

Oklahoma Comprehensive Water Plan Documents (OWRB Website)

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2012 Update of the Oklahoma Comprehensive Water Plan

The 2012 Oklahoma Comprehensive Water Plan (OCWP) Update, a 5-year effort conducted by the Oklahoma Water Resources Board, is nearing completion. During the final year of development, and prior to formal submittal to the Governor and State Legislature in February 2012, the OWRB and its planning partners will continue to solicit important input from stakeholders, citizens and others with a vested interest in the future of Oklahoma's water resources.

OCWP INTERIM DRAFT

Numerous executive, technical, workgroup, and supplemental reports are being prepared for inclusion in the final 2012 OCWP Update, which will be considered in its entirety by the nine-member Water Board in October 2011. This work represents the collective contributions of numerous citizens and experts from state and federal agencies, academia, and organizations who have spent almost five years researching and developing implementable recommendations to address Oklahoma's current and future water issues.

Available below for download and review are interim working draft versions of OCWP reports that will be included in the final 2012 OCWP Update. Reports remain in development and may be updated to reflect new and/or more accurate information.

OCWP Executive Report

1. Introduction
2. Water Resources Planning in Oklahoma
3. Water Management in Oklahoma
4. Statewide Summary
5. Statewide Water Assessment
6. Regional & Statewide Opportunities & Solutions
7. Water Policy Recommendations & Implementation

Watershed Planning Region Reports

- Panhandle
- Southwest
- West Central

UPCOMING OCWP SCHEDULE

- September 2011: Final Water Board review and public comment on draft OCWP
- October 2011: Formal Water Board consideration and adoption of OCWP
- October 2011: OCWP unveiled at 32nd Annual Governor's Water Conference
- February 2012: Formal submittal of OCWP to Governor and State Legislature

Joint Legislative Water Committee Briefing Documents

- Water Law & Management in Oklahoma

Policy Development & Public Participation

The OWRB contracted with the [Oklahoma Water Resources Research Institute \(OWRRI\)](#) in 2006 to initiate an intensive policy development and public participation process. [\(more . . .\)](#)

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Oklahoma Comprehensive Water Plan
OCWP

Board Meetings

- Presentation & Discussion of OCWP Draft Priority & Supporting Recommendations & Watershed Planning Region Reports (August 2011 OWRB Meeting)
- Presentation & Discussion of

www.owrb.ok.gov/ocwp

WATER LAW AND MANAGEMENT IN OKLAHOMA

Presented to
Joint Legislative Committee on Water
August 17, 2011

Dean Couch, General Counsel
Oklahoma Water Resources Board

Chuck Dumars, Attorney at Law
Law & Resource Planning Associates, P.C.

SOURCES OF WATER LAW

- U.S. Constitution
- Oklahoma Constitution: Article XVI, Section 3 – Systems of levees, drains, and ditches and irrigation

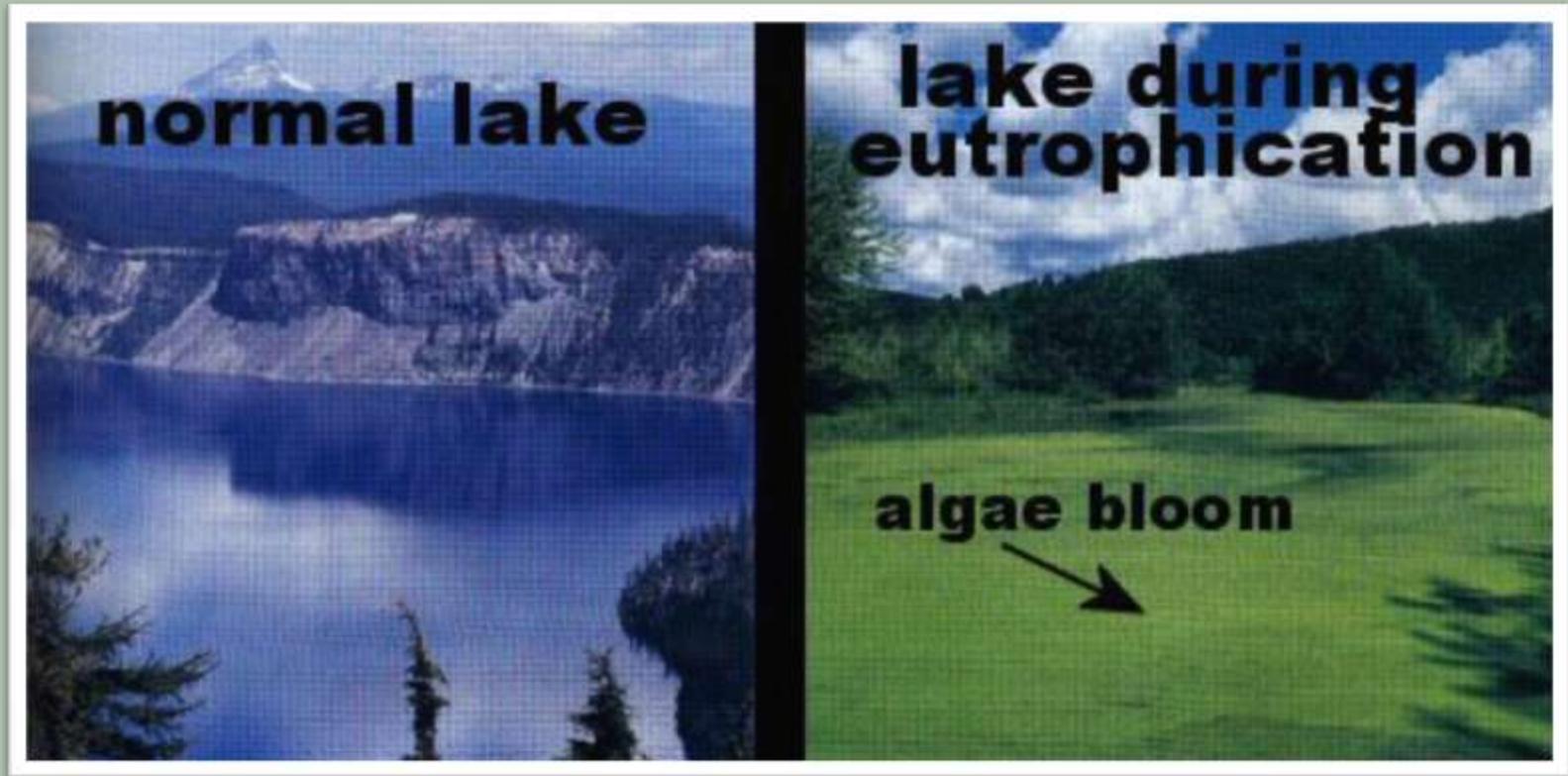
“The Legislature shall have power and shall provide for a system of levees, drains, and ditches and of irrigation in this State when deemed expedient . . . “

SOURCES OF WATER LAW

- Common law:
 - court cases, stare decisis, tradition
- Federal statutes
- State statutes
- Tribal codes

WATER LAW

Quantity/Quality



Right to quantity does not include right to pollute

HISTORIC DOCTRINES

Right of use - usufruct

- Riparian – land that abuts stream
 - Primarily in humid eastern states
 - Reasonable use, sharing in drought
- Appropriation -
 - Primarily in arid western states
 - Beneficial use, priority in time
 - No sharing in drought
- Correlative rights – groundwater
- Allocation - groundwater

GROUNDWATER

- One of four physical classifications of water
- Ownership - owner of land owns water flowing under surface not forming definite stream (1890 O.T. statute)
- Water under surface presumed percolating groundwater not in definite stream
- Use - governed by Oklahoma Groundwater Law (evolved from common law reasonable use then 1949 appropriation law to conserve and protect)

Groundwater – outside cut beds and banks

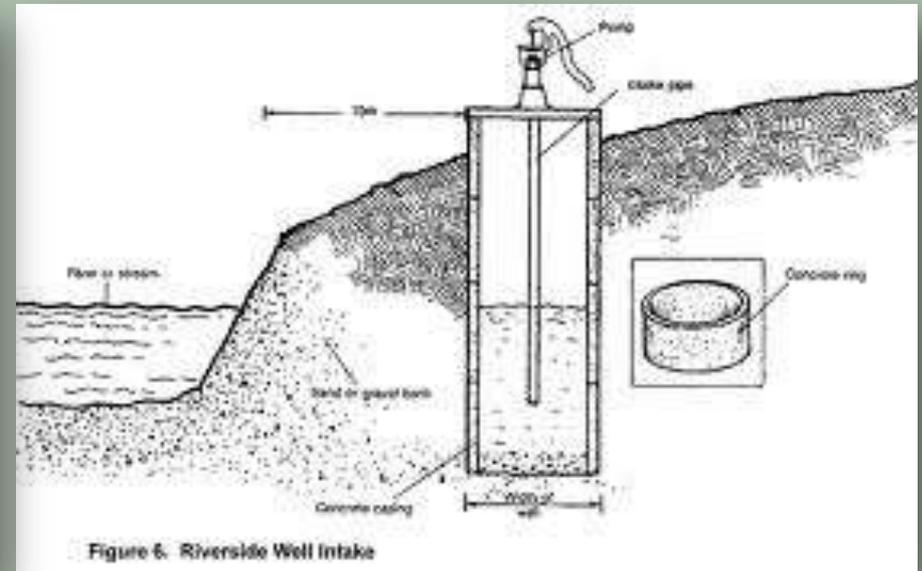


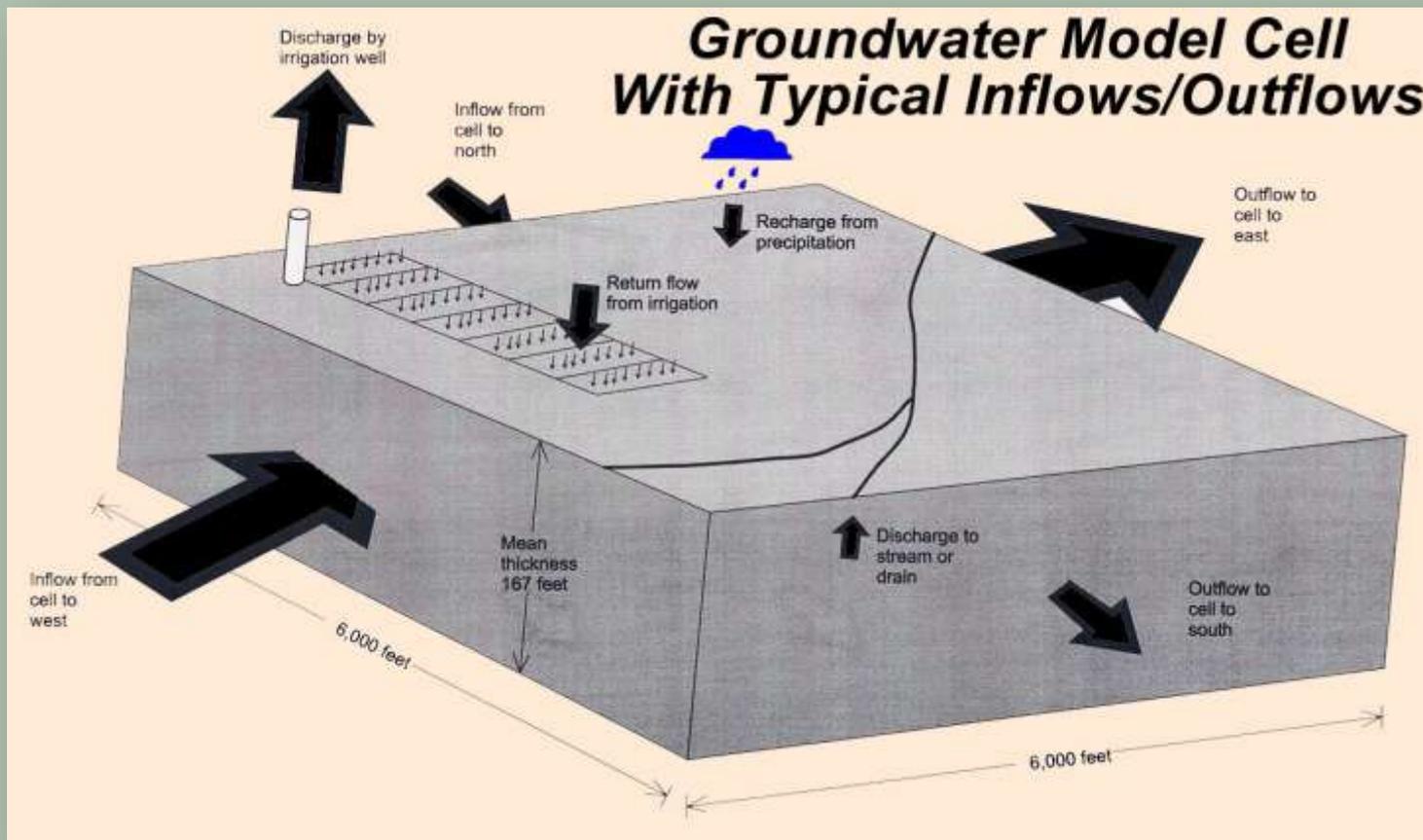
Figure 6. Riverside Well Intake

1973 OKLAHOMA GROUNDWATER LAW – Allocation Doctrine

- Replaces 1949 law – reasonable regulation for reasonable use, policy to “utilize”
- Direct connection to ownership of surface
- Groundwater – under surface, outside cut banks of definite stream
- Maximum annual yield, equal proportionate share
- “Prior rights” determined

1973 Allocation Law

M.A.Y. Factors – overlying land area, recharge, discharge, transmissivity, natural pollution – in 3D!



1973 Allocation Law

- Process to obtain permit
 - Application, notice, hearing, order
 - Elements: ownership, overlies basin, beneficial use, no waste
- Types of permits
 - Regular = basin studies and MAY determined
 - Temporary = no MAY determined
 - Provisional temporary (PT) for 90 days, no hearing

1973 Allocation Law

- Domestic use exempt, but no preference
- Well spacing, location exceptions, other cond.
- Metering – majority of landowners
- Platted lands and municipalities
- 2003 Sensitive sole source GW basin
 - Ties GW and SW in law
 - M.A.Y. so permits do not reduce natural flow
 - Permits cannot interfere or degrade flow

1973 Allocation Law

Ogallala High Plains Aquifer

- Should “mining” be limited?
- Texas – desired future condition (saturated thickness after X years)



STREAM WATER “ownership” natural channel, cut bed and banks



“Definite stream” = “public water”

STREAM WATER “ownership”



Lakes, ponds and reservoirs contain
'stream water'

STREAM WATER “ownership”

- Water flowing from springs = public water
 - “from its inception”
 - *OWRB v City of Lawton*, 1977 OK 89



Diffused surface water - owned by owner of land (1890)



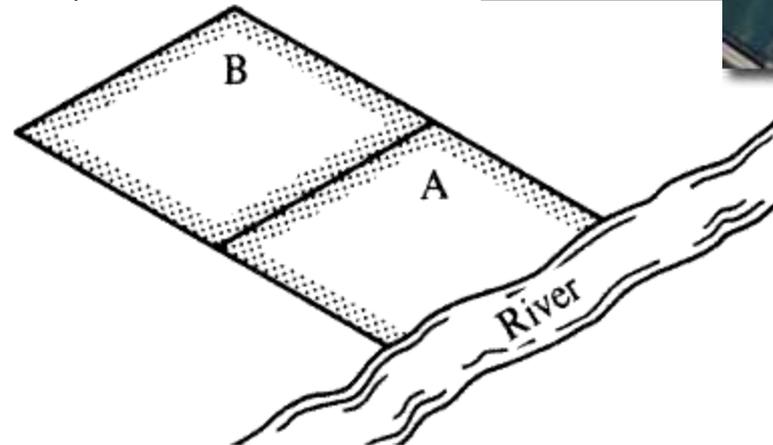
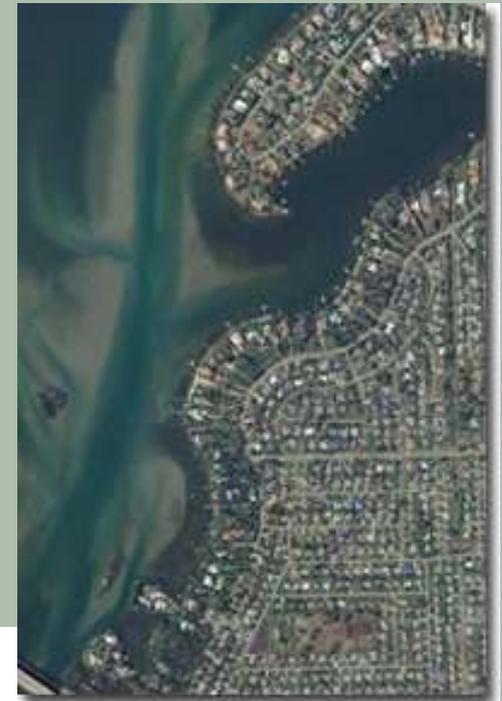
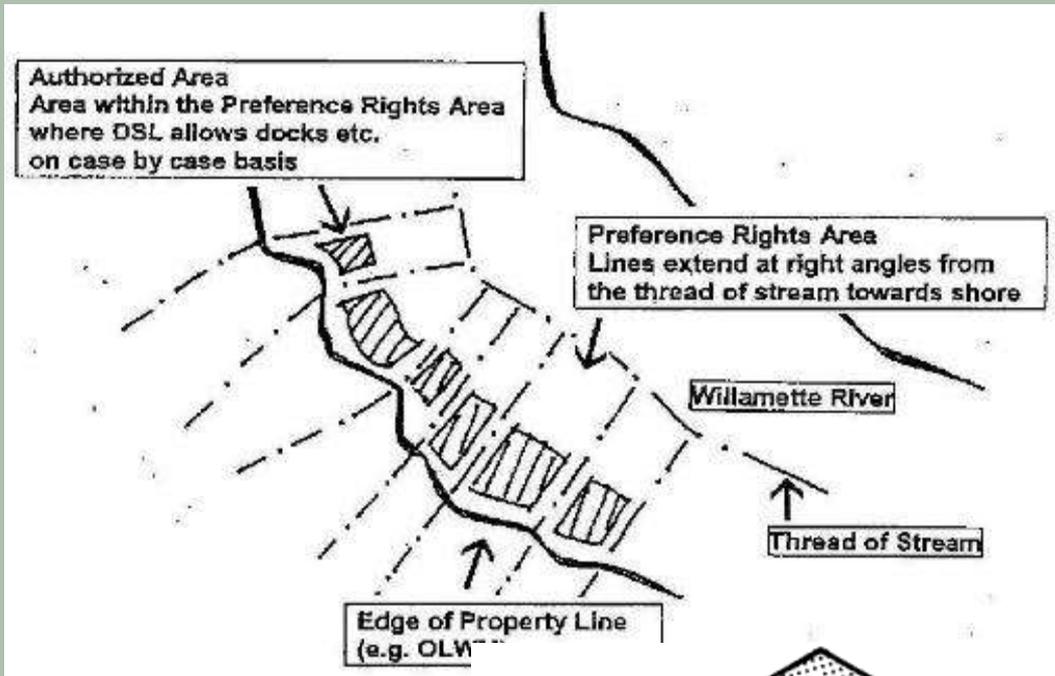
Flowing on surface

Not forming a
definite stream



“Riparian” lands

- Adjoin, abut or crossed by stream or lake



Appropriation common law right of use = usufruct

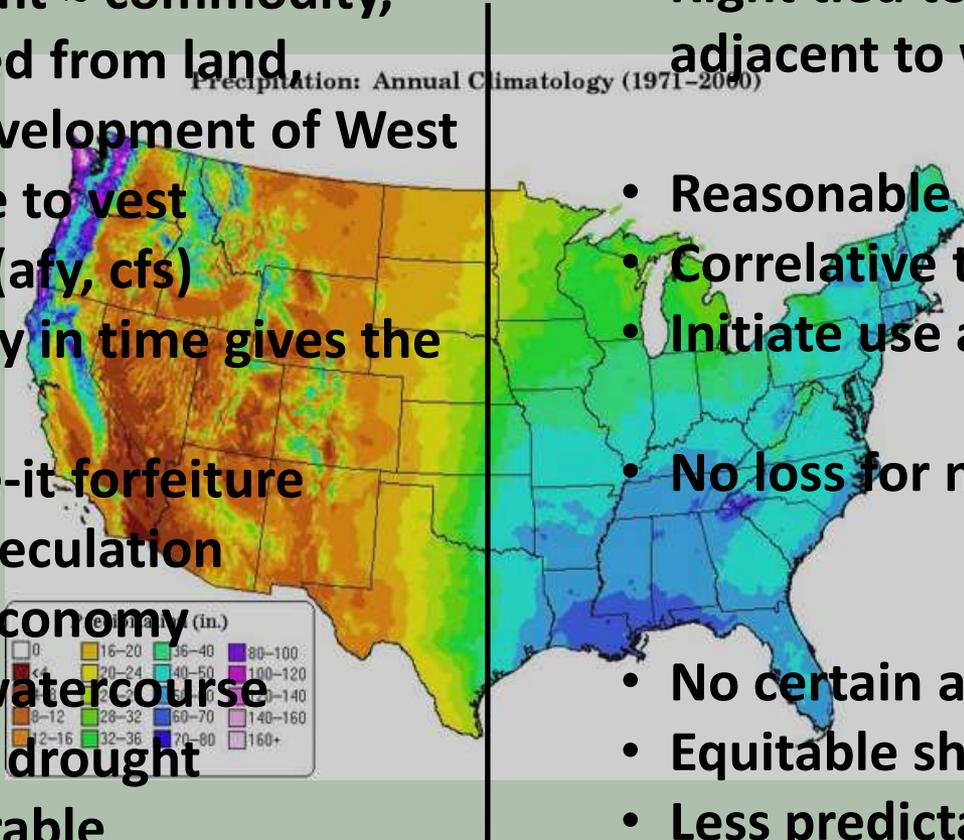
- Borrowed from common law on gold mining
- Beneficial use, first in time gives the better right



STREAM WATER USE DOCTRINES

Appropriation – arid west

- Water use right \approx commodity, can be severed from land, critical for development of West
- Beneficial use to vest
- Quantifiable (afy, cfs)
- Date – priority in time gives the better right
- Use-it-or-lose-it forfeiture
 - Prevent speculation
 - Promote economy
- Divert from watercourse
- No sharing in drought
- Right transferable



Riparian - humid east

- Right tied to land ownership adjacent to water source
- Reasonable use
- Correlative to other users
- Initiate use anytime
- No loss for non-use
- No certain amount
- Equitable sharing in drought
- Less predictable with new or changing uses with reasonability test

WHAT IS THE WATER LAW IN MOST WESTERN STATES?

ALMOST ALL WESTERN STATES FOLLOW THE PRIOR APPROPRIATION SYSTEM OF WATER ALLOCATION: FIRST DIVERTER IN TIME HAS FIRST RIGHT TO USE 100 % OF WATER IN TIMES OF SHORTAGE

**WHAT IS THE MEASURE OF A WATER
RIGHT IF ONE DIVERTS SURFACE WATER?**

**THE AMOUNT THEY PLACE
TO BENEFICIAL USE?**

**BENEFICIAL USE IS THE AMOUNT ONE CAN
PUT TO USE WITHOUT WASTE**

WHAT IS THE NATURE OF THE RIGHT THE DIVERTER RECEIVES?

THE DIVERTER RECEIVES A RIGHT TO USE WATER
– MAY BE BY PERMIT

A WATER RIGHT IS REAL PROPERTY AND
CANNOT BE TAKEN WITHOUT COMPENSATION,
BUT IT CAN BE REGULATED AS TO QUALITY AND
QUANTITY. AND IF NOT USED, SUBJECT TO
ABANDONMENT OR FORFEITURE

**WHAT IS THE MOST IMPORTANT ASPECT
OF WATER RIGHTS UNDER THE PRIOR
APPROPRIATION SYSTEM?**

**THE WATER RIGHTS ARE TRANSFERABLE
AND CAPPED AT AMOUNT OF WATER
AVAILABLE IN EACH STREAM**

WHAT ARE THE KEY PROBLEMS IN A PRIOR APPROPRIATION WATER SYSTEM?

- A. DETERMINING THE QUANTITY OF ONE'S RIGHT – NEED TO KNOW PRIORITY DATE AND AMOUNT ENTITLED TO USE TO ENFORCE PRIORITIES. JUDICIAL ADJUDICATION SUITS COSTLY, JOINDER, SERVICE, COMPLETION ISSUE. ADMINISTRATIVE ADJUDICATION ALSO TIME CONSUMING
- B. DETERMINING THE AMOUNT TO TRANSFER—ONLY CONSUMPTIVE AMOUNT TRANSFERABLE AND SUBJECT TO PROTESTS AND TIME CONSUMING APPEALS
- C. ENGAGING IN CONJUNCTIVE MANAGEMENT—SENIOR SURFACE RIGHTS CAN BE REDUCED BY WELLS HYDROLOGICALLY CONNECTED TO STREAMS. NEED TO REGULATE BOTH

Oklahoma – previous stream water use laws

- **1890 O.T. statute** – water running in definite stream may be used by riparian landowner but do not prevent the natural flow
- **1890 Organic Act** – Congress says Indian Territory governed by laws of Arkansas
- **1897 O.T. appropriation** law for ordinary flow and underflow of running streams or rivers
- **1905 O.T. appropriation** – beneficial use, priority in time gives the better right

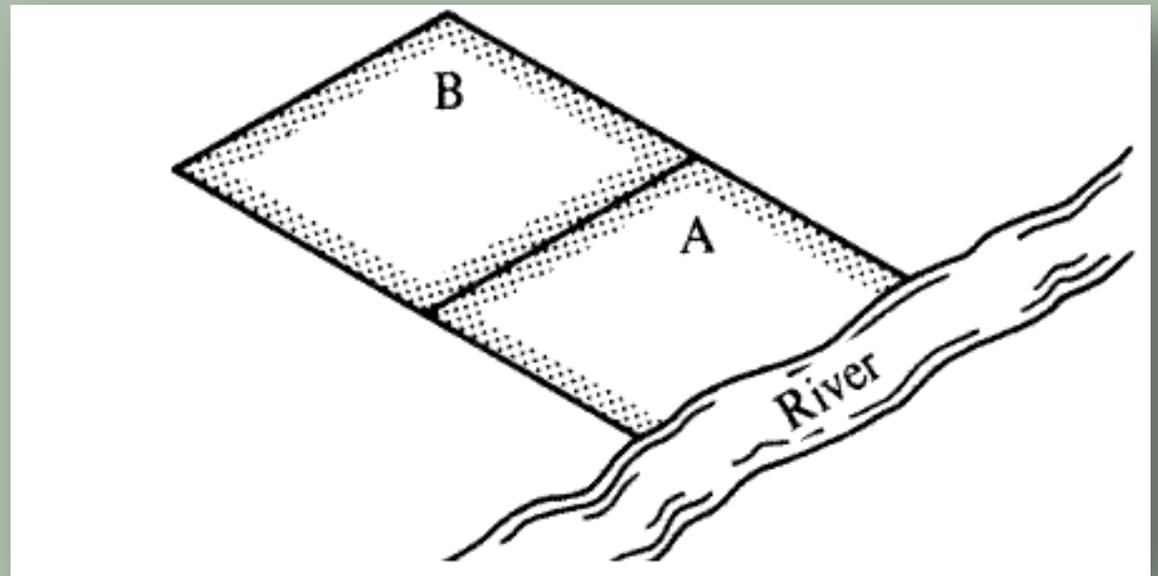
Oklahoma – previous stream water use laws

- **Court case** - *Gates v Settlers' Milling* (1907)
- Common law of appropriation
 - Commence work
 - Divert
 - Beneficial use
 - Priority in time

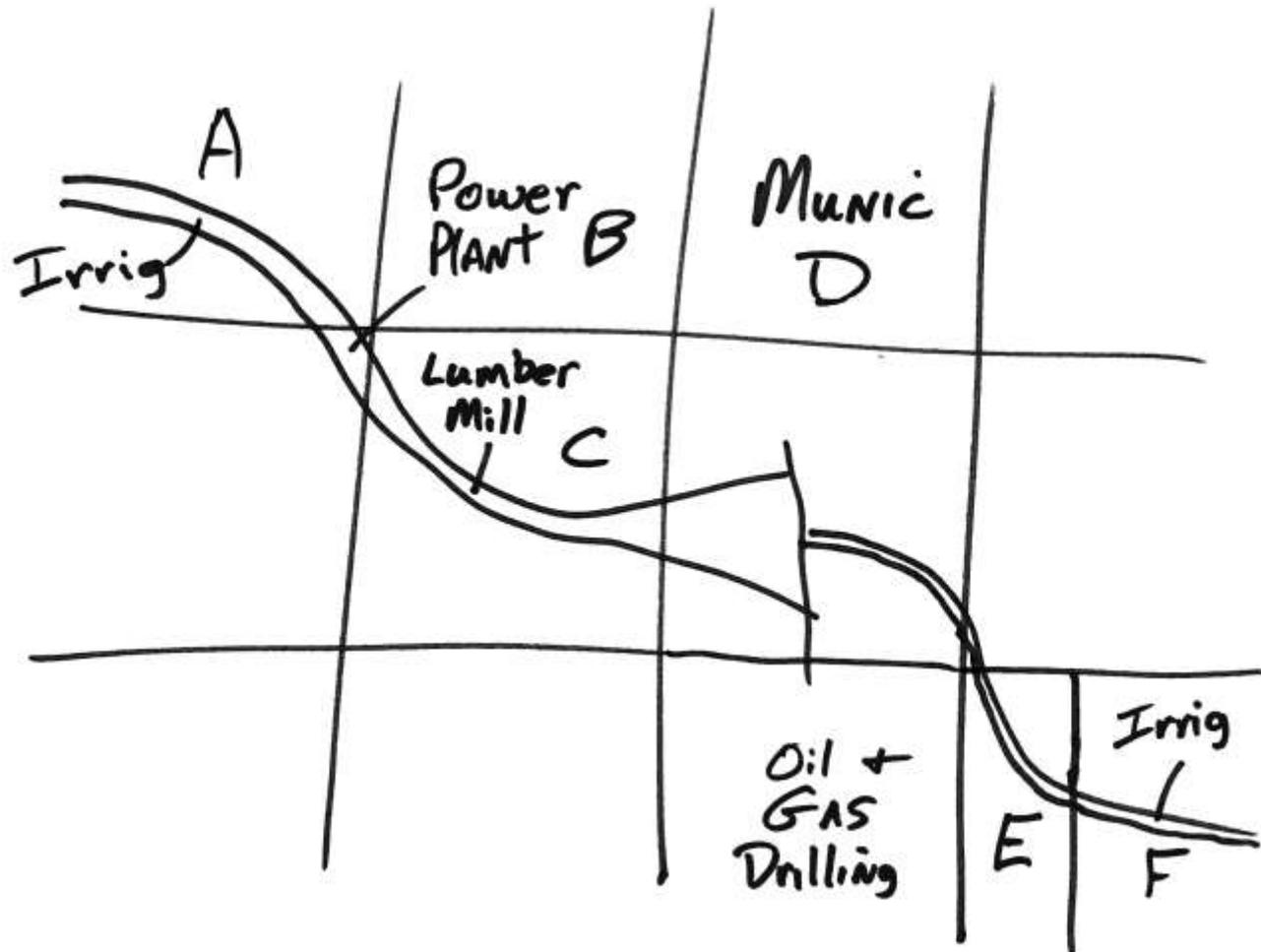


Oklahoma – previous stream water use laws

- **More court cases** – disputes between riparian owners - riparian right is to ‘reasonable use’
 - Use off riparian land allowed if reasonable
 - Oil and gas leases



Appropriation and Riparian doctrines Incompatible and irreconcilable



Current Stream Water Use Law 1963

- All use by appropriation – except domestic use
 - Beneficial use (quantifiable)
 - Priority in time gives the better right
 - Use of GW governed by Ok GW Law
- “Vested Rights” pre-1963 use claims
- No interference with “domestic use”
 - Household, small garden, orchard, cattle watering
 - Limit, not extinguish, riparian right to reasonable use

Current Stream Water Use Law



Byrd's Mill Spring – Pontotoc County

Current Stream Water Use Law

- *Franco-American* (1993) – riparian right to reasonable use still exists (reasonableness factors)
 - Size of stream
 - Custom
 - Climate
 - Season of year
 - Size of diversion, place and method of diversion
 - Type of use and importance to society (beneficial use)
 - Needs of other riparians
 - Location of diversion on stream
 - Fairness requiring user causing harm to bear the loss
- OWRB cannot issue appropriation until reasonableness amount determined by court

Current Stream Water Use Law

- 1993 Legislature response – Sec. 105.1A
 - Express statement
 - 1963 law intended to extinguish future claims to use based only on ownership of riparian land
 - Effective?

Current Stream Water Use Law

- Process to obtain permit
 - Application, notice, hearing, order
 - Elements: unappropriated water, present or future need/beneficial use, no interference
 - “Plenary authority” – seasonal and flow conditions possible
- Types of permits
 - Regular for “year round” use
 - Seasonal for specified periods
 - Provisional temporary (PT) for 90 days, no hearing

AREA OF ORIGIN PROTECTION

Application to transport out of basin

- Added requirement
- Must not interfere with in basin existing and future “beneficial uses”
- OWRB to review in basin needs every 5 years
- In basin needs review cannot decrease out-of-basin appropriation
- 82 basins in OCWP, up from 49

AREA OF ORIGIN PROTECTION and Beneficial Use

- Protect existing and future in basin “beneficial uses”
- Physical diversion requirement?
- Quantifiable
- Future beneficial use subject of in basin user application to appropriate
- Consider in basin application first

AREA OF ORIGIN PROTECTION and Beneficial Use

- Non-consumptive use – off-stream, but little volume lost from system (return flow)
 - Amount diverted and return amt. and location
- Instream flow – non-consumptive, but not taken out of stream or lake
 - No physical diversion
 - Can limit upstream diversions and reservoir yields
- Lake level maintenance – in lake use vs. required releases, storage costs

OUT OF STATE USE

- 2009 Amendment – HB 1483
- Comply with interstate compacts
- Legislative approval to use compacted water
- Feasible to alleviate in-state shortages?
- In state agent
- Comply with Oklahoma terms if conflict
- 10-year review and potential new conditions

PUBLIC INTEREST, RIGHTS AND TRUST

- Public interest criteria - removed 1972
 - Broad State Engineer authority
- Public rights – navigable in fact, but cannot trespass on land (*Curry v Hill*, 1969 OK 134)
- Public trust doctrine – State cannot transfer public rights in navigable waters for private enterprise
 - Mono Lake Calif. 1983: vested appropriation right always subject to public trust to protect WQ

WHAT ARE THE KEY WATER PLANNING ISSUES FOR SURFACE WATER?

**NEED TO KNOW AMOUNT OF SURFACE WATER
AVAILABLE HYDROLOGY—WHAT IS MOST RELIABLE
HYDROGRAPH, LAW-HOW MUCH HAS BEEN
COMMITTED TO THE STATE IN PERPETUITY. (IF
WATER NOT COMMITTED TO STATE IN PERPETUITY,
THEN DEMAND INCLUDES ALL STATES
SURROUNDING ONE'S OWN STATE — CANNOT
PLAN WHERE CANNOT CONTROL GROWTH IN
OTHER STATES.)**

HOW CAN A STATE ESTABLISH A PERMANENT SUPPLY?

EQUITABLE APPORTIONMENT SUIT, INTERSTATE COMPACT OR ACT OF CONGRESS CAN GUARANTEE FUTURE SUPPLY. CONGRESSIONAL ACTION DIFFICULT, EQUITABLE APPORTIONMENT SUITS UNCERTAIN OUTCOMES — BEST METHOD IS INTERSTATE COMPACTS. INTERSTATE COMPACT MEANS NO OTHER STATE CAN TAKE WATER FROM YOUR STATE WITHOUT PERMISSION

Impact of Congressional Assent to Interstate Compacts

- *Intake Water Company v. Yellowstone River Compact Commission*, 590 F. Supp. 293 (D. Mont. 1983) (“Thus, when it approves a[n interstate water] compact, Congress exercises the legislative power that the compact threatens to encroach upon, and declares that the compact is consistent with Congress's supreme power in that area.”), *aff'd* 769 F.2d 568 (9th Cir. 1985).
- *People ex rel. Simpson v. Highland Irr. Co.*, 917 P.2d 1242, 1249 n.8 (Colo. 1996) (“The congressional approval feature of a[n interstate water] compact is particularly important, in that Congress can assent to state laws which might otherwise be invalid as an unreasonable burden on interstate commerce.”).

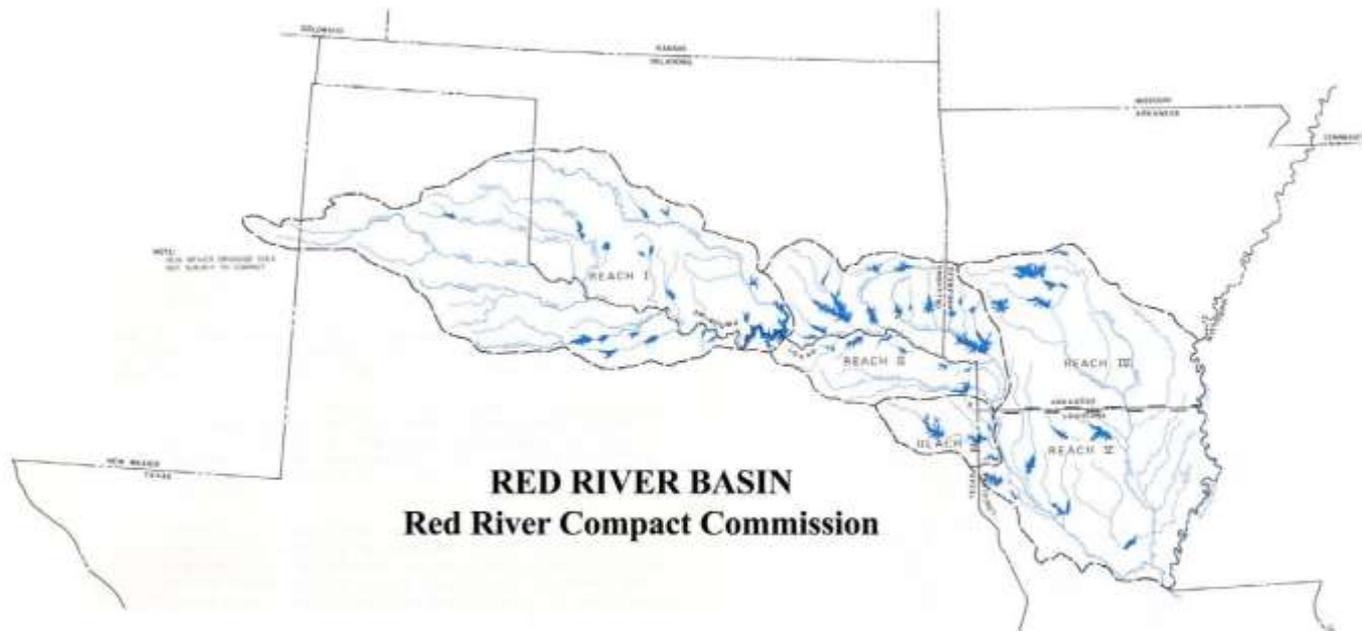
INTERSTATE STREAM COMPACTS

- Oklahoma is party to four Compacts
 - Canadian with Texas and New Mexico (storage)
 - 1950
 - Kansas-Oklahoma Arkansas River (storage)
 - 1965
 - Arkansas-Oklahoma Arkansas River (flow)
 - 1970
 - Red River with Texas, Arkansas and Louisiana (flow)
 - 1980

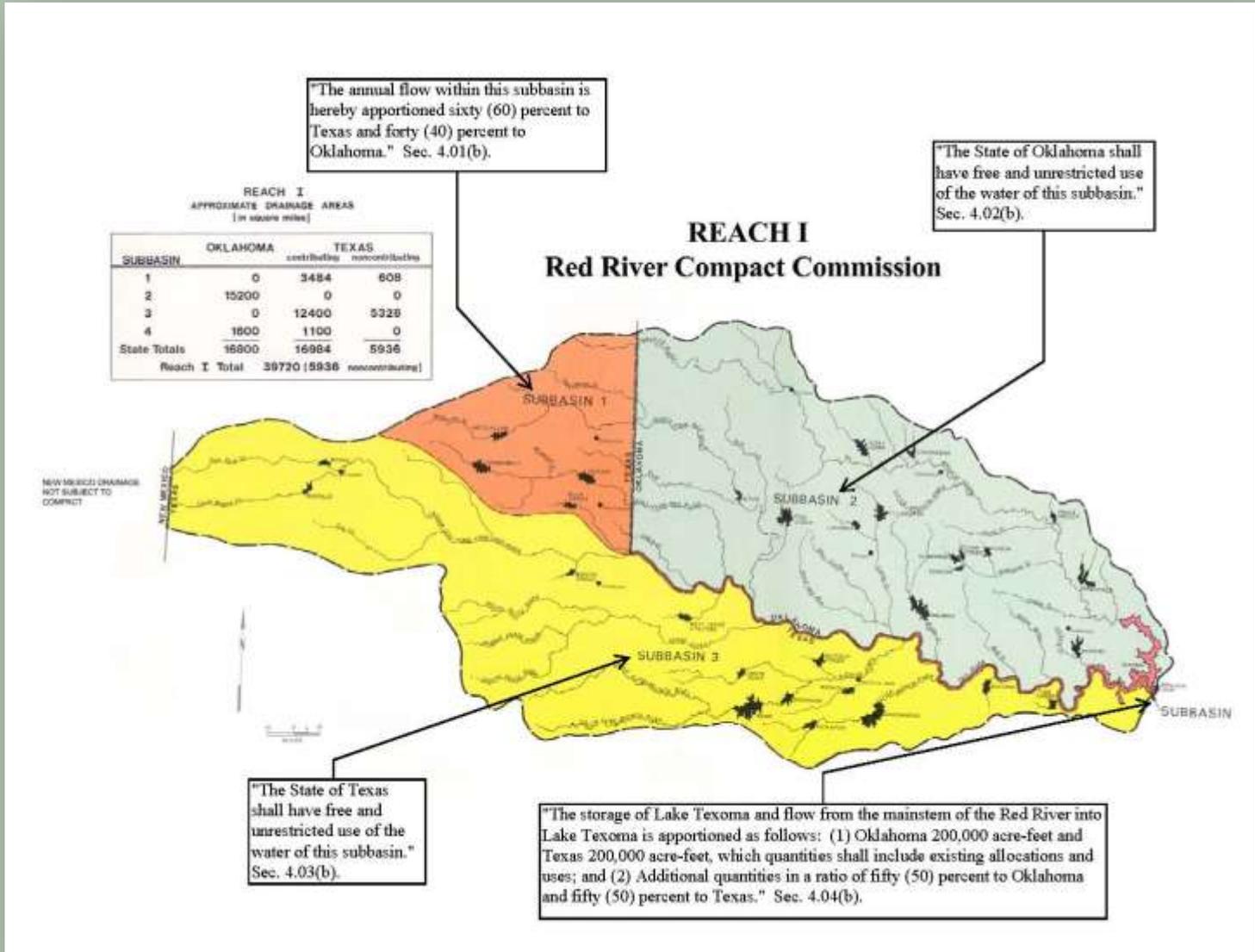
INTERSTATE STREAM COMPACTS



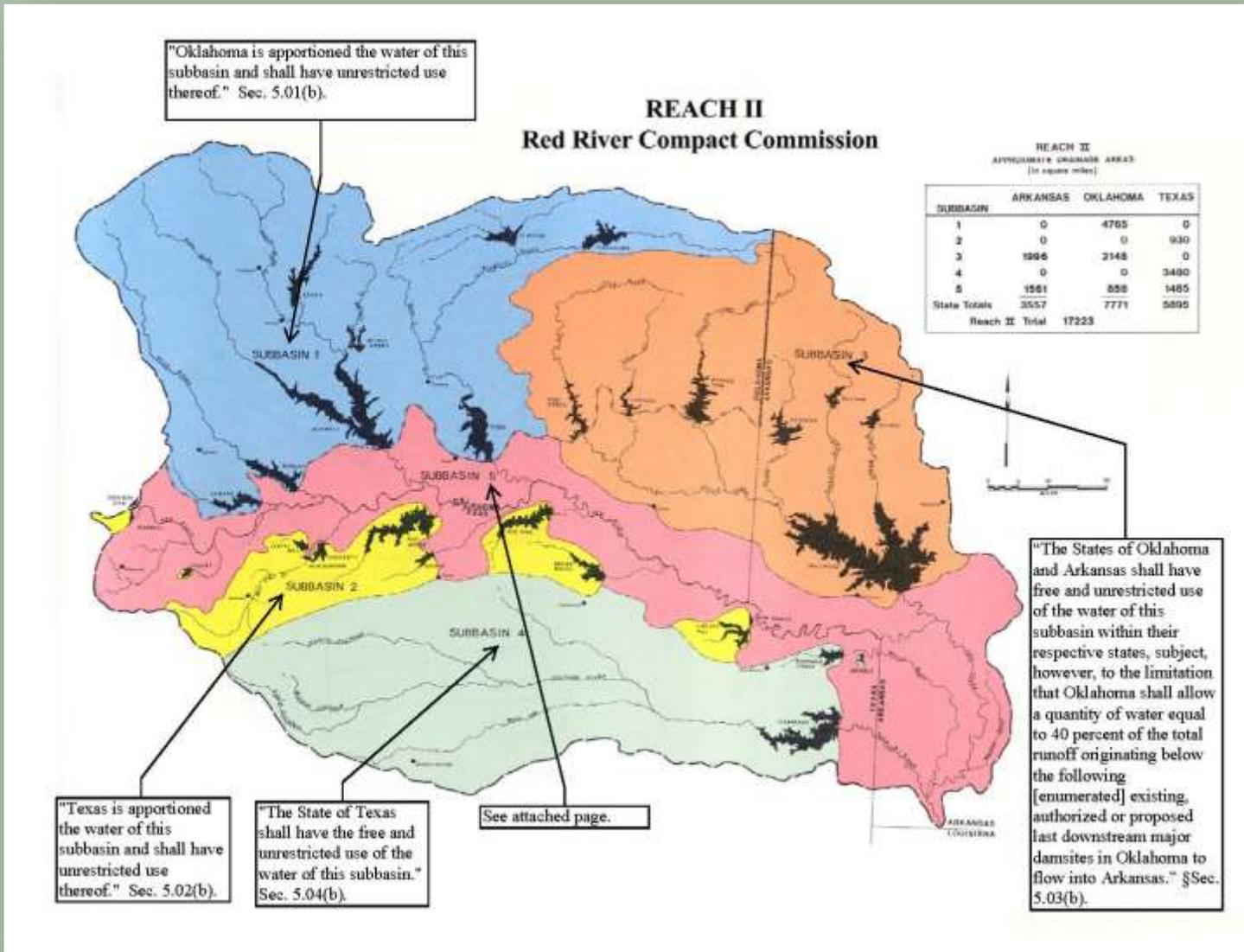
Red River Compact



Red River Compact—Reach I



Red River Compact—Reach II



Red River Compact—Reach II

(b) Water within this subbasin is allocated as follows:

- (1) The Signatory States shall have equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 [cfs] or more, provided no state is entitled to more than 25 percent of the water in excess of 3,000 [cfs].
- (2) Whenever the flow of the Red River at the Arkansas-Louisiana state boundary is less than 3,000 [cfs], but more than 1,000 [cfs], the States of Arkansas, Oklahoma, and Texas shall allow to flow into the Red River for delivery to the State of Louisiana a quantity of water equal to 40 percent of the total weekly runoff originating in subbasin 5 and 40 percent of the undesignated water flowing into subbasin 5; Provided, however, that that this requirement shall not be interpreted to require any state to release stored water.
- (3) Whenever the flow of the Red River at the Arkansas-Louisiana state boundary falls below 1,000 [cfs], the States of Arkansas, Oklahoma, and Texas shall allow a quantity of water equal to all of the weekly runoff originating in subbasin 5

and all of the undesignated water flowing in subbasin 5 within their respective states to flow into the Red River as required to maintain a 1,000 [cfs] flow at the Arkansas-Louisiana state boundary.

- (c) Whenever the flow at Index, Arkansas, is less than 526 c.f.s., the states of Oklahoma and Texas shall each allow a quantity of water equal to 40 percent of the total weekly runoff originating in subbasin 5 within their respective states to flow into the Red River; Provided, however, this provision shall be invoked only at the request of Arkansas, only after Arkansas has ceased all diversions from the Red River itself in Arkansas above Index, and only if the provisions of Subsection 5.05(b) (2) and (3) have not caused a limitation of diversions in subbasin 5.

- (d) **No state guarantees to maintain a minimum low flow to a downstream state. [Eliminates downstream dependency.]**

Tarrant District Court Ruling

- The “plain import” of the provisions of the Red River Compact “is to effect an allocation or division of the waters covered by the compact and that the essence of that process—allocating some portion of the resource in issue to a particular state or its citizens—is inherently inconsistent with the standards that would otherwise apply based on dormant Commerce Clause analysis.”
- That is, while the dormant Commerce Clause ordinarily precludes a state giving its residence a preferred right of access to natural resources, “[t]he principle purpose and effect of the [Red River Compact] ... through its provisions for allocation and apportionment of the Red River’s waters between the various states, is to do precisely that.”

Hugo District Court Ruling

- “The Compact here explicitly provides for the allocation of resources along a rational and consistent basis among the relevant states; ***the Compact is openly and unapologetically protectionist.*** Congress approved the Compact, and it is not subject to any dormant Commerce Clause challenge.” (Emphasis added).