

# FARM FOUNDATION® FORUM

**WATER RIGHTS AND POLICY  
IN AGRICULTURE TODAY**

APRIL 25, 2023



Today's webinar is made possible by a grant from  
Farm Credit

**#FarmFoundationForum**





MARTHA KING

Vice President, Programs and Projects  
Farm Foundation

# MEET FARM FOUNDATION

A 501(C)(3) NON-PROFIT AT THE INTERSECTION OF AGRICULTURE AND SOCIETY



Farm Foundation is an  
**ACCELERATOR**  
of practical solutions for agriculture.

We accelerate  
**PEOPLE AND IDEAS**  
into  
**ACTION.**



## OUR MISSION AND VISION GUIDE OUR WORK

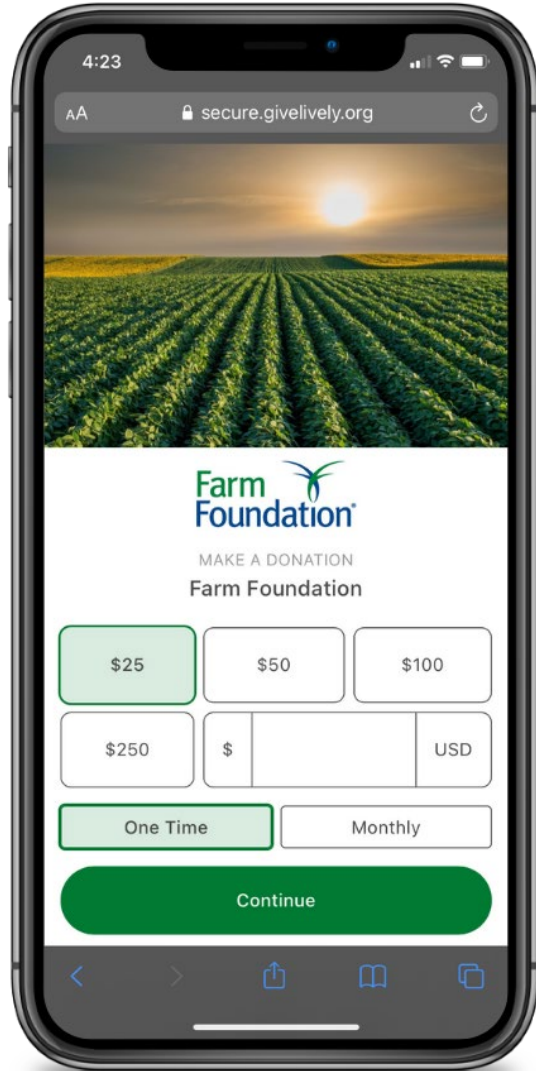
### **MISSION:**

To **build** trust and understanding at the intersections of agriculture and society.

### **VISION:**

To **build** a future for farmers, our communities, and our world.

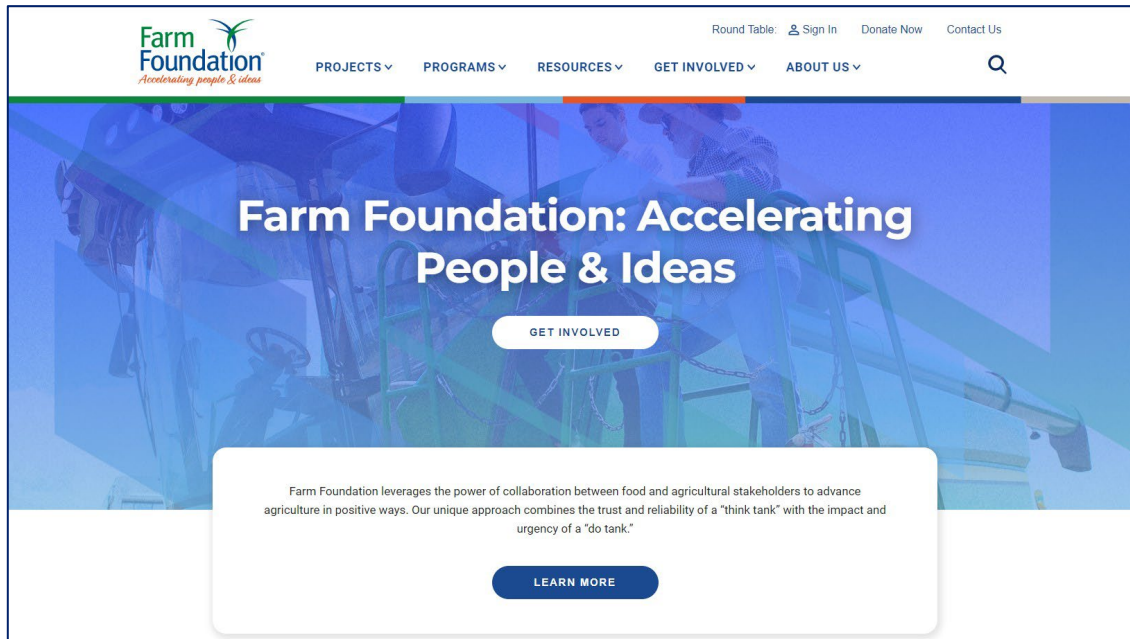
# BECOME A FRIEND OF FARM FOUNDATION



## See link in chat function

- Donate to Farm Foundation to support our mission
- Receive exclusive benefits and curated content
- Help us continue to provide valuable content like today's Forum

# CONNECT & COLLABORATE WITH US!



[farmfoundation.org](https://farmfoundation.org)

## Connect with us on social media:



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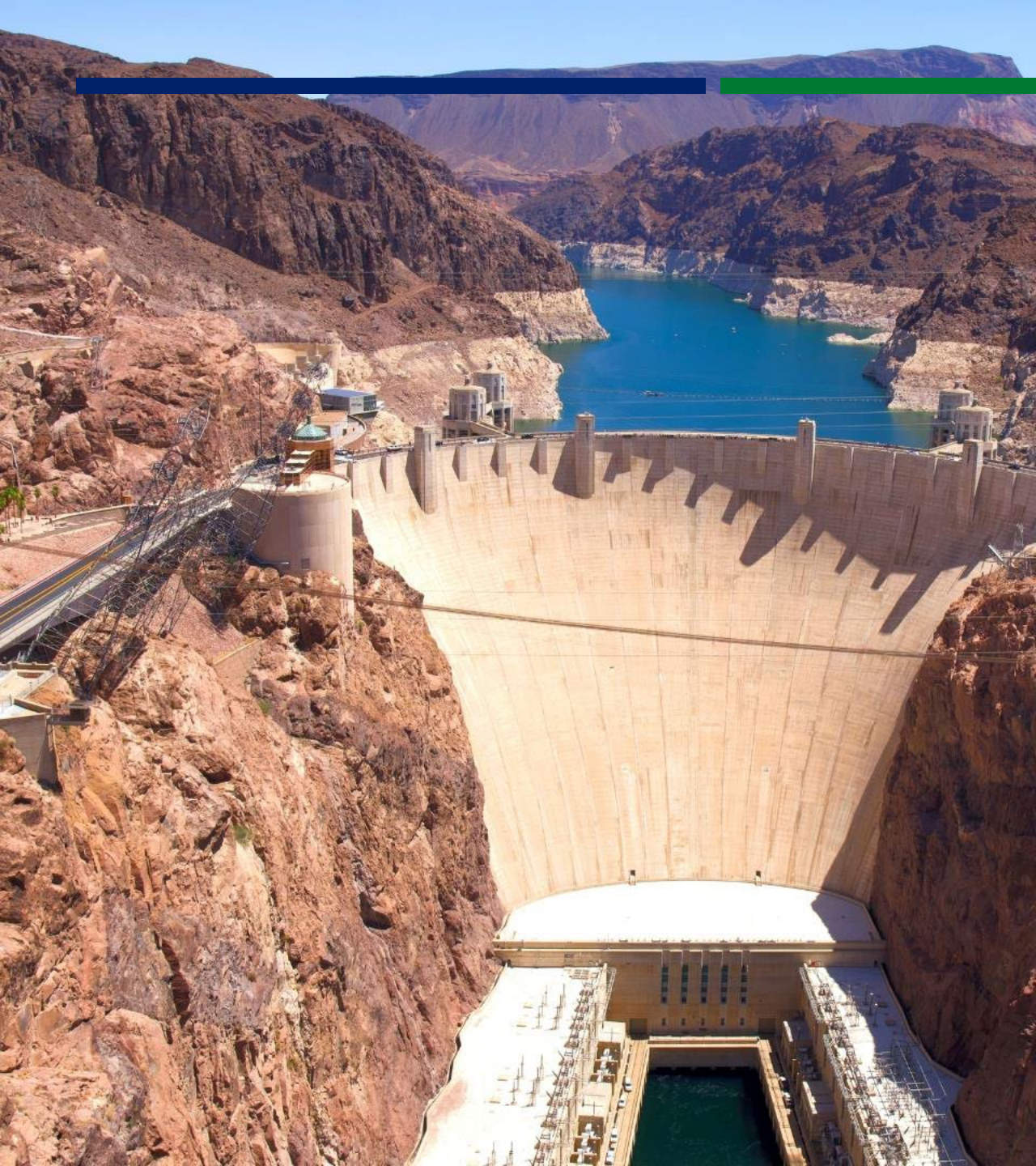
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# IMPORTANT NOTES

- Submit questions by clicking on the **Q&A Button** at the bottom of your screen.
- Please **include your name and company** so questions may be contextually understood.
- Due to **time limits**, we may not be able to ask all questions submitted.
- This Forum is being recorded and will be posted on our website at **farmfoundation.org** as well as the Farm Foundation **YouTube** channel.
- Please take the **short survey** at the conclusion of the Forum.



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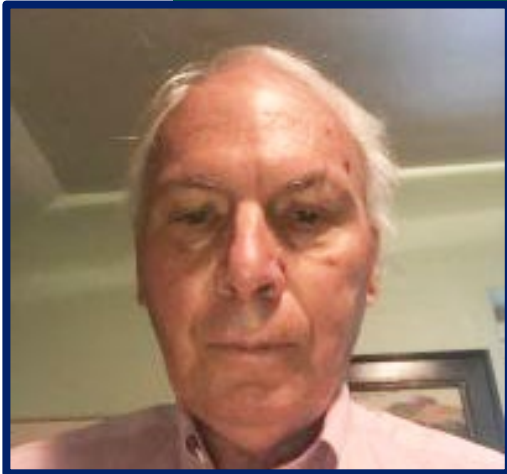




RICHARD MORRISON  
Moderator

Manager  
RNM Enterprises





## A. DAN TARLOCK

University Distinguished Professor Emeritus  
Professor of Law Emeritus  
Chicago-Kent College of Law

# EASTERN UNITED STATES WATER RIGHTS

EMERGING CHALLENGES FOR AGRICULTURE

Dan Tarlock, April 25, 2023

# Eastern Surface Water Rights: The Common Law Inheritance

- The original thirteen colonies adopted the English common law. This included the law of riparian rights.
- Riparian rights were limited to land owners along a stream and within the watershed.
- All riparians were entitled to make a reasonable use of the stream.
- Common law riparian rights were favorable to agriculture because it allowed farmers to divert the water needed without regard to other users unless they challenged the use which was and is difficult to do.

# The Law of Groundwater Use Has Always Been Favorable to Farmers

- 1. The Common Law was a pure rule of capture with almost no limitations on use regardless of the impact on other users.
- 2. Most states, with the major exception of Texas, have limited groundwater use to reasonable use. This rule basically allows cities to develop wells fields and compensate farmers for some of the costs of lowered water tables.
- 3. The benefit of the common law is illustrated by Nebraska which follows prior appropriation for surface water use but NOT for groundwater.



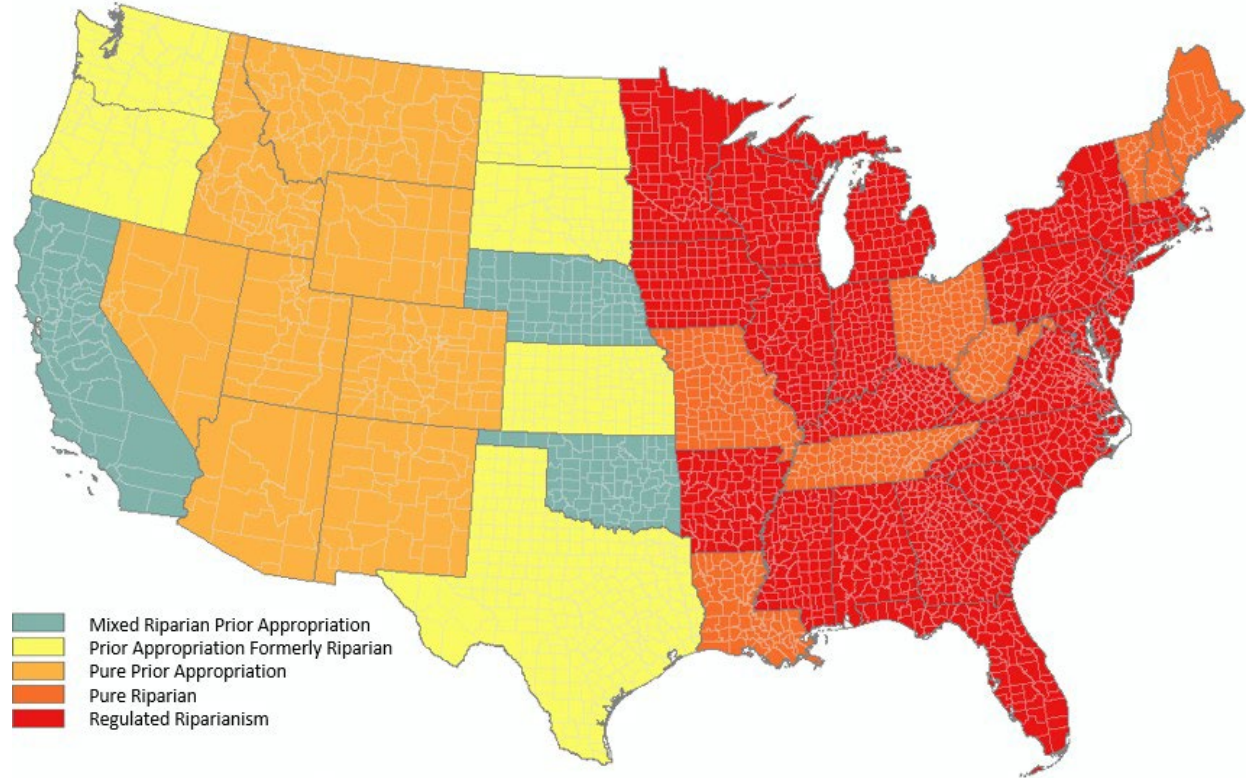


# The Disadvantages of the Common Law of Water Rights and the Remedy

- 1. Riparian rights are unstable because they can be displaced at any time,
- 2. Riparian rights are incoherent, making it impossible to predict the amount of water to which the right holder is entitled,
- 3. Groundwater rules encourage aquifer mining,
- 4. Thus, starting with Iowa in the 1950s and Florida in 1972, most states have adopted some form of regulated riparianism,
- 5. Which includes time limited permits and protection of prior uses.

# The East- West Divide, The Straddling States and California

Surface Water Appropriation Governance Systems



Data Source: Christian-Smith, Juliet, et al., 2012.

Water Markets LLC (2018)

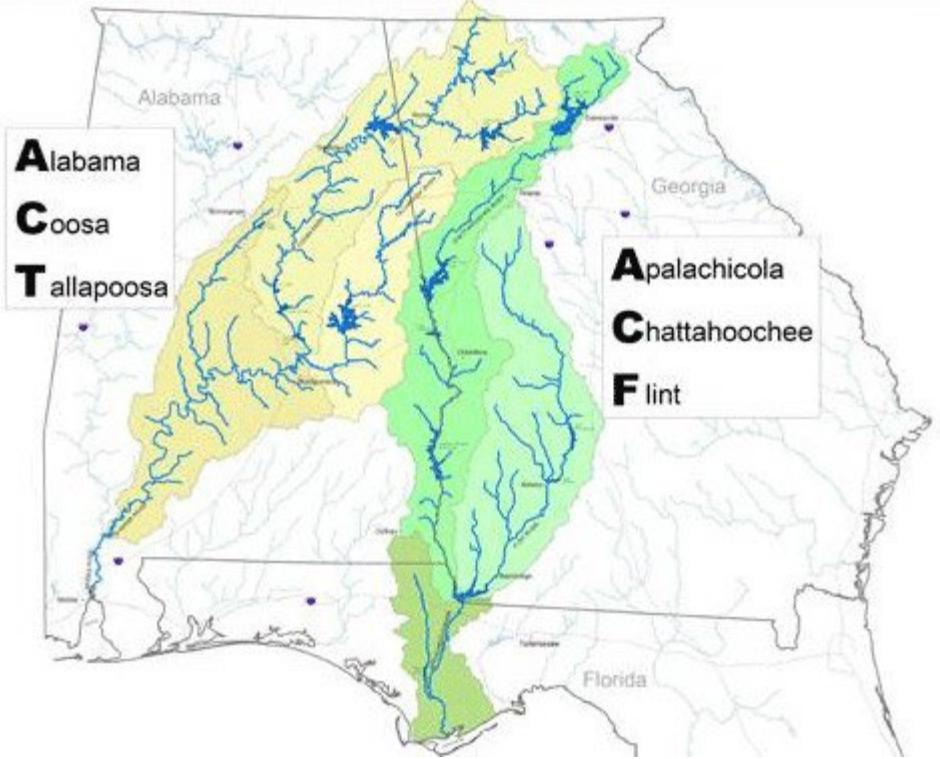
# Eastern and Southeastern Agriculture Has Not Been Overly Impacted By Regulated Riparianism

- South Carolina case in point. In 2017, South Carolina adopted a permit system for large users but exempted agricultural users. They must only register the amount of their withdrawal, no questions asked and no time limits on the registration. Other riparian users challenged this as a violation of the public trust and an infringement on common law rights, but the Supreme Court upheld the exemption. They did, however, note that other riparians could challenge an agricultural use as unreasonable under the common law. Good luck. *Jowers v. South Carolina Dep't Health and Environmental Control*, 814 S.E.2d (S.C. 2018).

# Looking to the Future

- 1. Interstate water litigation in the East is increasing.
- 2. All states are entitled to an “equitable” share of interstate rivers and groundwater basins. Priority is relevant but is not absolute.
- 3. If a state is required to share water with another state, the responsibility lies with that state.
- 4. For over three decades, Alabama, Florida, and Georgia have made inconsistent claims to the Chattahoochee Basin. In brief, Florida wants flows to support an oyster fishery, and Georgia wants to grow peanuts and Atlanta.

# The Tri-State Basins



# FLORIDA V. GEORGIA, 2021

- Florida pins the collapse on Georgia through a multistep causal chain. It argues that Georgia's unreasonable agricultural water consumption caused sustained low flows in the Apalachicola River . . . that these low flows increased the Bay's salinity . . . Georgia points to a more direct cause—Florida's mismanagement of its oyster fisheries. According to Georgia, Florida caused the collapse by overharvesting oysters and failing to replace harvested oyster shells. And even if low flows contributed at all, Georgia says, they were driven by climatic changes and other factors, not its upstream consumption.
- 2. The Supreme Court agreed 9-0 that Florida had not proven that Georgia's uses injured it.







# SARAH PORTER

Director

Kyl Center for Water Policy at Morrison Institute

Arizona State University's Morrison Institute for Public Policy

**Mission: promote informed public dialogue on critical **water** issues in Arizona and the West**

- **non-partisan**
- **research & analysis**
- **historical understanding**



Arizona  
**Water**  
**Blueprint**

[azwaterblueprint.asu.edu](http://azwaterblueprint.asu.edu)

An aerial photograph of a winding river, likely the Colorado River, flowing through a vast, rugged desert canyon. The canyon walls are steep and eroded, showing various shades of brown and orange. The river is a vibrant blue-green color, contrasting sharply with the arid landscape. The lighting suggests a bright, sunny day, casting long shadows that emphasize the depth of the canyon.

## What This Means for Arizona & What Comes Next

**ASU** **Kyl Center for Water Policy**  
**at Morrison Institute**  
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For the first time since the signing of the Colorado Compact in 1922,  
a Colorado River water shortage has been declared.

# Agriculture & Water



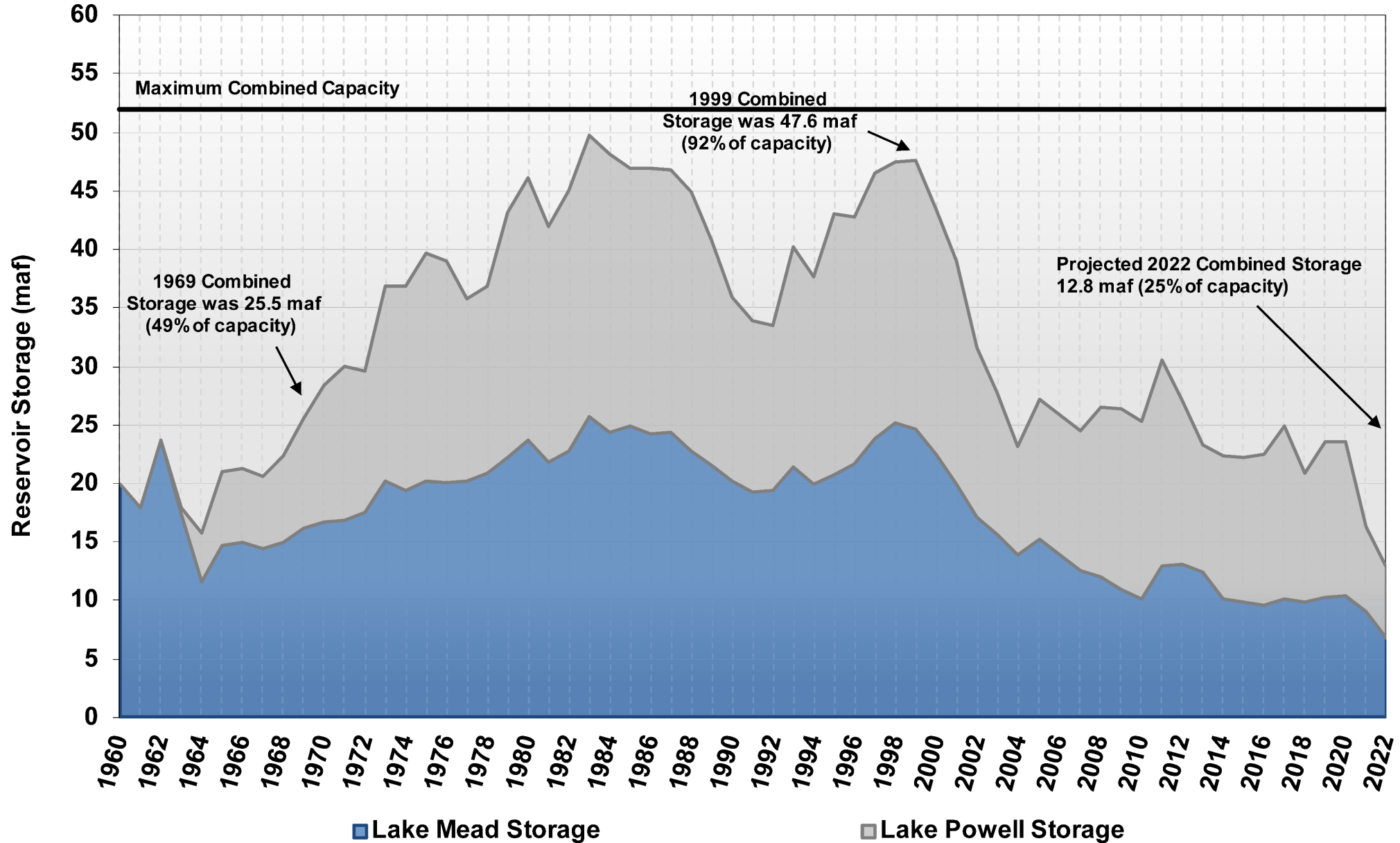
# Colorado Basin

- 40 million people
- 7 states, 29 tribes & Mexico
- 5 million acres of agriculture
- Significant biodiversity
- Grand Canyon & other national parks & monuments



# Lake Powell and Lake Mead End of Water Year Storage

Water Years 1960 through 2022

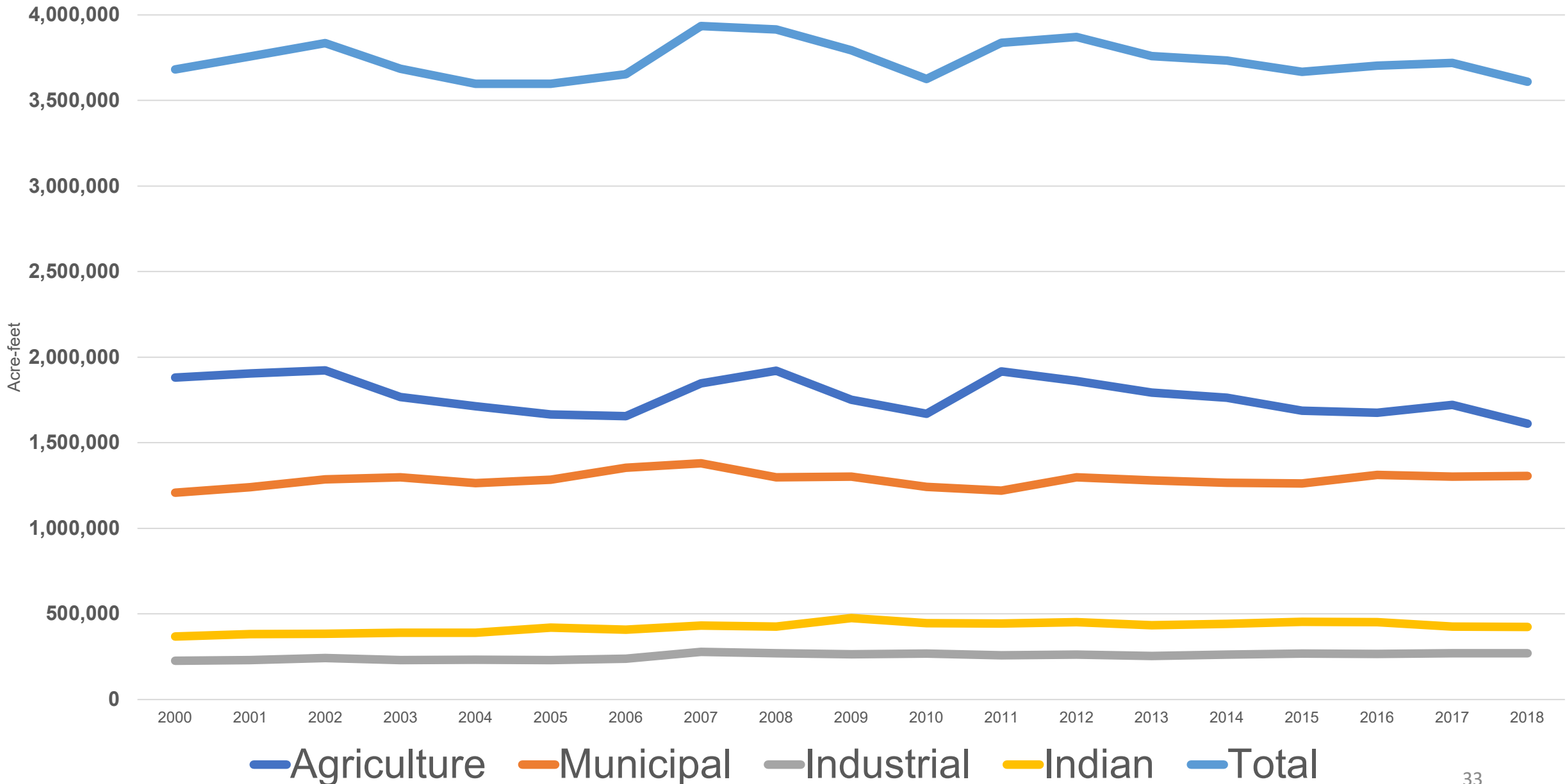


# Urban Growth is Not a Driver of Shortage

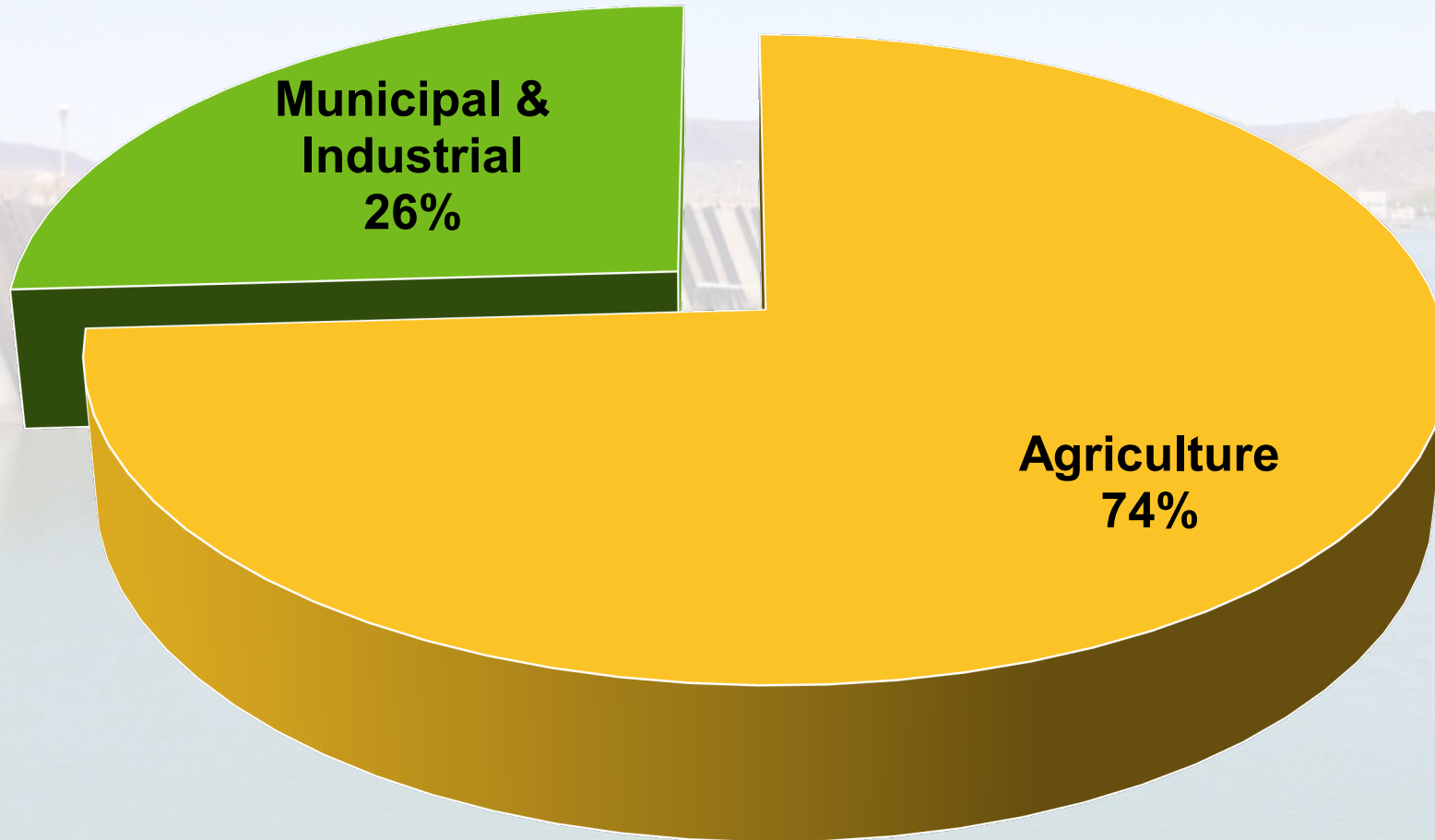




# Central Arizona Water Use by Sector, 2000 - 2018



# LOWER COLORADO BASIN WATER DEMAND





# Arizona Agriculture

## Market Value of Crops - \$2,094,218,000

- vegetables & melons \$ 1,009,125,000
- other crops & hay \$ 401,709,000
- nursery, sod \$ 195,925,000
- cotton & cottonseed \$ 184,002,000
- grains, oilseed, beans \$ 157,833,000

## Top Crops in Acres

- forage (hay) 369,229
- cotton 182,175
- vegetables 145,000
- wheat 104,650
- lettuce 72,411



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MATT MORELAND

Partner  
Moreland Farms







# 90th Anniversary Gala

Celebrating 90 years of accelerating  
practical solutions for agriculture.

**Join Us!**

Thursday, June 15, 2023

5:30 PM

The Drake

Chicago, Illinois

<https://farmfoundation.swoogo.com/90thgala>





# THANK YOU

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**We hope to see you at a future event!**

**#FarmFoundationForum**

