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Water Law in the Western United States

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The Utton Center is a Water Policy Center.

- We address transboundary water resource issues by providing expertise from a neutral standpoint.

Overview

- Basic principles of Western water law
- New appropriations
- Water administration – surface/ground
- Water rights transfers

- Adjudication of water rights
- Indian water rights
- Providing environmental flows
- Interstate Compacts
- Into the future

What is Water Law?

Water Law is a set of rules re water resource allocation & use

Necessary to have a basic understanding in order to assess U.S. efforts toward sustainable water management and ecosystem protection

Primarily, water law is STATE law, however, there is significant federal involvement

Federal issues

- Indian Water rights
- Federal Environmental laws
- Federal water projects – power, flood control, irrigation
- Interstate Compacts

Prior appropriation fundamentals

Prior appropriation doctrine governs surface water use in West

Water rights arise by actions of appropriator

- ‘first in time, first in right’ – earliest rights are best
- diversion of water from its natural course
- application of water to a ‘beneficial use’

Beneficial Use is the basis, measure and limit of a water right

- Quantity of water is that needed for beneficial use
  - *Water left in river until fairly recently was not considered a beneficial use*
- "Waste" is not beneficial use
- Examples: where most of water evaporates
- Reasonably efficient means of diversion required

Getting a water right

- Originally, users could establish a right just by putting water to beneficial use
- Starting with Wyoming in 1890, most western states began requiring a state permit for new water uses
- Permitting decisions are made by state agencies based primarily on water availability

Similarities and differences among the States: Prior Appropriation in most Western States

- Colorado
- New Mexico
- Idaho
- Montana
- Nevada
- Utah
- Wyoming
- Arizona

Other States

- California – dual system
  - riparian rights along streams
  - Appropriative rights – putting water to beneficial use
  - Pueblo rights

- Oregon – prior appropriation, with remnants of riparian water rights

Horse plow in young orchard, Hillcrest Orchard near Medford, Oregon – 1910

New Appropriations

Basic approach:

- Is there impairment?
- Is it contrary to water conservation?
- Is it contrary to the public interest?
  - *Impact on ecosystem is not specifically a criteria*
- (New Mexico follows this approach)

Idaho

- New use will not damage existing rights
- Water supply is sufficient for the purpose of the new use
- *Application is made in good faith and is not speculative*
- *Applicant has sufficient resources to complete the project*
- New use does not conflict with the local public interest
- Project is consistent with conservation of water

Utah

- Is there unappropriated water?
- Will the proposed use impair existing rights or interfere with uses that are more beneficial?
- *Is the proposed plan feasible?*
- *Was the application filed in good faith and not for speculation or monopoly?*
- *Will it unreasonably affect recreation or the natural stream environment?*
- Will it be detrimental to the public welfare?

Nevada

- Is there unappropriated water?
- Will the proposed use impair existing rights?
- Is the proposed use detrimental to the public interest?
- *State Engineer explicitly can consider water quality issues.*
- Can place conditions to protect any interests.

Surface water rights administration in the West

State officials are responsible for shutting off junior users as needed to get water to seniors

When senior users ask for such regulation, that's referred to as a **call** – 'putting a call on the river'

Typically NO regulation in *unadjudicated* basins

Groundwater

- Typically surface water and groundwater have been administered separately
- When early laws were enacted, people didn’t realize that surface and groundwater are often interconnected

Groundwater

1. Absolute Ownership (capture) – unlimited use by any overlying owner – some eastern states & Texas

2. ‘American’ Reasonable Use – ‘reasonable’ use on overlying lands (in AZ and many east/midwest states)

Groundwater

3. Correlative Rights (equitable sharing of water among overlying owners – mostly California)

4. Prior Appropriation: first in time, first in right, subject to limits (most western states)

Particular groundwater regulations:

Montana:

- Outside of Controlled Groundwater areas, no permit is needed to drill a well or develop a groundwater spring with an anticipated use of 35 gallons per minute or less, not to exceed 10 acre feet per year

Montana

Controlled Groundwater areas:

- Where withdrawals are in excess of recharge, or are very likely to occur in the near future; or there are significant disputes concerning priority or amounts being used; or the water quality is deteriorating

Arizona

- Arizona groundwater management:
  - Intended to control severe overdraft
  - Provide a means to allocate the state's groundwater
  - Augment groundwater through water supply development

Active Management Areas

Councils develop water conservation strategies within the AMA. Required to achieve a “safe yield” where consumption = recharge.

Water right changes (transfers)

Water rights are normally ‘appurtenant’ to a parcel

But, water right terms may be changed, especially:

- Point of diversion
- Place of use
- Type of use

Water rights transfers

Prior state approval is needed for such changes:

- Is there a valid water right?
- What is the historic beneficial use of the right?
- Would the change cause injury to other water users?

Highlights from States: Water Rights Transfers

Idaho:

- Has a thriving water rights market
- Water Resources Board also operates a water bank to facilitate temporary transfers to provide a mechanism for entities (that have excess water) to lease it

Wyoming Water Transfers

- Water rights cannot be sold. They are attached to the land and cannot be sold separately from the land, but can be included in the sale of the land

Oregon Water Transfers

- Water rights can be transferred, but a profit cannot be made. Only the expenses incurred regarding the operation and sale of the water right can be recovered
- This law may not be strictly enforced

California Water Transfers

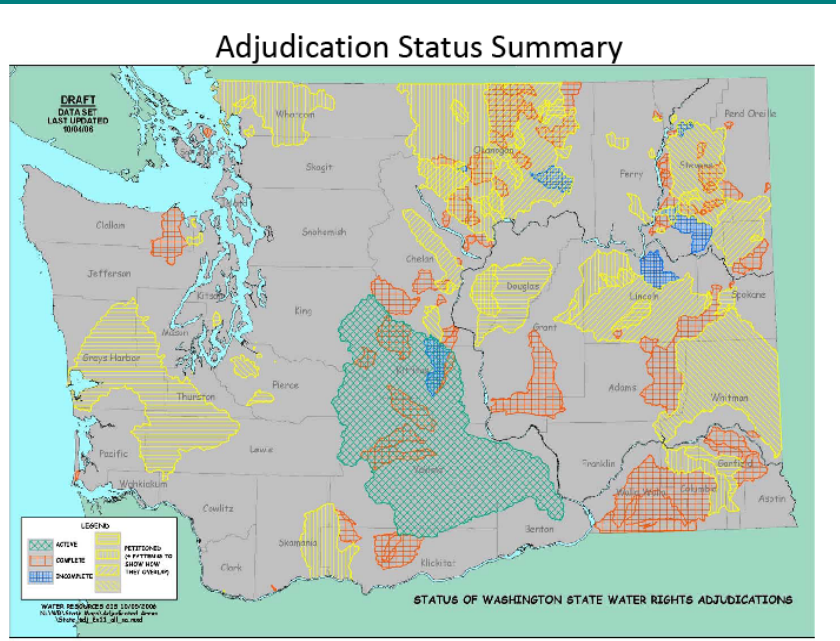
- Water rights can be transferred separately from land subject to approval of the State Water Board
- Must find that the transfer would not injure any other water rights and would not unreasonably affect fish, wildlife, or other instream beneficial uses

Adjudications

"Adjudications" are huge court cases that determine all water rights in a river system

They need to be complete in order for TRUE priority administration to occur

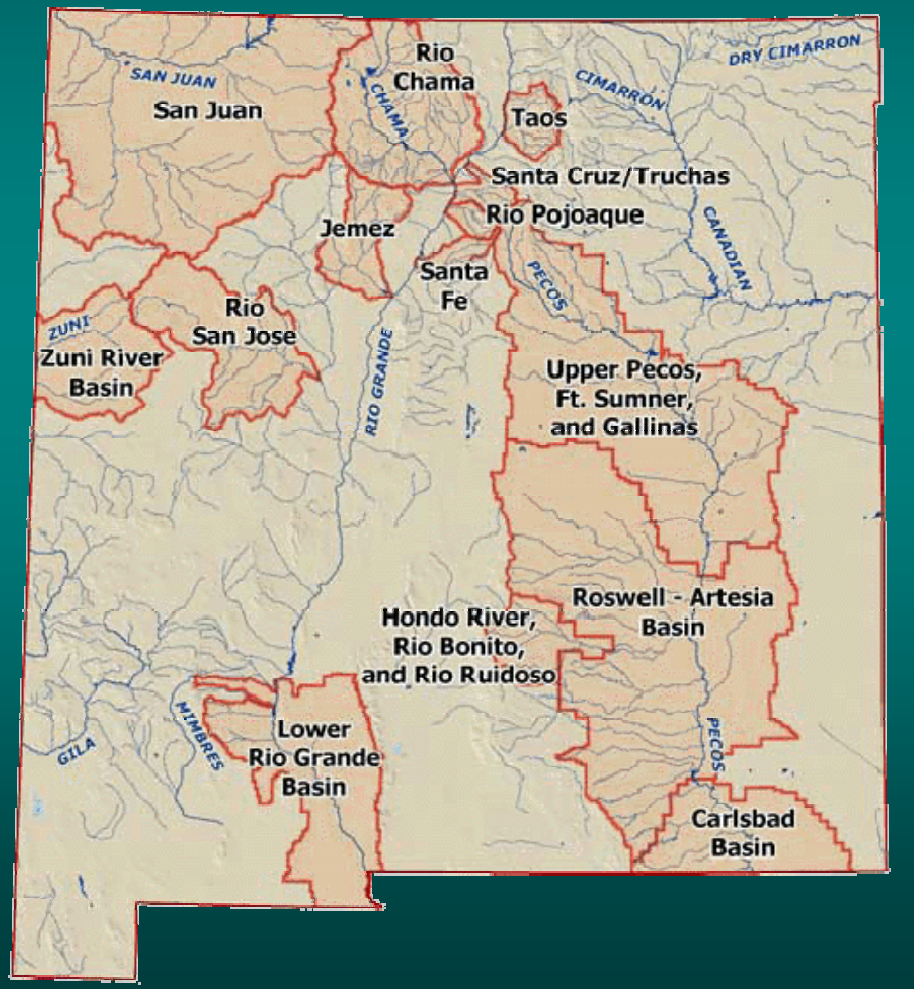
They are far from complete in most of the Western States



New Mexico Adjudication status

- 13 on-going adjudications filed starting in 1956, up through 2001
- There are 64,875 claimants involved

- Aamodt is longest running legal case in US history
- Estimate 100 years to complete all water rights adjudications



Idaho Adjudication

- Snake River Adjudication filed in 1987 involves 38 of the 44 counties in Idaho and accounts for about 87% of the state's water rights
- Settlements are pending

Montana adjudicaton

- 1979 bill enacted and mandates a comprehensive general adjudication of the entire state's 85 drainage basins
- Supreme Court ordered all claimants to file by 1982

Utah Adjudication

- Court ordered adjudication – started in the 1950s and 1970s
- Entire state is in adjudication except the Sevier and Weber Rivers which were adjudicated in the 1920s and 1930s

Wyoming Adjudication

- Application process results in an adjudicated right through administrative procedures on a right-by-right basis
- There are several general adjudications: Purpose is to determine and integrate tribal and federal water rights

Federal issues

- Indian Water rights
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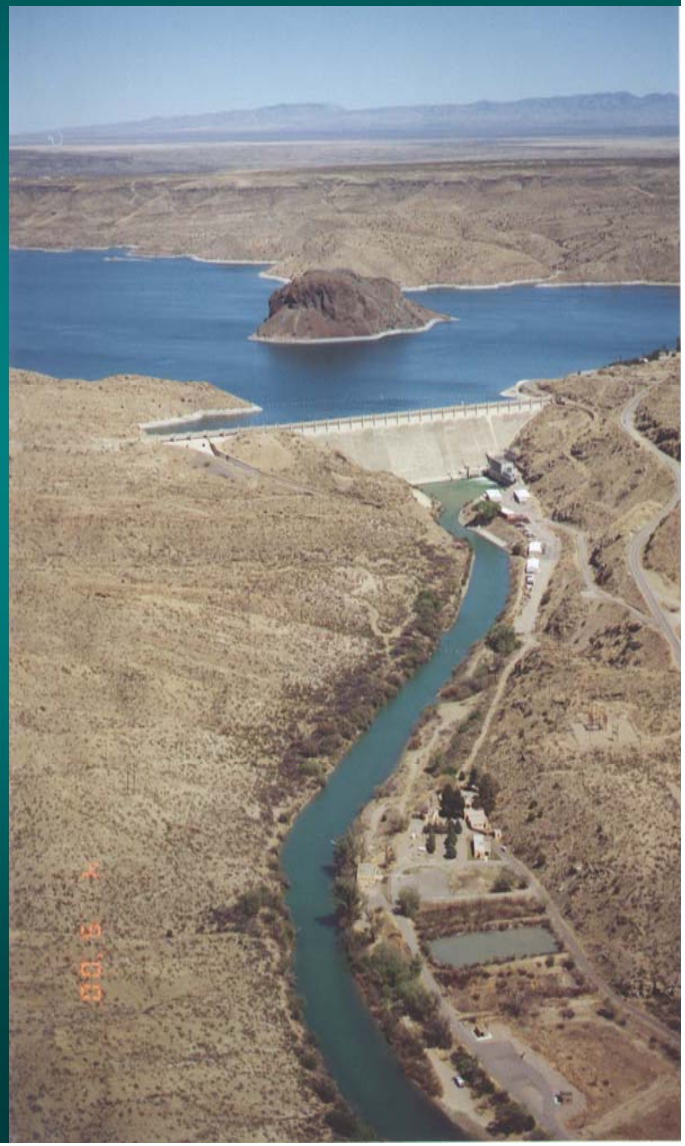
- Federal water projects
- Interstate Compacts



Reserved water rights intro

Doctrine began with *Winters v. U.S.*, Supreme Court, 1908

Originally applied to Indian reservations, on theory that water was needed to fulfill their purposes

- Rights created even though treaty silent re: water

Arizona v. California, 1963, extended doctrine to federal lands designated for a specific purpose, e.g. parks, forests

Basic features of reserved water rights:

- Created by operation of federal, not state, law
- Priority usually is date of reservation
- PIA is measure for Indian lands (Practicably Irrigated Acreage)
- For non-Indian reserved rights, the quantity of water is the amount minimally needed to fulfill primary purpose(s) of reservation

A typical reserved rights scenario

c. 1870: Indian Reservation established by treaty along the banks of the X River

c. 1910: US Bureau of Reclamation builds project to store & divert X River water for irrigation

c. 1975: Start of X River water rights adjudication

Indian water rights settlements

- Today: adjudication continues, tribal claims are largely still unresolved, and there is no change in pre-existing water uses
- Thus, senior tribal water claims remain unfulfilled
- Most pending Indian Water Rights Settlements include federal funds for water development

Addressing environmental impacts of water uses

- Endangered Species Act and Clean Water Act are key
- These laws don’t create or destroy water rights, BUT they may restrict the use of water rights
- ESA may require minimum stream flows

Protection for instream water uses

Traditional appropriation obstacles to instream use:

- Diversion requirement
- Instream uses have not historically been deemed “beneficial”

Statutes allow instream flow protection in most states:

- Problem is that IFL provision runs head-on into the prior appropriation doctrine
- States are doing it by agency action to bar new uses on some streams, or
- By allowing new water rights for instream uses, or
- By requiring water to be set-aside for ecosystem when water is transferred

Scientists' view

- Environmental flows must protect flow regimes NOT minimum flows
- Integrate five key drivers:
  - Hydrology
  - Biology
  - Geomorphology
  - Connectivity
  - Water quality

Instream flows = IFL

Environmental flows = E-flows

http://uttoncenter.unm.edu/E-Flows.html

Interstate compact basics

Compacts are binding agreements regarding the allocation (or other aspects) of interstate waters:

- Must be ratified by each signatory state
- Must also be approved by Congress

- Compacts may allocate waters by requiring delivery of a fixed quantity at the state line or otherwise
- Often set up a “compact commission” to administer
- Compacts require state officials to regulate water rights in order to ensure compact compliance

Compacts

- When negotiated, many interstate compacts ignored issues that are of concern today:
  - Indian water rights
  - Water quality
  - Groundwater
  - Ecological concerns

Utton Center – Model Water Compact

Usefulness of Model Compact:

- Deals with issues not included in older compacts
  - Environmental baseflow
  - Surplus water apportionment
  - Water quality
  - Groundwater
  - Tribal representation
  - Dispute resolution

Advisory Committee: Experts

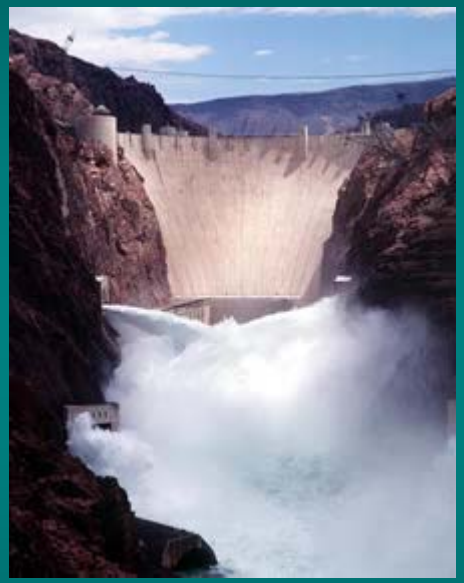
- Law
- Hydrology
- Economics
- Ecology
- Social Science
- Political Science
- Geography
- Fish and Wildlife

Advisory Committee: Agencies

- American Rivers
- Conference of Western Attorneys General
- DOI - Bureau of Reclamation
- Dividing the Waters
- Energy Trust of Oregon
- Environmental Defense
- EPA
- FERC
- Idaho National Laboratory
- Interstate Commission - Potomac River Basin
- National Hydropower Association
- National Association of Attorneys General
- National Conference of State Legislatures
- National Water Resources Association
- Native American Rights Fund
- Office of State Engineer, State of Colorado
- U.S. Army Corps of Engineers
- Western States Water Council
- World Bank

Compacts Assessed

- *Alabama-Coosa-Tallapoosa River Basin Compact*
- *Animas - La Plata Project Compact*
- *Apalachicola-Chattahoochee-Flint River Basin Compact*
- *Arkansas River Compact*
- *Arkansas River Basin Compact of 1965*
- *Arkansas River Basin Compact of 1970*
- *Bear River Compact*
- *Belle Fourche River Compact*
- *California-Nevada Interstate Compact*
- *Canadian River Compact*
- *Chesapeake Bay Agreement of 1983*
- *Chesapeake Bay Agreement of 1987*
- *Chesapeake Bay Commission Agreement*
- *Colorado River Compact*
- *Compact between Missouri and Illinois Creating the Bi-State Development Agency and the Bi-State Metropolitan District*



Hoover Dam

Compacts Assessed

- *Connecticut River Flood Control Compact*
- *Costilla Creek Compact*
- *Delaware River Basin Compact*
- *Great Lakes Basin Compact*
- *Great Lakes Charter*
- *Jennings Randolph Lake Project Compact*
- *Kansas-Missouri Flood Prevention and Control Compact*
- *Kansas-Nebraska Big Blue River Compact*
- *Klamath River Basin Compact*
- *La Plata River Compact*
- *Merrimack River Flood Control Compact*
- *Mississippi River Interstate Pollution Phase-Out Compact*
- *New England Interstate Water Pollution Control Compact*
- *New Hampshire-Vermont Interstate Sewage and Waste Disposal Facilities Compact*
- *Ohio River Valley Water Sanitation Compact*
- *Oregon-California Goose Lake Interstate Compact*
- *Pecos River Compact*

Delaware River and Delaware Water Gap

Compacts Assessed

- *Potomac River Basin Interstate Compact*
- *Red River Compact*
- *Red River of the North Compact*
- *Republican River Compact*
- *Rio Grande Compact*
- *Sabine River Compact*
- *Snake River Compact*
- *South Platte River Compact*
- *Susquehanna River Basin Compact*
- *Tennessee River Basin Water Pollution Control Compact*
- *Thames River Flood Control Compact*
- *Tri-State [Sanitation] Compact*
- *Upper Colorado River Basin Compact*
- *Upper Niobrara River Compact*
- *Vermont-New Hampshire Interstate Public Water Supply Compact*
- *Wabash Valley Compact*
- *Wheeling Creek Watershed Protection and Flood Prevention District Compact*
- *Yellowstone River Compact*

Yellowstone River

Provisions of the Model Compact

I. Compact Purposes, Water Subject to Compact and Signatory Parties

II. Effective Date and Duration of Compact
   a. Waiver of the United States' Sovereign Immunity
   b. Sunset Provisions
   c. Withdrawal

III. Definitions

IV. The Utton River Basin Commission

a. Establishment and Structure
b. The Commission
c. The Council
d. The Division of Scientific Analysis
e. Commission, Council and Division Decisions
f. Advisory Committee
g. Meetings and Voting

V. Interstate Water Apportionments

a. The Apportionment Scheme
b. Base and Supplemental Apportionments Limited by Safe Annual Yield
c. The Apportionment Methodology
d. Intrastate Allocations of Interstate Apportionments
e. Water Marketing
f. Subsurface Water Use and Chargeability
g. Reasonable Beneficial Use
h. Conjunctive Use

VI. Water Quality Protection Program
   a. Policy and Standards
   b. Tributary Waters

VII. Water Resources Management Program
   a. Water Supply and Requirements
   b. Flood Control
   c. Commission Authority

VIII. Enforcement of Compact Obligations and Resolution of Other Disputes

a. Duty to Seek Dispute Resolution
b. Commission Role and Authority
c. Alternative Dispute Resolution
d. Exhaustion of Commission Authority

IX. Interagency Coordination and Public Participation

X. Budgeting and Funding
   a. Capital Budget
   b. Operating Budget and Assessments
   c. Payment of Assessments
   d. Sanctions for Failure to Pay Assessments
   e. Annual Independent Audit

XI. Relationship of Compact to Existing Law

a. Legal Status of Compacts
b. State and Tribal Laws
c. Federal Laws
d. United States Supreme Court Decrees
e. Events Following Ratification of a Compact

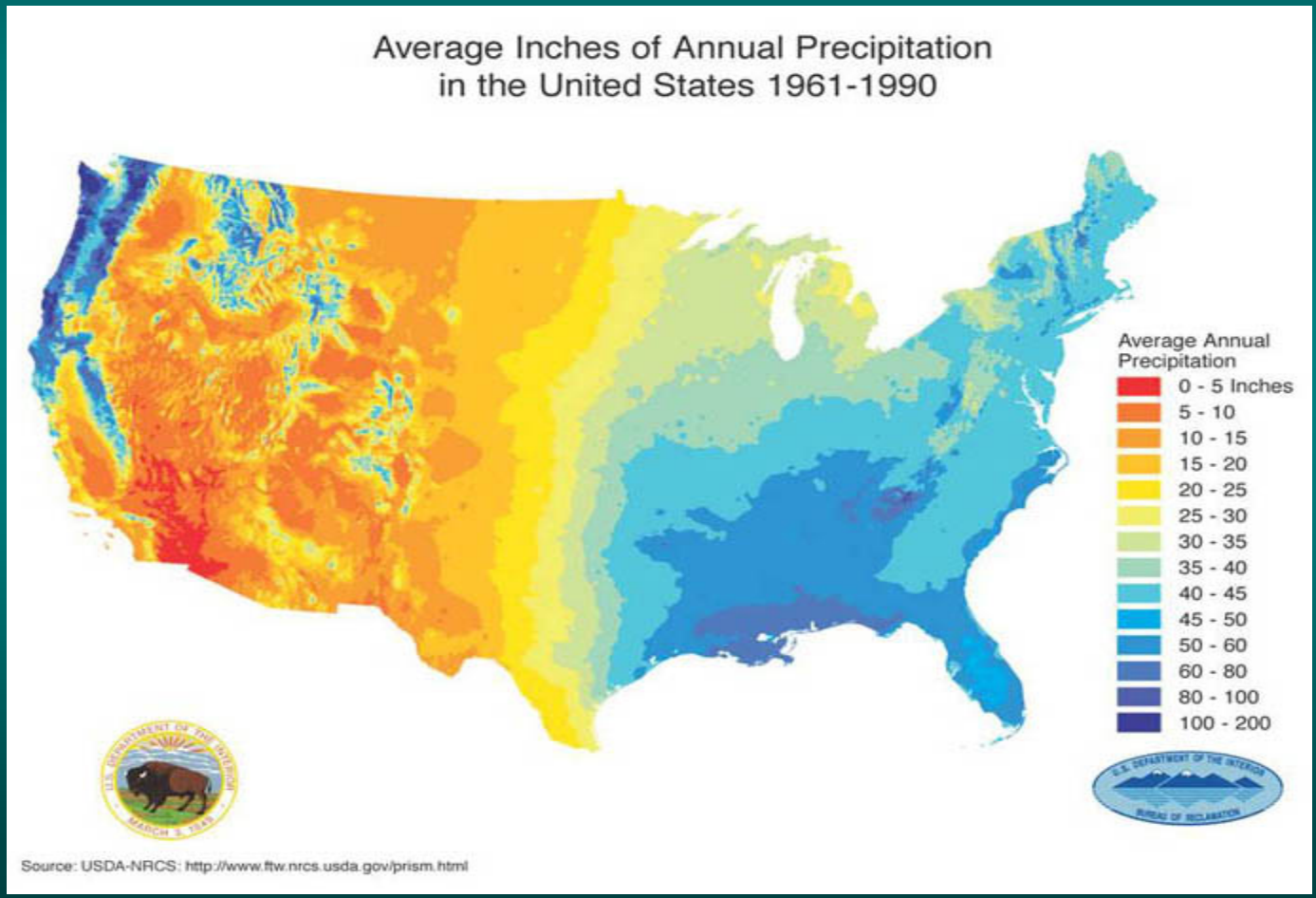
Improvements

- Official Science committee
- Compact regions = basins/watersheds
- Engages federal government
- Provides for adjustments based on shifting hydrology
- Provides for base flows for ecosystem health

Big challenges for western water law

- Explosive population growth in western cities along with projected changes in long-term supply
- Land use approvals and water availability considerations
- Administration of shortages without full adjudication of water rights

Average Precipitation



Big challenges cont.

- Managing effects of climate change on water supply
- Reforming old laws to meet 21st Century and address ecosystem health
- Dealing with Interstate compacts that weren't designed to meet current challenges

Future

- Water conservation – work towards reasonable beneficial use standard
- States will need to manage water to protect federal interests and interstate obligations
- Land use and water availability must be more closely linked

Future continued…

- Streamline adjudication – Montana reserved water rights commission approach?
- Use as concepts and approaches such as those identified in Utton Center Model Compact to resolve future interstate water disputes.

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http://uttoncenter.unm.edu/model_compacts.html