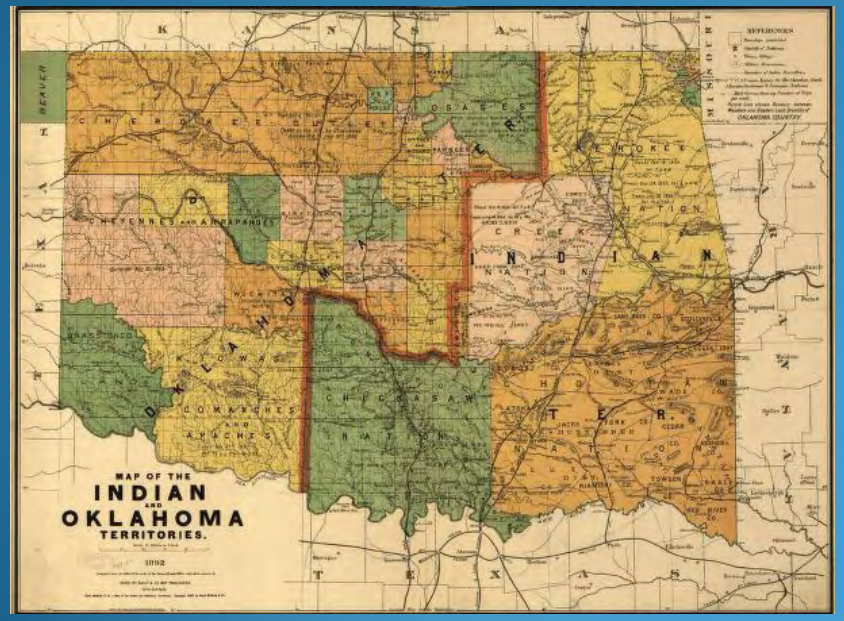
# Tribal-State Water Conflicts in Oklahoma

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# Central Issues
# Substantive and Procedural

- Who has what *property* interest in the resource?
- Who has *jurisdiction* to regulate use of the resource?
- By what *process* will we answer those questions?

- Why is it important to address these issues?
  - Clouded title
  - Regulatory uncertainty

- Who should care?
  - All of us

# Substantive Framework Oklahoma Context

- *Oklahoma generally: Reserved rights*
  - *U.S. v. Winans*, 198 U.S. 371 (1905)
  - *Winters v. United States*, 207 U.S. 564 (1908)

- *Eastern Oklahoma (former I.T.): Five Tribe claims*
  - *Atlantic & P.R. Co. v. Mingus*, 165 U.S. 413 (1897)
  - *U.S. v. GRDA*, 63 U.S. 229 (1960)
  - *Choctaw v. U.S.*, 397 U.S. 620 (1970)
  - *Oklahoma v. Tyson*, 258 F.R.D. 472 (N.D. Ok. 2009)

# Federal Policy
# First wave – Litigation

- 1973 – National Water Comm'n recommends full and complete adjudication of all *Winters* rights
- General stream adjudication
  - Determination of rights and entry of decree
  - Litigative framework
  - McCarran Amendment (jurisdiction and forum)
- Experience has illustrated limitations

# Federal Policy
# Second wave – Negotiation

- 1988 – Pres. George H.W. Bush declares federal preference for the negotiated settlement of Indian water right claims, whenever practical
- 1990 – Criteria and procedures (55 Fed. Reg. 9223)
  - Determination of rights and entry of decree
  - Litigative, negotiated, and legislative framework
  - Opportunity for case-by-case creativity
  - Opportunity for the three "R"s
- Experience has illustrated limitations, but approach has proven more successful than reliance on GSA

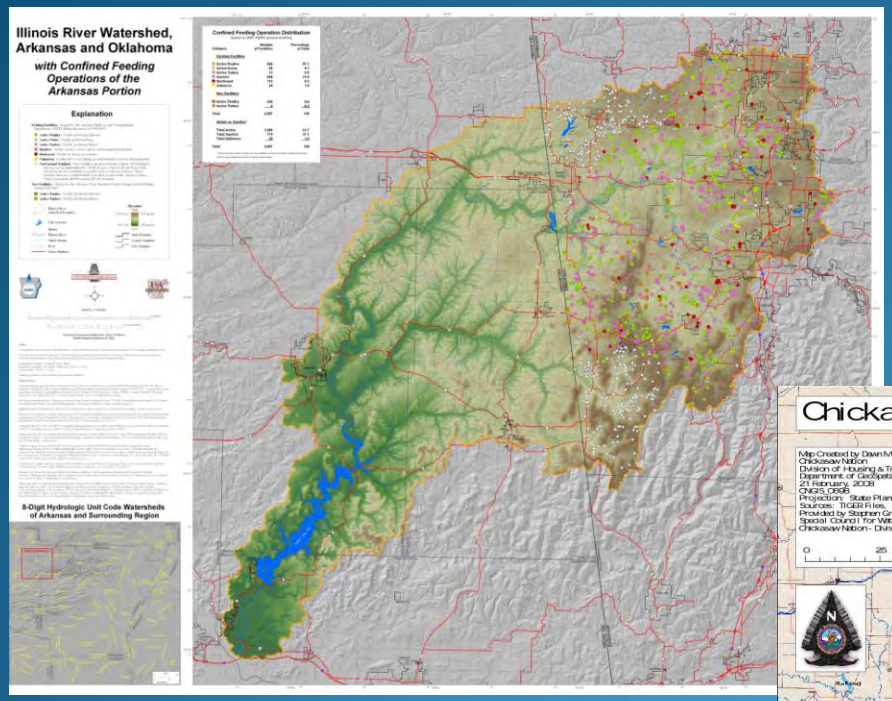
# Oklahoma Policy (1980 OCWP)

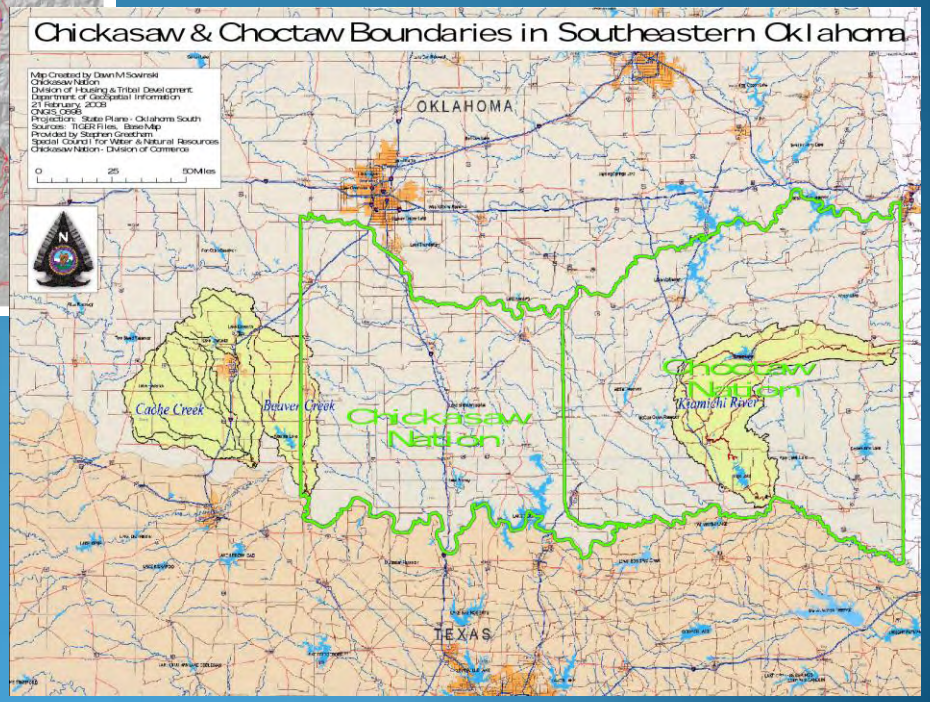
- Only tribes with reservations have water rights, and since "no Indian reservations presently exist in Oklahoma," there are no tribal water rights (p.5)
- "The future water needs of Oklahoma's substantial Indian population have been considered within the water requirement projections included in the [OCWP]" (*id.*)

# Oklahoma Policy (1995 OCWP)

- "The [OWRB] should request that Oklahoma Water Law Advisory Committee and selected tribal representatives to [*sic*] explore Indian water rights and quality issues in Oklahoma . . . ." (p.138)
  - Investigate formation of permanent committee
  - Develop negotiation system
  - Identify projects for cooperative action

# Implementation?





# Oklahoma Policy (2010 OCWP?)

- "State/Tribal Issues. State and tribal issues must be resolved through meaningful government-to-government negotiations, preservation and building upon history of 'good neighbor' relations, and implementation of the specific recommendation made on this subject in the 1995 state water plan so that the state and tribes can work cooperatively and more efficiently to resolve water issues."

  – Oklahoma Academy Water Town Hall (Final Report – 2010)

# Oklahoma Procedural Framework

- Litigation
  - Traditional GSA framework has been abandoned in favor of a non-general permit system (82 O.S. § 105.6) and limited state court jurisdiction (*e.g.*, 82 O.S. § 105.5)
  - Only GSA provision is left to the discretion of the OWRB
- Negotiation
  - No institutionalized structure or consistent system (*compare* 74 O.S. §§ 1221, 1221.A *with* 74 O.S. § 1222)
  - Good experience in the negotiated resolution of other intersovereign conflicts

# Oklahoma Context
# Current Events – Sardis

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# Current Events – Sardis

- The Sardis two-step
  - *Storage right transfer* – Transfer of storage rights, transfer of $82M+ debt, provision of municipal-entity role in OWRB permitting decisions
  - *Water-use permitting* – State law water-use permit for 136,000 AFY, *i.e.*, ~90% of Sardis' sustainable yield

- Where we are now
  - *Storage right transfer* – Not adequately submitted to feds
  - *Water-use permitting* – Application submitted

# Oklahoma Context
# Current Events – Sardis

- *Chickasaw-Choctaw Position (Litigation)*
  - Sardis transaction represents an attempted inverse condemnation of tribal property, pursued without regard for fundamental limitations on state jurisdiction and substantive questions of controlling federal law
  - Unilateral state-municipal movement on water-use permit will trigger complex of federal litigation

# Oklahoma Context
# Current Events – Sardis

- *Chickasaw-Choctaw Position (Negotiation)*
  - State-tribal accommodation of separate sovereign rights
  - Protection of in-territory present and future-use water needs, both consumptive and non-consumptive
  - To the extent "surplus" waters are available, exports must be conditioned on verifiable need and mitigation of in-territory economic and environmental impact

# Oklahoma Context
# Current Events – Framework?

- By what *process* will we answer the questions presented not only by Sardis but, more generally, by the treaties and common law of tribal, state, and private rights that arise from Oklahoma's history?

- *Government-to-government negotiation*
  - Establish procedural framework for the initiation, finalization, and implementation of water negotiations
  - Identify opportunities for cooperative action
  - Designate scope of talks and shape of the table
  - *Cf*. 1995 OCWP
  - *Cf*. Montana Reserved Rights Compact Comm'n

# Thank you!

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