

# REGULATIONS FOR REPORTING AND AUDITING LANDS "THEN BEING IRRIGATED"

## Section One: General Provisions

### **§1.1 Purpose**

The 1935 Globe Equity No. 59 Decree (herein "the Decree") provides the Gila Water Commissioner (herein "the Commissioner") with the authority and responsibility to administer and enforce the terms of the Decree and to regulate the diversion of Gila River water in accordance with the terms of the Decree, and any rules, regulations, or orders of the United States District Court for the District of Arizona (herein "the Court"). The Court filed a Final Memorandum and Order in this matter on September 18, 1992 and a Phase IV Memorandum and Order, on April 14, 1995, (herein "the Orders") which ordered that regulations be adopted which will require that parties to the Decree (herein "land owners") to file a report, reporting and identifying the lands which they own which they intend to farm for the ensuing calendar year. These lands must have appurtenant water rights under the Decree ("decreed lands"). The purpose of these regulations is to require that landowners report lands which will be irrigated during each ensuing calendar year. Because there are unresolved questions regarding the "urbanization" of numerous small parcels of decreed land in the upper Gila valleys and regarding the extent and location of parcels of land where water use should be classified as other than agricultural, these regulations are primarily intended to identify and quantify the use of Gila River water for farming (i.e. the growing of crops) on parcels of land two acres or more in size. However, these regulations require canal companies, irrigation districts, irrigation projects and Indian Tribes to determine and report to the Commissioner the amount of, points of diversion for and canal company for water used on parcels of decreed land of less than two acres and the amount of, points of diversion for and canal company for water used on parcels of decreed land for purposes other than agriculture. Persons using Gila River water for the irrigation of decreed land parcels of less than two acres or for other than agricultural purposes that are not within or served by an irrigation district or project will report such use directly to the Commissioner as provided herein. These regulations also require the Commissioner to make periodic audits to determine if any reporting violations have occurred. The Commissioner is authorized and empowered by these regulations to informally resolve violations. The Commissioner may also request that a hearing be scheduled before the Court for any violation of these regulations. Civil and/or water reduction penalties may be imposed upon a finding by the Court that a violation has been committed.

### **§1.2 Applicability**

These regulations apply to the diversion of surface water from the Gila River and to the distribution of such water upon the various lands that have appurtenant water rights under the Decree. These regulations apply to and are enforceable against all persons or entities who are using Gila River water on decreed lands.

### **§1.3 Authority**

These regulations have been approved by the Court by its order dated June 3, 1996, pursuant to the Court's continuing jurisdiction under Article XIII of the Decree to enforce the rights of the parties to the Decree, and pursuant to the Commissioner's authority under Article XII of the Decree to enforce the rules, regulations or orders of the Court, and to regulate the use of Gila River water under the Decree.

## Section Two: Reporting Requirements

### **§2.1 Reporting Form**

All persons or entities who will use water from the Gila River to irrigate decreed lands must fully and accurately complete the reporting forms prescribed by the Commissioner.

The reporting of lands "then being irrigated" shall be governed by this regulation. The reporting forms shall be used for the purpose of this regulation, and for the audits required by the Court. The irrigation districts, canal companies, San Carlos Irrigation Project, Indian Tribes or other entities regulating and supervising the use of Gila River water shall be responsible for distributing the regulations and reporting forms to the landowners and users, as appropriate.

The Office of the Gila Water Commissioner will make these regulations and the reporting forms available upon request.

The person or entity which owns the land having decreed water rights is responsible for the complete and accurate reporting of lands to be irrigated and for compliance with these regulations. If any reported parcel is to be irrigated and farmed by a third party and not the landowner, as for example, under a lease, rental, tenant farming, partnership or other contractual arrangement, such arrangement must be described in the reporting form for each parcel to be irrigated. The notarized consent and authorization or power of attorney of the landowner authorizing the person or entity to file the reporting form on behalf of the landowner shall be set forth on or attached to the reporting form. THE LANDOWNER IS RESPONSIBLE FOR COMPLIANCE WITH THE COURT'S ORDERS AND REGULATIONS. CIVIL FINES AND PENALTIES AND ENFORCEMENT COSTS FOR NONCOMPLIANCE OR VIOLATION MAY BE ASSESSED AGAINST THE LANDOWNER AND THE LAND(S) AS WELL AS THE PERSON OR ENTITY FARMING OR IRRIGATING THE LAND(S). WATER REDUCTION PENALTIES MAY ALSO BE ASSESSED AGAINST THE LANDS.

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### **§2.2 Land Then Being Irrigated**

The Decree defines an irrigation season as a calendar year. The reporting form shall state the number of acres which

will actually be irrigated during the irrigation season. Only lands which will be actually farmed during the irrigation season can be included as lands "then being irrigated." Lands which will be fallow for the irrigation season or included in a set-aside program (where no crops are grown on the land) shall not be considered "then being irrigated."

The lands to be irrigated must be defined to the nearest one-acre parcel unless more accurate information is readily available to the person filing the report as, for example, information from a government agency, loan or conservation program, survey or other source that permits reporting to the nearest one-quarter acre or one-tenth acre, in which case the more accurate information shall be reported. Detailed maps, surveys or legal descriptions of the parcels of land to be irrigated are not required unless such documentation is already available, in which case it shall be provided with the reporting form. In any event, the location of the acreage to be irrigated must be reported in sufficient detail that it may be verified in accordance with the auditing procedure of the Commissioner set forth in these regulations.

### **§2.3 Requirements for Completion and Filing of Reporting Forms**

All initial reporting forms must be completed and filed on or before the fifteenth (15th) day of June of the year in which delivery of water to the lands is to commence. An initial reporting form may be submitted after the 15th of June if good cause is shown to the Commissioner. Gila River water may not be delivered to any lands until a reporting form is filed and received by the Commissioner.

If lands are within or served by an irrigation project or irrigation district the reporting form shall be filed with the project or district. The San Carlos Apache Tribe and all persons whose lands are not within or served by an irrigation project or district shall file the reporting form directly with the Commissioner.

Upon receipt of the reporting forms, the district or project shall calculate the amount of acreage "then being irrigated" for the irrigation season and shall transmit this information in writing together with the original of the reporting form(s) to the Commissioner within five (5) business days of the filing date. The district, project, tribe, or other diverter shall update the information as additional reports are filed and forward a copy to the Commissioner within five (5) business days of filing.

Reports for lands that are within or served by both an irrigation district and an irrigation project shall be filed with the irrigation district. Upon receipt of the reporting forms, the district shall calculate the amount of acreage "then being irrigated" for the irrigation season and shall transmit this information in writing together with the original of the reporting forms(s) to the Commissioner within five (5) business days of the filing date and shall submit a copy of this information and the reporting forms(s) to the project. The district shall update the information as additional reports are filed and forward a copy to the commissioner and the project within five (5) business days of filing.

Except as shall be required by the Commissioner for lands within the Gila River Indian Community, separate reporting forms shall be used for each parcel of decreed land located in different quarter-quarter sections and for decreed lands served by different canal companies.

### **§2.4 Supplemental Reporting Forms**

If, after filing the initial reporting form alterations are made in individual farming plans that affect the total amount of acreage or location of land "then being irrigated," a supplemental reporting form must be filed in the same manner as the original reporting form. Upon receipt of the supplemental reporting form, the district or project shall recalculate the total acreage "then being irrigated" for the irrigation season (as defined by the Decree) and shall transmit this information in writing together with the Supplemental Reporting Form to the Commissioner within five (5) days. The information and reporting form must be transmitted to the Commissioner before Gila River water may be used in connection with the altered farming plan. Supplemental reporting forms for lands that are within or served by both an irrigation district and an irrigation project shall be filed with the district, and the district shall recalculate and transmit the information as provided in this paragraph and shall submit a copy of all such information to the project.

No more than two (2) Supplemental Reports will be accepted by the Commissioner during each irrigation season unless good cause for doing so shall be demonstrated to the Commissioner, but no Supplemental Report will be accepted after August 1 of any calendar year unless the Commissioner believes extraordinary circumstances exist which warrant the filing of a reporting form after this date. No filing fee shall be charged by the Commissioner for the initial reporting form or the first supplemental report for each initial form submitted, provided the first supplemental report is filed on or before April 15 of each year. A filing fee of \$25.00 shall be paid by the landowner for each Supplemental Report, but if multiple supplemental forms are filed at the same time by the same landowner/ lessee the filing fee shall be based on the time expended by the Commissioner's office in processing the additional forms billed at \$55.00 per hour or \$25.00 per additional form, whichever is less. Any irrigation district, tribe, individual or project that receives a supplemental report from a landowner shall collect the appropriate fee and forward the fee to the Commissioner with the original of the report. (Sections 2.4 was amended as approved by the Court in its Order of August 3, 1998.)

## **Section Three: Violation of Reporting Requirements**

### **§3.1 Violations**

It shall be a violation of these regulations to do any of the following:

- (a) To fail to report those lands to be irrigated and farmed for the applicable calendar year; or
- (b) To over-report the number of acres of lands to be irrigated and farmed during a calendar year, which are then not actually irrigated; or
- (c) To fail to timely file a Supplemental Reporting Form reflecting any changes in the number of acres or location of lands to be irrigated and farmed; or
- (d) To fail to properly comply with the General Instructions for completing a Reporting Form or supplemental Reporting Form; or
- (e) To report non-decreed lands as lands then being irrigated; or
- (f) To apply any Gila River water to non-decreed lands.

The Commissioner shall not allow the diversion or distribution of Gila River water for lands not reported. The civil penalties to be imposed for any violation under this § 3.1 are set forth in § 4.6 herein.

## **Section Four: Correction of Violation of Reporting Requirements**

### **§4.1 Informal Resolution**

Upon determining that a violation of this regulation has or may have occurred, the Commissioner shall attempt by informal means to correct the violation. The Commissioner, at his sole discretion, may attempt the informal resolution through the applicable irrigation project, district, canal company, tribe, BIA or other appropriate organizational entity or directly with the landowner. If the attempt is unsuccessful, the Commissioner may use the powers given to him under Article XII of the Decree or may request that the Court issue an Order to Show Cause to impose the penalties provided for herein.

As part of the informal resolution process, the Commissioner is empowered to issue a cease and desist order against the continuation of the practice deemed by him to be a violation of the Court's Orders or of these regulations. The Commissioner shall determine the amount of Gila River water which has been used on lands not entitled thereto and shall seek the written consent of the landowner to abide by the cease and desist order and to a water reduction penalty as may be appropriate under the circumstances. The penalty will not be more than twice the amount of water wrongfully taken which penalty shall be imposed and commenced on the date consented to. The water reduction penalty may, at the discretion of the Commissioner, be amortized over the period of the irrigation season. The Commissioner may also require payment of costs incurred by the Commissioner in enforcing these regulations, including reasonable attorney's fees. A written summation of the action taken by the Commissioner and the penalty consented to shall be filed with

the Court within sixty (60) days thereof and shall be included in the monthly report next published by the Commissioner after such sixty (60) days has elapsed and in the annual report filed with the Court. A copy of the cease and desist order and consent thereto shall be kept in the records of the Commissioner for three (3) years from the date of filing with the Court.

**§4.2 Order to Show Cause**

- a. The Petition for an Order to Show Cause shall be under oath, shall state the specific factual basis for the alleged violation, shall describe the informal attempts made to correct the violation, and shall be filed with the Court.
- b. Upon receiving a Petition for an Order to Show Cause from the Water Commissioner, the Court shall, if it deems the Petition well-founded and appropriate, issue an Order to Show Cause. The Water Commissioner shall cause, the Petition for the Order, the Order, and a copy of this regulation to be personally served in accordance with Rule 4 of the Federal Rules of Civil Procedure on the party allegedly in violation (the "Respondent"). If the Respondent is an Indian Tribe, the Order shall be served on counsel of record for the Tribe and the United States. The Order shall require that the Respondent file a Response to the Petition under oath, within thirty (30) days from service of the Order. A copy of the Order shall be mailed to any other party who has filed a request with the clerk for notice of any such Order. The Response shall respond to each factual allegation made by the Commissioner that a violation(s) has occurred.

**§4.3 Evidentiary Hearing**

A hearing on the Order to Show Cause shall be scheduled at least ninety (90) days after the time for filing the Response has expired. The Federal Rules of Evidence shall apply in such hearing. The Commissioner shall notify, in writing, all parties on the Court's service list of the hearing date at least thirty (30) days prior thereto.

**§4.4 Burden of Proof**

At the evidentiary hearing the Gila Water Commissioner shall have the burden of proving, by a preponderance of the evidence, that this regulation was violated as alleged in the Petition for Order to Show Cause. The Court shall determine if the Respondent, as alleged in the Petition for Order to Show Cause, has violated this regulation.

**§4.5 Participation of Parties**

Any party to the Decree may petition the Court at least twenty (20) days prior to the hearing date for permission to participate in the hearing. The petition shall state the position the party intends to take at the hearing and the reasons why the party believes his participation would be helpful to the conduct of the hearing. At the discretion of the Court, the party may participate in the hearing.

**§4.6 Civil Penalties**

- a. If the Court finds that the Respondent has violated the regulation, the Court may impose the following penalties on the Respondent for each violation:
  - (1) a civil fine up to a maximum of \$10,000.00, and/or
  - (2) a water reduction penalty as it determines appropriate under the circumstances, to be imposed in the following irrigation year, of up to twice the amount of water diverted by the Respondent in violation of this regulation.
- b. It shall be the responsibility of the applicable Irrigation District, Irrigation Project or Indian Tribe to collect and/or enforce the penalty upon the Respondent within sixty days.
- c. If the Irrigation District, Project or Indian Tribe is unable to enforce any penalty, it shall notify the Court in writing, describing its attempts at enforcement and the reasons for its inability to enforce the penalties.
- d. Within sixty days from the Court's order imposing such fine or water reduction penalty, the irrigation district, irrigation project, or Indian tribe serving water to the respondent shall collect any civil fine from and enforce any water reduction penalty against the respondent.
- e. The Court may relieve the irrigation district, project or Tribe of its enforcement obligation upon showing a legal impediment, such as a declaration of bankruptcy by the Respondent or the legal inability to place a lien, or any other just reason which prevents the irrigation district, Project or Indian Tribe from fulfilling its obligation. Upon granting relief, the Court may issue any order necessary to ensure future compliance with this regulation.
- f. In imposing the penalty, the Court may consider all relevant factors, including the following:
  - (1) The damage caused to other parties by the violation;
  - (2) The Respondent's cooperation with the Water Commissioner to resolve the matter informally;
  - (3) The impact any water reduction penalty will have on parties who stack water with the Respondent;
  - (4) The willfulness of the violation; and
  - (5) The financial circumstances of the Respondent.
- g. The Court shall distribute civil fines to the Gila Water Commissioner to be used as part of the administrative costs in enforcing the Decree.

**§4.7 Enforcement Costs**

If the Gila Water Commissioner's office incurs any costs in the enforcement of these regulations against a Respondent, and a written decision is entered against a Respondent, then such Respondent shall be ordered to pay all such reasonable costs incurred by the Gila Water Commissioner, together with any Court costs, and attorney's fees incurred by the Gila Water Commissioner.

**Section Five: Small Parcels and Non-Agricultural Uses**

**§5.1 REPORTING REQUIREMENTS**

The diversion to and use of Gila River water on parcels of decreed land of less than two acres and on parcels of land for other than agricultural purposes (i.e., the growing of crops) shall be reported as follows:

- (a) Each landowner of a parcel of decreed land of less than two acres who intends to irrigate such parcel(s) with Gila River water shall, on or before the fifteenth (15) day of the month preceding the month in which delivery of water to such land is to commence, but not later than June 15 of such year, file with the irrigation district, irrigation project, or Indian Tribe serving such lands an initial reporting form prescribed by the Gila Water Commissioner, identifying the location of such parcel(s) and setting forth the amount of acreage (in tenths of an acre or by number of square feet) which will actually be irrigated during the ensuing calendar years and the purpose of such irrigation (for example, lawn, garden, trees, etc.). A map, county parcel map or plat map (handwritten is permissible, if legible) showing the location and dimensions of such parcels shall be attached to the form and shall show all improvements on the land (for example, buildings, barns, driveways, etc.). The name of the canal serving the parcel shall be stated, and the actual immediate source of such water shall also be shown (i.e. canal, ditch, pipe, etc.). If no material change is made in irrigation plans in successive years, no reporting form need be filed until the fifth year following the date on which the initial reporting form was filed (e.g. if the initial reporting form were filed June 15, 1998, for the 1998 irrigation year, the next reporting form must be filed on or before June 15, 2003.) However, if a material change in irrigation plans is made for any irrigation year a new reporting form must be filed for that year and the five (5) year period would commence on the date on which the new reporting form is filed.

- (b) Each landowner of decreed land which is sought to be irrigated with Gila River water for other than agricultural purposes (i.e. the growing of crops) shall file a reporting form in the manner prescribed in (a) above.
- (c) At the time reports are filed with the Commissioner under § 2 of these regulations, the irrigation district, project, or Tribe serving lands covered by (a) and (b) above shall file a report in form prescribed by the Commissioner, setting forth the aggregate amount of acreage, by each category set forth above (a) and (b) and by the canal company sought to be irrigated by Gila River Water for the ensuing year. As supplemental reports are filed with the district or project, the district or project shall file a supplemental report with the Commissioner changing the aggregate acreage in each category.
- (d) Any original reports filed with the district, project or Tribe shall be retained for three (3) years from the end of the calendar year to which they apply. The records maintained by the district or project shall be available for examination by the Commissioner.
- (e) The information provided to the Commissioner hereunder shall be summarized and reported by the Commissioner as soon as can be done in a monthly report and in the annual report filed with the Court.  
(Sub-Sections 5.1 (a) and (d) was amended as approved by the Court in its Order of August 3, 1998.)

**Section Six: Periodic Audits**

**§6.1 PROCEDURE FOR ANNUAL PERIODIC AUDIT OF LANDS "THEN BEING IRRIGATED":**  
The purpose of the annual periodic audit system is to detect violations of this regulation required by the Court's Final Memorandum and Order filed September 18, 1992.

**§6.2 Method:**  
Upon receipt of the reports required by these regulations, the Commissioner will select at random approximately three (3) to five (5) percent of the lands to be inspected by the Commissioner's office.

**§6.3 Inspections:**  
The inspections will be for the purpose of insuring that the lands "then being irrigated" submitted, by the landowners to the Gila Water Commissioner are in fact:

- (a) Decreed lands;
- (b) Actually being irrigated; and that
- (c) Crops are planted

**§6.4 Maps and information:**  
The Office of the Gila Water Commissioner may utilize either current available aerial maps and/or county assessor maps for review and location purposes, as well as other information available to the Commissioner.

**§6.5 Records:**  
Upon completion of these audits a report will be on file at the office of the Gila Water Commissioner. These records will be open for inspection by all parties upon request. The report will be summarized in the Annual Report rendered to the Court by the Commissioner.

**§6.6 Non Decreed Lands-Pumps:**  
(a) During the audit, if non-decreed lands are found to be irrigated the Commissioner will require the district/canal company involved to provide proof that pumps are being used to provide water to these lands and that such lands are not receiving waters of the Gila River.

This will require documentation of the pumps used, dates and times the pump(s) were run and the discharge rate of each pump. Annual pump tests will also be submitted by the District to the Commissioner's Office to insure that pump output is current. This will include all pumps being used to supply water to non-decreed land and those that pump directly into a canal company's canal.

(b) All districts/canal companies will be required to provide to the Commissioner, at the beginning of each irrigation season, the "non-decreed" lands to be served by pump water placed into canals for delivery during the current season. The land description should be such that it can be easily located by Section, Township and Range (Sec., Tn., Rn.) and the specific 1/4-1/4 section being supplied.

**§6.7 Violations:**  
Any violations not explained satisfactorily to the Commissioner will subject the irrigation district/canal company and landowners to the penalties set forth herein.

**§6.8 Complaints:**  
In addition to the random audit inspection, the Office of the Water Commissioner will inspect all lands which are the subject of a complaint of possible violation filed with the Commissioner by the owner of decreed lands.

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## DISTRIBUTION OF APPORTIONMENTS "THEN BEING IRRIGATED LANDS"

I

The Gila Water Commissioner will continue to calculate apportionments for the upper valleys as specified in the Gila Decree in Article VIII (2) of the Gila Decree.

II

The apportionments available to the upper Valleys will be allocated to the lands reported to the Commissioner as "then being irrigated" ("TBI") as of January 1, of each year. Allocations will be made to each canal company, District or other entity that has submitted TBI forms to the Commissioner on or before December 15, of the preceding calendar year.

III

As additional or supplemental forms are submitted in subsequent months, the Commissioner will calculate and re-allocate the apportionment to those lands "then being irrigated" on a monthly basis. This will either increase or decrease the waters available to each entity dependent upon whether TBI lands are added or reduced based upon submittal of new or supplemental forms.

IV

The effect of this procedure is that the amount of apportioned water available to the TBI lands may change each month and the amount of apportioned water that can be diverted from the Gila River may be increased or decreased each month based upon the submittal of new or supplemental reporting forms.

If for example, under Article VIII (2) of the Decree the apportionment to each decreed acre TBI in the upper Valleys on January 1, of a given year is 5.58 AF/Ac, (140,000 AF total available, divided by total acres TBI on January 1, =  $140,000 / 25,100 = 5.58$  AF/AC), as shown in the attached example Exhibit "A" this apportionment will be allocated and can be diverted by the canal companies based on the number of decreed acres reported to the Commissioner as then being irrigated.

Therefore, as shown in the attached Exhibit "A" assume canal company "A" has 13,826 acres of decreed lands after removal of "lands permanently removed" (LPR) however, only 100 acres are designated as TBI lands on January 1. It then will be issued 558 AF of apportionment water for its share of the total apportionment. This same procedure is used for canal company "B" and "C" in the example.

Assume that on February 1, 19xx the TBI lands of canal company "A" have increased from 100 acres to 10,000 acres and additional reporting forms have been received by the Commissioner by January 15, 19xx. The Commissioner will recalculate the total lands now TBI for canal companies "A," "B," "C" and determine the new amount of apportionment available to each acre TBI within each canal company for February. In this case the February apportionment now available to each canal company is 4.0 AF/Ac ( $140,000 / 35,000$ ). This in effect is due to the overall increase of total acres TBI from 25,100 acres to 35,000 acres which has reduced the amount available to each TBI acre (5.58 AF/AC to 4.00 AF/AC). This same process is followed with canal company "B" and "C" although in February they made no change to their TBI lands.

Now assume that on March 1, 19xx an additional apportionment is made in the amount of 10,000 AF. The total available apportionment is now 150,000 AF.

Assume also the TBI lands of canal company "A" have decreased from 10,000 acres to 8,000 acres due to supplemental forms being received by the Commissioner by February 15, 19xx. The Commissioner will recalculate the total lands now TBI for canal companies "A," "B," "C" and determine the new amount of apportionment available to each acre TBI within each canal company for March. In this case the March apportionment now available to each canal company is 4.55 AF/Ac ( $150,000 / 33,000$ ). This in effect is due to the increase of 10,000 AF of apportionment and an overall decrease of total acres TBI from 35,000 acres to 33,000 acres which has increased the amount available to each TBI acre (4.00 AF/AC to 4.55 AF/AC). This same process is followed with canal company "B" and "C" although in March they made no change to their TBI lands.

In the event a canal company were to exceed its apportionment in any one year due to a monthly reallocation by the Commissioner this amount would be deducted from this canal company's allocation in the next year and divided equally among the remaining canal companies. The Commissioner will track each canal company's use in an attempt to control this so that it does not happen.

V

This procedure will be continued throughout the year as necessary, as new and supplemental forms are submitted during this period as provided in the regulation governing the reporting of lands then being irrigated.

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