

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

*Water Management in Federal
and Federal-type States*

Zaragoza, Spain

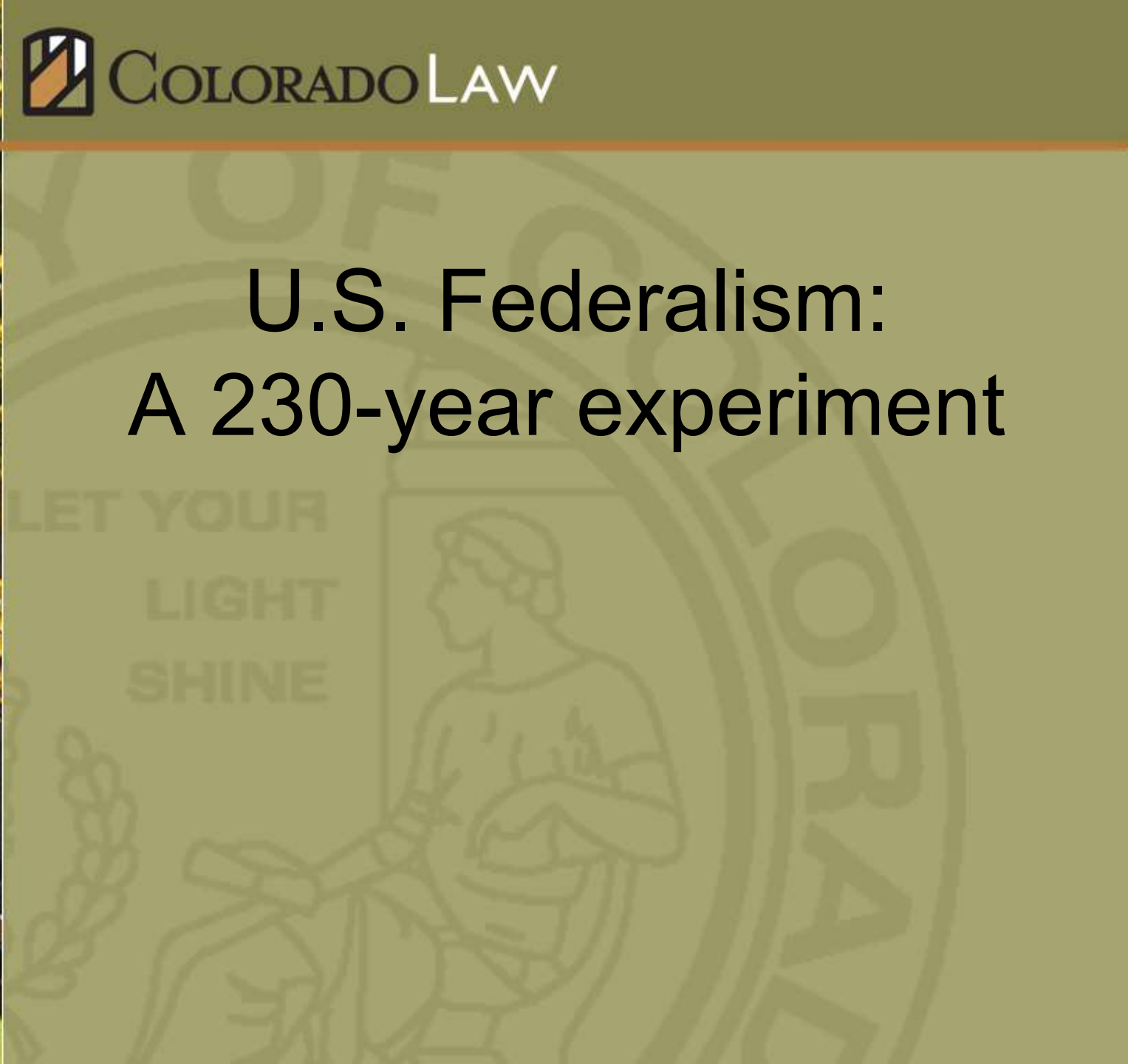
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U.S. Federalism: A 230-year experiment





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

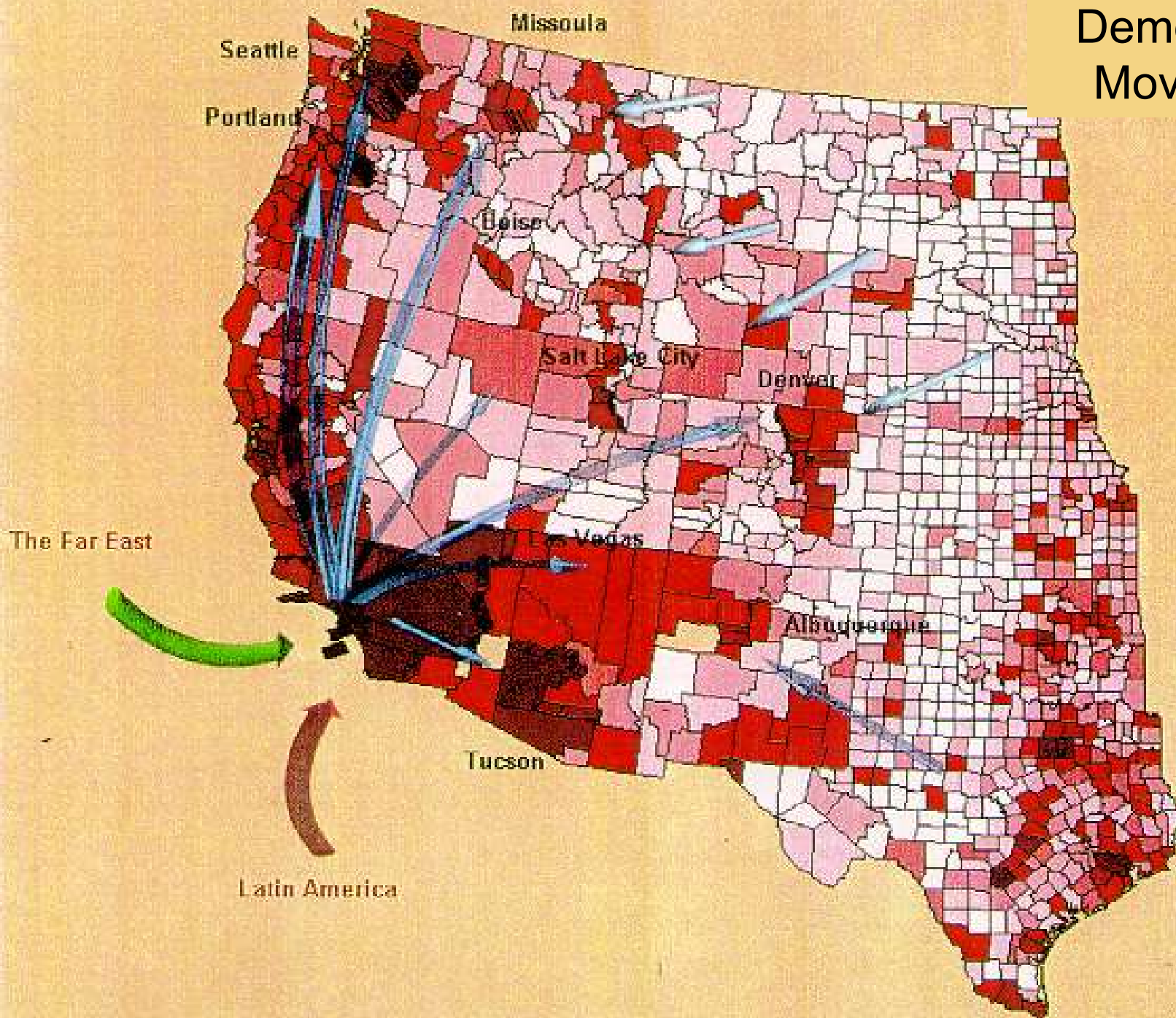
- Congress has passed many laws controlling water or affecting state management
- Can “preempt” state law
- Many conflicts
 - Usually resolved by courts
 - Increasing use of negotiation at local or watershed level

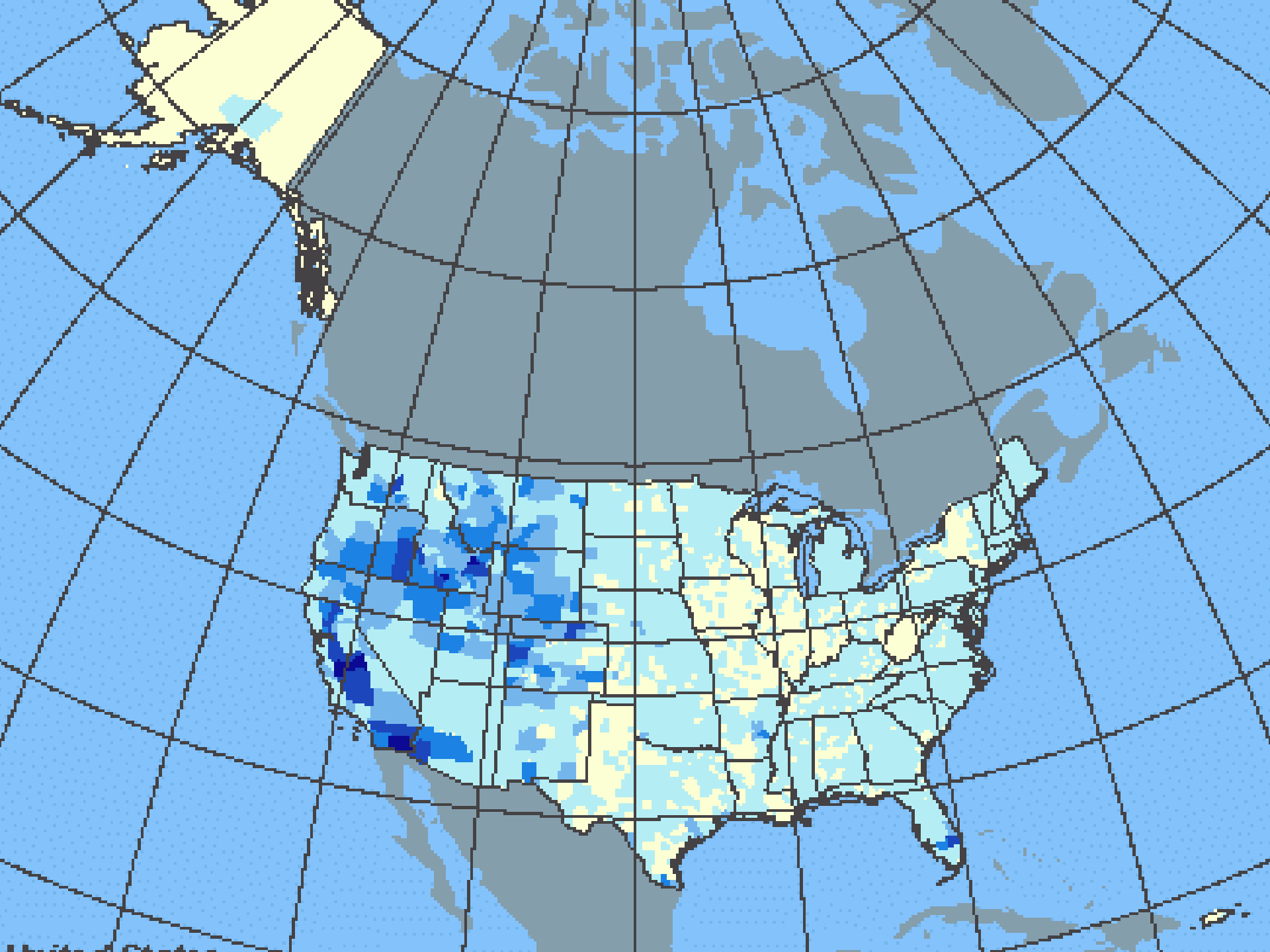


Conditions and demands make water scarce in the West

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

Demographic Movements





Canal carrying Colorado
River water across
desert



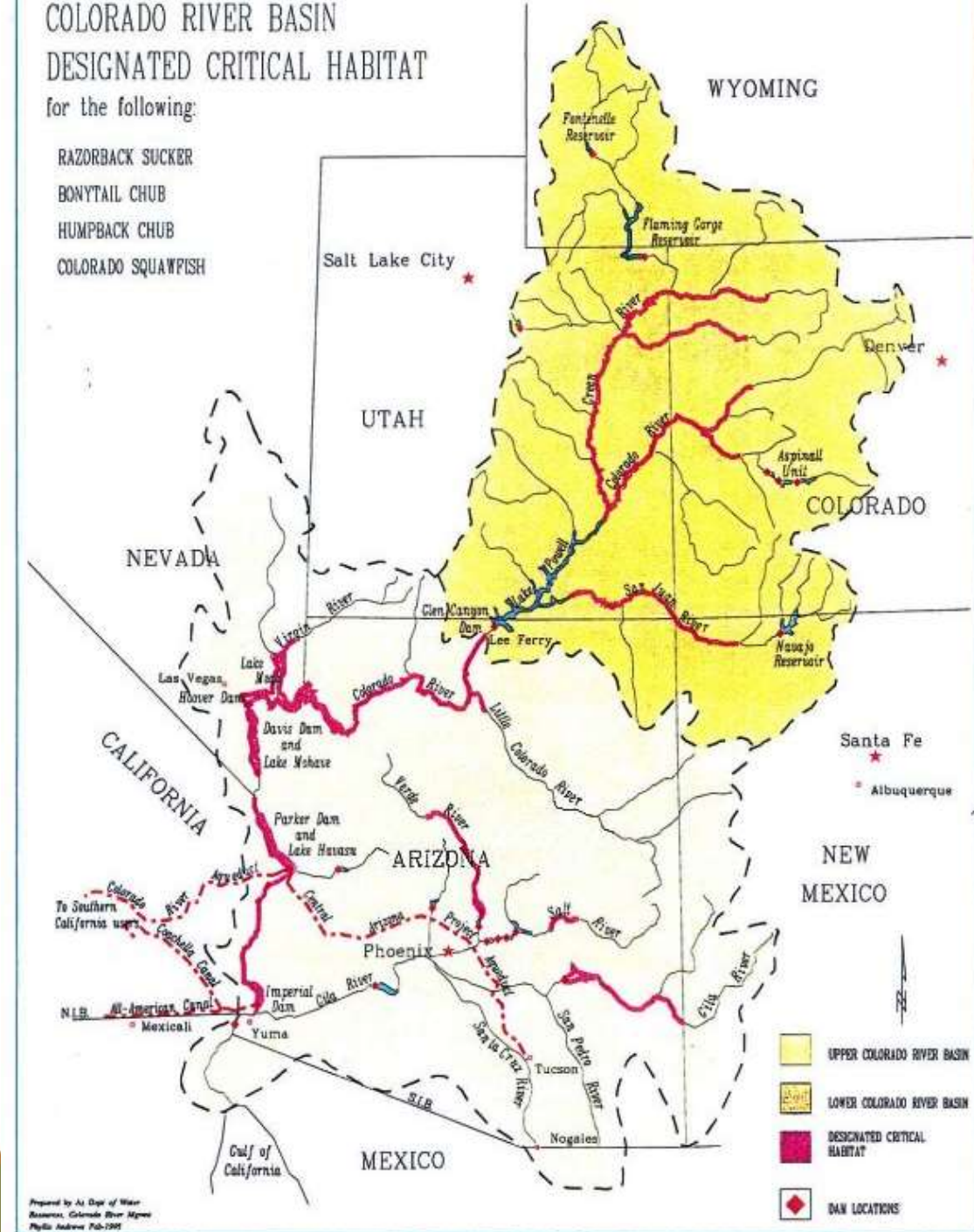
Lawns: The largest use of urban water



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



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- 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
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- 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



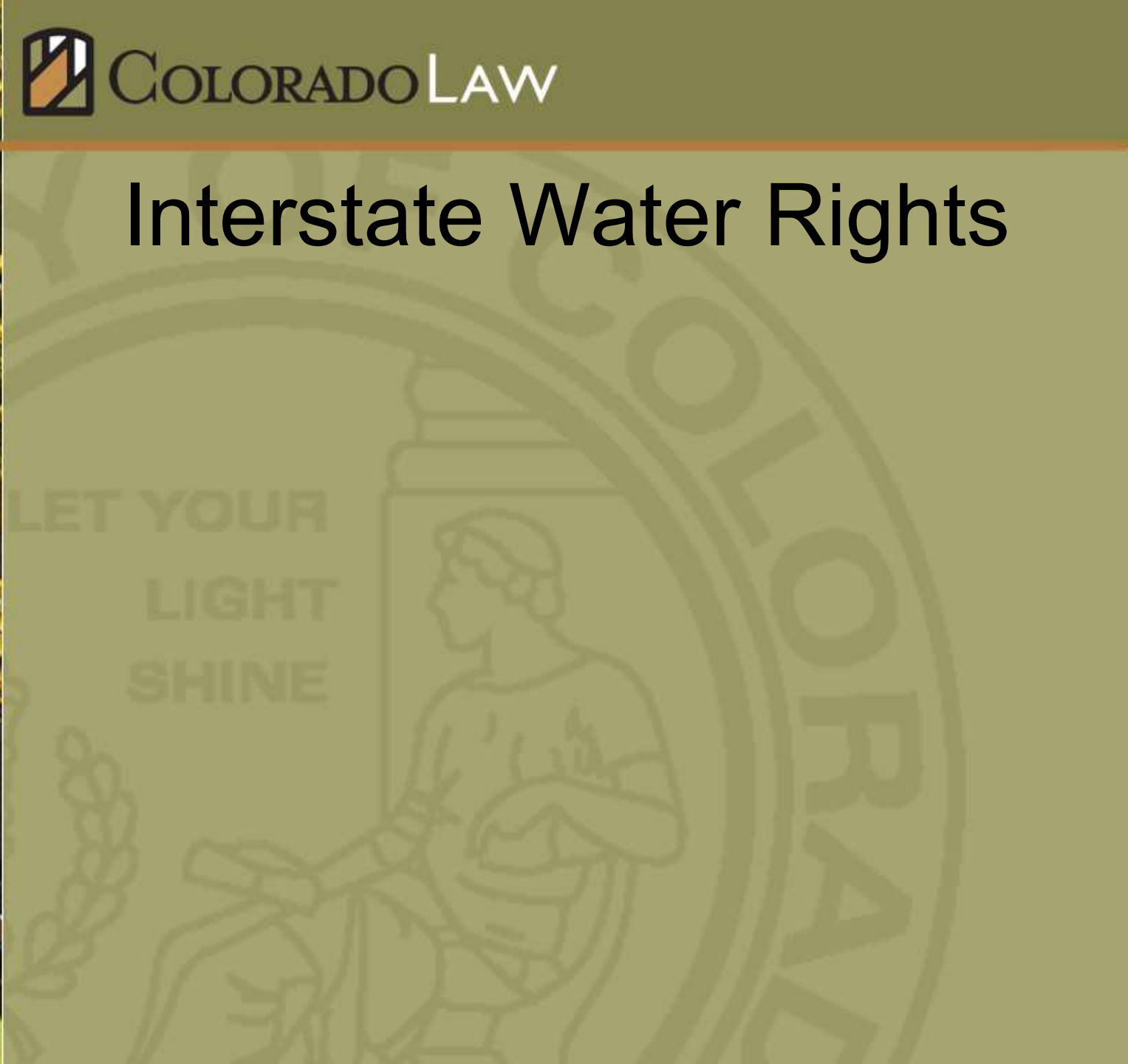
Indian Rights as a Limit on State Water Control

- 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

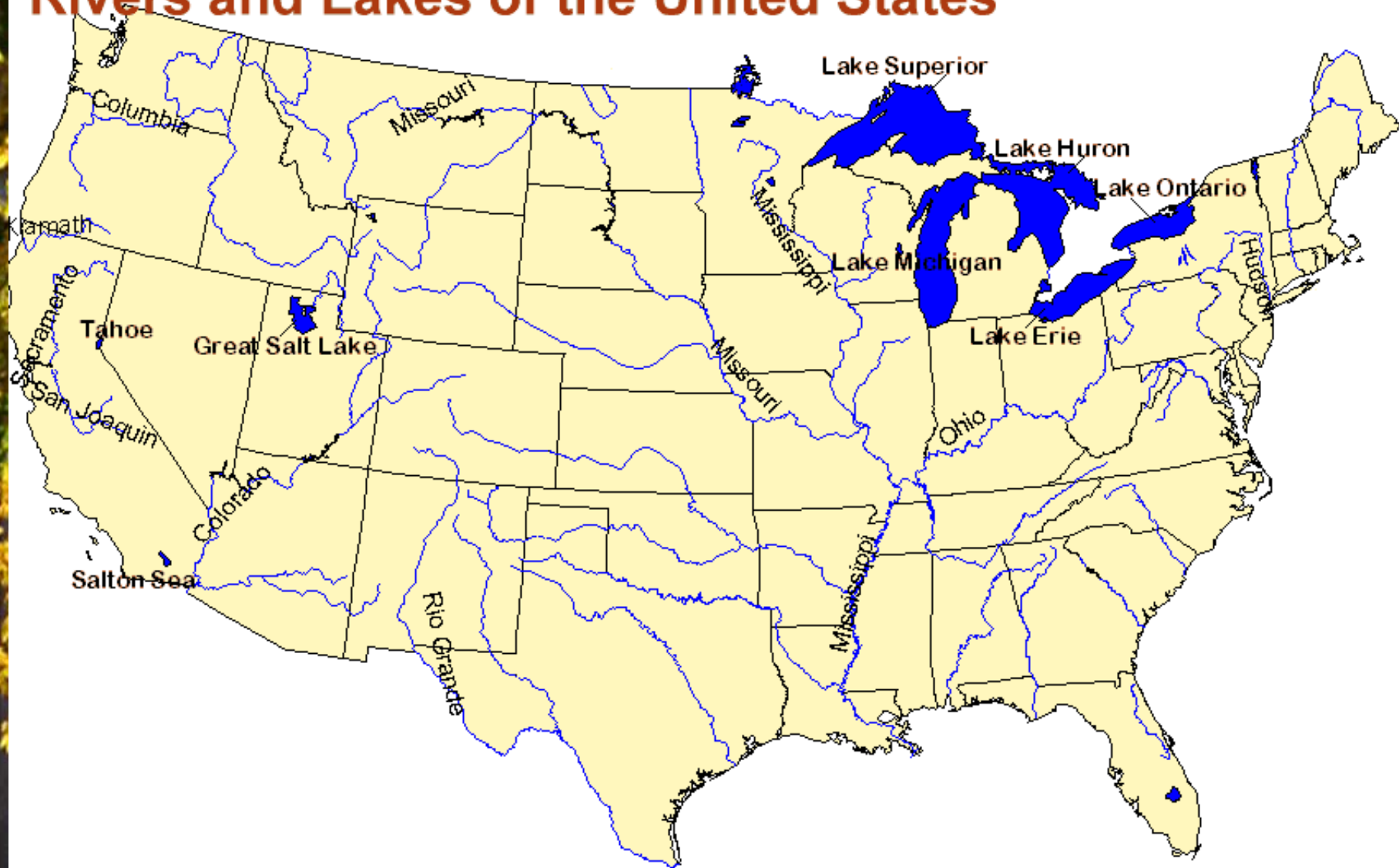


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Interstate Water Rights



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

Colorado River Delta at Sea of Cortez







International Waters

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- *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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