

**Society of
American
Foresters**
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WATER LAW “FLY-OVER”

Lois Witte, Esq.

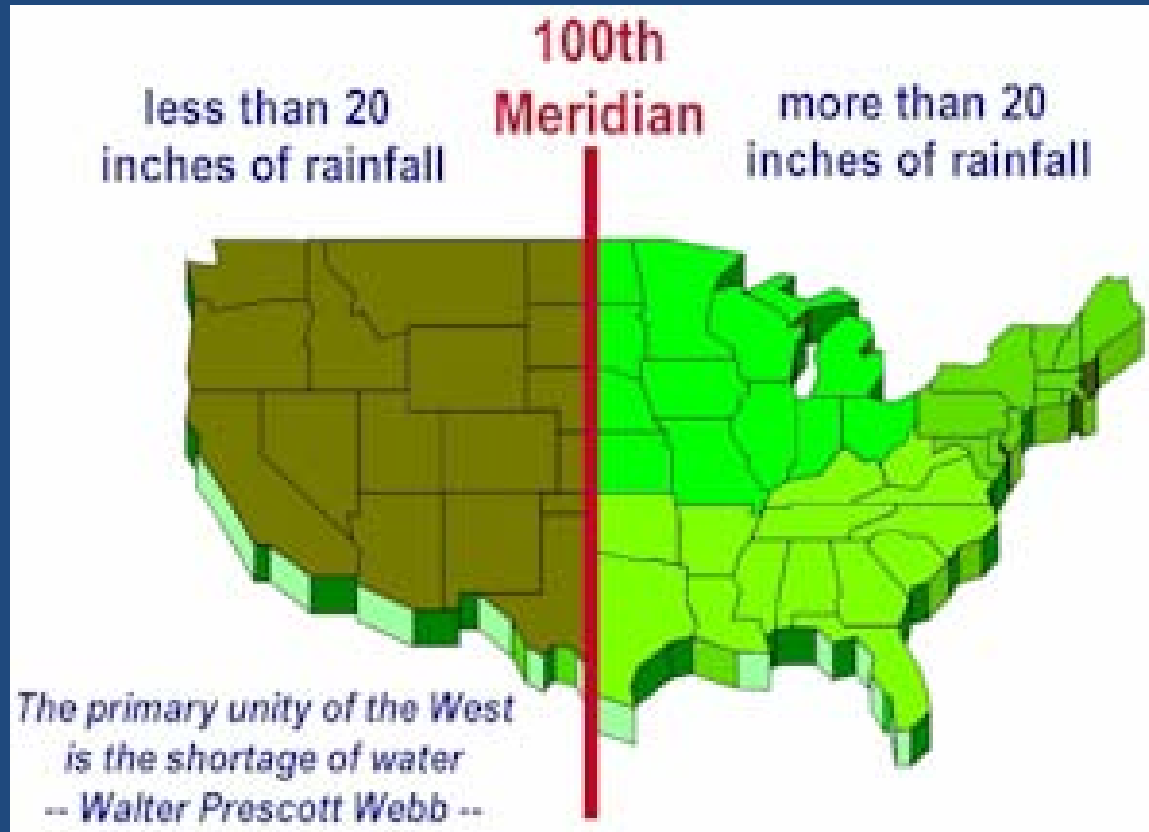
Office of the General Counsel

USDA

lois.witte@ogc.usda.gov



STATE SURFACE WATER ALLOCATION SYSTEMS (groundwater varies by state)

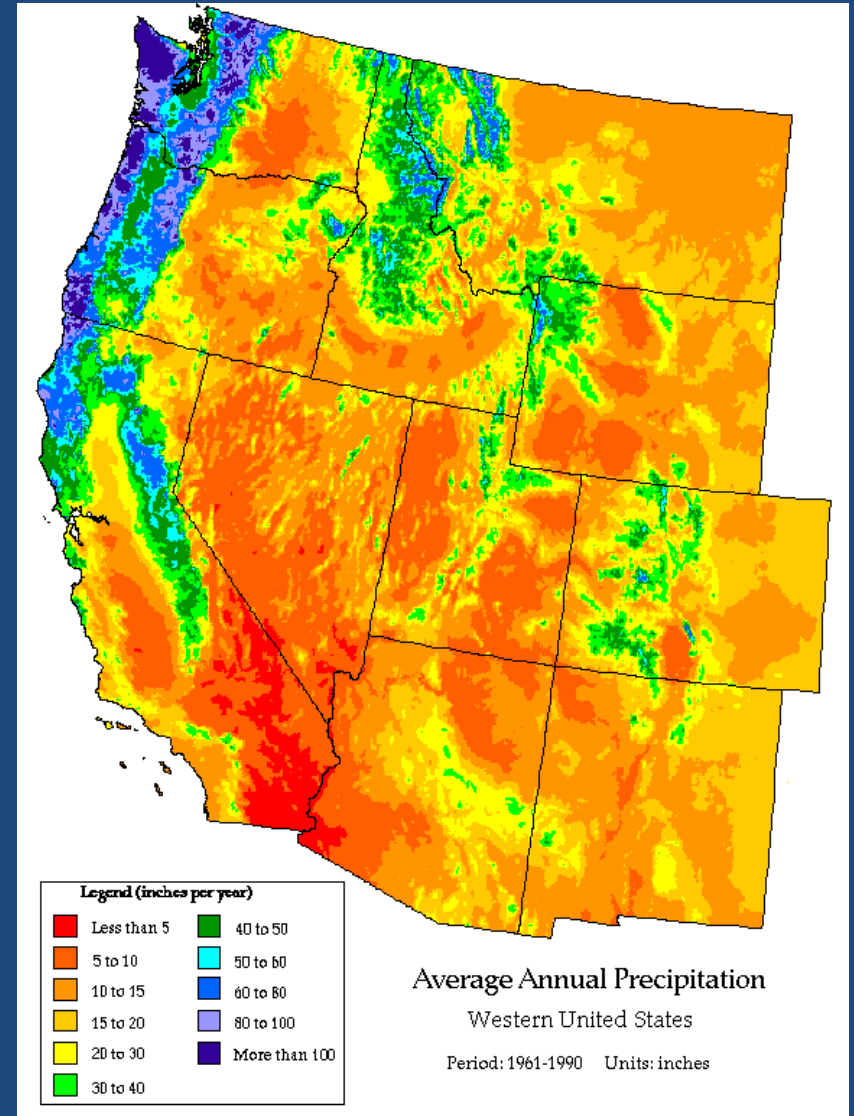


Western States: Prior
Appropriation Doctrine

Eastern States:
Riparian Doctrine

PRIOR APPROPRIATION

- Water “severed” from land and ownership claimed by the State under the State’s constitution. CO Const., Art. XVI Sec. 5; WY Const., Art. 8 Sec 1.
- State constitutions grant the “right to use” water to citizens under the prior appropriation doctrine. CO Const. Art. XVI Sec 6; WY Const. Art. 8, Sec. 3.



PRIOR APPROPRIATION DOCTRINE

- First in time is first in right. Protects the first -- or senior -- user based on appropriation date.
- “Appropriation” occurs when a user puts or intends to put water to “beneficial use” according to state law. (WY requires a permit first, Colorado recognizes both “absolute” and “conditional” water rights).
- Appropriation requires the application of water to a “beneficial use”, or a plan and intent to divert, store, or control water for “beneficial use.”
- The “beneficial use” of water is the historic limitation on the water right – no waste.

BENEFICIAL USES

- “Beneficial uses” of water are identified by state statutes or common law (courts).
- Typical Beneficial uses include: domestic, irrigation, industrial, manufacturing, municipal, power, fish and wildlife culture, stock watering, etc.
- Beneficial uses change over time and today many states recognize limited instream flow water rights as beneficial, albeit with significant limitations on holders and uses.

WHAT IS A WATER RIGHT?

- A water right is a usufructory right, or the “right to use” a certain portion of water from an identified source in accordance with its priority date.
- It includes the right to sell, lease, or change the type of use, place of use, or place of diversion subject to state rules (limited to historic consumptive use, no injury or enlargement).
- It is a real property right and can be passed by deed or taken by adverse possession.

WHAT A WATER RIGHT *DOES NOT* INCLUDE: ACCESS TO THE WATER BODY

- The grant of a water right does not include the granting of ditch easements or rights of ways.
- On state land, access to the water occurs under state law (statutes or common law). Access to the water body is obtained from the affected landowner.
- On federal land, access to the water occurs under federal law.

OBTAINING A WATER RIGHT

- Colorado: *Absolute Water Rights* - put water to beneficial use (with groundwater, also apply for a permit). File water right application in state water court to determine priority date. Unless adjudicated, the water right is junior to other adjudicated rights. *Conditional Water Rights* - file plan to use water in water court. Groundwater rights require permits.
- Wyoming, File for a permit. The permit date determines priority. If a permit is granted, the user has 5 years to put the water to use. Prior to 1890, permits were not required.

WHAT A WATER DECREE OR PERMIT INCLUDES

- Water right identifies: diverter; water source; location of diversion; type of diversion (direct flow or storage); quantity diverted (cubic feet per second) and/or volume (acre-feet per year); beneficial use; place of use; and season of use.
- In Wyoming, a survey and maps/plans are required with the application for larger diversions.

STATE BASIN-WIDE ADJUDICATIONS OF WATER RIGHTS

- Priority of old and new water rights established in a stream or basin-wide adjudication.
- State basin-wide adjudications define the water right (amount, priority, place and purpose of use, source, ownership).
- Similar to a quiet title action for land.
- McCarran Amendment provided for limited federal waiver of sovereign immunity and federal water claims are adjudicated in state courts.
- Procedures may take years and can be very costly.
- After 1969 Colorado Water Rights Act provides for annual adjudication of water rights on all streams in water court.
- Wyoming administers water rights by a permit system.



**Thank you for your
attention.**