

2015



STATUS OF THE NEW MEXICO UNIT FUND

Report to the New Mexico Legislative Finance
Committee



**New Mexico Interstate
Stream Commission
November 2015**

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Mexico Legislative Finance Committee

2015



New Mexico Interstate Stream Commission

Santa Fe, NM

November 2015

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ABBREVIATIONS AND ACRONYMS

AWSA	Arizona Water Settlements Act of 2004
CAP	Central Arizona Project
CRBPA	Colorado River Basin Project Act of 1968
CUFA	New Mexico Consumptive Use and Forbearance Agreement
EIS	Environmental Impact Statement
FTE	Full-time equivalent
GSFCC	Gila San Francisco Coordinating Committee
ISC	New Mexico Interstate Stream Commission
JPA	Joint Powers Agreement
NEPA	National Environmental Policy Act
NGO	Non-governmental organization
OM&R	Operation, Maintenance & Repair (or Replacement)
NM CAP Entity	New Mexico Central Arizona Project Entity
ROD	Record of Decision
SWNMSG	Southwest New Mexico Stakeholders Group

EXECUTIVE SUMMARY

The New Mexico Unit Fund is a fund in the New Mexico treasury consisting primarily of deposits from the United States pursuant to the federal Arizona Water Settlements Act of 2004 (“AWSA”). The New Mexico Unit Fund Act, NMSA 1978, § 72-14-45, requires that the Interstate Stream Commission report to the Legislative Finance Committee every year by November 15 on the following three items:

- (1) the status of the New Mexico Unit Fund;
- (2) the distribution of money from the New Mexico Unit Fund to implement the purpose of the fund pursuant to the Act; and
- (3) proposed uses and levels of funding projected for the following fiscal year.

The AWSA provides New Mexico with up to an annual average 14,000 acre-feet of water per year from the Gila and San Francisco Rivers above the water decreed to New Mexico by the U.S. Supreme Court in *Arizona v. California*. In addition, the AWSA provides \$66 million (adjusted for inflation) for construction of a New Mexico Unit or other water utilization project(s) in the counties of Catron, Grant, Hidalgo, and Luna. Additional amounts up to \$62 million may be available for construction of a New Mexico Unit.

The New Mexico Unit would be the water project that diverts, stores, and conveys the additional water. The AWSA provides that the NM CAP Entity, which is currently formed by 13 local governments and the ISC under a Joint Powers Agreement, shall own the New Mexico Unit.

On November 24, 2014, the ISC voted to fund eight non-diversion projects from the New Mexico Unit Fund as well as pursue a New Mexico Unit. The ISC also voted to be joint lead agency with the U.S. Bureau of Reclamation for environmental compliance for a New Mexico Unit at its February 2015 meeting. On July 22, 2015, the ISC designated the parties to the Joint Powers Agreement as the NM CAP Entity.

The U.S. Bureau of Reclamation and the NM CAP Entity then turned their efforts to executing the New Mexico Unit Agreement, an agreement mandated by the CUFA regarding diversion and consumptive use of AWSA Gila River water by the New Mexico Unit. The central terms of the New Mexico Unit Agreement were drafted in 2004, appended to the AWSA and ratified by Congress when it passed the AWSA. However, supplemental terms were needed to reflect certain issues not addressed in the mandatory terms drafted in 2004.

After negotiations between the U.S. Bureau of Reclamation, a negotiating team appointed by the NM CAP Entity, and the ISC, the NM CAP Entity and the ISC approved supplemental terms to the New Mexico Unit Agreement.

The New Mexico Unit Agreement, including the supplemental terms, is now being routed to the Secretary of the Interior for her signature. The AWSA provides that Secretary of the Interior must execute the New Mexico Unit Agreement within one year of notification that the State of

New Mexico intends to pursue a New Mexico Unit. Therefore, the deadline is November 23, 2015.

The \$66 million provided to New Mexico by the AWSA is paid in 10 installments, adjusted for inflation, into the New Mexico Unit Fund. Payments began in 2012. New Mexico has received four annual payments of \$9.04 million totaling \$36.16 million. Expenditures to date for AWSA activities total \$5.073 million. The current balance in the fund is \$31.28 million.

The ISC's FY2016 operating budget of \$425,300 from the New Mexico Unit Fund includes 3.5 full-time equivalent positions and support costs.

In addition, the ISC approved staff's FY2016 Work Plan of \$7.7 million for AWSA activities. The work plan includes a portion of the ISC-approved funding for non-New Mexico Unit projects in southwestern New Mexico. As some of the ISC's requirements for these projects have not yet been met, e.g., matching funds, the full amount has not been budgeted.

The ISC also approved the NM CAP Entity's FY2016 budget of \$208,864, which will be paid from the NM Unit Fund.

In FY2017, the ISC anticipates expenditures from the NM Unit Fund for funding of the non-New Mexico Unit projects; 30-percent design of the New Mexico Unit, i.e., engineering to a level sufficient to begin NEPA; federal environmental compliance; and the NM CAP Entity's budget.

I. INTRODUCTION

During the 2011 Legislative Session, the New Mexico Legislature passed H.B. 301 (“the Act”) creating the New Mexico Unit Fund in the State Treasury. The Act is codified as 2011 NM Laws, Ch. 99, NMSA 1978, § 72-14-45 (2011). The fund consists of money distributed to the state pursuant to Paragraphs (2)(D)(i) and (ii) of Section 403(f) of the Colorado River Basin Project Act of 1968, as amended by Section 107(a) of the Arizona Water Settlements Act of 2004. It further consists of appropriations, grants, and donations or bequests to the fund.

Income from the fund is credited to the fund. Balances do not revert to the general fund.

Money in the New Mexico Unit Fund is administered by, and appropriated to, the Interstate Stream Commission (“ISC”). The Act requires the ISC to report to the Legislative Interim Committee dealing with water and natural resources and to the Legislative Finance Committee every year by November 15 on the following three items:

- (1) the status of the New Mexico Unit Fund;
- (2) the distribution of money from the New Mexico Unit Fund to implement the purpose of the fund pursuant to the Act; and
- (3) proposed uses and levels of funding projected for the following fiscal year.

This report includes these three items. In addition, this report provides a general update on issues and activities arising from the Arizona Water Settlements Act.

II. BACKGROUND

The federal Colorado River Basin Project Act of 1968 (“CRBPA”) authorized the construction of “Hooker Dam and Reservoir or suitable alternative” on the Gila River in New Mexico as a feature of the Central Arizona Project.

The CRBPA also directed the Secretary of the Interior to offer to contract with water users in New Mexico for water from the Gila River, its tributaries, and underground water sources in amounts to permit consumptive use of water in New Mexico of not to exceed an annual average in any period of ten consecutive years of 18,000 acre-feet over and above consumptive uses provided by Article IV of the Decree of the Supreme Court of the United States in *Arizona v. California*, 376 U.S. 340 (1964).

The increased consumptive uses were conditioned upon the delivery of Colorado River water, via the Central Arizona Project, to downstream Gila River users in Arizona to replace the diminished supply resulting from increased use in New Mexico.

The federal Arizona Water Settlements Act of 2004 (“AWSA”) amended the CRBPA by directing the Secretary of the Interior to offer to contract with water users in New Mexico, with the approval of the ISC, or with the State of New Mexico through the Interstate Stream Commission (ISC), for water from the Gila River, its tributaries and underground water sources in amounts that permit consumptive use not to exceed 140,000 acre-feet in any 10-year period. This consumptive use is in addition to New Mexico’s decreed right in *Arizona v. California*.

Should New Mexico divert and consumptively use the additional AWSA water, the Secretary of the Interior must deliver a like volume from the Central Arizona Project (“CAP”) to downstream, forbearing Gila River water users in Arizona (sometimes called the exchange water). New Mexico is responsible for reimbursing the Secretary for operation, maintenance, and repair (“OM&R”) costs attendant to delivery of the exchange water.

The AWSA also provides for the creation of the NM CAP Entity, which is the entity designated by the State of New Mexico, through the ISC, to enter into the NM Unit Agreement with the Secretary of the Interior. The NM CAP Entity shall own and hold title to the water project constructed pursuant to the AWSA, which is called the New Mexico Unit (of the Central Arizona Project). The New Mexico Unit is the “suitable alternative” to Hooker Dam authorized in the CRBPA.

The Secretary of the Interior is authorized to design, build, operate, and maintain the New Mexico Unit. Upon request by the NM CAP Entity, the Secretary of the Interior shall transfer to the NM CAP Entity the responsibility to design, build, operate, and maintain the New Mexico Unit, or any combination thereof.

The AWSA further provides \$66 million, adjusted for inflation since January 1, 2004, in ten annual payments to the New Mexico Unit Fund beginning with year 2012. Withdrawals from the New Mexico Unit Fund are for the purpose of paying costs of the New Mexico Unit or other water utilization alternatives to meet water supply demands in Catron, Grant, Hidalgo, and Luna Counties as determined by the ISC in consultation with the successor to the Southwest New Mexico Water Study Group. Costs associated with planning, environmental compliance, and environmental mitigation and restoration are included as authorized withdrawals.

An additional amount of \$34 million, adjusted for inflation since January 1, 2004, is authorized for construction of the New Mexico Unit.

If the rate of return on carryover funds in the federal Lower Colorado Basin Development Fund exceeds an average annual rate of four percent for the period beginning with the AWSA's enactment through the date of initiation of construction of the New Mexico Unit, an additional amount up to \$28 million shall be made available for construction. Thus, a maximum additional \$62 million may be available for construction of the New Mexico Unit.

Earnings in the Development Fund to date would not support the additional \$28 million.

III. ISC PLANNING, PROJECT SELECTION, AND ADMINISTRATION

The ISC began its AWSA planning in the spring of 2001. The AWSA was signed into law in December 2004.

In early 2005, the ISC formed the Gila San Francisco Coordinating Committee (GSFCC), the first attempt to build consensus among regional stakeholders. The GSFCC was composed of one representative each from the ISC, the Bureau of Reclamation, the U.S. Fish and Wildlife Service, the Office of the Governor, and the Gila San Francisco Water Commission (representing local governments). The GSFCC convened a Technical Committee composed of representatives from local water users, environmental groups, and state and federal agencies.

The task of the GSFCC's Technical Committee was to determine the studies necessary to evaluate the environmental effects of potential water withdrawals under the AWSA. After literature reviews, science forums, and initial baseline studies, the Technical Committee reached consensus on a suite of 13 studies and surveys with a total projected cost of \$945,000. The 2006 New Mexico Legislature appropriated the full amount of funding for these studies, but the funding was vetoed.

After this initial failed consensus, the ISC formed the Southwest New Mexico Stakeholders Group ("SWNMSG") in 2007. The SWNMSG was open to any member of the public, environmental non-governmental organizations ("NGOs"), and state and federal agencies. The task of the SWNMSG was to reach a consensus among all stakeholders on a small suite of projects to be funded from AWSA monies. By November 2010, the SWNMSG's recommendation consisted of 70 different projects. In February 2011, after a request by the ISC to reach consensus on a much smaller set of projects, the SWNMSG could only reduce the number of projects to 50.

As a consequence of years of failed attempts to obtain consensus from stakeholders, the ISC developed its own process to solicit and evaluate proposals. The ISC, with input from regional stakeholders, initiated a two-tiered evaluation process for selection of projects to be funded from the New Mexico Unit Fund.

The ISC evaluated 41 Tier-1 project proposals received from stakeholders. The evaluation panel consisted of representatives from the ISC staff; the New Mexico Department of Game and Fish; the New Mexico Environment Department; the Energy, Minerals, and Natural Resources Department; and the Office of the State Engineer. Twenty proposals met the Tier-1 criteria and passed to the Tier-2 ranking process. On February 29, 2012, the ISC selected 16 of the 20 projects for further assessment, refinement, or combination. In 2013, the City of Bayard withdrew its proposal from consideration, leaving a total of 15 projects under consideration.

After extensive evaluation of the proposals' technical feasibility, legal feasibility, costs, water supply, benefits, and environmental impacts, the ISC staff presented project recommendations to the Interstate Stream Commission in Silver City on November 14, 2014.

At its November 24, 2014 public meeting, the ISC selected the 9 projects listed in **Table 1** (following page) for funding (with some modifications made by the ISC at its February 26, 2015, meeting).

The ISC staff has provided draft funding agreements to several of the awardees for review. The funding agreement for the City of Deming's effluent reuse project (**Figure 1**) has been signed by the City of Deming's representatives and returned to the ISC.



Figure 1: The ISC awarded \$1.75 million from the New Mexico Unit Fund for upgrades and expansion of the City of Deming's wastewater reuse system. The City of Deming will use the treated wastewater for non-potable purposes in lieu of depleting fresh groundwater.

Table 1: AWSA projects and funding as selected by the Interstate Stream Commission

No.	Project	Funding from NM Unit Fund
1	Municipal Water Conservation Fund	\$3,000,000
2	Gila Basin Irrigation Commission (Irrigation Diversion)	\$1,250,000
3	Southwest Regional Water Supply System (New Mexico Unit)	TBD
4	Catron County Ditches	\$500,000
5	Deming Effluent Reuse	\$1,750,000
6	Pleasanton East-Side Ditch	\$200,000
7	Sunset and New Model Canals (Figures 2 and 3)	\$200,000
8	Grant County Water Commission Well Field and Pipeline	\$2,100,000
9	1892 Luna Irrigation Ditch	\$100,000

The AWSA directs the U.S. Bureau of Reclamation to be the lead agency for environmental compliance on a New Mexico Unit. The AWSA also provides for the State of New Mexico, at the ISC’s option, to be joint lead agency for environmental compliance. On February 26, 2015, the ISC voted to be joint lead agency and transmitted its intent to the Secretary of the Interior on February 27.



Figure 2: Fields in Virden, Hidalgo County irrigated from the Sunset Canal. Virden farmers must rely on expensive well pumping due to the unreliability of surface water supplies, as illustrated by Figure 3 below.



Figure 3: The Gila River above the Sunset and New Model diversions in Virden, Hidalgo County, June 2013.

IV. NM CAP ENTITY

The AWSA provides that the State of New Mexico, through the ISC, shall form or designate the NM CAP Entity. The purpose of the NM CAP Entity is to be the beneficiary of the NM Unit. The NM CAP Entity shall own and hold title to the New Mexico Unit. The NM CAP Entity may also exercise its option to design, construct, operate, and maintain the New Mexico Unit or any combination of those functions. The NM CAP Entity must enter into the New Mexico Unit Agreement with the Secretary of the Interior.

In early 2015, the ISC staff prepared a Joint Powers Agreement (“JPA”) creating the NM CAP Entity. The ISC staff distributed the JPA, in draft form, to potential parties to the JPA, stakeholders, state and federal agencies, and non-governmental organizations. The ISC staff made revisions based upon internal and public comments and presented the JPA to the ISC for approval. The ISC approved the text of the JPA at its meeting on June 9, 2015.

Thirteen local governments opted to sign the JPA and thus participate in the NM CAP Entity. They are as follows:

1. Upper Gila Irrigation Association
2. Fort West Irrigation Association
3. Gila Farm Irrigation Association
4. Gila Hot Springs Irrigation Association
5. Catron County
6. Grant County
7. Luna County
8. Village of Santa Clara
9. Hidalgo Soil & Water Conservation District
10. Hidalgo County
11. City of Deming
12. San Francisco Soil & Water Conservation District
13. City of Lordsburg

In addition, the ISC signed the JPA as a non-voting member of the NM CAP Entity.

On July 22, 2015, the ISC passed a resolution designating the signatories to the JPA as the NM CAP Entity. The New Mexico Department of Finance and Administration approved the JPA on July 27, 2015. The JPA is available online at <<http://nmawsa.org/ongoing-work/nm-cap-entity-jpa>>.

The NM CAP Entity held its first public meeting on August 10, 2015, in Silver City.

At present, the NM CAP Entity expenses are paid from the New Mexico Unit Fund pursuant to Paragraph V(m) of the JPA. On September 15, 2015, the NM CAP Entity approved an FY2016

budget for submittal to the ISC. On September 17, 2015, the ISC approved the budget at its regular meeting in Santa Fe.



Figure 4: Hidalgo Soil & Water Conservation District represents district water users, such as the Sunset Canal. In the photograph, taken August 11, 2015, the Sunset Canal diversion dam backs up the Gila River for diversion into the ditch heading (left upstream, right downstream). The Sunset Canal diversion dam is one of three diversion structures that span the entire width of the Gila River in New Mexico.

None of the diversions proposed by stakeholders and evaluated by the ISC would extend fully across the Gila River, prevent migration of aquatic species, or prevent rafting, fishing, or other aquatic recreation.

V. NEW MEXICO UNIT AGREEMENT

The New Mexico Unit Agreement is an agreement by and between the Secretary of the Interior and the NM CAP Entity as the owner of a NM Unit. It was drafted as part of the New Mexico Consumptive Use and Forbearance Agreement (“CUFA”) and contains the mandatory terms under which New Mexico may divert and consumptively use AWSA water from the Gila River. The CUFA was ratified by Congress’s passage of the AWSA. The attachments to the CUFA, including the New Mexico Unit Agreement were also ratified by Congress at that time.

The AWSA requires that the Secretary of the Interior execute the New Mexico Unit Agreement within one year of New Mexico’s notice to the Secretary that it intends to have a New Mexico Unit constructed. As the ISC gave such notice on November 24, 2014, the deadline for the Secretary’s signature is November 23, 2015.

The mandatory terms of the New Mexico Unit Agreement had been negotiated and ratified in 2004 with passage of the AWSA. However, in 2015 the U.S. Department of the Interior insisted upon supplemental terms to the agreement. Consequently, one of the NM CAP Entity’s first actions was the appointment of a negotiating committee. The negotiating committee met a number of times with representatives of the U.S. Bureau of Reclamation in order to arrive at terms. (Reclamation is a bureau of the Department of the Interior and provides technical support to the Secretary.)

Generally, the supplemental terms include a recitation of additional agreements between the NM CAP Entity and the Secretary of the Interior that will be required once the Secretary signs the New Mexico Unit Agreement. The additional agreements include: Construction and Construction Funding Agreements; Water Service Agreement(s); Water Delivery Agreement(s); and, potentially, an Operations & Maintenance Transfer Contract. In addition, the ISC and the Bureau of Reclamation will negotiate an Environmental Compliance Agreement, as the ISC is joint lead agency with the Bureau of Reclamation for federal environmental compliance.

The New Mexico Unit Agreement requires the written consent of the State of New Mexico for any amendment of any term of the New Mexico Unit Agreement. The CUFA defines “State of New Mexico” as “the State of New Mexico acting through the Interstate Stream Commission.” Thus, ISC staff participated in the negotiations and the ISC ultimately approved the supplemental terms on October 16, 2015, at its meeting at Ruidoso Downs. The ISC communicated its approval to the Secretary of the Interior on the same day.

VI. NEW MEXICO UNIT

If the NM CAP Entity exercises its option to design the NM Unit, it will decide on the final configuration of the New Mexico Unit. At present, it is expected that a New Mexico Unit would be constructed in phases, with the first phase able to stand alone. Conceptually, the first phase of diversion and storage could be located near the towns of Cliff and Gila, shown in the project area map in **Figure 5**.

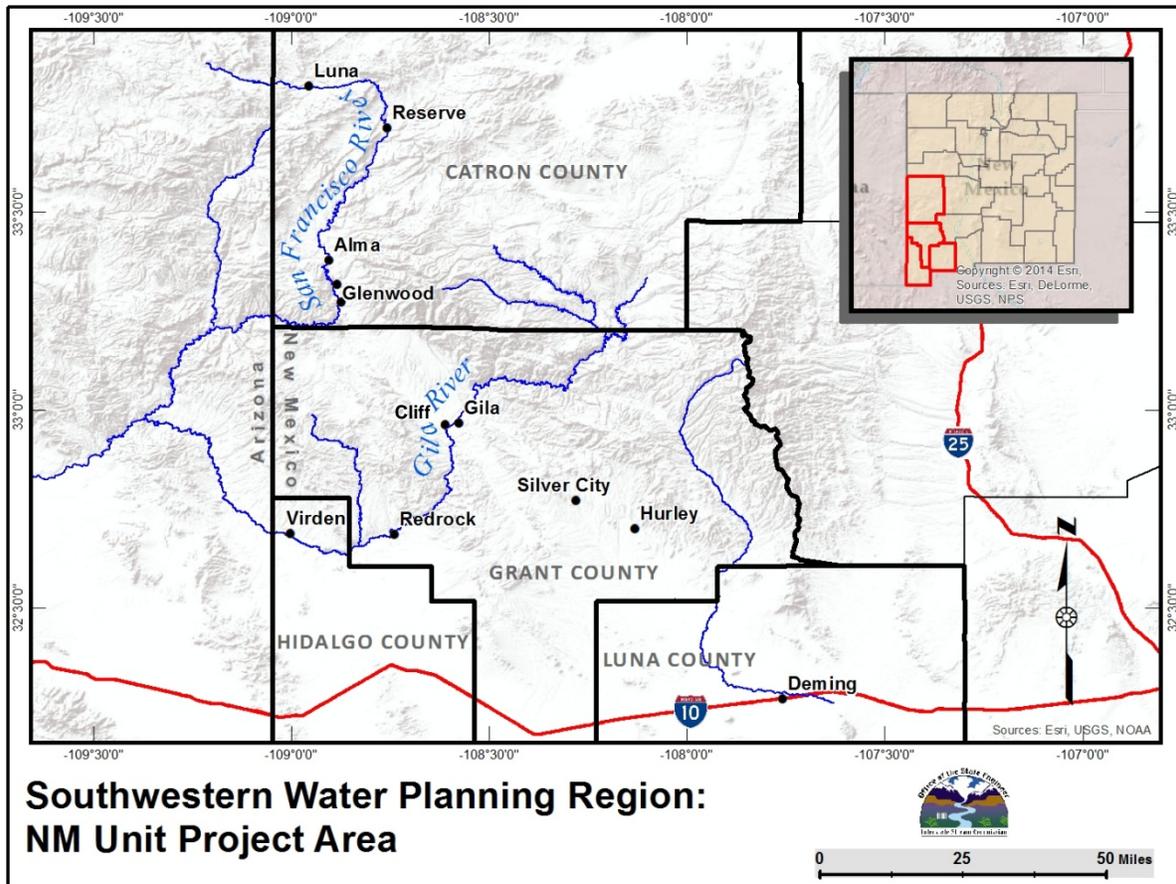


Figure 5: NM Unit Project Area map

A first phase could divert a small portion of higher river flows into a storage facility in order to later provide releases for agricultural water and, potentially, environmental flows in order to alleviate conditions such as those shown in **Figure 6**. Additional phases of a New Mexico Unit would likely serve municipal and industrial water users.



Figure 6: The Gila River near Gila, NM, on June 10, 2013.

The Cliff-Gila Valley in Grant County, a possible beneficiary of a first phase, contains over 1,400 irrigated acres. Many of the farms have been passed down through successive generations since the 1860s.

The drying and fragmentation of the Gila River, as shown in **Figure 6**, occurs during late May and June of most years, making farming difficult and limiting crop selection to only the most forgiving of crops.

Such events concurrently stress both floral and faunal species, including species listed under the Endangered Species Act.

Stakeholders' proposals for a New Mexico Unit contained features to synergistically alleviate the detrimental environmental and economic impacts these drying events cause by diverting and storing water when there is excess (See Figure 7 below) and releasing some when flows decline below environmental or agricultural minimums.



Figure 7: On June 16, 2013 (top photo) the Gila River at the Highway 211 bridge near Gila had virtually no flow. On September 11, 2014 (bottom photo), the flow at the bridge was more than 5,700 cfs. Flows peaked at 29,000 cfs. Skimming and storing water during high flows can provide for releases when flows won't meet human and environmental demand.

The ISC has investigated stakeholder site and design alternatives in two preliminary engineering reports from the Albuquerque-based engineering company Bohannon Huston as well as an appraisal level report from the Bureau of Reclamation. In addition, the ISC asked the geotechnical water resources firm RJH Consultants to conduct two reviews, including a value engineering study.

In June 2015, the Bureau of Reclamation hosted a Value Planning Study in Denver, CO. At the study, the value planning team examined, evaluated, and ranked alternatives based upon criteria selected by the team. The Bureau of Reclamation intends the results to be used in the decision-making processes.

The first phase of the Value Planning Study's highest ranked alternative would store 13,000 acre-feet of water and cost a roughly estimated \$360 million. However, this alternative only garnered 67 percent of the possible points, clearly indicating that additional investigations for better alternatives are warranted.

The first phase of the fourth-ranked alternative could be constructed for an estimated \$125 million, though the calculated reservoir storage is only 2,750 acre-feet. Nonetheless, this alternative demonstrates that cheaper configurations can be developed.

VII. NEW MEXICO UNIT FUND

The New Mexico Unit Fund and NMSA 1978, § 72-14-45 are described in the Introduction, and the descriptions are not repeated here.

STATUS

The most recent annual deposit of \$9.04 million dollars from the United States into the New Mexico Unit Fund (“the Fund”) occurred in January 2015. This was the fourth such deposit. Deposits from the Bureau of Reclamation to date total \$36.16 million. The total amount expended from the Fund to date is \$5.073 million. The current balance of the Fund is \$ 31.28 million.

DISTRIBUTION OF MONEY TO IMPLEMENT THE PURPOSE OF THE FUND

The expenditures to date of \$5.073 million have been for the purposes of paying the following: 3.5 full-time equivalents (“FTEs”) dedicated to AWSA and Gila River work; staff support costs; engineering investigations and reports; scientific investigations and reports; economic studies and reports; website development and maintenance; and facilitators for public meetings. The corpus of work can be viewed online at <<http://nmawsa.org>>.

For FY2016, the appropriated operating budget for ISC Gila staff is \$425,300.

In addition, the ISC approved staff’s FY2016 Work Plan (online at <<http://nmawsa.org/ongoing-work/interstate-stream-commission/fy2016-work-plan/view>>) in the amount of \$7.7 million for the purposes of engineering; NEPA, environmental impact analyses, and related services; financial advisory services, public outreach services; and legal services. To date, less than \$34,000 of the \$7.7 million approved by the Commission has been encumbered. In addition, some of the Commission’s allocations for non-diversion projects have not been budgeted, as some of the ISC’s requirements for non-New Mexico Unit projects have not yet been met, e.g., matching funds.

The ISC also approved the NM CAP Entity’s FY2016 budget of \$208,864 on September 17, 2015. The NM CAP Entity’s budget includes: operational expenses; an executive director; an engineering consultant; and legal services. The entirety of the NM CAP Entity’s FY2016 budget will be paid from the New Mexico Unit Fund.

USES AND LEVELS OF FUNDING PROJECTED FOR THE FOLLOWING FISCAL YEAR

The ISC's FY2017 appropriation request for its Gila staff operating budget is \$425,300 for 3.5 FTEs and the support costs.

The ISC anticipates FY2017 expenditures to include the funding of the non-New Mexico Unit projects that are included in Table 1. In addition, the ISC anticipates expenditures for a 30-percent design of the New Mexico Unit, i.e., engineering, and federal environmental compliance including, but not limited to, NEPA. The costs are not known at this time.

The NM CAP Entity will develop an FY2017 budget no later than May 1, 2016. It will submit its budget for ISC approval at the ISC's first meeting following May 1, 2016, in accordance with the Joint Powers Agreement creating the NM CAP Entity. The NM CAP Entity cannot implement its budget until it has been approved by the ISC.