

# Understanding Surface Water Rights in the Verde Valley, Arizona

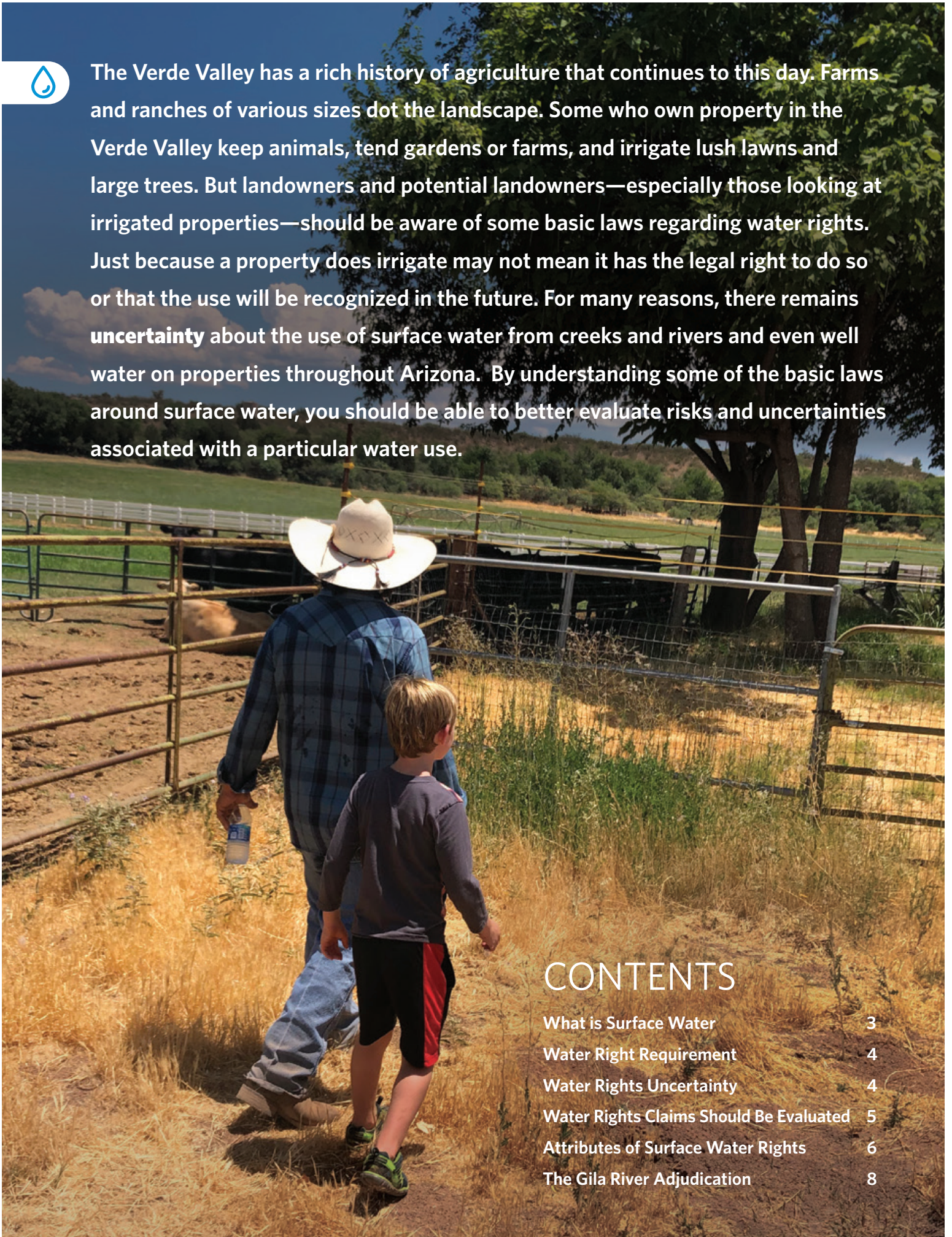




The Verde Valley has a rich history of agriculture that continues to this day. Farms and ranches of various sizes dot the landscape. Some who own property in the Verde Valley keep animals, tend gardens or farms, and irrigate lush lawns and large trees. But landowners and potential landowners—especially those looking at irrigated properties—should be aware of some basic laws regarding water rights. Just because a property does irrigate may not mean it has the legal right to do so or that the use will be recognized in the future. For many reasons, there remains **uncertainty** about the use of surface water from creeks and rivers and even well water on properties throughout Arizona. By understanding some of the basic laws around surface water, you should be able to better evaluate risks and uncertainties associated with a particular water use.

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# What is Surface Water

“Surface water” generally refers to water in rivers, streams, washes, lakes, or springs. Water that comes from the Verde River, Oak Creek, West Clear Creek, or other local creeks or streams is surface water. Often this water is delivered to a piece of property through an irrigation ditch. Surface water from these rivers and creeks is used to “irrigate,” or provide water to, crops, lawns, gardens, or pastures. Arizona’s laws say that water pumped from wells is also surface water if that water is found by a court to be closely enough connected to a river, creek, or other surface water source based on underground hydrology and legal criteria. This water is called “subflow.”



## SURFACE WATER



Legally, **surface water** in Arizona is defined as “the water of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels, whether perennial or intermittent, floodwater, wastewater or surplus water, and of lakes, ponds and springs on the surface.” (Arizona Revised Statutes, § 45-101)

## SUBFLOW



**Subflow** is underground water that is treated like surface water under Arizona law. Water pumped from a well may be found to be subflow in the **adjudication** (see section below on the Gila River Adjudication). If a well is found to be pumping subflow, more senior water right holders may be able to place a “call” on that water use and prevent a well user from pumping. Whether a well is pumping subflow will eventually be determined by where the well is located (whether it is in the subflow “zone”) and what water it is pumping (whether and how its pumping will impact water in the subflow zone).



# Water Right Requirement

In order to use surface water in Arizona, state law requires that you have or obtain a water right. This means that a water right is required in order to use any water that comes from the Verde River, Oak Creek,

or another local creek, stream, or wash. This includes water conveyed through an irrigation ditch. A water right *may* also be required to use water that comes from a well, if that well is legally determined to be pumping “subflow.”

# Water Rights Uncertainty

Water rights in the Verde Valley area and in much of Arizona have not yet been fully “adjudicated” or determined by a court. Unfortunately this means that **in most cases a property owner (or potential buyer) cannot be certain about the details of a property’s water right** or its seniority relative to others’ rights. Instead, property owners and potential buyers can investigate the piece of property’s “Claim” to a water right in the adjudication—including court filings, agency documents, and other supporting documentation—to better understand how and whether surface water may be used on the property.

**In this document we use “Claim” to mean a “Statement of Claimant” (SOC). A Claim is a filing that describes a legal claim, under oath, to a water right in the ongoing adjudication.** We use “water right” to mean a legal right to use surface water. Claims are filed to assert a claim for a water right in the adjudication but do not in themselves establish a right. See box about “Rights, Claims, and the 1919 State Water Code.”

# Water Rights Claims Should Be Evaluated

Water rights and Claims to water rights in the adjudication are tied to specific acres of land and are therefore transferred with the land in a real estate transaction. Buyers and landowners should evaluate water right Claims and documentation prior to purchase and update ownership records with the Department of Water Resources and the adjudication court after a purchase (see companion piece *Evaluating Surface Water Right Claims*). Just because a parcel has access to the river, a creek, or an irrigation ditch does not necessarily mean that the property has a legal right to use water on that land. Also, just because you can see surface water being used on a piece of property does not mean that that property has a legal water right or that water is being used in a way that is consistent with the property's water right Claim. **It is therefore important to evaluate the water right Claims and supporting documentation for a specific parcel of land.** Claims do not in themselves establish a water right but must be filed to assert a right in the adjudication.

## RIGHTS, CLAIMS, AND THE 1919 STATE WATER CODE



The process to establish a legal right to use surface water in Arizona (a **"surface water right"**) has evolved over time.

Prior to 1919, the right to use surface water in Arizona could be acquired by simply "appropriating" or putting the water to beneficial use and providing some type of notice of the use. As with other water rights, these pre-1919 water rights have not been individually confirmed by the adjudication court, which will ultimately determine the validity, extent, and priority of all claimed rights.

With the passage of the 1919 Arizona Water Code, a person wanting to obtain a water right and use additional water was required to go through an administrative **application** and **permit** process. If successfully completed, this process results in first a permit and then a **certificate of water right** issued by the state. Post-1919 water rights are therefore sometimes called "certificated rights." A certificated right is subject to existing water rights with priority dates earlier than the priority date in the certificate. Very few certificated water rights exist in the Verde Valley area. Most Claims are for surface water rights that pre-date the 1919 Water Code.

A **"Claim"** or **"Statement of Claimant"** (with a "39" prefix) is a document filed with the Arizona Department of Water Resources (ADWR) that describes a legal claim to a water right in the adjudication. Other documents and filings are needed to support the Claim in the adjudication.

A **Water Rights Registration Act (WRRRA) Filing** (with a "36" prefix) is a filing made with ADWR to document water rights that have previously been asserted. Though a WRRRA Filing is confusingly called a "Statement of Claim" it is not the same thing as a Claim in the adjudication. A WRRRA Filing can support a Claim to a pre-1919 water right. Claims and supporting documentation such as WRRRA Filings do not in themselves establish a water right. (See *Evaluating Surface Water Right Claims* for more on these and other filings.)



## PRIOR APPROPRIATION

Prior appropriation evolved in the western United States as a way to allocate a scarce and unpredictable resource and ensure those first diverting water were not adversely impacted by future water users. It is sometimes described by the phrase “first in time, first in right.”



# Attributes of Surface Water Rights

A surface water right entitles the holder to use a specific amount of water on a specific piece of land for a specific purpose. These details are just some of the **attributes** of a water right. Because water rights themselves have not been fully adjudicated or determined in the Verde Valley, it is important to consider the attributes of the claimed water right, and how well they are substantiated by the water right Claim (SOC) and supporting documentation.

### Appurtenance:

A water right may only be used on the specific land where it was originally used. The water right is specific to certain acres and may or may not extend to the entire parcel. Under Arizona law, only under certain conditions can surface water rights be transferred from one location of use to another (called a **“sever and transfer”**). Special proceedings are also required to change the purpose of use or point from which the water is diverted. Even before water rights have been fully adjudicated it is necessary to go through the appropriate administrative processes to make changes to a claimed water right.

### Priority:

Surface water rights are based on a legal doctrine called **“prior appropriation.”**

Under the doctrine of prior appropriation, the landowner of lands where water was first beneficially used is entitled to their entire share before the next user receives any water. This means that land where water was first applied retains a priority for use that is senior to uses on lands where water was first used at a later date. The adjudication court will confirm a “priority date” for each water right that determines the relative seniority of that right.



If your water right is found to have a junior, or more recent, priority date, a water user with a senior date may be able to make a “call on the river” and insist that you stop using your water right. For example, water rights with priority dates after 1900 are more junior than Verde Valley water rights dating to the 1800s, and if a successful call is made these more junior rights cannot be used unless there is enough water to first satisfy the water rights of the more senior users. By sometime in the early 1900s, most people think that all of the water in the Verde and Salt River watersheds was already appropriated.

### Quantity:

A specific volume of water will be assigned for each water right based on when and how much water has been used historically. Unless water rights have been adjudicated in some fashion, a quantity has not been defined for most rights.

### Type of Use:

A water right is for a specific **type of use**. Beneficial uses of water generally include domestic, municipal, irrigation, stock watering, water power, recreation, wildlife (including fish) and mining.

Under certain circumstances it may be possible to **forfeit** a water right by not using it for five or more years, or to **abandon** a water right by taking actions that show you don’t intend to use the right anymore. It can therefore be important to understand the history of water use on your property, or before purchasing the property of another.

## FEDERAL WATER RIGHTS



Most of this document has focused on surface water rights granted under Arizona state law. It is also possible to have a federal right to use water in Arizona. For example, a “federal reserved right” is a right to use water that arises when the federal government “reserves” or “withdraws” land for a specific purpose. The priority date for the water right is usually tied to the date the reservation was created. Federal reserved water rights have different characteristics than water rights that come from state law.

The federal government has withdrawn land to create, for example, national forests, national parks, military bases, and Native American homelands or “Indian reservations.” A federal reserved water right exists in connection with most of these types of lands.





## GRANDFATHERED WATER RIGHTS

Real estate listings sometimes refer to properties as having “grandfathered water rights.” When used to describe surface water, **this term does not have a legal meaning.** It is important to know if a parcel has a Claim to a surface water right based on historic use, and to learn more about that Claim and the history of use. But “grandfathered water right” could mean different things to different people, and the use of that term (or similar ones) does not mean that a water right is guaranteed.



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# The Gila River Adjudication

The Gila River General Stream Adjudication, often just called the “adjudication,” is a ongoing court case involving thousands of parties called “claimants” that will eventually determine the validity of claimed water rights and their attributes, including priority, appurtenance, the quantity of water that may be used, and the type of use. All claimed water rights within the Verde River Watershed are under the jurisdiction of the the Gila River Adjudication. This means all users of surface water in the Verde Valley—and many users of water from wells—are part of or may be affected by the adjudication. As a water user in the Verde Valley area, you or your water provider may be a party in this court case. It is important to understand your “Claim” to water rights in the adjudication and understand that the adjudication will eventually determine water use on your property—including how much water may be used, on what acres, for what purpose, and with what level of seniority relative to others. Until then, there remains a degree of uncertainty. Water rights in Arizona can seem complicated and daunting, however, owners and buyers can make better purchasing and selling decisions by educating themselves about water rights issues, adjudication Claims, and supporting documentation. (Also see companion piece, *Evaluating Surface Water Right Claims*)

## FOR MORE INFORMATION ABOUT WATER IN ARIZONA AND THE VERDE VALLEY:

Arizona Department of Water Resources: [azwater.gov](http://azwater.gov)  
Friends of the Verde River: [verderiver.org](http://verderiver.org)  
Salt River Project: [WatershedConnection.com](http://WatershedConnection.com)

Superior Court General Stream Adjudication page:  
<http://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/Index.asp>



The information presented herein is intended to be strictly informative and does not constitute legal advice. Anyone having questions about specific water rights issues should consult with an attorney.