

Cooperative Federalism in Water: A Tale of Two Basins

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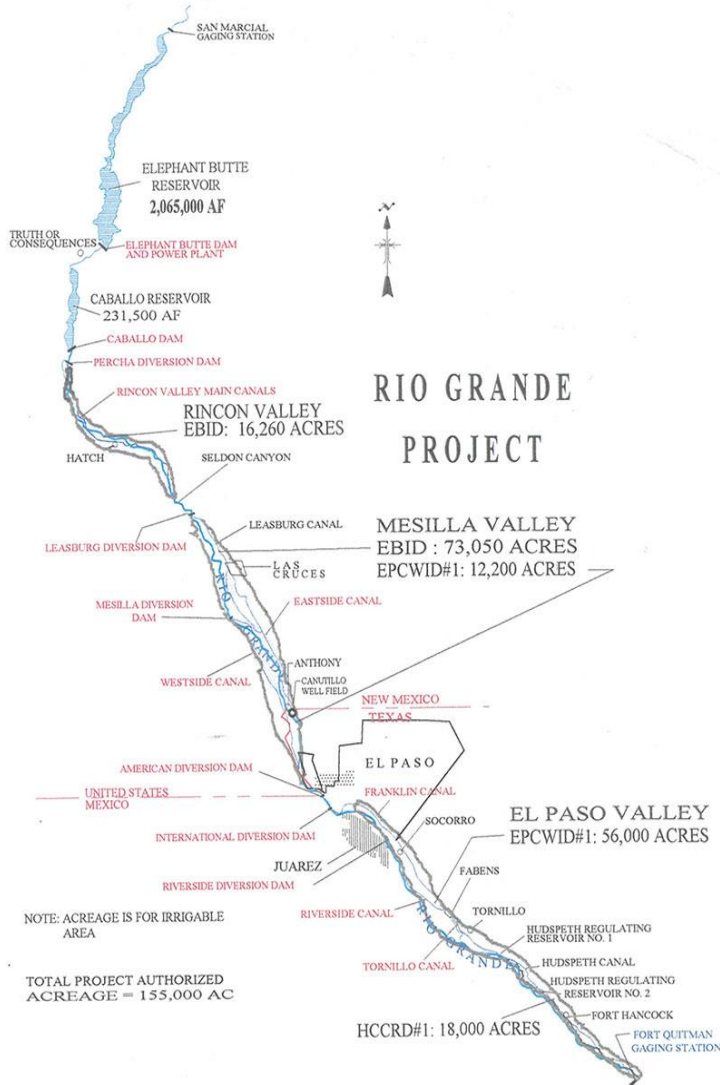
Summary of Presentation

- I. The Basics of Cooperative Federalism in Water
- II. Cooperative Federalism in two different basins
 - A. The lower Rio Grande Basin (NM-TX)
 - B. The lower Republican River Basin (NE-KS)
- III. The Groundwater Revolution and its Interstate Resolutions
- IV. The Uneven State of Cooperative Federalism
 - A. The lower Republican River Basin, 2010-Present
 - B. The lower Rio Grande Basin, 2014-Present
- V. Conclusion: Some Troubling Issues.

Cooperative Federalism in Western Water

1. First line of federal laws: The Reclamation Act, 1902
 - A. Deference to State Law.
 - B. Section 8 Exceptions to that deference
2. Second line of federal laws: Interstate Compacts
 - A. Harmony with the Reclamation Act
 - B. Protection of federal interests
 - C. Deference to state law, with exceptions
3. Compacts and Federal water projects, 1930's-1960's
 - A. The Rio Grande Compact (1938) and the Rio Grande Project (NM, TX): Elephant Butte Reservoir
 - B. The Republican River Compact (1943) and the Bostwick Project (NE, KS): Harlan County Lake

Rio Grande Project



Reclamation across the Republican

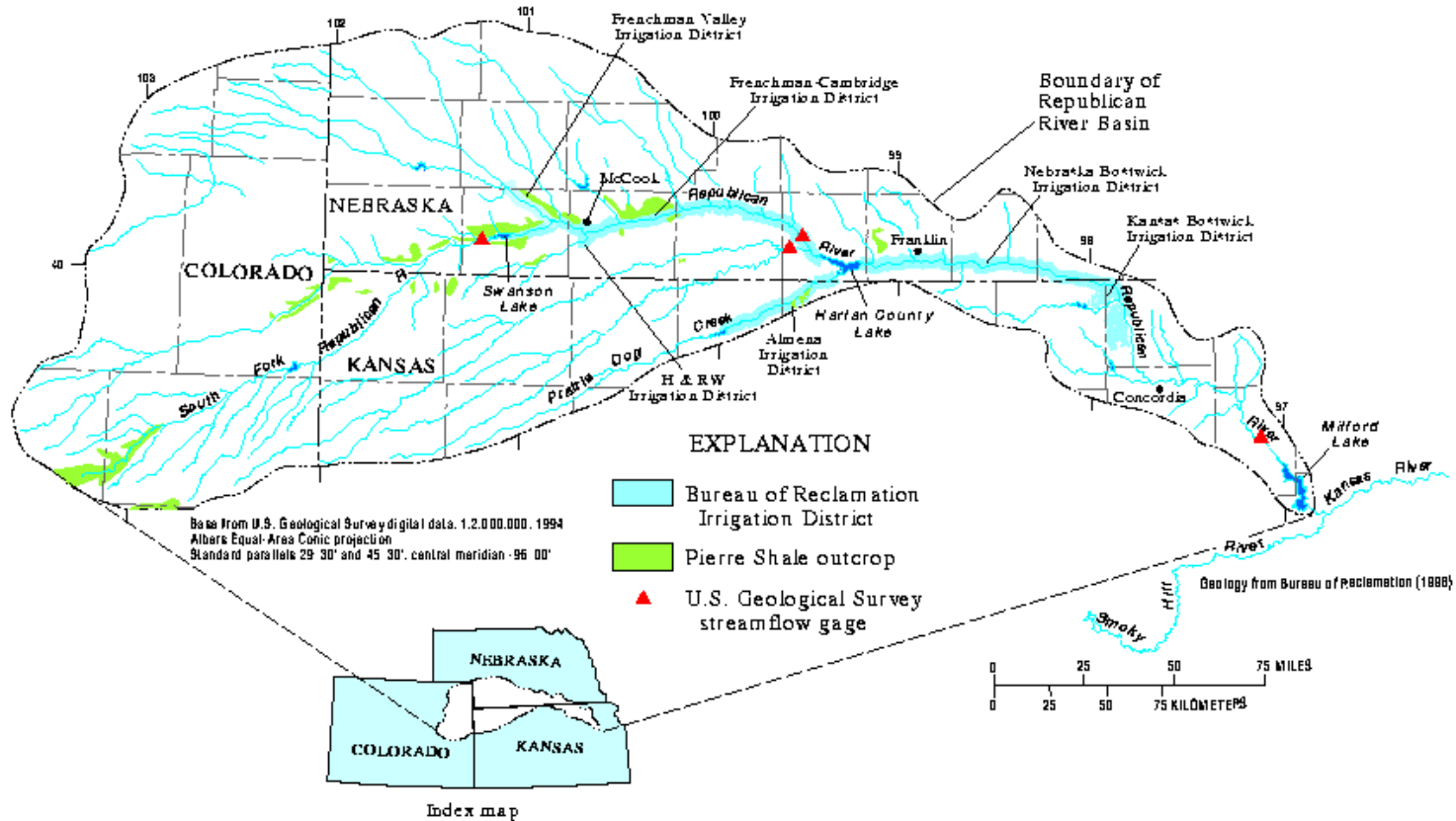


Figure 1. Location of reservoirs, Bureau of Reclamation irrigation districts, and Pierre Shale outcrops in the Republican River Basin.

Litigating the Groundwater Revolution, 1974-2009

1. Excessive groundwater irrigation as a hydrological source of noncompliance.
2. State law diversity and non-administration as legal sources of continued noncompliance.
3. The Principal Cases:
 - a. *Texas v. New Mexico* (1974-1987, Pecos River Compact)
 - b. *Kansas v. Colorado III* (1984-2009, Arkansas River Compact)
 - c. *Kansas v. Nebraska & Colorado I* (1998-2003, Republican River Compact)

Interstate litigation forces Resolution

1. Groundwater is an integral part of the Compact allocations.
2. Money Damages. Retroactive.
3. Groundwater Models
 - A. Contested (Pecos, Arkansas)
 - B. Collaborative (Republican)
4. State law reform and regulation
5. Retirement of irrigated acreage
6. “Augmentation” as a compliance tool.

Kansas v. Nebraska II (2010-2015)

1. Sources of Nebraska's noncompliance
 - A. Groundwater overpumping
 - B. Nebraska's bifurcated water law, well-deployed
2. SCOTUS resolution of NE's noncompliance, 2015
 - A. Disgorgement as a comprehensive remedy
 - B. No intrusion into Nebraska water law
3. Nebraska's response: a Compliance strategy, 2013-
 - A. "Augmentation" groundwater, sent downstream
 - B. Curtailing use from federal reservoirs
 - C. Threats to spill water stored in federal reservoirs
 - D. Creates a wedge: Compliance with Compact vs. noncompliance with the Reclamation Act

Reaction to Nebraska's Compliance Strategy

1. Litigation within Nebraska (7 lawsuits and counting)
 - A. Surface water irrigators with senior rights suing Nebraska
 - B. Takings/Inverse Condemnation actions
2. Letter from Interior, 2013
 - A. State law violations
 - B. Compact violations
 - C. Reclamation Act violations
 - D. But, as of yet, the USA has not sued
3. RRCA Long-Term Resolution, 2016
 - A. Augmentation the central compliance tool for NE
 - B. NE flexibility in exchange for KS security
 - C. Defines reservoir operations *without* the USA
 - D. Defines compliance according to the Resolution

Texas v. New Mexico & Colorado (Background)

1. Rio Grande Compact and Rio Grande Project Act
2. Jurisdiction of NM State Engineer?
3. Agreement between Elephant Butte I.D. (NM) and El Paso Water Improvement District No. 1 (TX) over reservoir management.
4. Reclamation endorses agreement.
5. NM State Engineer opposes; NM sues USA.
6. Disputes over Compact accounting.
7. 2014: Texas files in the Supreme Court.

Texas v. New Mexico & Colorado

(simplified)

1. Texas's Complaint:
 - A. NM has committed Compact violations
 - B. NM violations of Rio Grande Project Act
 - C. Seeks Dec Judgment, Injunction, and Damages
2. New Mexico's response:
 - A. Compact does not require NM to deliver water to the Texas line.
 - B. Compact does not require NM to prevent below-dam diversions, or to limit post-Compact development there
 - C. NM law, not the Compact, governs the distribution of water released from EBR within NM.
3. USA moves to intervene (in contrast with the Republican River litigation)

June 28, 2016 Special Master Report

1. Texas has stated a claim: so a trial will ensue.
 - A. Compact requires NM to relinquish control of water delivered to Elephant Butte Reservoir.
 - B. Compact and Rio Grande Project Act *are an integrated whole*.
2. Compact confirms Texas's argument that NM cannot recapture water released from EBR.
3. On USA's motion to intervene:
 - A. Rio Grande Project Act does not elevate USA's claim into Compact claims.
 - B. But, recommends that the Court exercise its jurisdiction to hear the USA's claims.

Whither the Future of Cooperative Federalism?

1. Surface water irrigators in Reclamation projects at odds with their state engineers and, by extension, their parent states (NM, NE)
2. Inconsistent federal policy:
 - A. Reclamation's commitment to the Rio Grande Project
 - B. Reclamation's inaction re: the Bostwick Project
3. Federalism issues in the 2016 RRCA Resolution:
 - A. Wedge between the Compact and the Reclamation Act
 - B. Wedge between provisions within the Compact
 - C. Interstate comity purchased with anti-federalism
4. The Law of Western Water vs. its Politics