

Who Owns Water?

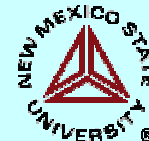
Water Rights in the Southwest States



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Overview

- + Water rights and prior appropriation doctrine
- + Key features and complicating factors
- + Groundwater
- + International, federal, and inter-state issues
- + Public interest and public trust doctrine
- + Final thoughts

Public Water, Private Rights

- + Water is at the core of society's deepest concerns:
 - Commercial livelihood
 - Health
 - Sustenance
 - Ecological integrity
 - Aesthetics
 - Community identity
 - Spiritual satisfaction
- + Most Western State constitutions declare that all waters:
 - “belong to the public” (NM)
 - “are the property of the state for the use of its people” (ID)
 - “property of the public” (CO)



Water Rights: What Are They and Why Are They Needed?

WHAT

Property claim to the USE of public waters
Means for allocating a scarce resource
Marketable real property

“The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right.”
(Colorado Constitution, Article XVI, Section 6.)

Water Right = Right to divert and use water beneficially



WHY

Uncertainty and conflict deter investment, economic development, and stable settlement.

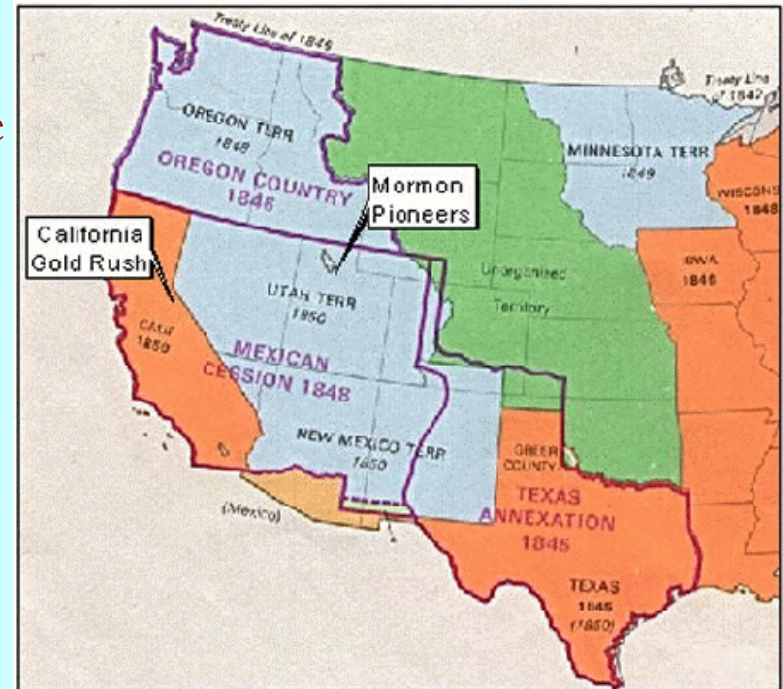
Appropriated water rights provide a measure of legal security against the uncertain actions of others.

“The role of law is particularly important when so many varied needs must be recognized. An absence of order – of clearly defined rights and rules of liability – can be dangerous”
(David Getches, *Water Law in a Nutshell*, 1984)

Doctrine of Prior Appropriation

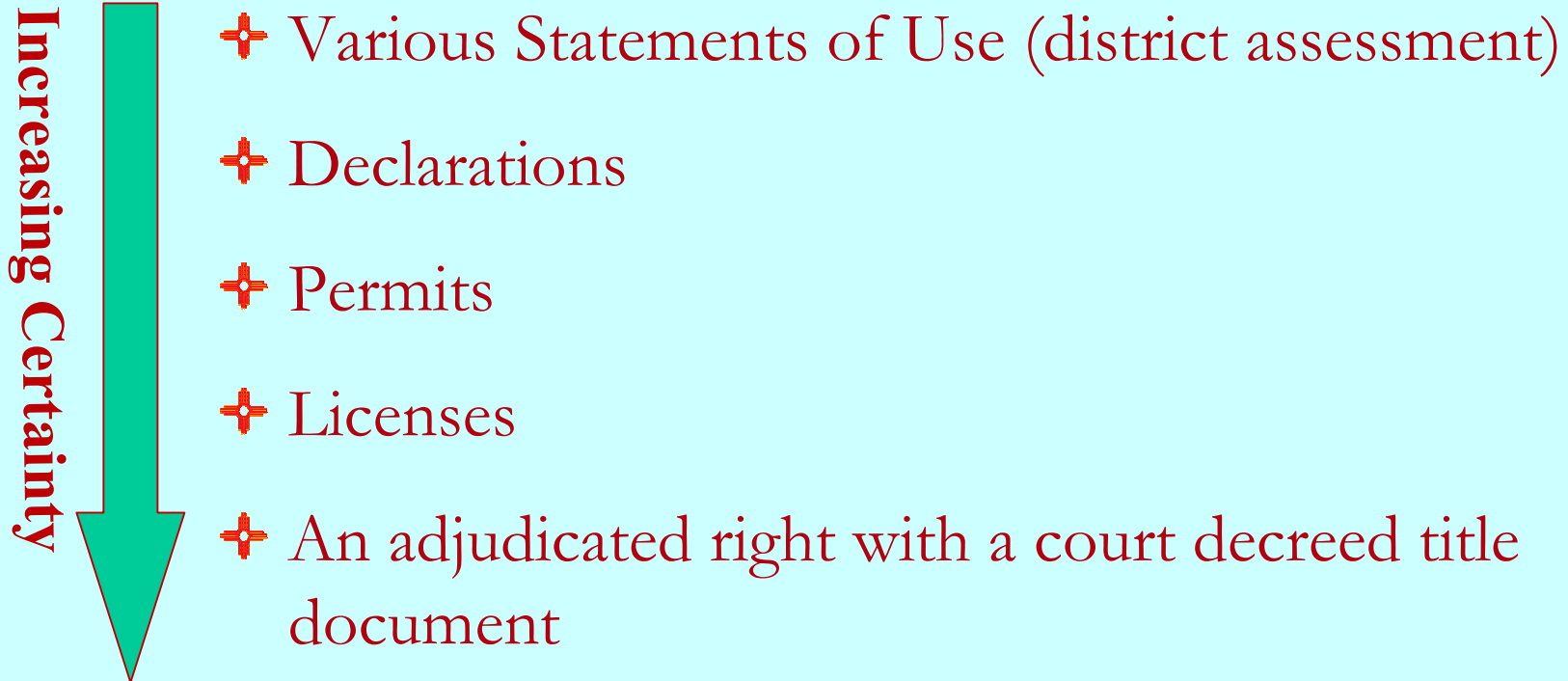
Rights Based on 'Use' Instead of Land Ownership

- + First user in time, first in right
 - Senior and junior appropriators
- + Acquiring a water right
 - Unappropriated water in natural source
 - Intent to apply water to a beneficial use
 - Application to a beneficial use
- + Dimensions of a water right
 - Who owns it
 - What is the source and
 - What is the purpose of use
 - Where is the diversion and
 - Where is the use
 - How much is diverted and for
 - How long
 - **When** was intent to divert formed



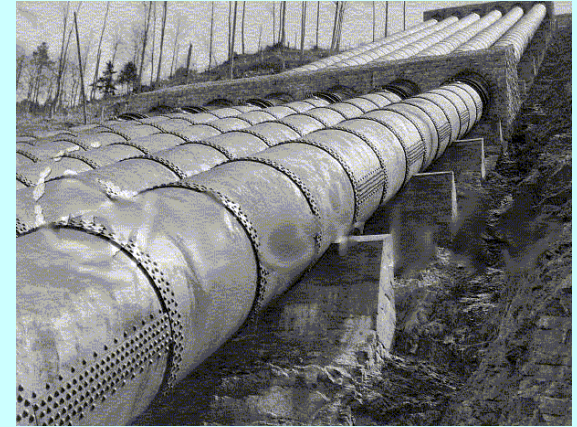
Defines Priority Date of the Right

Property Claims & Degrees of Certainty



Cornerstones: Beneficial Use

- + “Beneficial use shall be the basis, the measure and limit of the right to use of water”
- + Beneficial use is broadly interpreted and identifies no preference of one use over another
- + Instream flows are considered by most States – AZ and NM are exceptions – as a beneficial use for recreation, hydropower, aesthetics, navigation, ecosystem habitat



Cornerstones:

Don't Cause Harm

- + New appropriations and any subsequent changes in use or transfer must not harm, impair, damage, or diminish the rights of other appropriators.
- + Courts recognize rights of juniors “in the continuation of stream conditions as they existed at the time of their respective appropriations” (Farmers Highline Canal and Res. Co v. City of Golden, CO1954)
- + Issues:
 - Changes in return flows
 - Water quality changes (Heine v. Reynolds, NM1962)
 - Burden of proof is on person seeking new use



Key Features of Appropriated Systems

- + Consequences of water shortages are borne by junior rights – **not proportionally**. Priority provides security and value for senior holders.
- + State interpretations of beneficial use have been broad – perhaps generous -- changing conditions and technologies may alter how ‘wasteful’ is defined.
- + Failure to use the right can result in loss of the right. “Use it or Lose it” through intentional nonuse (Abandonment) or unintended nonuse (Forfeiture).
- + Water rights are separable from the land and transferable absent harm to existing users. Original priority date is preserved. Expanded role for markets, option leases, water banks, offset provisions etc.



Complicating Matters

+ Mixed systems

- Notably California, riparian rights are established and compete with claims of appropriators.

+ Groundwater

- Legal treatment evolved separately from surface water and varies widely across states.

+ International, Federal, and Inter-State Issues

- Treaty provisions, compliance, redress
- Federal reserved rights, endangered species
- Interstate compacts, compliance, modification

+ Public interest and public trust doctrine



Groundwater

+ Duality of water law

Legal approach and allocation rules for groundwater evolved separately from surface water because of poor understanding hydrogeology

+ Tug-of-war of legal concepts

- Absolute ownership (rule of capture) of overlying property
- Shared ownership (correlative rights) that apply ‘reasonable use’ criteria and restrict export
- Reasonable use doctrine
- Prior appropriation
- States vary widely and apply various combinations

+ Regionalized management

Many States are recognizing localized nature of critical groundwater problems and develop area-specific management regimes.

Groundwater ‘Conjunctivitis’

- ✦ Surface- and ground-water interactions have many practical difficulties
 - Complex geologies
 - Complicated temporal and spatial relationships
 - Varying water qualities
 - No respect for political boundaries
- ✦ Legal duality yields significant unintended consequences, for example:
 - Behavioral:
‘slippage’ decreasing policy effectiveness
 - Geophysical:
expanded groundwater overdraft
- ✦ Curing ‘conjunctivitis’?
 - In theory, integrate legal institutions and management
 - In practice, easier for states using prior appropriation doctrine
 - Focus on ‘critical areas’ first

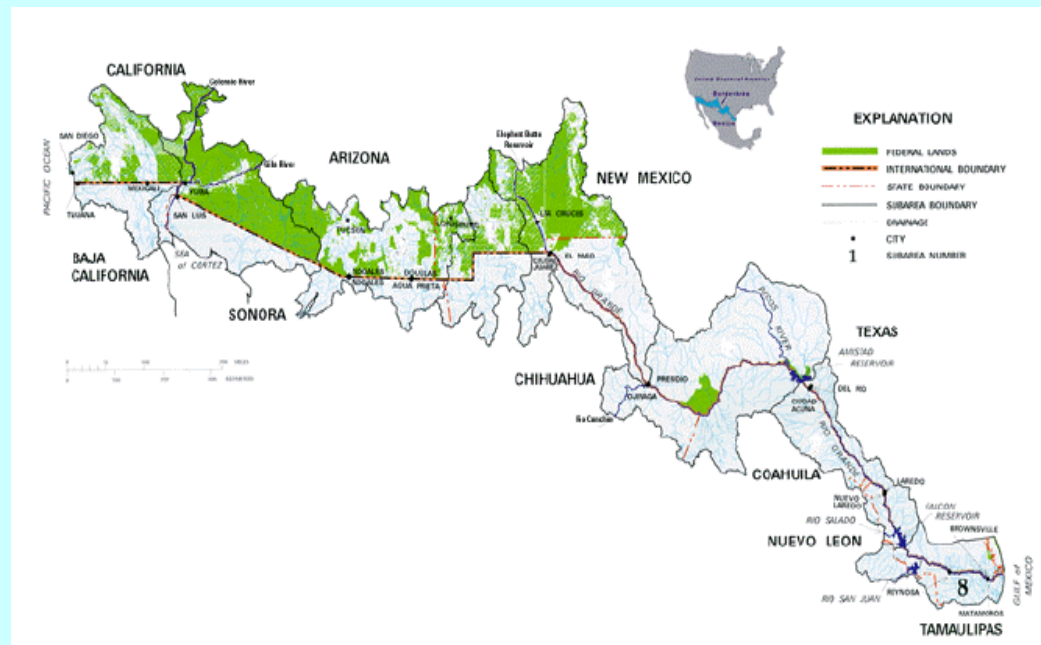


A.G. Fiedler, U.S. Geological Survey

Figure 100. This flowing well was completed in the carbonate-rock aquifer 8 miles southeast of Roswell, N. Mex. On April 21, 1926, it flowed at a rate of 3,190 gallons per minute.

International Treaties and Conflicts

- + Treaties balance territorial sovereignty with desire to reduce conflict
- + Treaties are the 'Supreme Law' and preempt inconsistencies with state laws
- + Treaties with Mexico
 - 1906 allocated 60 kaf/yr to Mexico from the upper basin near Juarez.
 - 1944. (1) Divided waters of the Colorado River, Mexico to receive 1.5 maf/yr; (2) In the lower Rio Grande (south Texas) U.S. to receive ~350 kaf/yr, primarily from flows of the Rio Conchos.
- + Mexico is currently in “material breach” of their obligations to the lower Rio Grande, water debt has accrued to about 1.5 maf owed to south Texas farmers.



Federal Reserved Rights

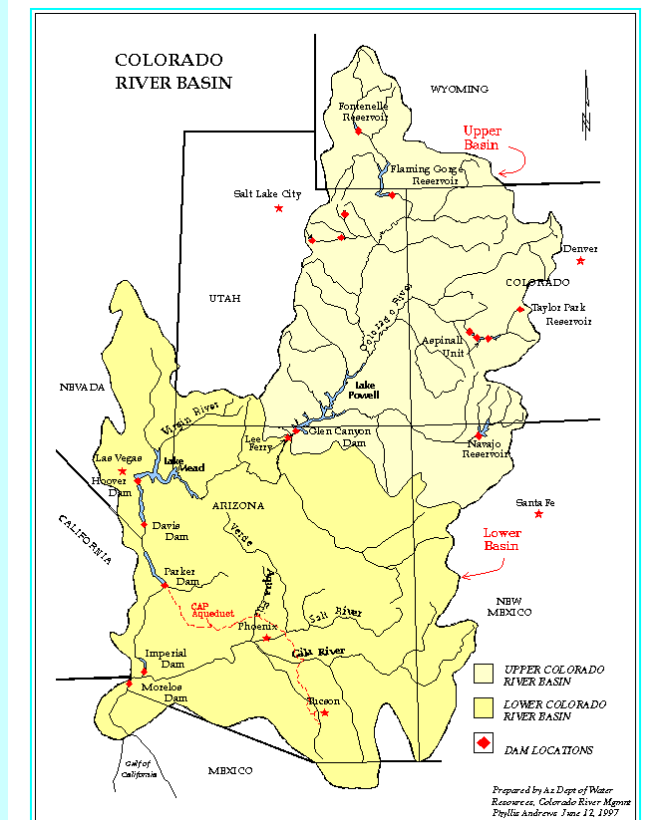
- + Water deemed necessary to fulfill designated congressionally intended purposes of federal lands, including Indian reservations, military installations, and national parks.
- + Indian rights (Winter's doctrine) are prior and paramount may be based on practicably irrigable acreage. Remain largely unquantified and with uncertain potential impact to appropriated systems.
- + Pueblo rights. Particular to the southwest, Treaty of Guadalupe Hidalgo confirmed preexisting rights under Mexican and Spanish law. Water rights under land grants were common property.



Devil's Hole and Puppfish, Amargosa Valley, Nev.

Interstate Compacts

- + Shared waters give rise to disputes
- + Resolution by (a) judicial action of Supreme Court (b) congressional legislation and (c) interstate compact
- + Preference has been for negotiated settlement in a interstate compact
- + Compact disputes typically resolve in the Supreme Court based on original intent of the parties and the concept of equitable apportionment



Public Interest, Public Trust

States have latitude to reject or condition water claims that are not consistent with public interest or public welfare.

- New Mexico. State engineer must evaluate proposed claims and determine that they are “not contrary to conservation of water within the State and not detrimental to the public welfare of the State”
- Alaska details public interest as: applicant benefit, harm to others, economic effects, wildlife, recreation, public health, loss of future alternative uses, access to public waters.



Public Trust Doctrine

Limiting Private Rights in Public Waters

- ✦ Landmark case at Mono Lake allows retroactive review and subsequent qualification of a right to take into account ‘public uses’ not originally considered.

(National Audubon Society v. Superior Court, 1983)

- ✦ Water Quality. Court has upheld that administrators have a “public trust duty” to exercise authority to condition appropriations to accomplish water quality goals.

(U.S. v State Water Resources Control Board, 1986)

- ✦ Reluctance to apply doctrine outside of California. Idaho court was rebuffed in 1995 by legislation that prevented application of public trust doctrine to water appropriation and use.



Final Thoughts

- + Fairness and justice rests on clarity of rights, responsibilities, and expectations
- + Water quality concerns will grow in the debate over individual rights, interstate compacts, and treaties
 - Already affecting wastewater reuse and recycling
 - How good is ‘good enough’?
 - Impact of tradable pollution permits on third parties?
 - Apportioning liabilities for non-point source pollution management

- + Mexican Proverb:

“A dios rogando y con el mazo dando”

“praying to God and with
the hammer continue working”

*We should not rely on divine intervention
though it doesn't hurt to hope a little
comes our way.*

