

An Introduction to Arkansas Water Law

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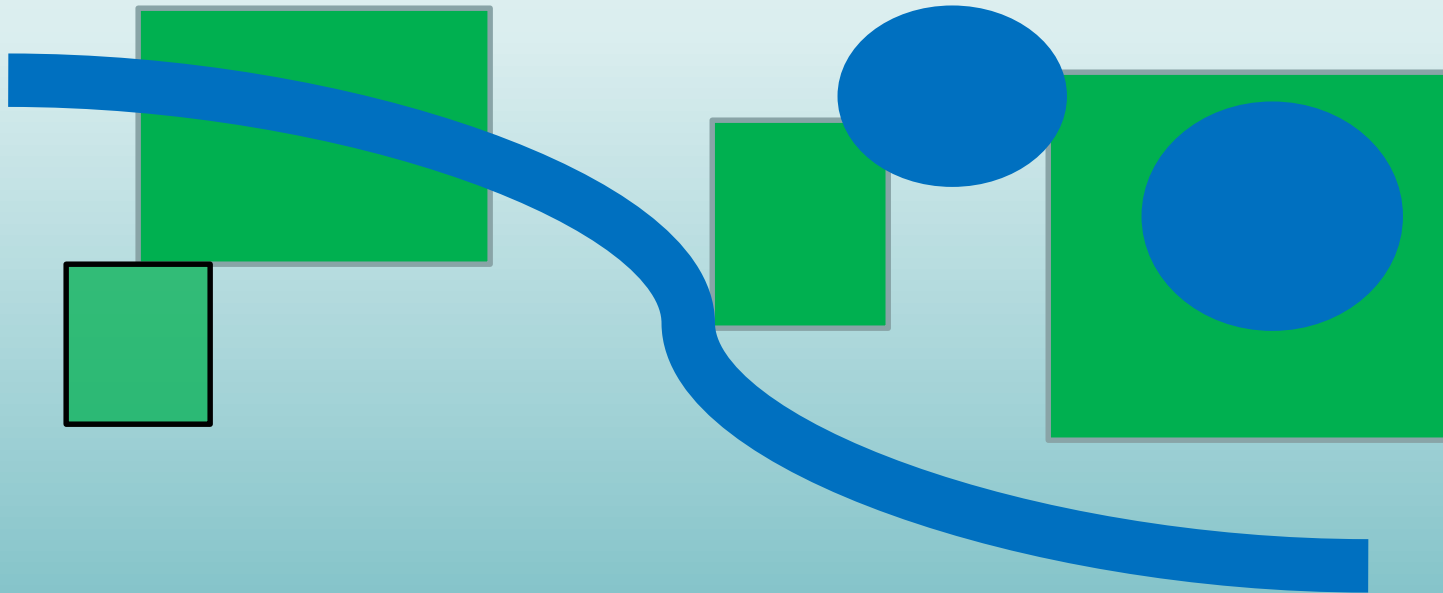


Arkansas is “Water Rich”

- We receive about 48” of rainfall per year
- Abundance keeps us from fighting
- Scarcity makes policy and law

Riparian Land

- Land contiguous to a body of water
- Right *to use* does not equal ownership



Riparian Land

- Land contiguous to a body of water
- “Unity of title” vs. “source of title”
- Right to use water is a property right
- No “use it or lose it” requirement

Old Common Law Riparian Doctrine

- “Natural Flow Theory”
- Each property owner was entitled to the “normal” or “uniform” level of the stream undiminished by upstream uses
- Domestic use only: family, livestock, and gardening



Natural Flow Unworkable with Progress

- Agricultural irrigation
- Mill ponds
- Industrial use
- Wastewater discharge
- All lower the level or diminish the flow

Horseshoe Lake near Augusta



“...the fish quit biting...”



Harris v. Brooks

- Harris v. Brooks, 283 S.W.2d 129, 225 Ark. 436 (1955)
- Farmers (there first) v. boat dock (came later)
- Analyzed natural flow and reasonable use theory and adopted the latter
- Natural flow declared “unreasonable and **unutilitarian**”

Harris v. Brooks Rules


- Domestic use superior & other uses equal
- Lawful use unreasonably harming another lawful use must yield
- Lawful uses included fishing, swimming, recreation, and irrigation
- No “first in time, first in right” requirement

Legislation to Manage Water

- Dry periods bring court cases and legislation (As do floods)
- Many new laws in response to early 1950s drought and 1980 drought
- Predictability, conservation, development, and dispute resolution are major drivers

Major Water Legislation

- Dry periods bring court cases and legislation (As do floods)
- State rejected Western-style allocation in the 1950s and 1980s
- Laws to give predictability to water use:
 - Water use reporting
 - Allocation during shortage
 - Regulation of dams
 - Minimum streamflow
 - Non-riparian transfer



Water Use Registration/Reporting

- Required annually
- Is after-the-fact, not pre-permitting
- Surface: Arkansas Code section 15-22-215
- Ground: Arkansas Code section 15-22-302
- “...fee for...withdrawal...” Arkansas Code section 15-22-913
- Exceptions

Allocation During Shortage

- 1957 effort by the legislature to streamline Harris v. Brooks process
- Arkansas Code section 15-22-217
- Step one: Declare a shortage: “not sufficient water in a stream to meet all beneficial uses”
- Then a notification and adjudication process starts

Allocation-Reserved Priorities

- Domestic and municipal domestic
- Federal water rights.
- ~~Minimum Streamflow (2013)~~

Allocation Order of Priority

1. Agriculture
2. Industry
3. Minimum streamflow
4. Hydropower
5. Recreation

Minimum Streamflow

- Starting point to determine how much water there is to allocate
- In the context of allocation, it is the minimum amount to be left in a stream for the largest of these uses:
 - Aquifer recharge
 - Fish and wildlife
 - Interstate compacts
 - Navigation
 - Water quality



Allocation “Order of Preference”

1. Sustaining life
2. Maintaining health
3. Increasing wealth

Non-Riparian Permitting Law

- 1985 law
- Current and future riparian rights, aquifer recharge, fish and wildlife needs, navigation, and interstate compacts are protected
- 25% of everything above that is permissible
- Non-riparian use inferior to riparian use
- Arkansas Code section 15-22-304

Fayetteville Shale

- Non-riparian permits few before the Fayetteville Shale
 - Only about a dozen large projects
- Protected surface water and showed good stewardship by gas companies
- At peak well over 1,000 active permits

Interstate Transfer

- Texas is thirsty and has planned to look to Arkansas for water since at least the 1960s
- Law disfavors interstate transfer and requires a long, involved process of review
- Arkansas Code section 15-22-303

Dams

- Dams 25 feet or higher and impounding 50 acre-feet or more of water must be permitted
- Hazard classifications bring inspection and emergency action requirements
- Can only impound “surplus water” and must release water at a rate that doesn’t cut off lower riparians



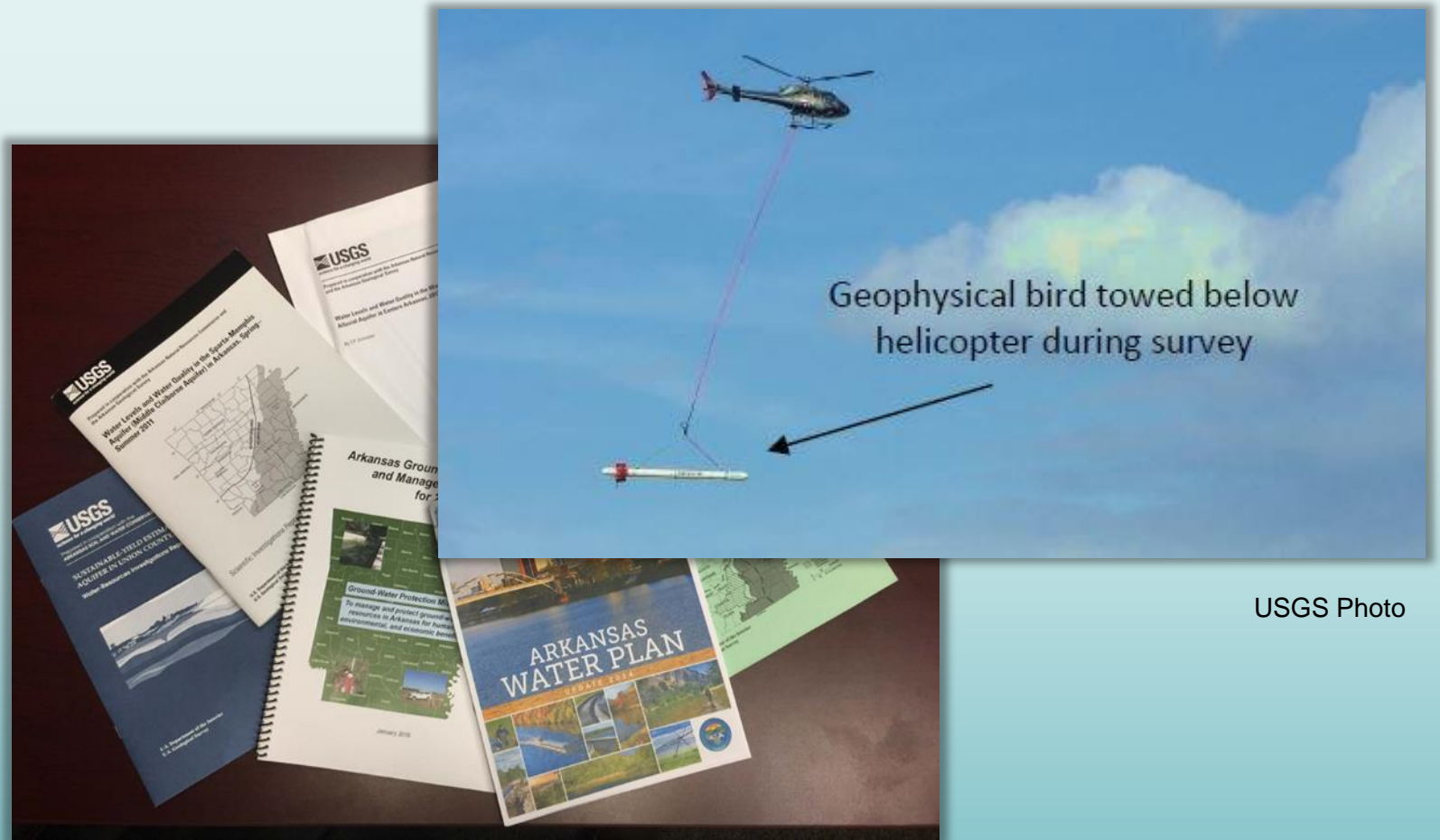
- This is where we analyze supply, demand, and “gaps”
- Arkansas Code section 15-22-503
- “A comprehensive program for the orderly development and management of the state’s water and related land resources”
- 1969 – Authorized
- 1975 – Plan updated in 1990 and 2014
- Rules adopted in 2015 updating Plan

Groundwater

“...so secret, occult and concealed, that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would be, therefore, practically impossible.”

Frazier v. Brown, 12 Ohio St. 294 (1861)

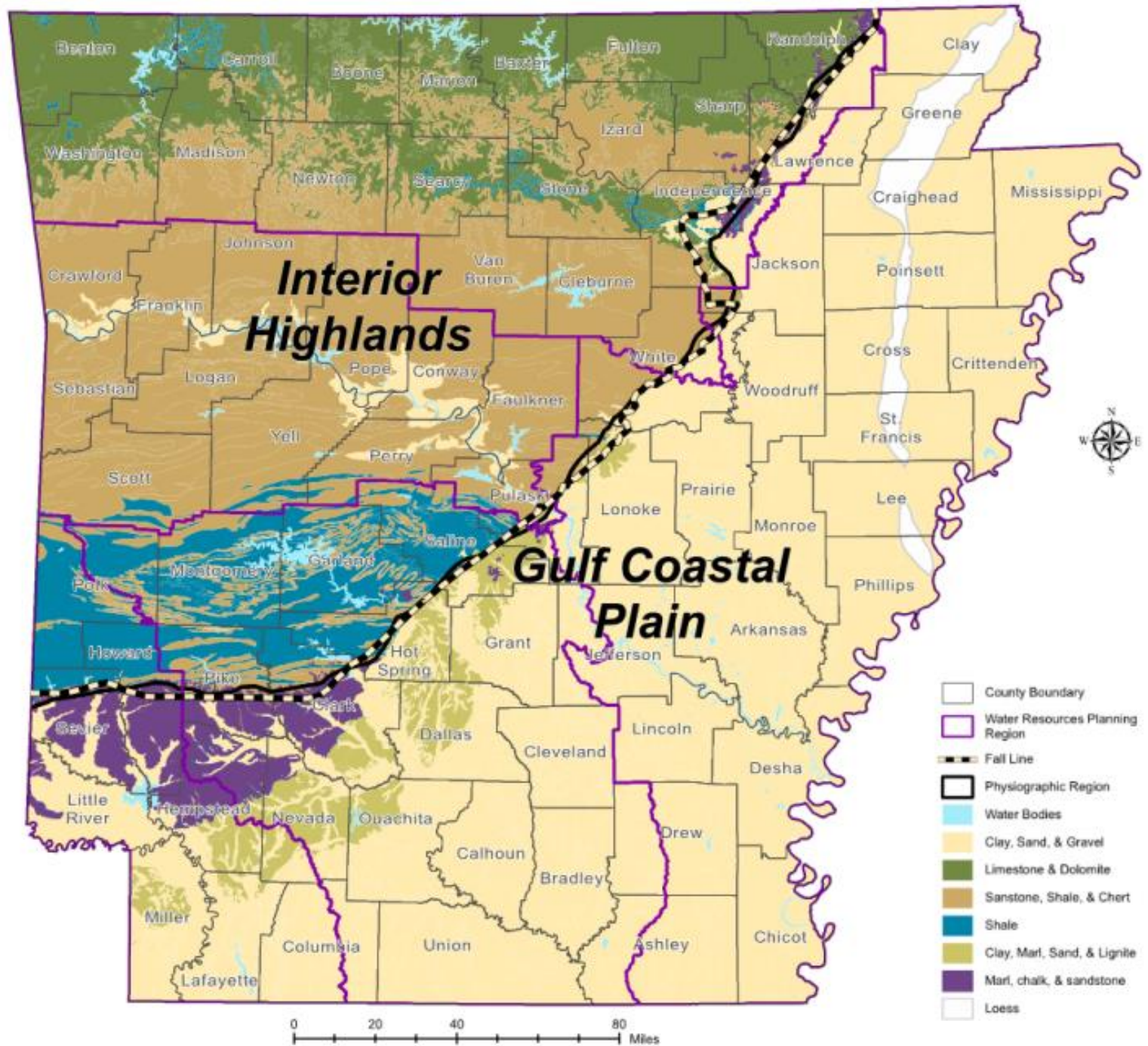
Groundwater Data Now



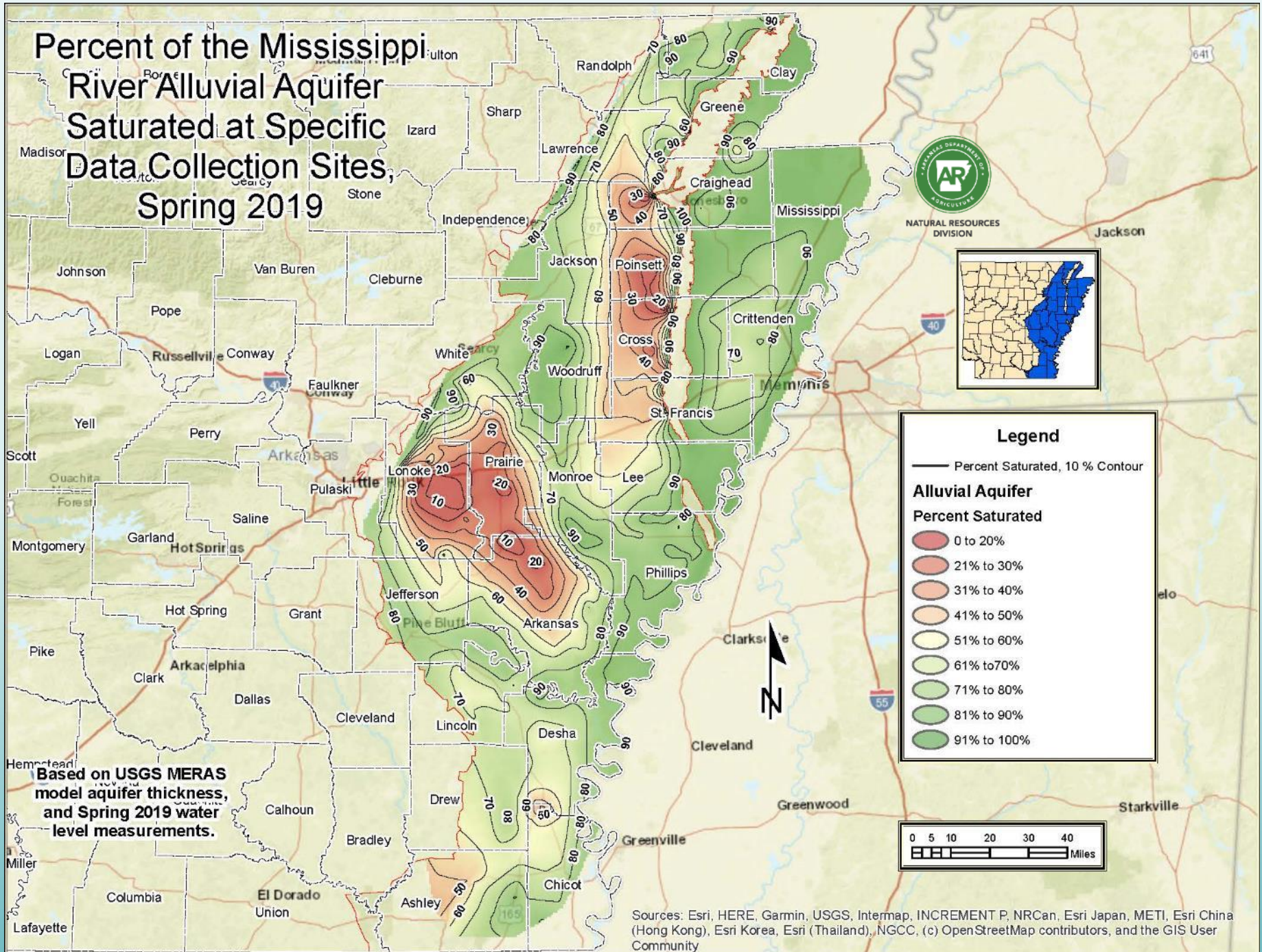
USGS Photo

Severe Groundwater Overdraft

“Based on 2015 water use data, only approximately 44.2 percent of the current alluvial aquifer withdrawal of 7,636.08 million gallons per day, and approximately 55% percent of the Sparta/Memphis aquifer withdrawal of 160 million gallons per day is sustainable.”



Percent of the Mississippi River Alluvial Aquifer Saturated at Specific Data Collection Sites, Spring 2019



NATURAL RESOURCES DIVISION



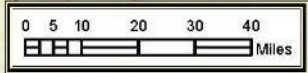
Legend

— Percent Saturated, 10 % Contour

Alluvial Aquifer

Percent Saturated

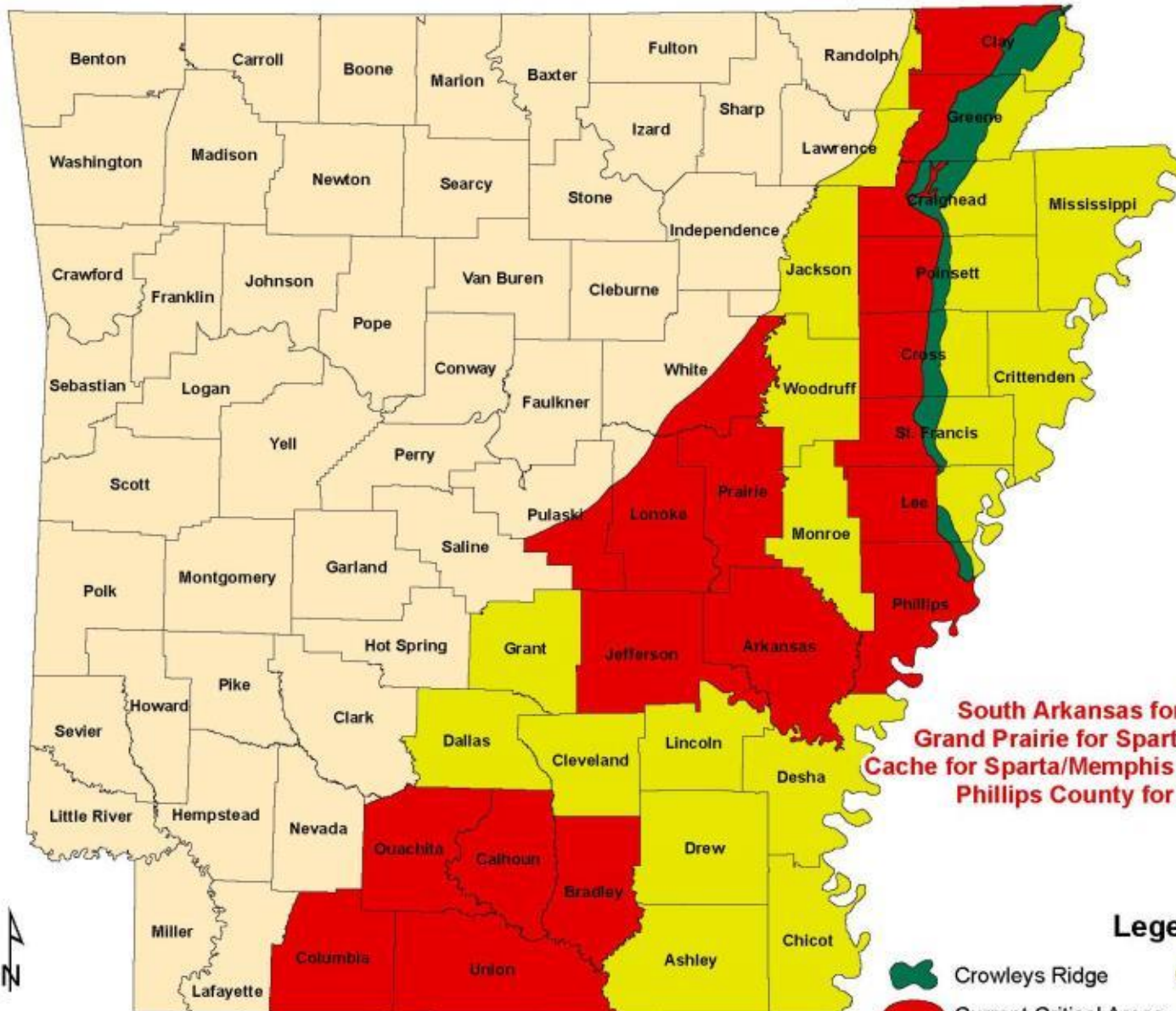
- 0 to 20%
- 21 to 30%
- 31 to 40%
- 41 to 50%
- 51 to 60%
- 61 to 70%
- 71 to 80%
- 81 to 90%
- 91 to 100%



Based on USGS MERAS model aquifer thickness, and Spring 2019 water level measurements.

Sources: Esri, HERE, Garmin, USGS, Intermap, INCREMENT P, NRCan, Esri Japan, METI, Esri China (Hong Kong), Esri Korea, Esri (Thailand), NGCC, (c) OpenStreetMap contributors, and the GIS User Community

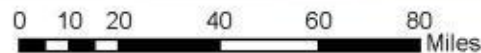
Critical Groundwater Areas



South Arkansas for Sparta in 1996
Grand Prairie for Sparta & Alluvial in 1998
Cache for Sparta/Memphis Sand & Alluvial in 2009
Phillips County for Alluvial in 2015

Legend

- Crowleys Ridge
- Current Study Areas
- Current Critical Areas
- County Boundaries



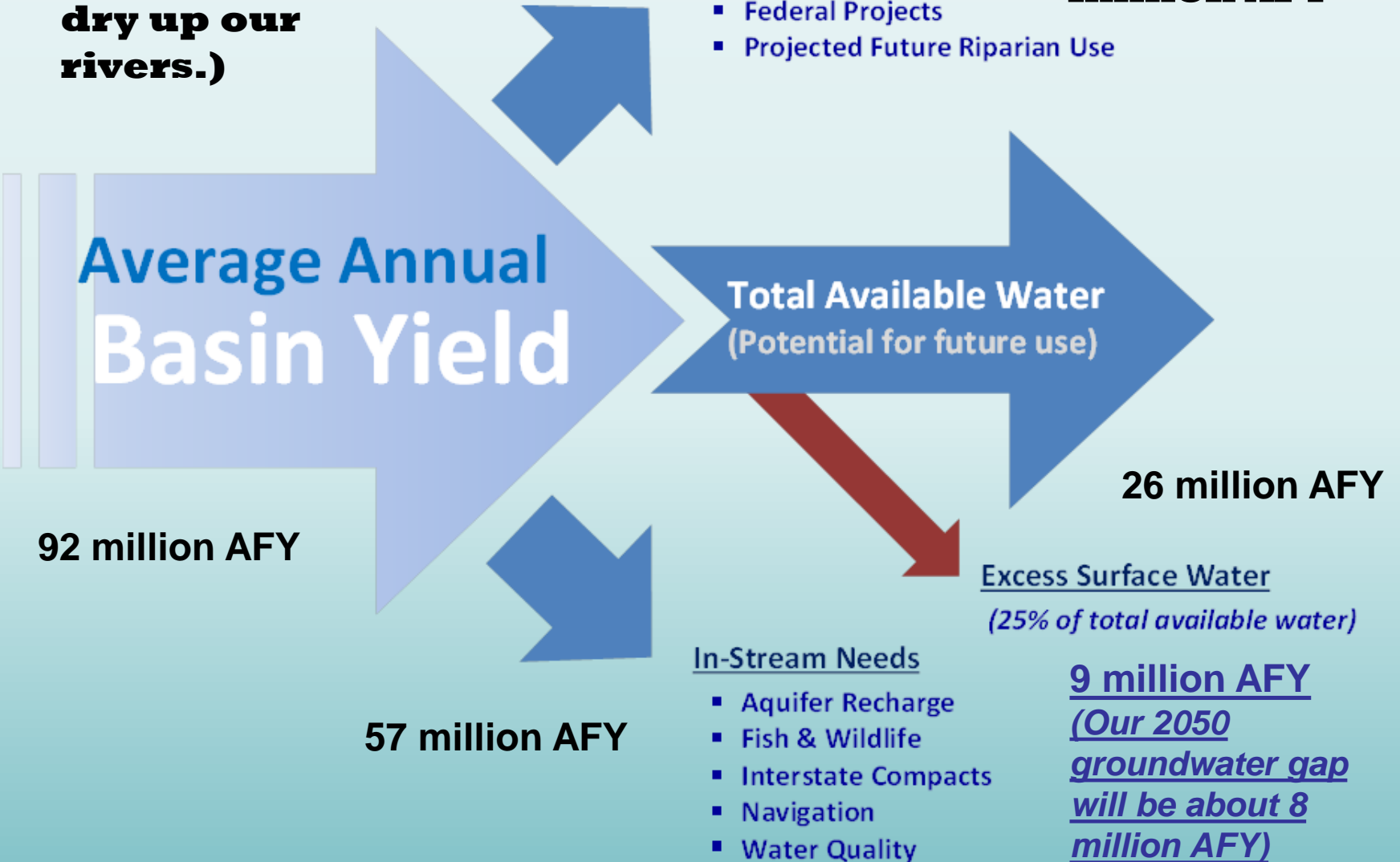
Groundwater Cases

- Jones v. Oz-Ark-Val Poultry Co., 228 Ark. 76, 306 S.W. 2d 111 (1957)
 - Rejected “English Rule” of unlimited pumping
 - Adopted “American Rule” of reasonable use
- Lingo et al. v. City of Jacksonville, 258 Ark. 63, 522 S.W.2d 403 (1975)
 - Similar case with a municipal water system’s well field in a rural area

Regulation of Groundwater Use

- 1991 - Groundwater Protection and Management Act, Arkansas Code 15-22-901, et seq.
 - Long, appealable process
 - Grandfathering
 - Alternative surface water supplies must be available or can be made available
 - Issuance of “water rights”

(We will not dry up our rivers.)



Bayou Meto Water Management Project Location



Summary: Protecting Your Water Use

- “The right of a riparian owner to take water inheres in the soil and it is vested.”
Thomas v. LaCotts, 257 S.W.2d 936, 96 Ark. 653 (1953)
- “The riparian right does not depend upon use and is not lost by nonuse.” Thomas v. LaCotts at 940
- Property right + Reasonableness of use = Successful defense of right to water



Thank you

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