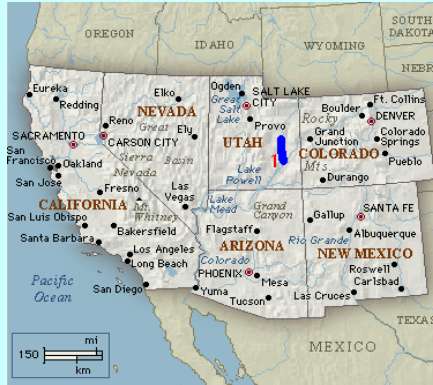


# Who Owns Water? Water Rights in the Southwest States



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## Overview

- + Public water, private rights
- + Surface Water: Doctrine of prior appropriation
  - Concept of beneficial use
  - 'No injury rule'
  - Abandonment and forfeiture
  - Right to quality of water
- + Groundwater: Varied approaches
- + Public rights
  - Federal reserved water rights
  - Instream flow rights
  - Public trust doctrine
- + Interstate compacts

## Public Water, Private Rights

- ✦ 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)
- ✦ “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
  - ‘Usufructuary’ right in contrast to a ‘possessory’ right
    - Considered ‘real property’
    - An article of commerce
  - (e.g., subject to the interstate commerce clause and just compensation for takings under the U.S. Constitution)

## Public Water, Private Rights (cont.)

- ✦ Federal Reserved Rights
- ✦ “The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of

## Groundwater: Additional Complications

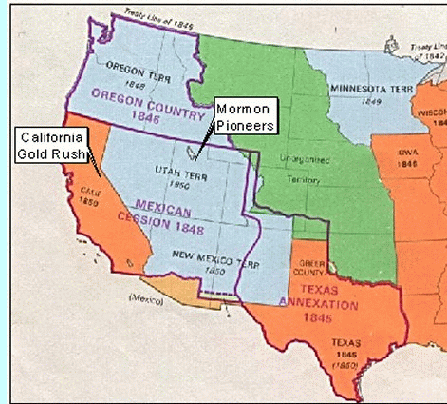
- + Legal concepts and applications vary significantly from state to state
- + Differences typically vary depending on the degree of emphasis between:
  - Importance of overlying property ownership
  - Shared ownership of a public, common-property, resource
- + Important to distinguish Tributary and non-tributary

## Tributary Groundwater

- + Groundwater that is hydrologically linked to surface water
- + This means that groundwater depletions can affect surface flows and vice versa
- + Conjunctive management in some states treats pumpers as another appropriator subject to priority calls
- + Some states require offsetting actions, e.g., increased pumping must be offset by retired surface rights

## Doctrine of Prior Appropriation

+ aa



***“Beneficial use shall be the basis, the measure and limit of the right to use of water”***

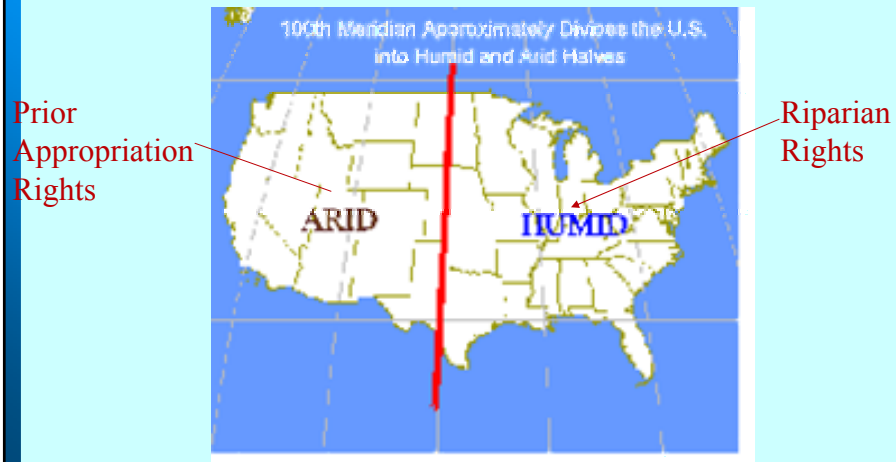
## Who owns water rights?

- + Property owners often acquire water rights with their property
- + Individuals who have filed a claim for rights and put the water to use
- + Individuals who have acquired water rights through sale or transfer

## Water Rights Origins

- + Water is a public good
- + Riparian Rights
  - English Common Law
  - Currently governs the eastern United States
- + Prior Appropriation Rights
  - Originated with Native Americans and Mexico
  - Currently governs the western United States

## 100<sup>th</sup> Meridian



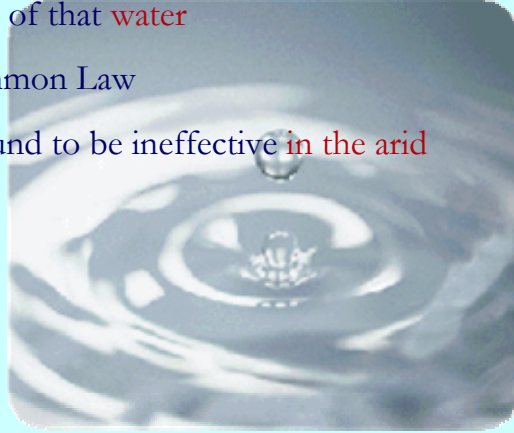
## Three Approaches to Water Rights

- + Riparian Water Rights
- + Prior Appropriation Water Rights
- + Hybrid System Water Rights



## Riparian Rights

- + Rights to water by virtue of land ownership
- + The owners of land contiguous with a water body has the right to divert a portion of that water
- + Origins in English Common Law
- + Riparian rights were found to be ineffective in the arid west



## Prior Appropriation Rights

- + Declared water the property of the public
- + Rights to water acquired by beneficial use
- + Established water rights based on time of declaration



## Doctrine of Prior Appropriation

- + Prior appropriation is a result of the practices used by early settlers
- + The doctrine of Prior appropriation was first adopted as part of the Colorado Constitution in 1876
- + Known as the “First in time, first in right” doctrine



## Doctrine of Prior Appropriation

- + The Doctrine of Prior Appropriation is the governing system over the western United States
- + Although some states acknowledge riparian rights, the majority have moved to a prior appropriation system



## Hybrid System

- + Hybrid, meaning a combination of riparian and prior appropriation systems
- + Also known as the California Doctrine since CA was the first to implement this system



## Water Rights in New Mexico

- + Today water rights in NM are based largely on the Colorado Doctrine of Prior Appropriation
- + Article XVI of the NM Constitution establishes guidelines for water concerns



## New Mexico Water Rights

- + Native Americans irrigated crops prior to the 1500s
- + Spanish missions began irrigated farming in the mid 1600s
- + Acequias have been in existence since the 1600s

## Acequias

- + Acequias are the first community ditch system
- + Allocated water to users it was needed
- + Governed by the Mayordomo or ditch manager
- + Still in existence today



## Acquisition of New Mexico

- + Treaty of Guadalupe- 1848
- + Gadsden Purchase- 1853
- + Prior to the United States acquiring New Mexico water rights had been an issue for hundreds of years

## The Kearney Code

- + Adopted Sept. 22, 1846, the Kearney Code was the provisional government document for New Mexico.
- + It stated that, "*The laws heretofore in force concerning watercourses shall continue in force...*"

## **Desert Land Act of 1877**

- + Recognized the right of western states to the legislative appropriation of water within their boundaries
- + Set down the Doctrine of Prior Appropriation as law for the west

## **First Judicial Decisions**

- + 1883-Carrillo v. Keeney case upheld the doctrine of prior appropriation
- + 1887-Trambley v. Luterman addressed water rights transfer

## Water Code of 1907

- + Declared the law as it had been stated by court decisions
- + Established regulations on volume of water and period of annual use
- + Created the Office of State Engineer

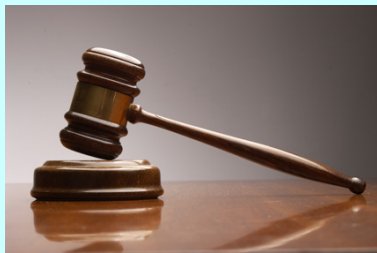
## Office of the State Engineer

- + State Engineer is the authority on matters concerning water in the state
- + NMSA 1978 states, *He has general supervision of waters of the state and of the measurement, appropriation, distribution thereof...*



## Adjudication

- ✦ Adjudications are deliberate determinations by a judicial power, a judicial decision or sentence

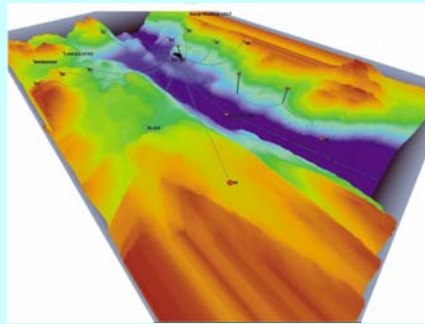


## Water Rights Adjudications

- ✦ Water rights adjudications are the determination and verification of water rights on a stream or in a basin
- ✦ Adjudications ensure that rights on paper translate to water in the ditch
- ✦ Are needed because of a lack of accurate records of water rights

## Adjudication Process

- + Hydrographic survey
- + Historical water use survey
- + Determines beneficial use



## Adjudication Process

- + States employ two methods of adjudication
  - Judicial
  - Administrative
- + NM uses a combination of the two
  - Administers offerings of water rights
  - Contested claims are taken to court

## New Mexico Adjudications

- + 13 current adjudications in process
- + NM uses a combination administrative and judicial procedure
- + Rights are assessed by the state engineers office and delivered to rights holders then disputed claims are decided in court

## Interstate Compacts

- + Interstate compacts are treaties between states regarding the flow of water that crosses borders
- + Every state in the U.S. is party to some compact
- + New Mexico for example is party to eight interstate compacts



## Rio Grande Compact

- + Signed 1938 by New Mexico, Colorado, and Texas
- + Commits CO to deliver water downstream based on yearly runoff
- + Commits NM to deliver an amount of water to TX

## Colorado River Compact

- + The Colorado River Compact is between Colorado, Arizona, and California
- + This compact has seen lots of attention lately due to the current drought