Some Thoughts on Water Law for the Edisto RBC

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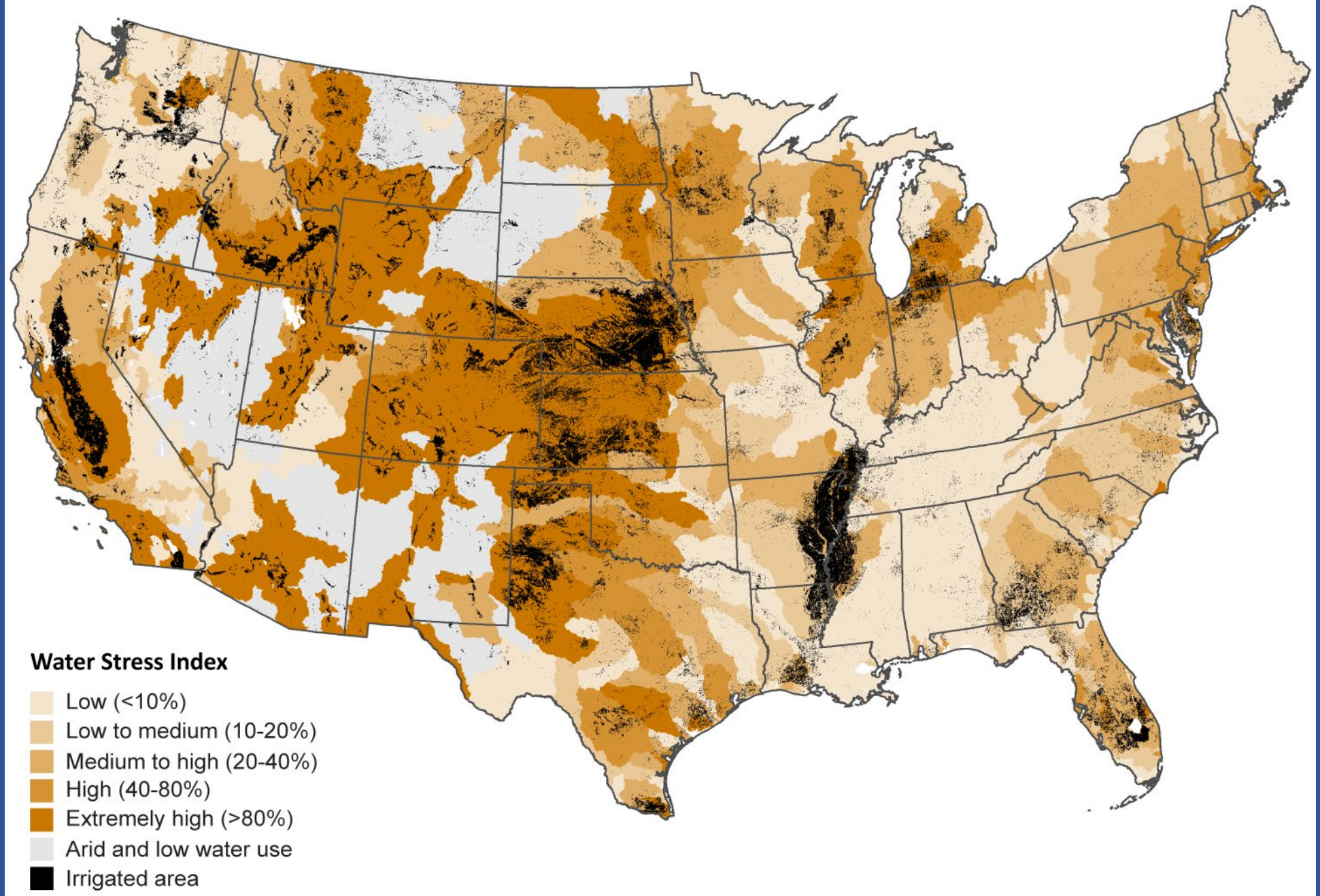


Source: GAO analysis of data from World Resources Institute Aqueduct, accessed on February 21st, 2018, and Moderate Resolution Imaging Spectroradiometer Irrigated Agriculture Dataset for the United States for 2012. | GAO-20-128SP

- It is important to think about property issues in designing any kind of voluntary or mandatory regulatory regime for ground or surface water.

- Why?

- Property = legal protection (trespass/Takings Clause) for owner's reasonable, investment-backed expectations

- Political property = while not entitled to legal protection, the political system will protect some expectations and play a major role in shaping reasonable legal expectations

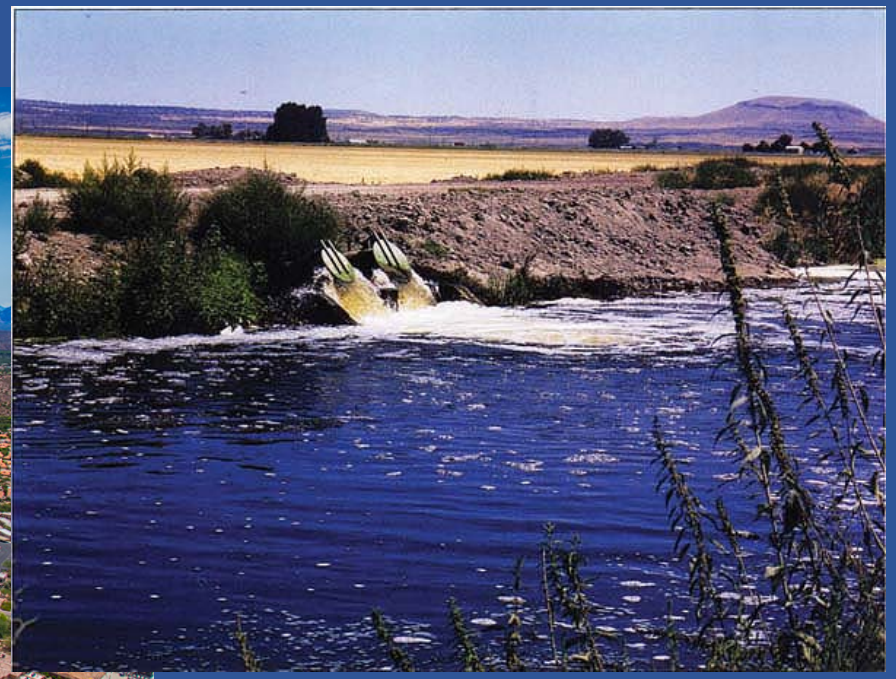
- We should ask:

- What expectations do water users have regarding their ability to use water in the future, at current or increased levels?

- Are those expectations reasonable? If not, what would reasonable expectations look like? Can we get the community of users to accept those as reasonable?

Who owns water?

One it has been taken out of the ground or stream, it is owned by the possessor, unless it has been taken unlawfully (waste) or abandoned (return flows).



Who owns water when it is still in the ground or in the creek?

In every state, the state. But there are features of the common law of water (court-created rules) that can create legal and political expectations in the right to future use.

SC groundwater =

Not sure what our common law is (!), but we are probably an American Rule jurisdiction;

One can use as much as one wants for on-tract, non-wasteful purposes;

Fugitive resource, but are there *in situ* rights?

SC surface water =

Riparian rights;

No right to a specific amount of water, but right to a reasonable share of the water, depending on what other riparians (and the river – ecology, navigation, recreation) need or want.

Permits and rights alter (increase) common law expectations.