

The Situation in the United States of America: Deference to States; Federal Supremacy

*Water Management in Federal
and Federal-type States*

Zaragoza, Spain

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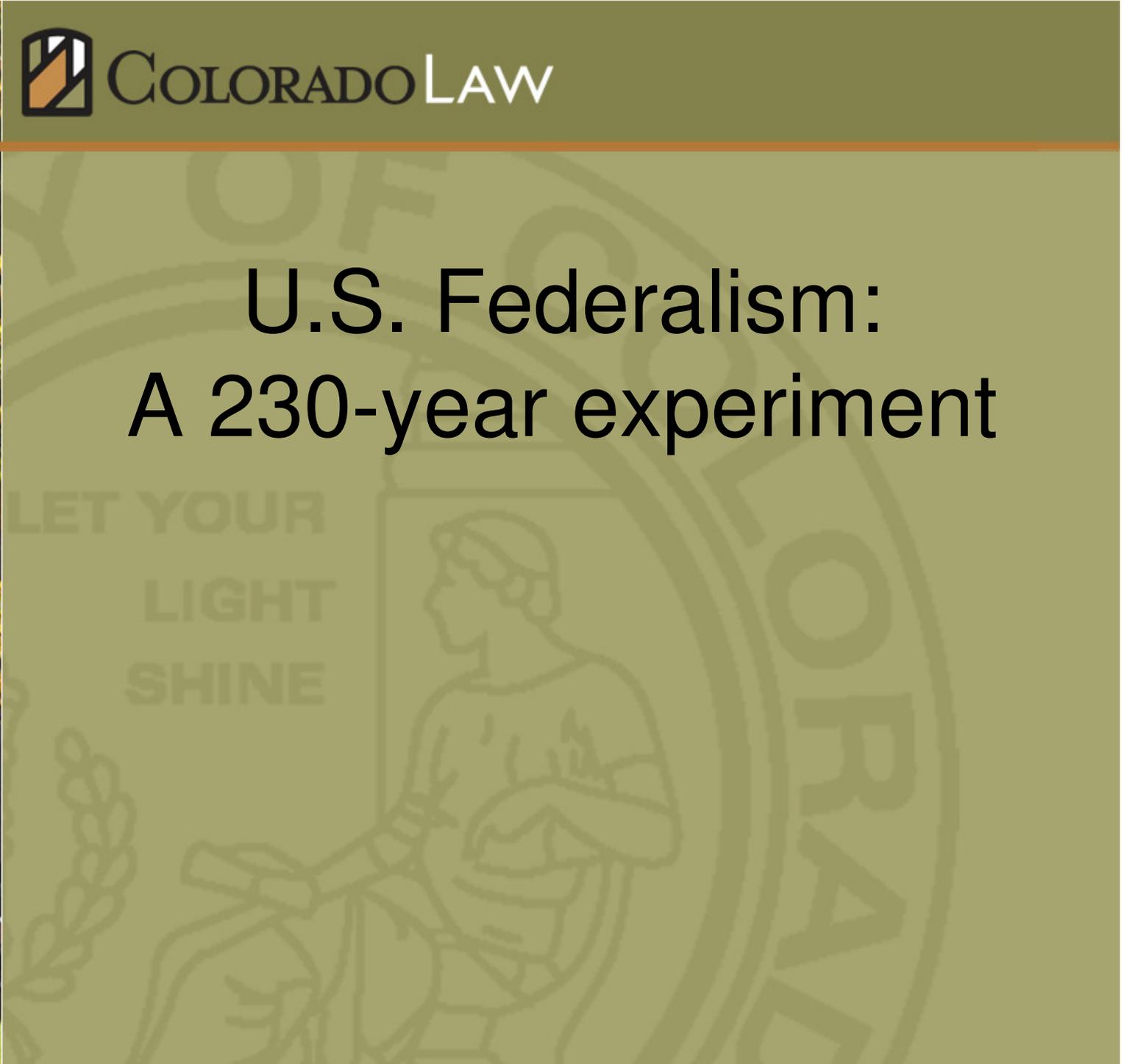
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U.S. Federalism: A 230-year experiment





Features of U.S. Federalism

- *Origin:* Powers granted **by** states **to** national government
- *“Enumerated powers” in Constitution:*
 - **Defense**
 - **Commerce** (Interstate, International, Indian)
 - **Treaties** (foreign relations; Indian tribes)
 - **Taxing and Spending** for General Welfare
 - **Public Lands**
- **Supremacy Clause:**
 - Federal laws and treaties are “supreme law of the land”
- All powers not delegated to federal government reserved to states (10th Amend.)



Governance of Water?

- States each have own systems
 - Eastern states mostly “riparian” (i.e., landowners have right to use adjacent waters)
 - Western states mostly “prior appropriation” (i.e., first to use water acquires a water right)
- States jealously guard their control of natural resources.
- Common belief: Federal government defers to state control of water



Federal Control

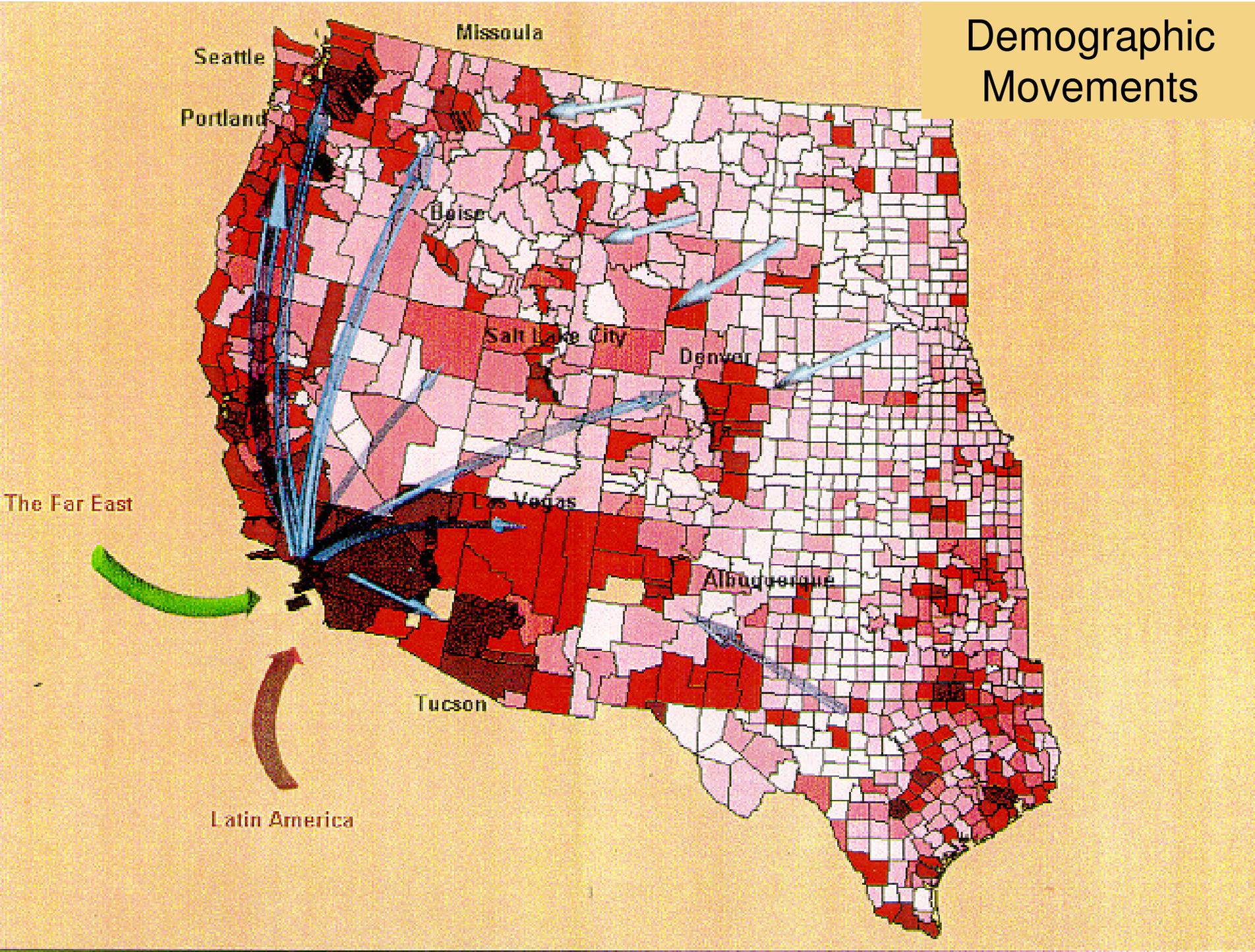
- Congress has passed many laws controlling water or affecting state management
- Can “preempt” state law
- Many conflicts
 - Usually resolved by courts
 - Increasing use of negotiation at local or watershed level

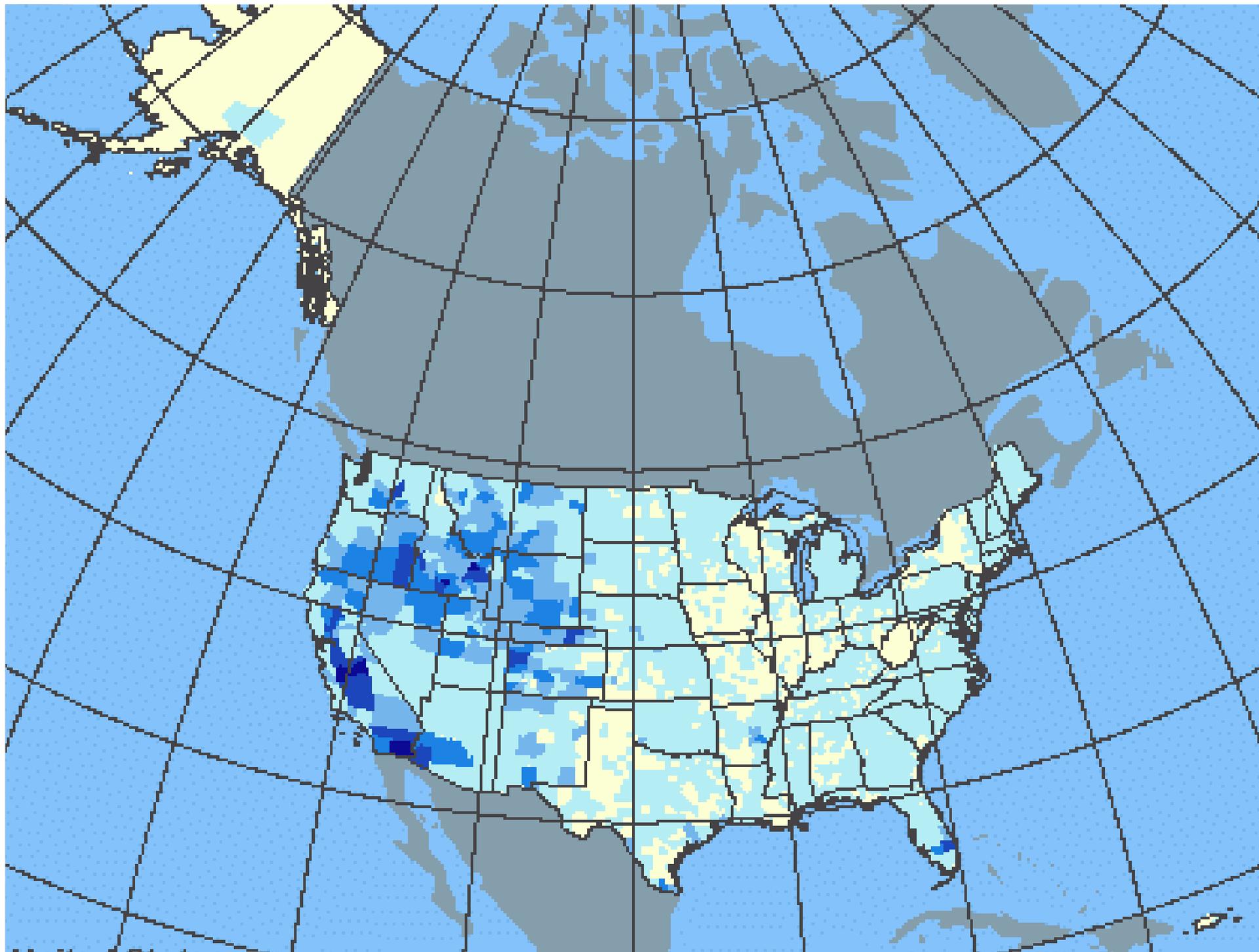
Conditions and demands make water scarce in the West

- Semi-arid; cyclical drought
- Rapid population growth; urbanization



Demographic Movements







Canal carrying Colorado
River water across
desert



Lawns: The largest use of urban water



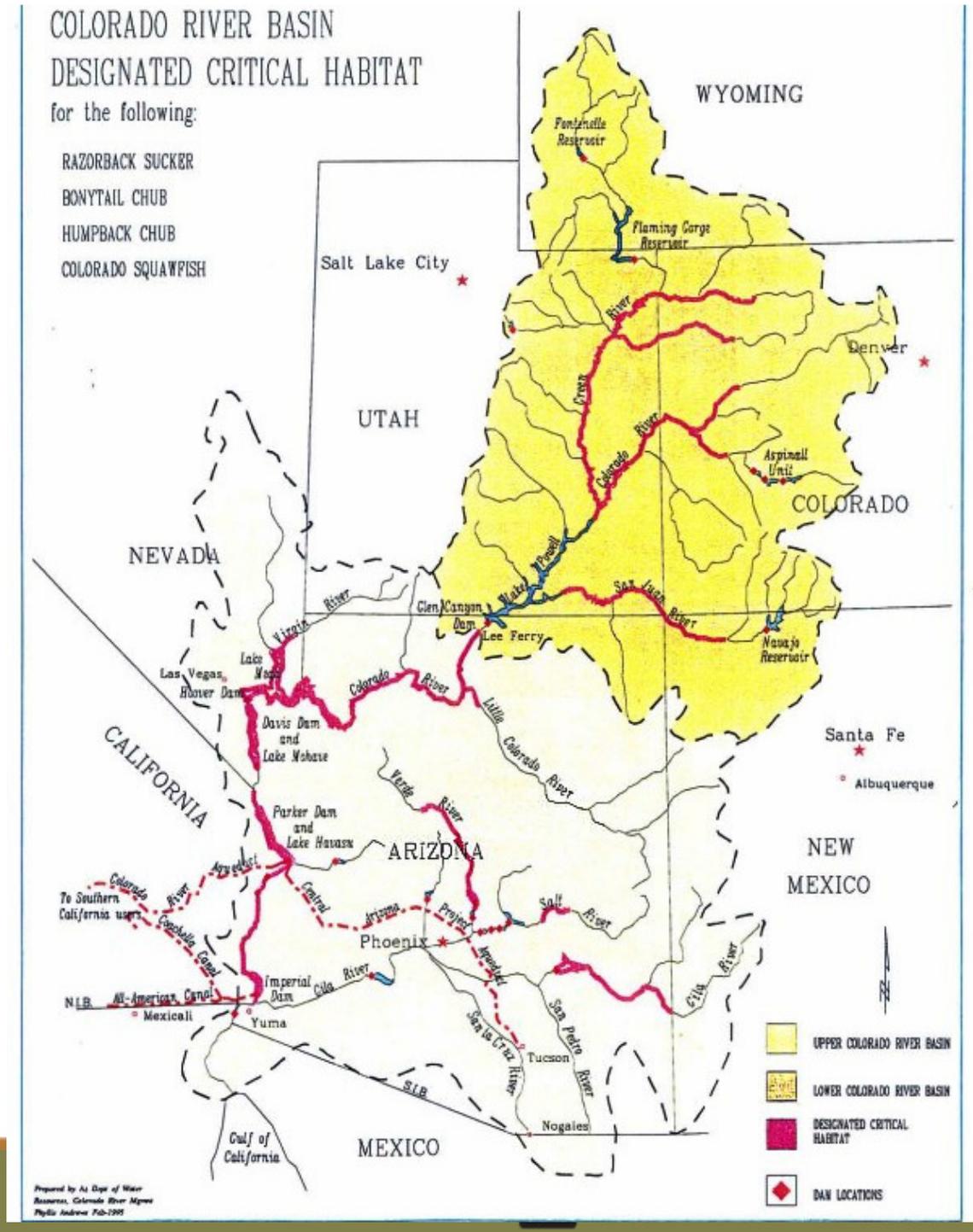


Conditions and demands make water scarce in the West

- Semi-arid; cyclical drought
- Rapid population growth; urbanization
- Valuable ecosystems; recreation
 - demand for instream flows



Critical Habitat – Colorado River Endangered Fish

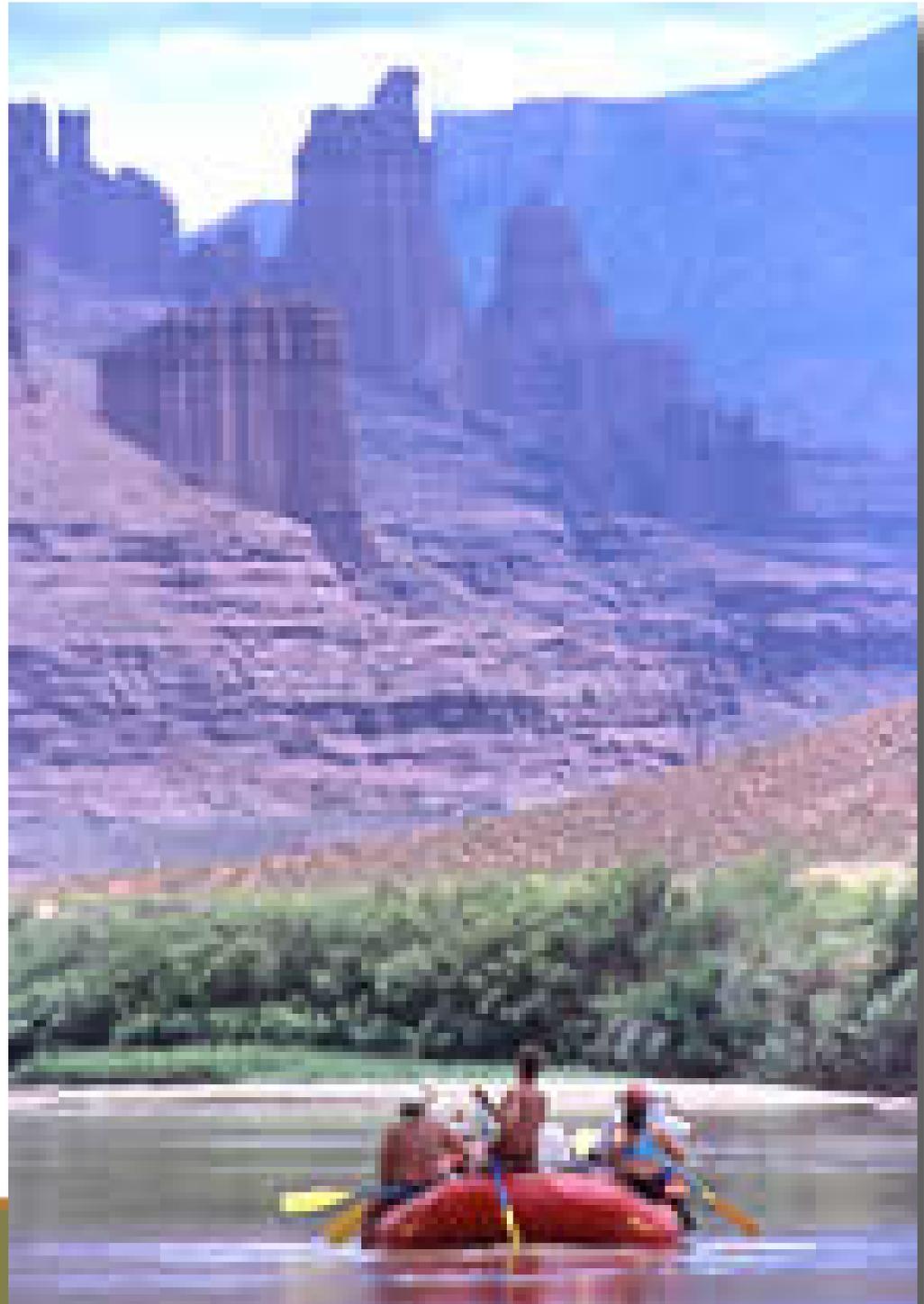




Colorado River in the Grand Canyon



Rafting on the Colorado



Conditions and demands make water scarce in the West

- Semi-arid; cyclical drought
- Rapid population growth; urbanization
- Valuable ecosystems; recreation
 - demand for instream flows
- Energy production
- Indian water rights





Conditions and demands make water scarce in the West

- Semi-arid; cyclical drought
- Rapid population growth; urbanization
- Valuable ecosystems; recreation
 - demand for instream flows
- Energy production
- Indian water rights
- Climate change

History of West and Water Law

- Lands acquired from other nations
- Subject to Indian rights of use and occupancy
 - extinguished by treaty
 - tribes kept smaller reservations
- US gave away or sold land
 - Railroads
 - States
 - Settlers (“homesteads”)
- Some lands kept by US (1/3 land area)
 - Forests, Parks, etc. reserved (“national interest lands”)
 - Grazing, mining allowed by private users
 - Some “useless”
- US allowed water on public lands to be used under state water laws

Growth of Federal Influence

- Dam building
 - Navigation
 - Irrigation (“Reclamation Act”)
 - Hydroelectricity
- Fish and Wildlife Protection
- Environmental Quality
 - Water pollution
 - Wetlands preservation
 - Endangered Species



Indian Rights as a Limit on State Water Control

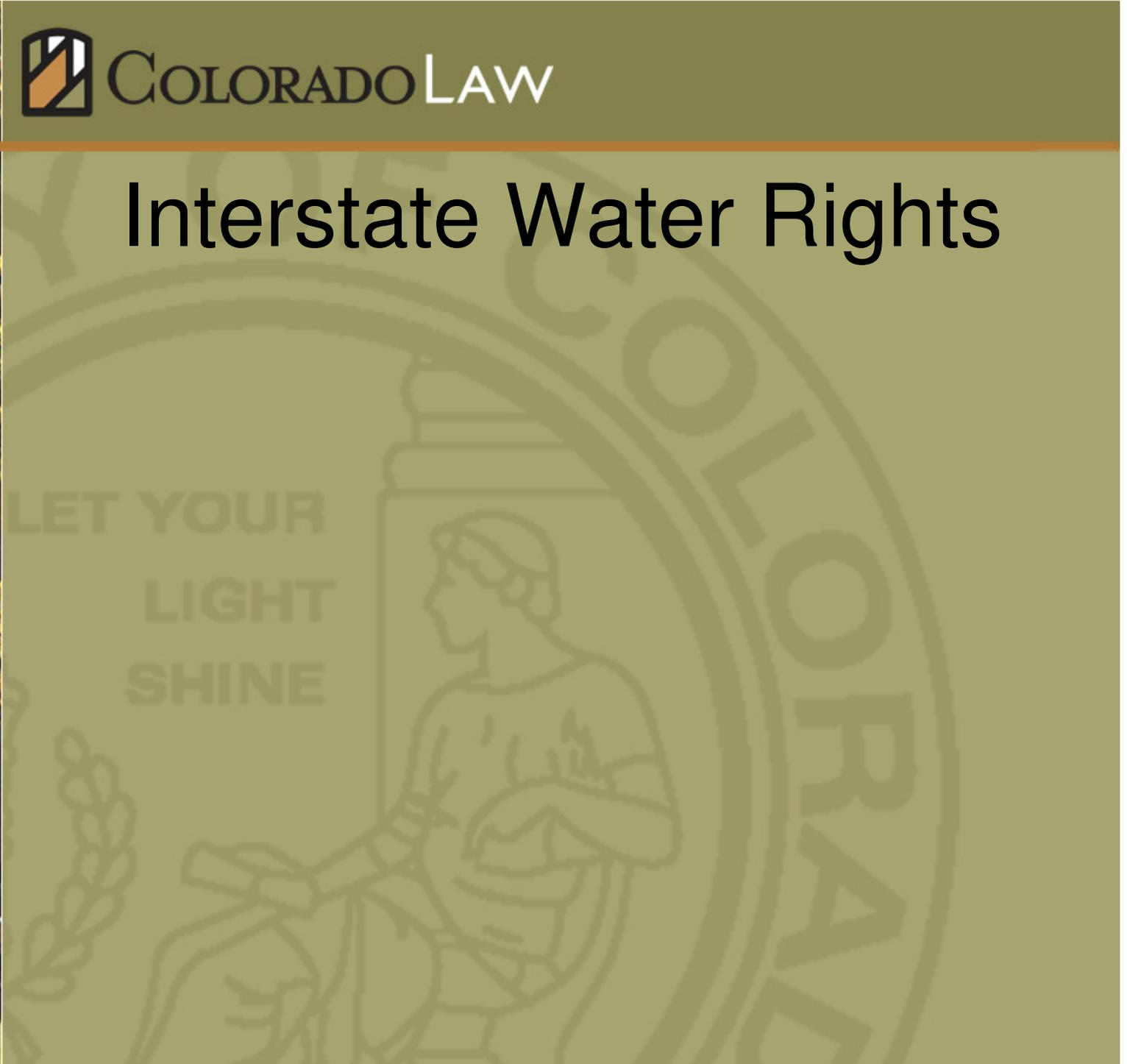
- Tribes are sovereign; not subject to state law
- Tribes are subject to federal laws and treaties
- Treaties intended to:
 - Get land for non-Indians and settle the West
 - Protect and “civilize” Indians
- 1908 Supreme Court case (*Winters*) said Indians had water rights superior to non-Indians who got rights under state law by prior appropriation
 - Necessary to fulfill federal purposes of reservation



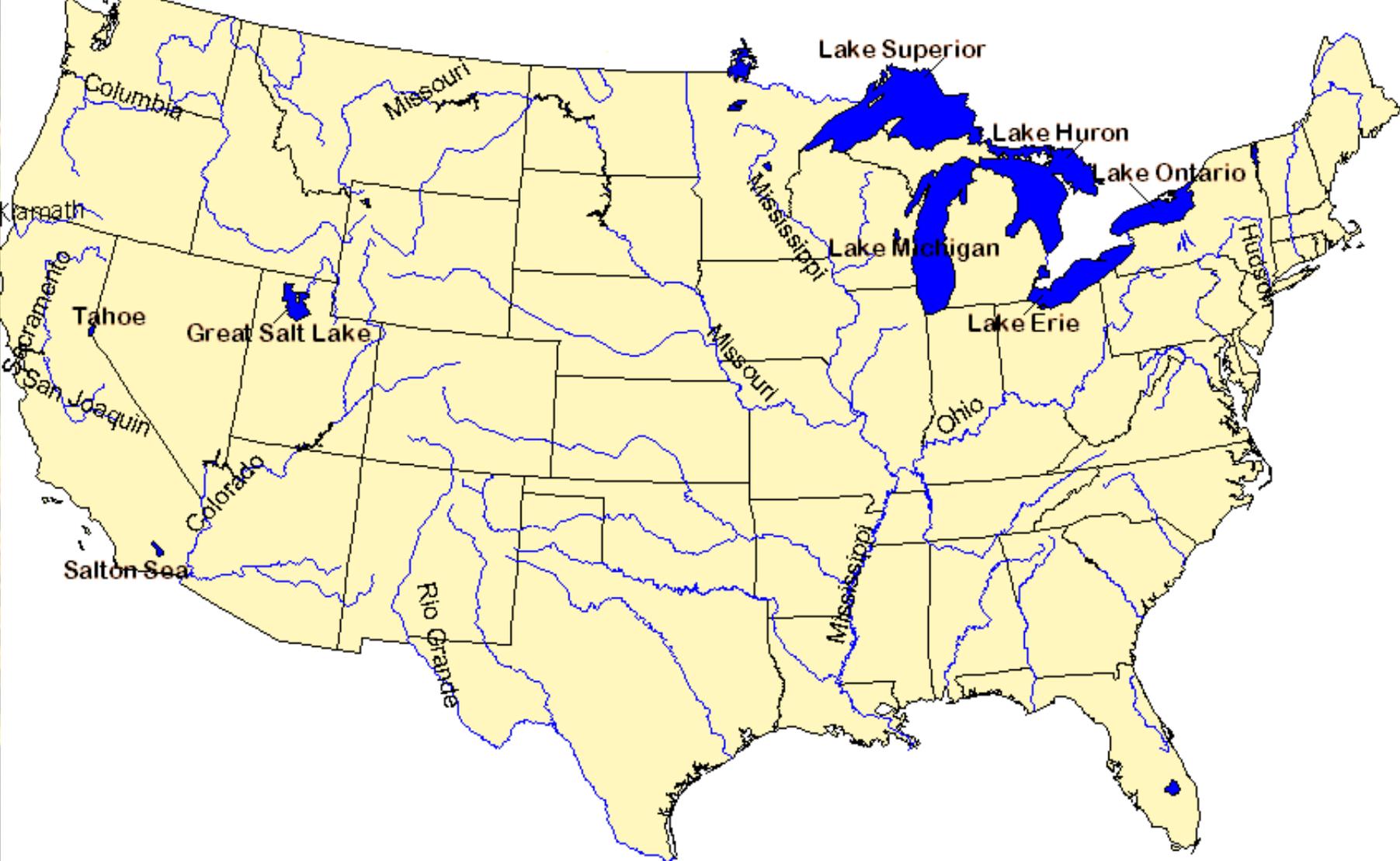
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Interstate Water Rights

LET YOUR
LIGHT
SHINE



Rivers and Lakes of the United States





Interstate Water Rights

- States compete for use of transboundary waters
- Conflicts can be resolved by:
 - US Supreme Court decision
 - Interstate compact, approved by Congress
 - Congressional legislation
 - *State laws are subordinate to compacts or federal legislation*
- States cannot restrict commerce in water

International Waters

- Mexico
 - 1944 Treaty: Colorado River; Rio Grande
- Canada
 - Columbia River and tributaries



Photo 3. Aerial view of the Colorado River delta, near where the Colorado meets the upper Gulf of California

Colorado River Delta at Sea of Cortez







International Waters

- Mexico
 - 1944 Treaty: Colorado River; Rio Grande
- Canada
 - Columbia River and tributaries
- *State laws are subordinate to federal treaties and agreements*



Example of Growth of Federal Regulation of Water

- Federal power over navigation – Commerce power
- Early law regulated “dredging and filling” of “navigable waters” – permit from Army Corps of Engineers
- Clean Water Act later defines “navigable waters” as “waters of US”
- Army Corps creates regulations that require permit for any construction in wetlands
- Under regulations, Corps must consider economics, culture, water needs, environmental factors
 - Includes protection against any “jeopardy” to endangered species habitat, protection of fish and wildlife, etc.
- US Supreme Court: Navigable waters limited to “relatively permanent “ bodies of water



Conclusion: State water law prevails only until national interests are affected

- Navigation
- Interstate Commerce (strong federal power; states can't inhibit commerce even if Congress has not acted)
- Water projects – dams, reservoirs
- Environmental protection
- Indian water rights
- Interstate waters
- International treaties



The Future of Federalism in Water in the US?

- *We continue to search for the “right” level of decision making*
- *Some values and policies are best expressed at state level, some at the federal level*
- *Courts will continue to play a role in mediating powers (rule of law)*
- *Some of most important decisions will be made locally, by water providers, subject to state and federal law*

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