

**University of Arizona**  
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- **YOU'VE GOT IT ALL  
WRONG ABOUT WATER**

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# **Format for Today's Lecture**

## **Transboundary Water/River Disputes**

**1. Vectors Impacting Water Availability**

**2. The Hydrologic Cycle**

**3. Water Scarcity**

**4. Why You've Got it All Wrong**

**5. The Rule of Law**

**6. The U.S. Supreme Court & Transboundary  
Water Disputes**

**7. Come Down off Your Thrown**

# **Transboundary Water Disputes**

State Conflict and the Assessment  
of their Adjudication

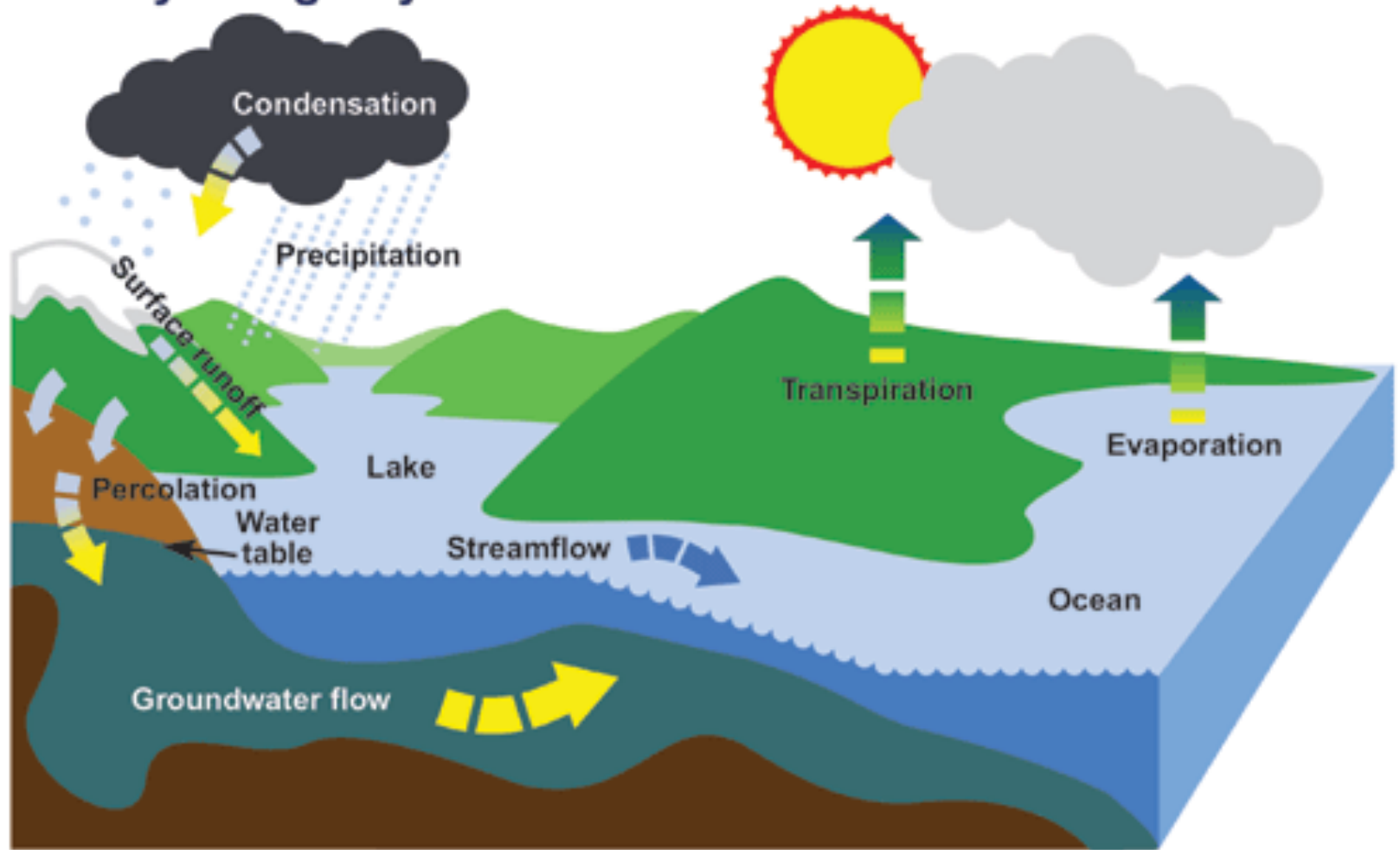
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# **Vectors that Impact Water Availability**

- 1. Scarcity of Water**
- 2. High Population Density**
- 3. Power Imbalances**
- 4. Climatic Stressors**

# The hydrologic cycle



**\* Scarcity of Water – defined by geography, weather climate**

**\* High Population Density – stresses water supplies and effects allocation**

**\* Power Imbalances – Farmers vs. Potable Water for People; political power - - money talks**

**\* Climatic Stressors – constraints due to scarcity of water**

# We Know Well That Water and Other Natural Resources Recognize No Borders Or Political Subdivisions! But . . .



**It is all about SOVEREIGNTY!!!!!!  
NOT SCIENCE! Or LOGIC!**

**Sovereignty, legally, is a political concept that refers to dominant power or supreme authority.**

- \* the power to make laws;**
- \* implications of autonomy;**
- \* to have sovereign power is to be beyond the power of others to interfere with your efforts.**



**Sir William Blackstone SL KC (10 July 1723 – 14 February 1780)**  
**Blackstone's Commentaries on the law:**

**While the legislature is capable of tyranny,**

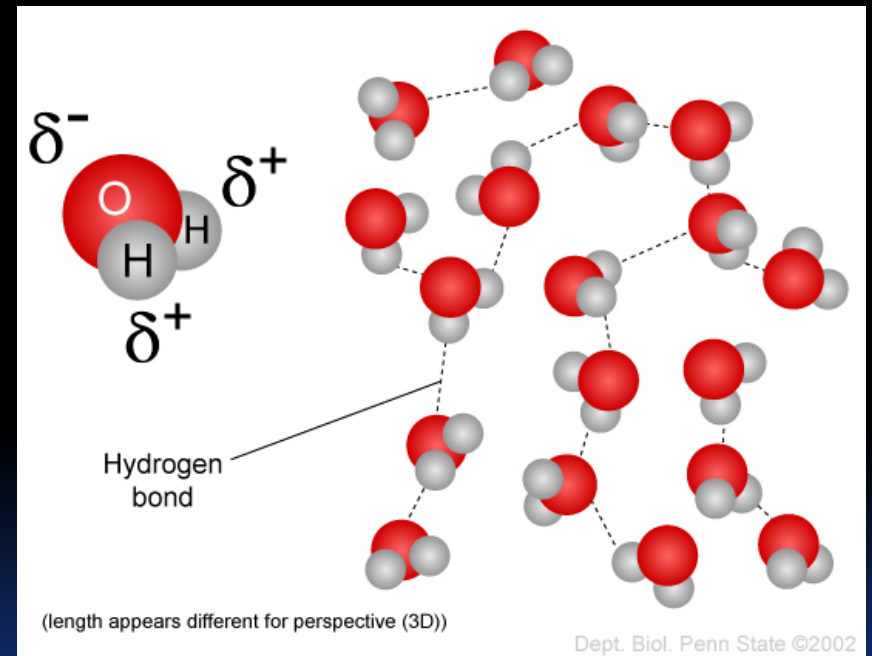
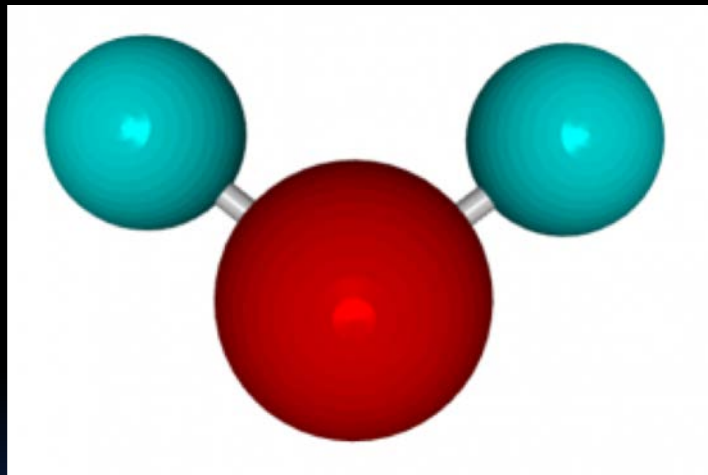
***it is in the king [or President] and the courts that historically is found the greatest examples of arbitrary rule.***

**And it has been the exercise of parliamentary sovereignty that has reinstated and guarded due process—in particular, habeas corpus—thereby preserving and facilitating public liberty.**

## **Sir William Blackstone**

**“It is in the courts that historically is found the greatest examples of arbitrary rule”.**

# The Tiny Water Molecule! Without it We Are Nothing



# This is Water Rights in the Southwestern U.S.



*Discussing Water Rights, A Western Pastime*

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# **There are Between 263 and 286 trans-boundary or inter-state rivers in the World**

**\* 286 according to The Transboundary Waters Assessment Programme (TWAP) – <http://twap-rivers.org/>**

**\* 263 according to UN Water <https://www.unwater.org/water-facts/transboundary-waters>**

# A transboundary or inter-state river is one that crosses at least one political border





## Disputes between U.S. States:

**The U. S. Supreme Court  
has *Original Jurisdiction*  
“[i]n all Cases . . . in which  
a State shall be a Party.”**

**U.S. CONST. art. III, § 2, cl. 2.**



***“Sitting, as it were, as an international as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand ....”***

***Kansas v. Colorado, 206 U.S. 46, 97 (1907), (Brewer, J.).***

***Kansas v. Colorado* - - 104  
year-long litigation. Began in  
1902 - - probably millions of \$  
spent, paying for lawyers,  
experts, the masters, travel  
to D.C., etc.**

**U.S. CONST. art. III, § 2, cl. 2.**



# ***Kansas v. Colorado***

**1. long-term two state dispute over the transboundary apportionment of the waters of the Arkansas River.**

**2. The case can be divided into two temporal periods:**

**(a) 1901–1949, addressed apportionment issues that preceded a compact executed by the two states; and**

**(b) 1949–2009, which post-dates the compact.**

## **Initial suit filed 1901:**

**Kansas = Eastern Riparian doctrine is a system of water law that gives the owner of land bordering a stream or river, or riparian land, the legal right to use the water of the stream**

**Colorado = prior appropriation, the right to the full volume of water "related back" or had the priority date as of the time of first diverting the water and putting it to beneficial use.**

**In the Court's 1907 decision, its second in the case, Justice Brewer, introduced the concept of equitable apportionment, as a means of pacifically resolving the dispute.**

***Kansas v. Colorado, 206 U.S. 46 (1907).***

## **Equitable allocation**

***does not refer to an equal division of the water between states disputing an allocation along the same transboundary river, but rather, to an equitable or fair division, based on in which sovereign the water will be most beneficial economically, and generally irrigation only - - to this very day***

# ***Subsequently applied in international Water Disputes***

***Meuse River Case, (Belgium/Netherlands), PCIJ - 1937***

***Lake Lanoux Arbitration (Spain/France), ad hoc Arb. - 1957***

***Gabčíkovo-Nagymaros Project (Hungary/Slovakia), a/k/a the Danube River Case - - Int'l Court of Justice - 1997***

***Indus Waters Kishenganga Arbitration (Pakistan v. India), PCA - 2010***



<b>*1902 – Kansas v. Colorado, 185 U.S. 125</b>	<b>2001 – Kansas v. Colorado, 531 U.S. 1122. Colorado’s Motion for leave to reply to the brief of the U.S. Granted, and the exceptions to the Special Master’s Report are set for oral argument in due course</b>
<b>*1907 – Kansas v. Colorado, 206 U.S. 46.</b>	<b>2001 – Kansas v. Colorado, 532 U.S. 902, Motion of the Acting Solicitor General for divided argument granted</b>
<b>*1943 – Colorado v. Kansas, 320 U.S. 383.</b>	<b>2001 – Kansas v. Colorado, 537 U.S. 1230, Motion of Special Master for Interim Fees and Costs Granted</b>
<b>1944 – Colorado v. Kansas, 321 U.S. 803, Petition for rehearing denied.</b>	<b>2004 – Kansas v. Colorado, 541 U.S. 1071, Motion of Kansas for leave to file sur-reply granted. Exceptions to the Special Master’s Report are set for oral argument in due course.</b>
<b>*1995 – Kansas v. Colorado, 514 U.S. 673.</b>	<b>*2004 – Kansas v. Colorado, 543 U.S. 86, Exceptions to Special Master’s pre-judgment interest calculation overruled and other findings.</b>
<b>1997 – Kansas v. Colorado, 522 U.S. 803, The Second Report of the Special Master Received and Filed</b>	<b>2008 – Kansas v. Colorado, 552 U.S. 1229, Special Master’s Fifth Report received and ordered filed. Briefing schedule ordered. Motion of Special Master for Interim Fees &amp; Costs granted.</b>
<b>1998 – Kansas v. Colorado, 522 U.S. 1073, Colorado’s exceptions to the Special Master’s Second Report overruled w/o prejudice.</b>	<b>*2009 – Kansas v. Colorado, 129 S. Ct. 1294, Opinion re: Kansas’ exceptions to Special Master’s Fifth and Final Report, contending that the Special Master erred in setting expert witness fees</b>
<b>1999 – Kansas v. Colorado, 526 U.S. 1048, Motion of Special Master for Interim Fees and Costs Granted</b>	<b>2009 – Kansas v. Colorado, 129 S. Ct. 2423, Motion of the Special Master to be discharged is granted.</b>
<b>2000 – Kansas v. Colorado, 529 U.S. 1015, Motion of Special Master for Interim Fees &amp; Costs Granted.</b>	

# ***Arizona v. California***

**86-year litigation**

**1963 – Court States: Native American  
Tribes have right to irrigation water – And  
Altered Supreme Court Practice**



**Colorado River Compact**  
**&**  
**The Boulder Canyon Project Act (“BCPA”)**

# Compacts between states are like treaties between countries/states in the U. S.

*“No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”*

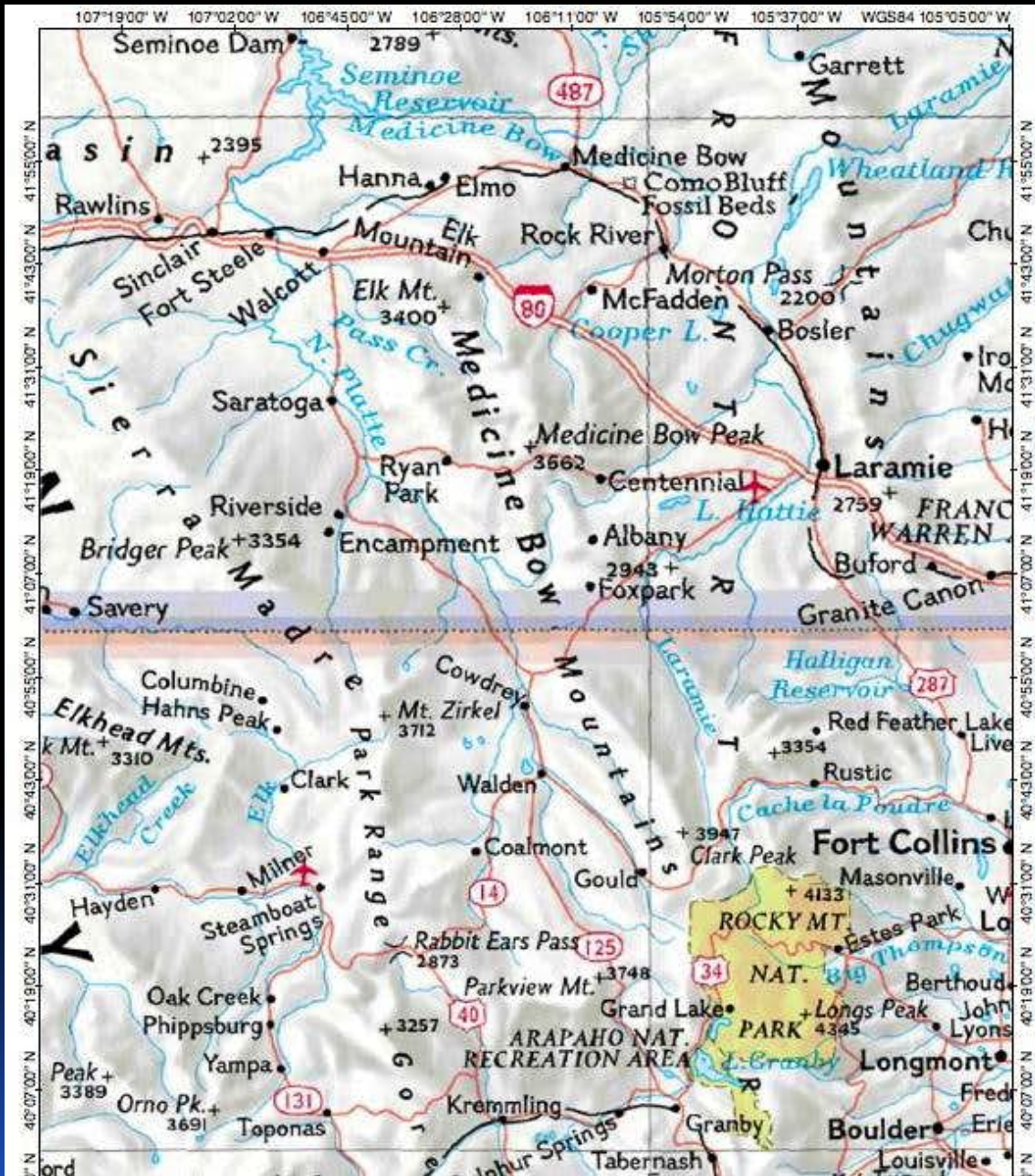
## Article I, Section 10, Clause 3: Compact Clause

# ***Wyoming v. Colorado***

**37 yr. long litigation**

## ***Wyoming v. Colorado***

***Was a fight over water for irrigation from the Laramie River, whose headwaters lie in northern Colorado, in the Roosevelt National Forest in the Front Range, in western Larimer County, flowing north-northwest into Wyoming, along the east side of the Medicine Bow Mountains and then empties into the North Platte River***



## The Venue of the Dispute



**Associate Justice Willis Van Devanter , 1911-41  
(April 17, 1859 – February 8, 1941)**

**Moved to the Wyoming Territory in 1884**



*Wyoming v. Colorado*, 353 U.S. 953 (1957)  
The “Laramie River Decree,”

**Colorado could divert a limited amount of water from an interstate stream system as long as it did not interfere with Wyoming's previously established (prior appropriation) to the same stream system.**

# ***The Rule of Law***

**“That which evokes no sense of obligation is not law. It is only the appearance of law.”**

**Joseph Vining, *From Newton's Sleep* (1995) 34**

**“No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.”**

**—Article 39, Magna Carta (1215)**

**Ensured that the life, liberty, or property of *free subjects of the king* could not be arbitrarily taken away.**

**“The rule of law is more of an ideal that we strive to achieve, but sometimes fail to live up to.”**

**Am. Bar Assoc., Division for Public Education,  
*Part I, What is The Rule of Law* (undated)**

**<https://www.americanbar.org/content/dam/aba/migrated/publiced/features/Part1DialogueROL.authcheckdam.pdf>**

**“If men were angels, no government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”**

**James Madison, Federalist Paper No. 51 (1788)**

**“The rule of law is a term that is often used but difficult to define. A frequently heard saying is that the rule of law means the government of law, not men. But what is meant by ‘a government of law, not men’”?**

**Am. Bar Assoc., Division for Public Education, *Part I, What is The Rule of Law* (undated), <https://www.americanbar.org/content/dam/aba/migrated/publiced/features/Part1DialogueROL.authcheckdam.pdf>**



**“Aren’t laws made by men and women in their roles as legislators? Don’t men and women enforce the law as police officers or interpret the law as judges? And don’t all of us choose to follow, or not to follow, the law as we go about our daily lives?”**

**Am. Bar Assoc., Division for Public Education, *Part I, What is The Rule of Law* (undated), <https://www.americanbar.org/content/dam/aba/migrated/publiced/features/Part1DialogueROL.authcheckdam.pdf>**

**“How does the rule of law exist independently from the people who make it, interpret it, and live it?”**

***Massachusetts v. EPA*, 549 U.S. 497 (Nov. 29, 2006),  
Transcript of Oral Argument at 22–23,**

**JUSTICE SCALIA:**

**Mr. Milkey, I always thought an air pollutant was something different from a stratospheric pollutant, and your claim here is not that the pollution of what we normally call “air” is endangering health.**

**JUSTICE SCALIA (CONT.):**

**That isn't, that isn't – your assertion is that after the pollutant leaves the air and goes up into the stratosphere it is contributing to global warming.**

**MR. MILKEY: Respectfully, *Your Honor,*  
*it is not the stratosphere. It's*  
*the troposphere.***

**JUSTICE SCALIA: *Troposphere,*  
*whatever.* I told you before I'm  
not a scientist.**

**JUSTICE SCALIA: That's why I don't  
want to have to deal with global  
warming, to tell you the truth.**

***Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001).***

## **A decision by the Supreme Court**

**regarding whether “isolated waters” that are not adjacent to true navigable waters are properly within the jurisdiction of the CWA’s section 404, requiring dredge and fill permits to excavate wetlands!**

**Are there “isolated waters”? Not hydrologically! Isn’t all water connected!**

# Get Out of Your Silos!

**We have judges, justices and politicians, who eschewed science, generally because it was too hard, *i.e.*, they had to think differently! Or, they had to think!!!**

**The U.S. has lost the science edge that it had in the 1960s – there is an anti-science fervor racing across the land!**

**We must break out of our scientific and professional societies: our self - indulgent silos, where we preach only to the converted and engage the public. Once you have achieved tenure, go out and save a piece of the world.**

# **Get Out of Your Silos!**

**When the average person is educated, politicians and judges cannot hoodwink her. Become like Carl Sagan, David Attenborough, Neil deGrasse Tyson!**

**Water is a finite resources in the west.**

**Leave your comfort zone!!!**





*Thank You*

