OKLAHOMA
2009 Governor's Water Conference

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Interstate Stream Compacts

Presented by

Charles T. DuMars

Professor Emeritus, University of New Mexico School of Law

Law & Resource Planning Associates, PC

201 Third Street NW, Suite 1750, ABQ, NM 87102

(505)346-0998 / ctd@lrpa-usa.com

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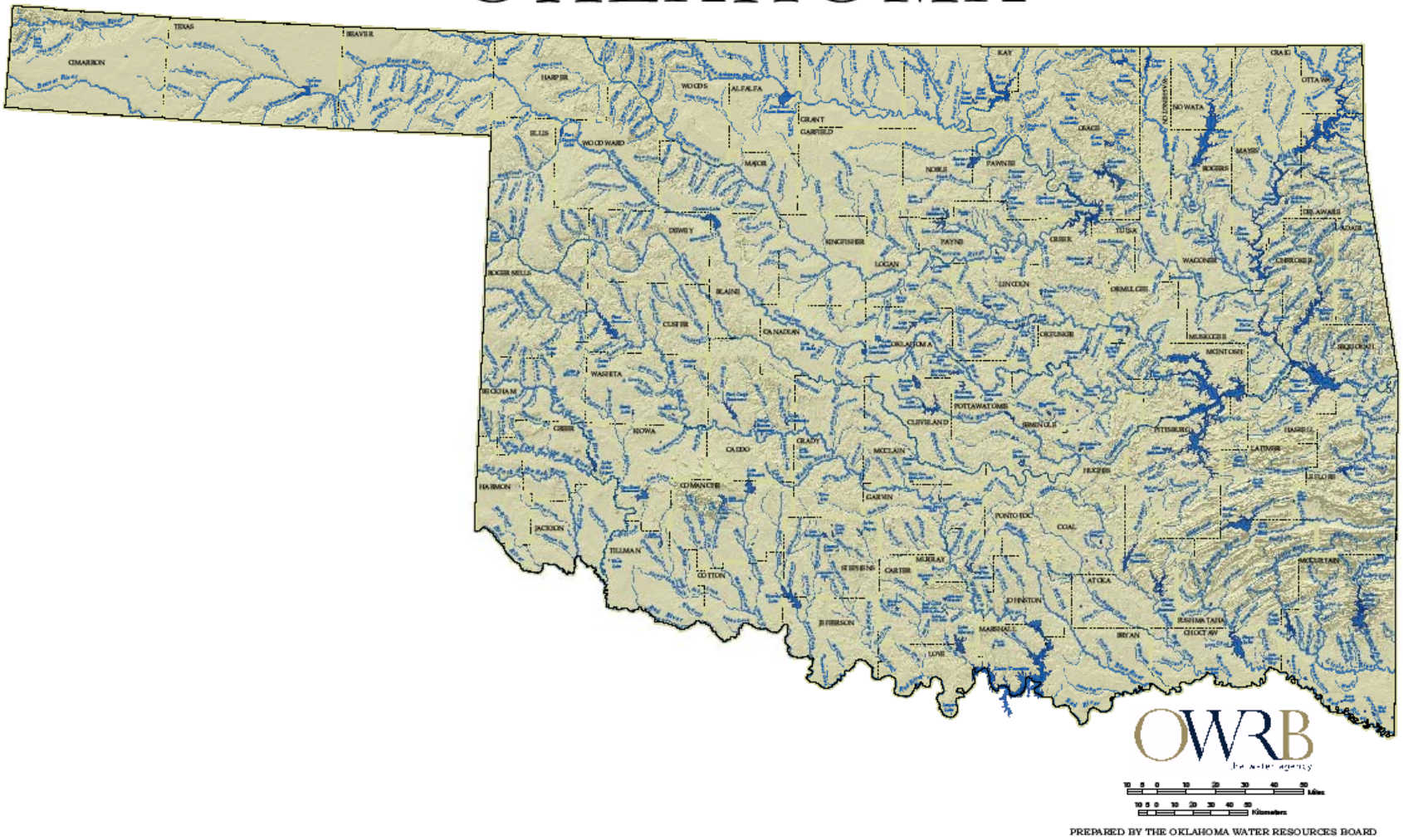
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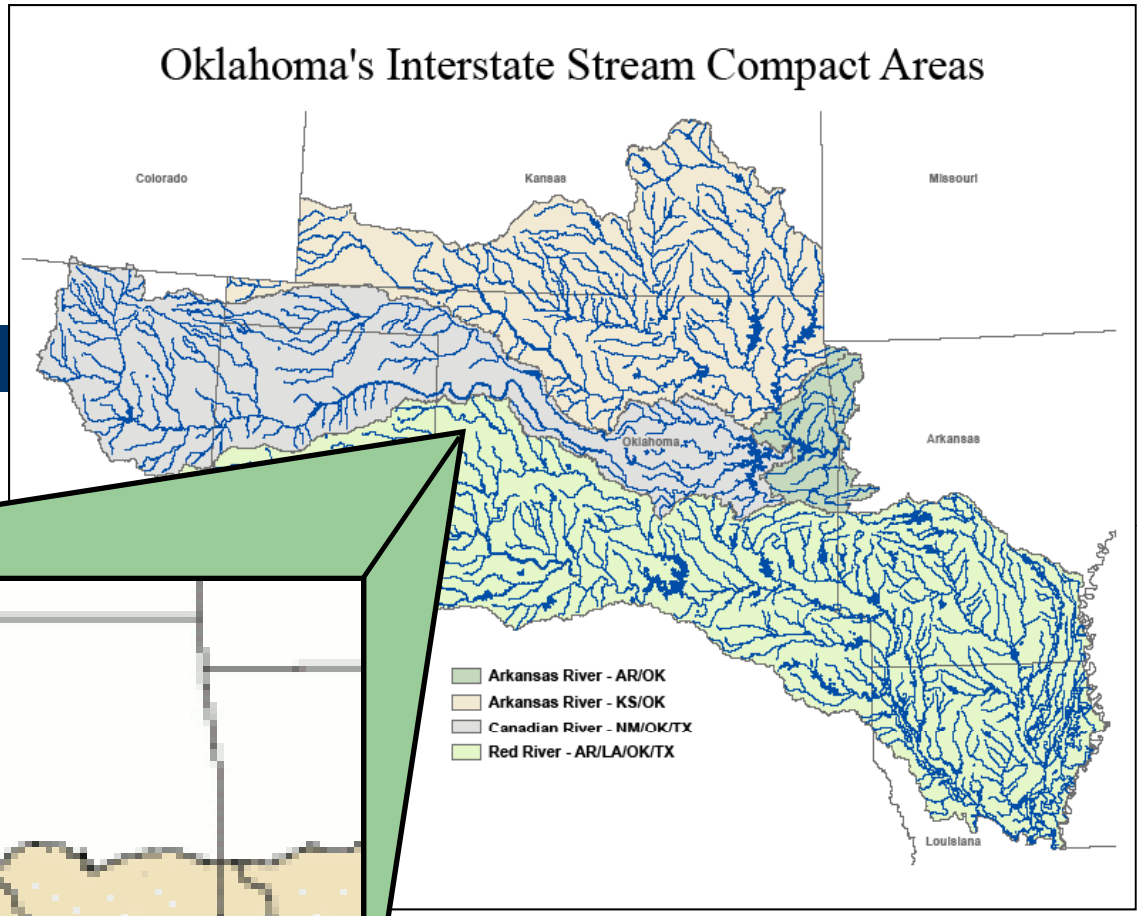
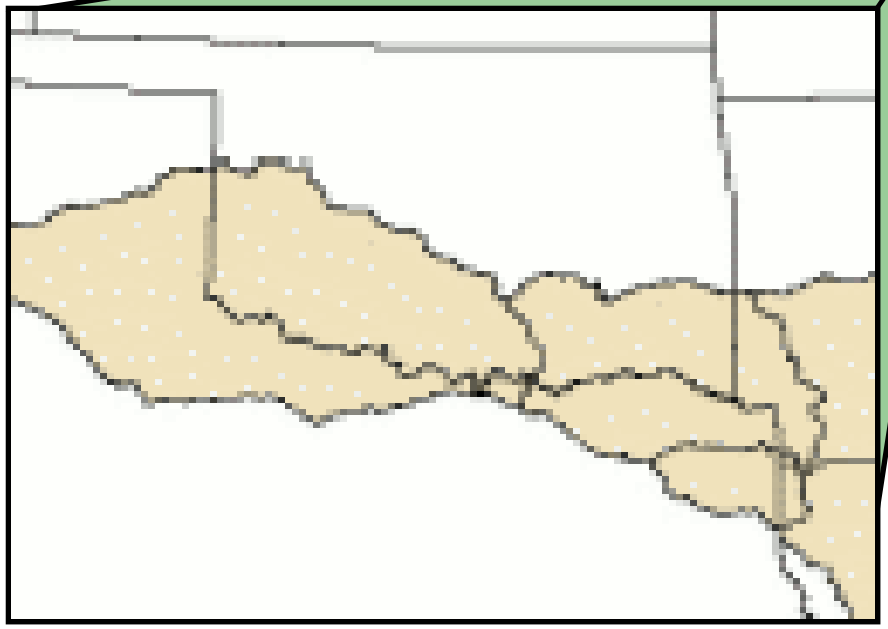
PREPARED BY THE OKLAHOMA WATER RESOURCES BOARD





Red River Basin Compact

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Supreme Court Jurisdiction

- "The judicial Power of the United States shall be vested in one supreme Court . . ."
  - U.S. Constitution, Article III, section 1
- "The judicial Power shall extend to . . . Controversies between two or more States . . ."
  - U.S. Constitution, Article III, section 2

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Compact Clause

- "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . ."
  - U.S. Constitution, Article I, section 10, cl. 3

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Supreme Court Jurisdiction

- "As Congress cannot make compacts between the states . . . disputes between them must be settled either by force or else by appeal to tribunals empowered to determine the right and wrong thereof. Force, under our system of government, is eliminated. The clear language of the Constitution vests in this Court the power to settle those disputes."
  - ***Kansas v. Colorado*, 206 U.S. 46, 97 (1907)**

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Equitable Apportionment

- "Equitable apportionment is the doctrine of federal common law that governs disputes between States concerning their rights to use the water of an interstate stream. It is a flexible doctrine which calls for the exercise of an informed judgment on a consideration of many factors to secure a just and equitable allocation."
  - ***Colorado v. New Mexico*, 459 U.S. 176, 183 (1982)**

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Equitable Apportionment

- "Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors."
  - ***Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945)**

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Equitable Apportionment

- "While the equities supporting the protection of established senior uses are substantial, it is also appropriate to consider additional factors relevant to a just apportionment, such as the conservation measures available to both States and the balance of harm and benefit that might result from the diversion . . ."
  - ***Colorado v. New Mexico*, 459 U.S. 176, 188 (1982)**

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Interstate Compacts

- "Whether the apportionment of the water of an interstate stream be made by compact between the upper and lower States with the consent of Congress or by a decree of this Court, the apportionment is binding upon the citizens of each State and all water claimants . . . That the private rights of grantees of a State are determined by the adjustment by compact of a disputed boundary was settled a century ago . . ."
  - ***Hinderlider v. La Plata Co.*, 304 U.S. 92, 106 (1938)**

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Interstate Compacts

- "As the States had power to bind by compact their respective appropriators by division of the flow of the stream, they had power to reach that end either by providing for a continuous equal division of the water from time to time in the stream or by providing for alternate periods of flow to the one State and to the other of all the water in the stream . . . [D]elegation to the State Engineers of the authority to determine when the waters should be so rotated was a matter of detail clearly within the constitutional power."
  - ***Hinderlider v. La Plata Co.*, 304 U.S. 92, 108 (1938)**

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Interstate Compacts and Dormant Commerce Clause

- "[W]e are reluctant to condemn, as unreasonable, measures taken by a State to conserve and preserve for its own citizens this vital resource in times of severe shortage. Our reluctance stems from the confluence of several realities . . .
  - ***Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956 (1982)**

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Interstate Compacts and Dormant Commerce Clause

- [Among these realities], the legal expectation that, under certain circumstances, each State may restrict water within its borders has been fostered over the years not only by our equitable apportionment decrees, but also by the negotiation and enforcement of interstate compacts. Our law therefore has recognized the relevance of state boundaries in the allocation of scarce water resources."
  - *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956 (1982)

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Interstate Compacts and Dormant Commerce Clause

- "Under the Commerce Clause, Congress may, unlike the states, enact legislation that affects states unequally. Thus, to the extent the Compact is federal law, this Court cannot invalidate it on the basis of its effects on interstate commerce."
- "Here, Congress's approval of the Yellowstone River Compact in 1951 may be considered the express statement of intent to immunize the Compact from attack that the Court found lacking in *Sporhase*."
  - ***Intake Water Co. v. Yellowstone River Compact Comm'n*, 590 F. Supp. 293, 297 (D. Mont. 1983), *aff'd* 769 F.2d 568 (9th Cir. 1985)**

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Interstate Compacts and In-State Preferences

- The States and the Supreme Court agreed that under the Canadian River Compact, which authorized New Mexico to exercise "free and unrestricted use" of waters originating above Conchas Dam, "nothing . . . would prevent New Mexico from simply enlarging Conchas Reservoir to capture all of the waters flowing into the river."
  - ***Oklahoma v. New Mexico*, 501 U.S. 221, 238 (1991)**

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Dormant Commerce Clause and In-State Preferences

- "[I]t would be unreasonable to require a state to wait until it is in the midst of a dire shortage before it can prefer its own citizens' use of the available water over out-of-state usage. A limited preference which could not be exercised until water resources were almost depleted would be no preference at all. If the limited preference is to be meaningful the states must be permitted to prefer local usage while there is still water to conserve."
  - *City of El Paso v. Reynolds (El Paso II)*, 597 F. Supp. 694, 701 (D.N.M. 1984)

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A Question

- In a federal system composed of fifty states—each having two United States Senators irrespective of population and having equal right to grow and self-govern—was it the intent of the framers of the Constitution that all the waters of an interstate stream should go to the State that can grow at the most rapid rate and utilize the water first?

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Enrolled House Bill No. 1483

Section 1

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

- A. The State of Oklahoma has long recognized the importance of the conservation and preservation of its public waters and the necessity to maintain adequate supplies for the present and future water requirements of the state and to protect the public welfare of its citizens, and has entered into interstate compacts for that purpose.
- B. No permit issued by the Oklahoma Water Resources Board to use water outside the boundaries of the State of Oklahoma shall:
  1. Impair the ability of the State of Oklahoma to meet its obligations under any interstate stream compact; or
  2. Impair or affect the powers, rights, or obligations of the United States, or those claiming under its authority or law, in, over and to water apportioned by interstate compacts.
- C. Water apportioned to the State of Oklahoma by an interstate compact is subject to the right and power of the State of Oklahoma to control, among other matters, the method of diversion of the water and the place of use.
- D. No permit for the use of water out of state shall authorized use of water apportioned to the State of Oklahoma an interstate compact unless specifically authorized by an act of the Oklahoma Legislature and thereafter as approved by it.

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