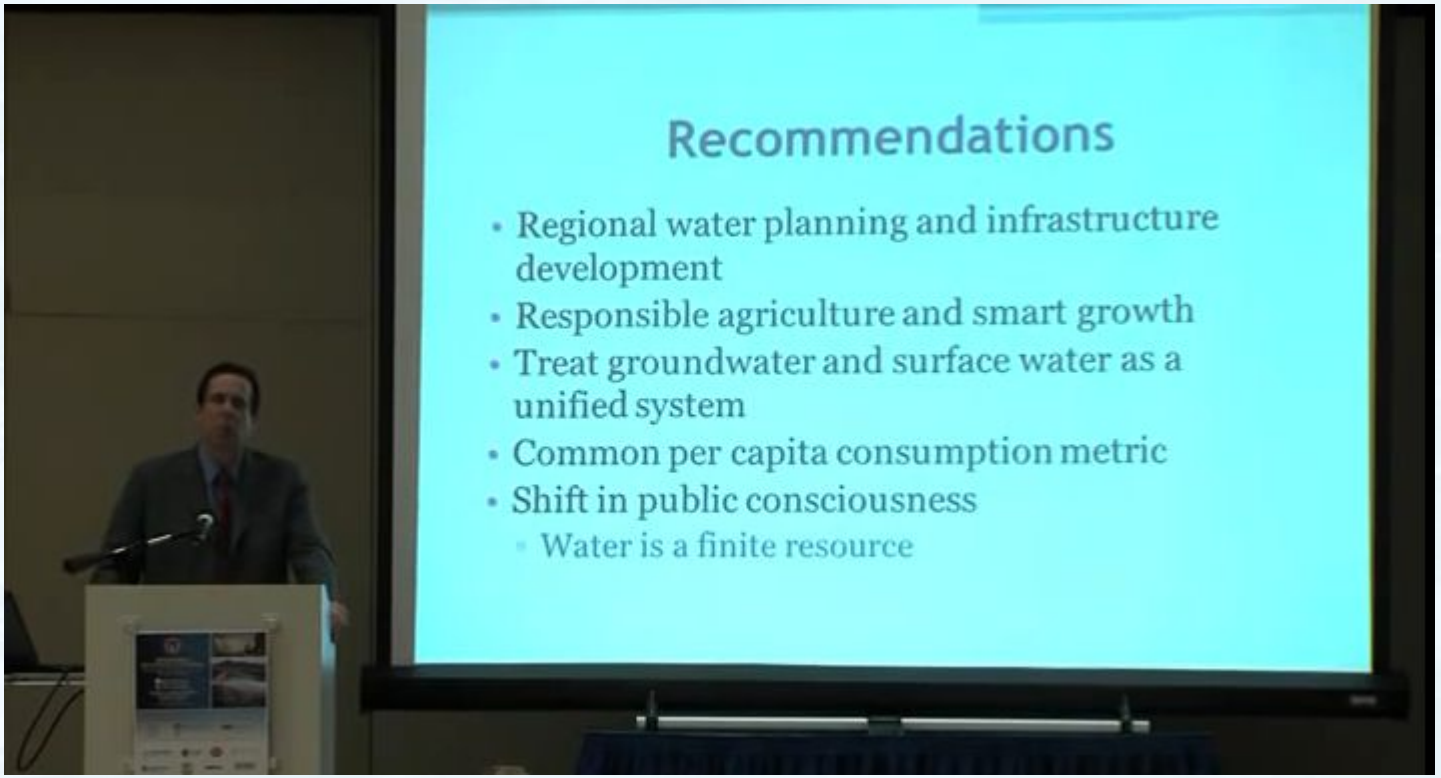
which the person had the right to use the water that the person gave in the trade. Currently, water

exchanges are most common within the

Central Arizona Project

Prior Appropriation vs. Future Generations

Colorado River Compact


Recommendations
Regional water planning and infrastructure development
Responsible agriculture and smart growth
Treat groundwater and surface water as a unified system
Common per capita consumption metric
Shift in public consciousness
Water is a finite resource

Commodity or Element?

Water as more than


ARIZONA
SNOWBOWL


STOP BLACK MESA PROJECT!
COAL IS HER LIVER
KEEP IT IN THE GROUND. KEEP HER

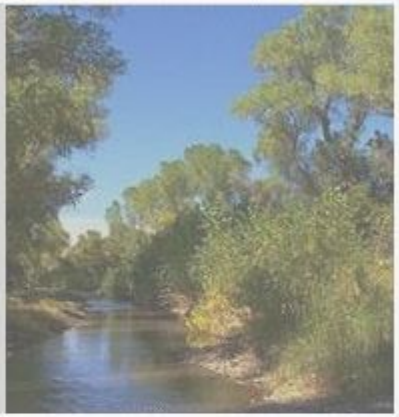

UTAH
ARIZONA
Grand Canyon National Park
BLACK MESA
Window Rock
Gallup
Flagstaff
NAVAJO POWER PLANT
NEW MEXICO

A quarter of Arizona's water comes from the Colorado River, and that river is running low. There's not enough water in the basin to keep Arizona's crucial Lake Mead reservoirs topped up. If changes aren't made to the entire multi-state hydrological system, says the Times, things could get bad.

If upstream states continue to be unable to make up the shortage, Lake Mead, whose surface is now about 1,085 feet above sea level, will drop to 1,000 feet by 2020. Under present conditions, that would cut off most of Las Vegas's water supply and much of Arizona's. Phoenix gets about half its water from Lake Mead, and Tucson nearly all of its.

Gerrodette v. Fabritz-Whitney et al.

On May 17, 2013, the Center filed a Complaint in Maricopa County Superior Court on behalf of Patricia Gerrodette seeking judicial review of the Arizona Department of Water Resources' (ADWR) decision to grant an adequate water supply designation to Pueblo del Sol, a private water company that is proposing to deliver groundwater to a massive master planned community planned for Sierra Vista. Ms. Gerrodette objected to PDS's application when it was first submitted to ADWR, and appealed the decision in an administrative proceeding. The Center became involved at the judicial review phase because her attorney at the administrative level, ASU Professor Joe Feller, was tragically killed in April, 2013.



The case raises a critical issue that involves an intersection of federal and state law. Under state law, when deciding whether to grant an application for an AWS designation, ADWR must determine whether the proposed water supply will be physically, legally and continuously available for at least 100 years. In evaluating PDS's application, however, ADWR refused to consider the effect that federal water rights held by the Bureau of Land Management for the San Pedro Riparian National Conservation Area (SPRNCA) would have on the "legal availability" of the proposed water supply. However, federal law protects federal surface water rights from the adverse effects of groundwater pumping. Thus, if the pumping from the new development were to impair BLM's surface water rights --which it most certainly will do given the current overdraft of the aquifer--then BLM would have the right to enjoin the pumping, thereby making the water legally unavailable.

CASE UPDATES

A Big Win for the San Pedro River

On June 10, 2014, the Maricopa County Superior Court vacated a finding of adequate water supply by the Arizona Department of Water Resources for a proposed deveopment of 7000 homes in Sierra Vista. The judge held that ADWR abused its discretion and acted contrary to law when, in its assessment of the water's legal availability for 100 years, it refused to consider the federal reserved rights held by the Bureau of Land Management for the San Pedro Riparian National Conservation Area. This represents a big win for those trying to protect the San Pedro River!

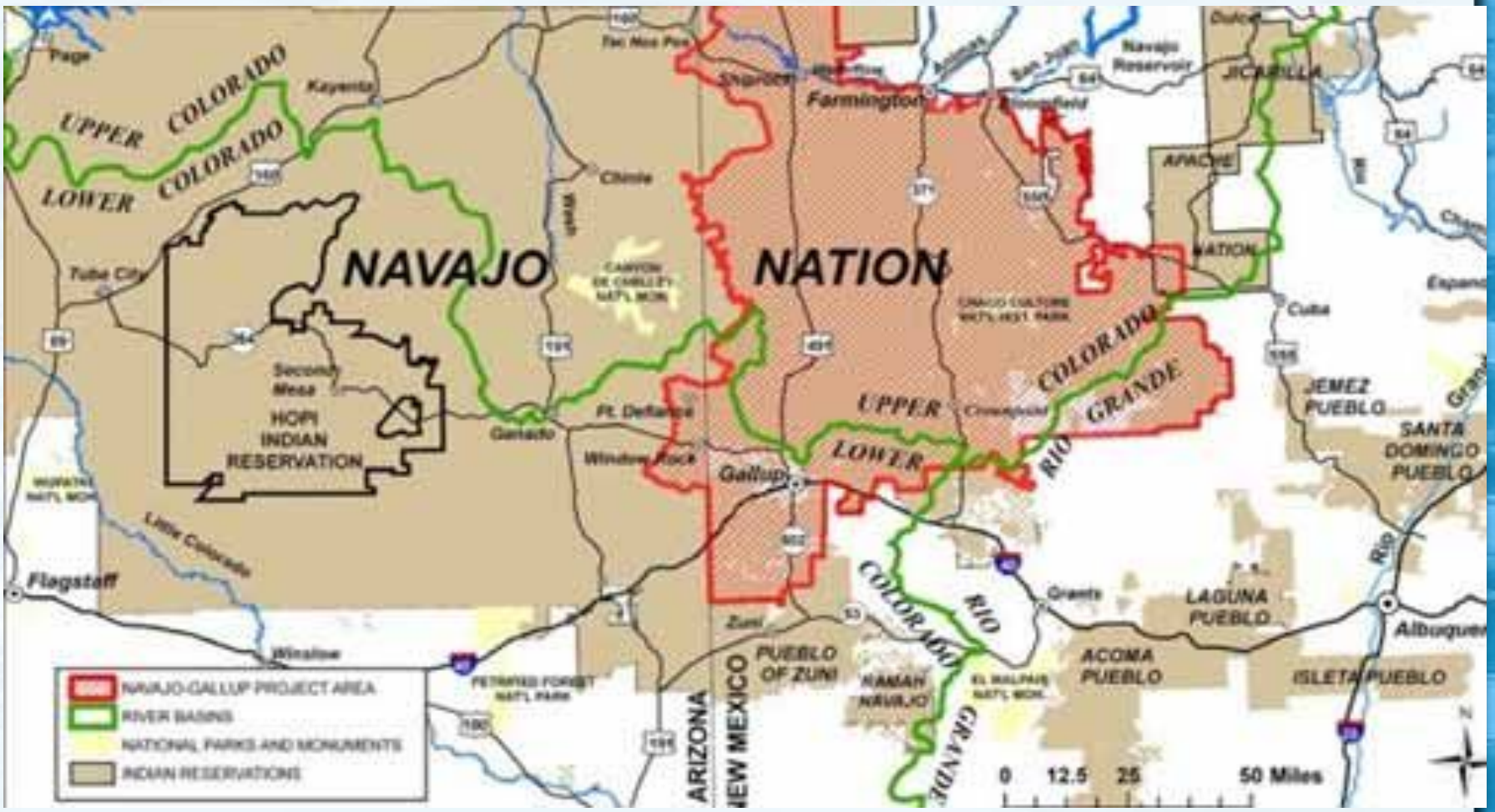
Hualapai Valley Solar LLC

The Center scored a monumental victory in this case by convincing the Arizona Corporation Commission that it did not make sense to pump groundwater from an already-depleted aquifer to run a solar power plant. Because of the Center's hard work, Arizonan's can reap the benefits of solar energy without having to give up precious water.

This case began when Hualapai Valley Solar ("HVS") filed an application with the Arizona Corporation Commission to construct a 340-megawatt solar power plant in Mohave County. HVS stated that the plant required 2,400 acre feet of groundwater every year for cooling purposes. This water would come straight from the Hualapai Valley Aquifer.

As desert dwellers, we know that water is a quickly vanishing, finite resource. This is even more the case with groundwater because it is replenished only by rainfall, another scarcity in the desert. It is understandable, then, that Mohave County resident Denise Bensusan had concerns when she heard about HVS's plans to pump groundwater. When her request to intervene in proceedings regarding HVS's plant application was denied, she contacted the Center for help.

Tribal Water Rights and Existing Property Frameworks


NAVAJO
NATION
HOPI
INDIAN
RESERVATION
UPPER COLORADO
LOWER COLORADO
RIO GRANDE
Farmington
Gallup
Flagstaff
Winslow
Page
Kayenta
Chinle
Tuba City
Second Mesa
Ganado
Ft. Defiance
Window Rock
Zuni
Grants
Cuba
JICARILLA APACHE NATION
JEMEZ PUEBLO
SANTA DOMINGO PUEBLO
LAGUNA PUEBLO
ACOMA PUEBLO
ISLETA PUEBLO
PUEBLO OF ZUNI
Albuquerque
Navajo Reservoir
NAVAJO-GALLUP PROJECT AREA
RIVER BASINS
NATIONAL PARKS AND MONUMENTS
INDIAN RESERVATIONS
ARIZONA
NEW MEXICO
0 12.5 25 50 Miles

Treaty Rights

Aboriginal Rights

- http://truesnow.org/