



NEGOTIATION OF FEDERAL RESERVED WATER RIGHT CLAIMS IN UTAH

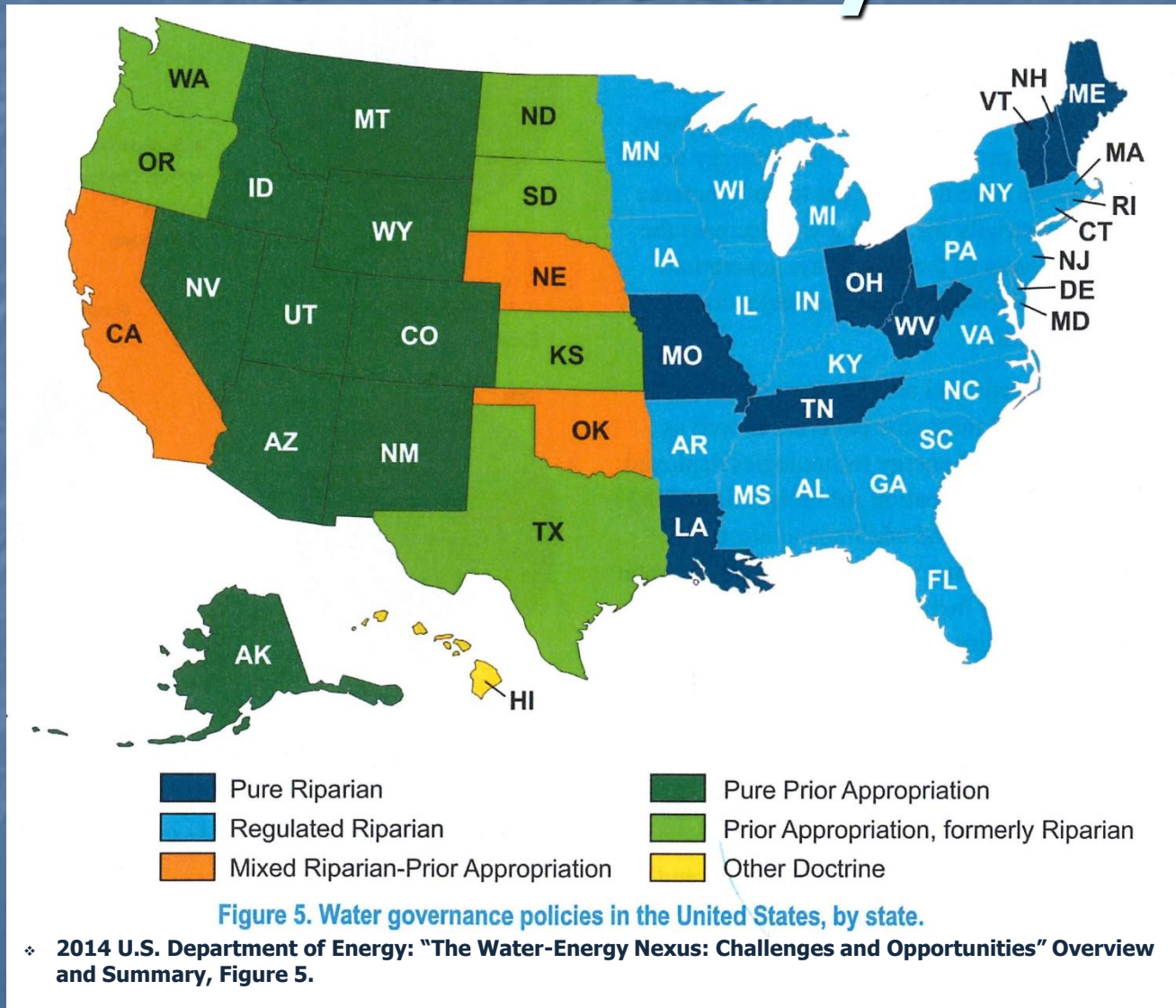
Boyd Clayton

Utah Division of Water Rights

September 26, 2016

Springdale, Utah

Western Water Law — Origin and History



Western Water Law — Origin and History

- ❖ Appropriative water rights are constitutionally protected property rights
- ❖ Their basis is the beneficial use of water
- ❖ They are defined by quantity, time, and nature of use
- ❖ Priority date is when beneficial use began or when an application was filed to use them
- ❖ They can be lost by non-use

Reserved Rights Doctrine — Origin and History

- ❖ At the same time the appropriation doctrine was developing with federal approval, federal reservations of land were being made in the West
- ❖ Congress and the President set aside public lands for a particular purposes, such as Indian reservations, but did not create accompanying water rights



Reserved Rights Doctrine — Origin and History

- ❖ In 1906 the U. S. sued on behalf of the Ft. Belknap Reservation Indians to secure water rights for them on the Milk River
- ❖ Defendant farmers/ranchers protested, saying they had valid water rights created under Montana law
- ❖ The suit created a genuine dilemma

Reserved Rights Doctrine — Origin and History

- ❖ In 1908 the Supreme Court issued its *Winters* decision
- ❖ It said Congress, when it set aside the reservation, impliedly intended to reserve water for the Indians
- ❖ The “reserved rights” doctrine was born as an equitable, judicial response to a real and difficult controversy

Reserved Rights Doctrine — Further Refined

- ❖ *Arizona v. California* (1963) - Reserved rights doctrine applies to federal reservations other than Indian reservations.
- ❖ *Cappaert v. U.S.* (1976) – The amount of water reserved is the minimum amount necessary to fulfill reservation purposes
- ❖ *U.S. v. New Mexico* (1978) – Only primary purposes get reserved water rights

Reserved Right Characteristics

- ❖ Reserved water rights are important sovereign and property interests
- ❖ Their basis is the creation of reservations
- ❖ The purpose of the reservation defines their quantity
- ❖ Priority date is creation of the reservation
- ❖ They are not lost by non-use

Reserved Rights vs. Appropriative Water Rights

- ❖ In addition to having characteristics that conflict with appropriative water rights, the more pressing problem is that reserved water rights are usually unquantified when created
- ❖ Given their early priority dates, they compete with and can displace State-created water rights

Reserved Rights vs. Appropriative Water Rights

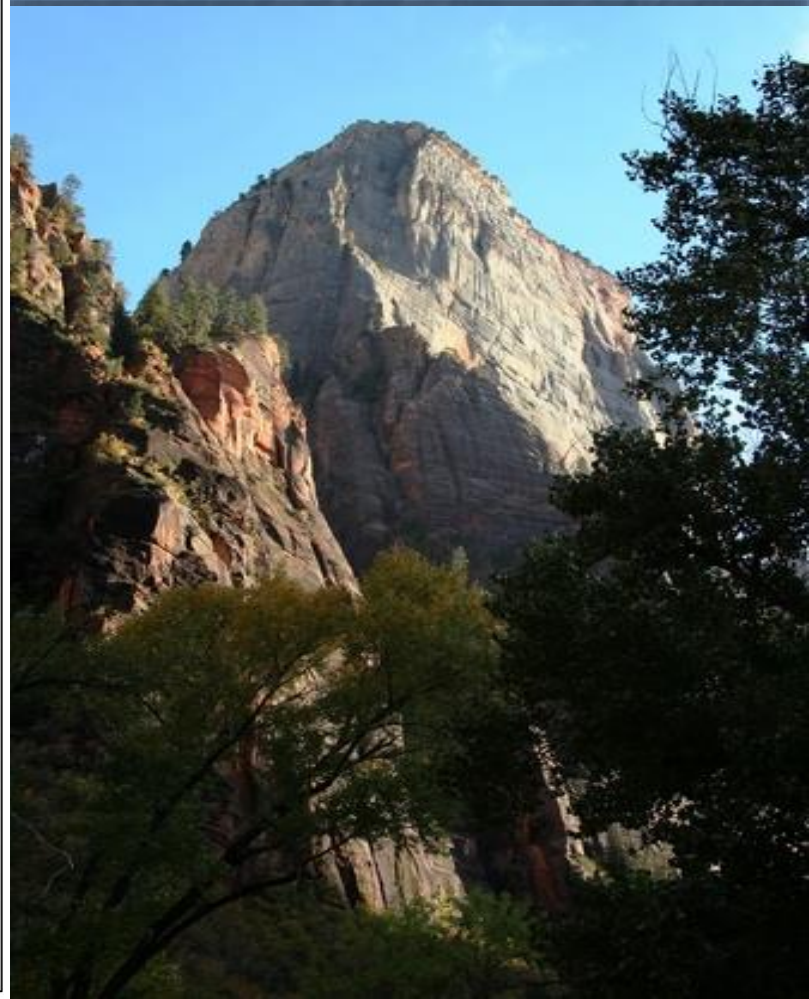
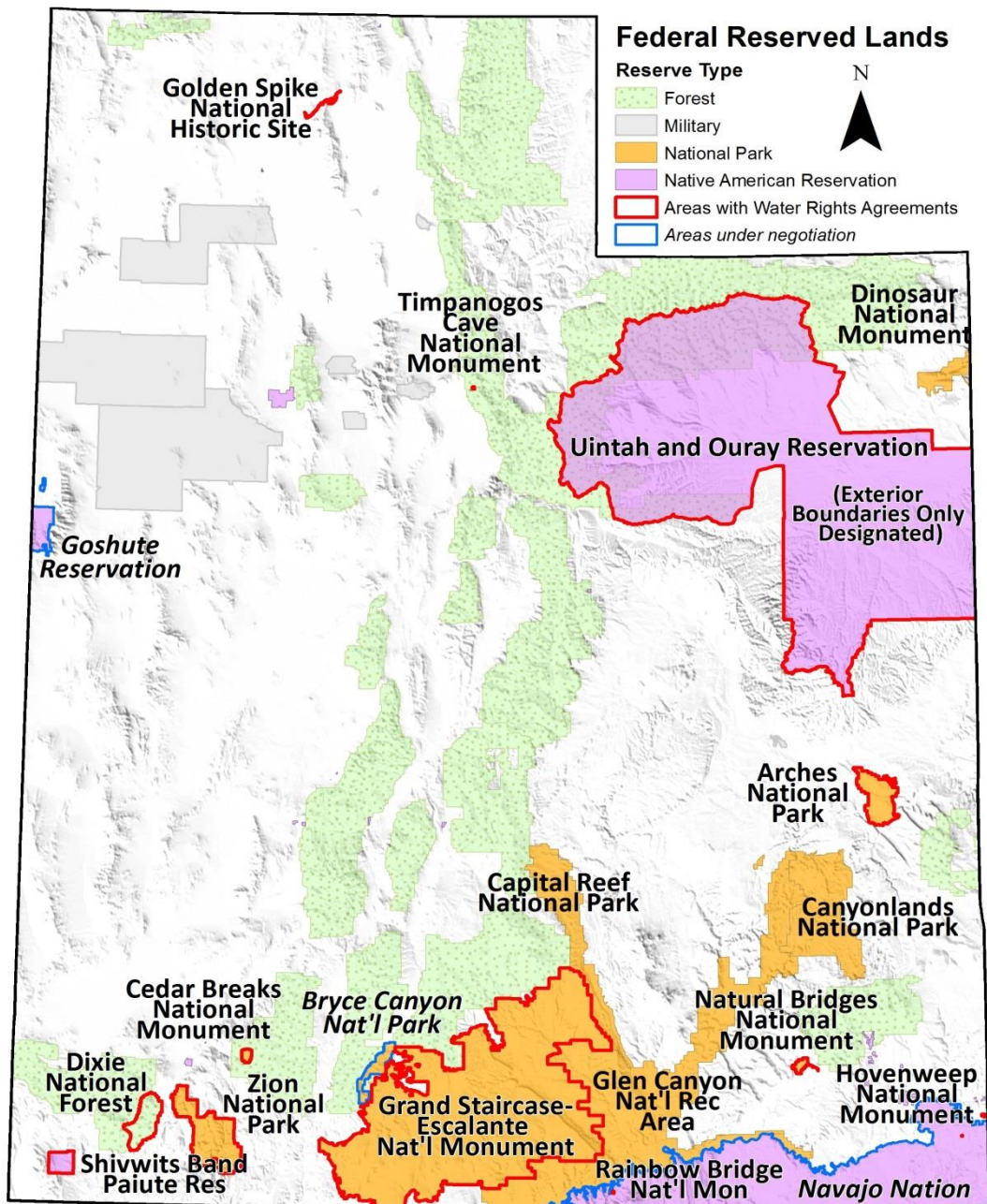


- ❖ Utah, an arid state, has many federal reservations — federal lands set aside for specific purposes, like Indian reservations, national parks and monuments, military bases, etc.
- ❖ How should these rights be quantified?

Reserved Rights vs. Appropriative Water Rights

- ❖ States have taken different approaches:
 - ❖ Pretend reserved rights don't exist
 - ❖ Litigate reserved rights
 - ❖ Negotiate such rights on a case-by-case basis
- ❖ Utah has chosen to negotiate because it provides the best opportunity for a win/win result

Federal Reservations in Utah



MECHANISM TO IMPLEMENT NEGOTIATED AGREEMENTS

- ❖ In Utah, general water right adjudications are pending in most of the State
- ❖ These adjudications, typically done in sub-basin drainages, are comprehensive and qualify for the McCarran Amendment sovereign immunity waiver

GENERAL ADJUDICATION CONSIDERATIONS

- ❖ Once a reserved right agreement is finalized, the State Engineer presents it to the Adjudication Court as a Proposed Determination (PD)
- ❖ The PD is the State Engineer's recommendation concerning the water rights for the reservation
- ❖ The PD is circulated to all parties
- ❖ Parties have the opportunity to object

GENERAL ADJUDICATION CONSIDERATIONS

- ❖ To minimize controversy, we educate parties before they receive the PD and work with water users to minimize controversy before entering into an agreement
- ❖ Objections must be dealt with and the agreement provides the state engineer will support the agreement concepts in resolving the objections

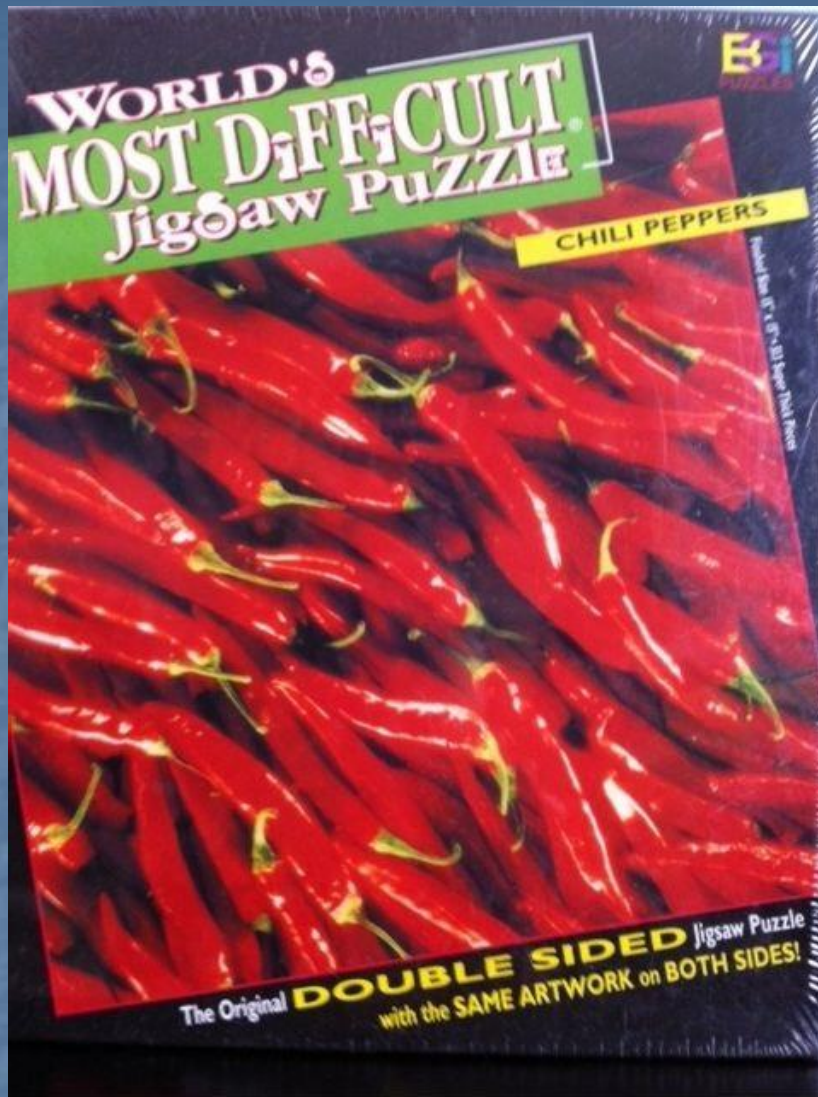
SETTLEMENT MECHANICS

- ❖ Negotiators must:
 - ❖ Be cognizant of all rights;
 - ❖ Realize that settlements must work for all;
 - ❖ Communicate and educate;
 - ❖ Focus on what matters;
 - ❖ Use technicians;
 - ❖ Build trust;
 - ❖ Be patient;
 - ❖ Put things in context; and
 - ❖ Acknowledge finality.



Utah Negotiation Process

- Authorization through Negotiation MOU
- Define Reservation and Purpose
- Analyze Potential Claim
- Identify Impacted State Based Rights
- Discuss what win/win looks like
- Exchange Proposals supported by stakeholders
- Agree to find a solution



**THE
CHALLENGE**

Zion Agreement – Case Study

- Competing Objectives
 - Natural flows through park
 - Hanging gardens
 - Some private lands above park
 - Growing need for water
 - Difficult Flashy drainage
 - Storage Plans above park

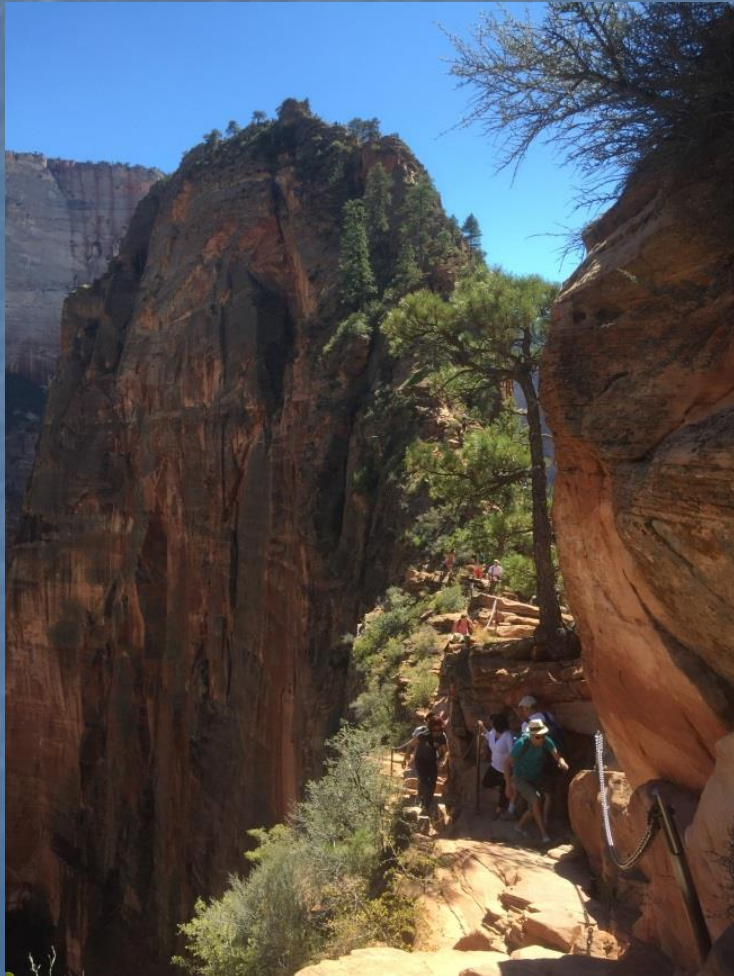


Quantification

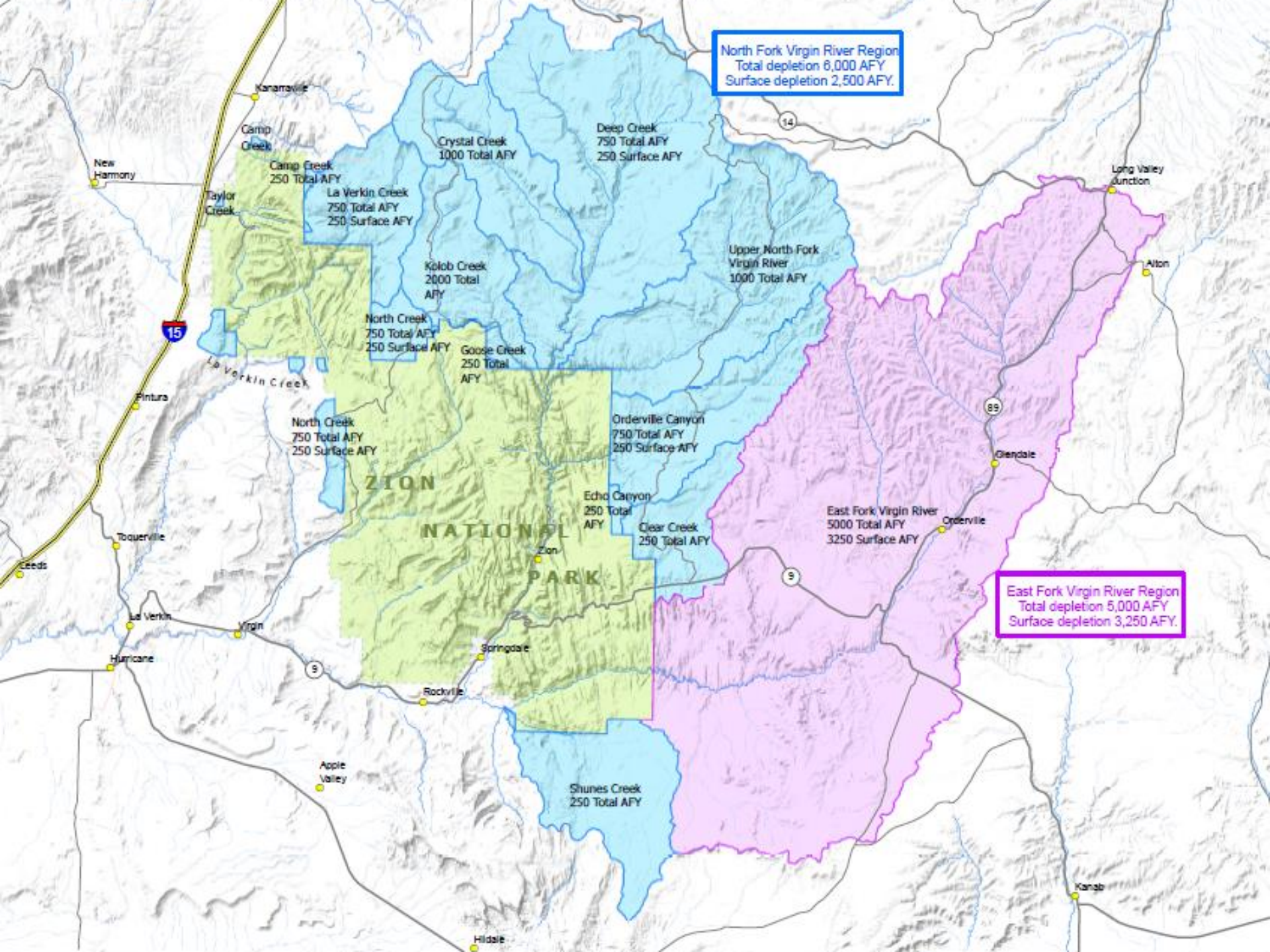
- Administrative Uses
 - Memorialize uses based on State Appropriative Rights
 - Maximum Overall use
- GW Protection Zone
- Limits on New Reservoirs
- Limits on new uses above park



Major Hurdles



- Maintaining the flow status quo
- Subordination to existing rights
- Finding ways to store excess water if not above Park
- Co-existing in a developing area



Arriving

- Accounting for new uses in sub-basins
- Policies to limit appropriations
- Land acquisition for downstream reservoir



Getting Air

- Pd Published with 3 Objections
- Decree Entered Jan 2001



Implementation

reserved rights within Zion National Park was distributed. In January of 2001, an "interlocutory Decree" was entered by the Fifth District Court affirming the rights in Book 6. **Part of this agreement limits the amount of available water that can be developed above the park.** Scanned pages of the [Zion National Park Settlement Agreement](#) are available online. The following table showing water remaining for development will be updated regularly as change applications are approved and developed. A [map showing the regions and subregions](#) is available as a printable PDF.

EAST FORK VIRGIN RIVER REGION

Subregion	Total AF Permitted	Total AF Appropriated	Total AF Remaining	Surface AF Permitted	Surface AF Appropriated	Surface AF Remaining
East Fork Virgin River	5,000	0.52	4,999.48	3,250	0.27	3,249.73

NORTH FORK VIRGIN RIVER REGION

Subregion	Total AF Permitted	Total AF Appropriated	Total AF Remaining	Surface AF Permitted	Surface AF Appropriated	Surface AF Remaining
Camp Creek	250	0.00	250.00	250	0.00	250.00
Clear Creek	250	117.84	132.16	250	117.84	132.16
Crystal Creek	1000	1,429.99	0	1000	1,429.99	0
Deep Creek	750	0.91	749.09	250	0.91	249.09
Echo Canyon	250	0.00	250.00	250	0.00	250.00
Goose Creek	250	0.00	250.00	250	0.00	250.00
Kolob Creek	2000	4.12	1,995.88	2000	3.67	1,996.33
La Verkin Creek	750	0.32	749.68	250	0.32	249.68
North Creek	750	1.06	748.94	250	1.06	248.94
Orderville Canyon	750	0.01	749.99	250	0.01	249.99
Shunes Creek	250	11.96	238.04	250	11.96	238.04
Taylor Creek	250	0.00	250.00	250	0.00	250.00
Upper North Fk Virgin R.	1000	0.00	1,000.00	1000	0.00	1,000.00
TOTALS:	6,000	1,566.21	4,433.79	2,500	1,565.76	934.24

In 2009, [H.R. 146](#) became law designating as "Wild and Scenic Rivers" approximately 165.5 miles of segments of the Virgin River and tributaries of the Virgin River across Federal land within and adjacent to Zion National Park, as generally depicted on this [map](#). This designation provides protections which are described in U.S. Code [TITLE 16 chapter 28](#) for these river segments as of the date of the designation. H.R. 146 specifically states that the stream segments within Zion



QUESTIONS?

