



RESOLVING WATER DISPUTES: COMPACTS AND THE SUPREME COURT

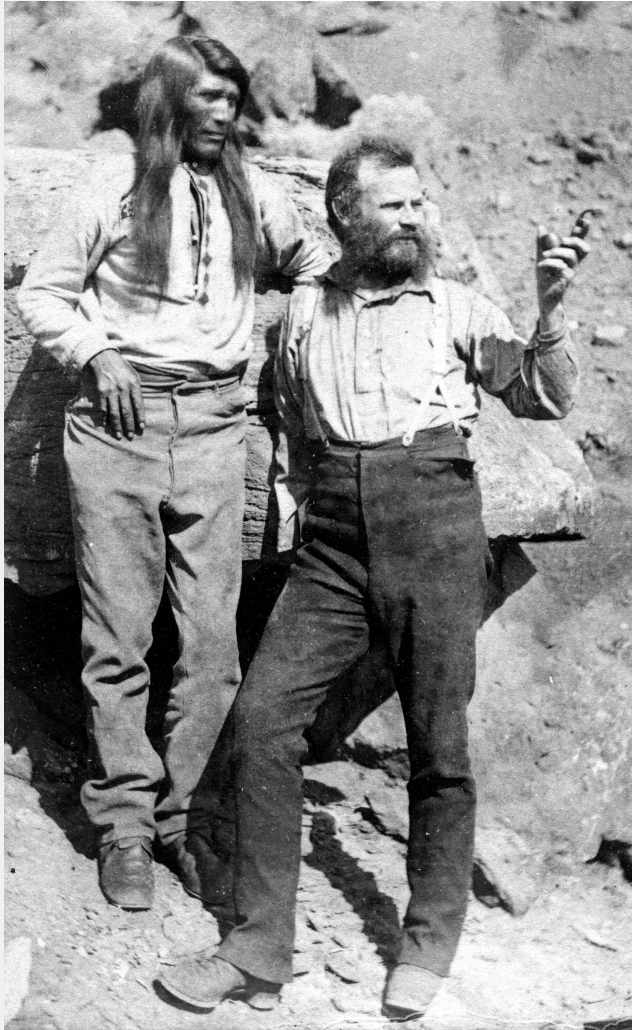
Matthew E. Draper
ABA SEER-ADR /Water Committee Webinar
June 11, 2015

JOHN WESLEY POWELL

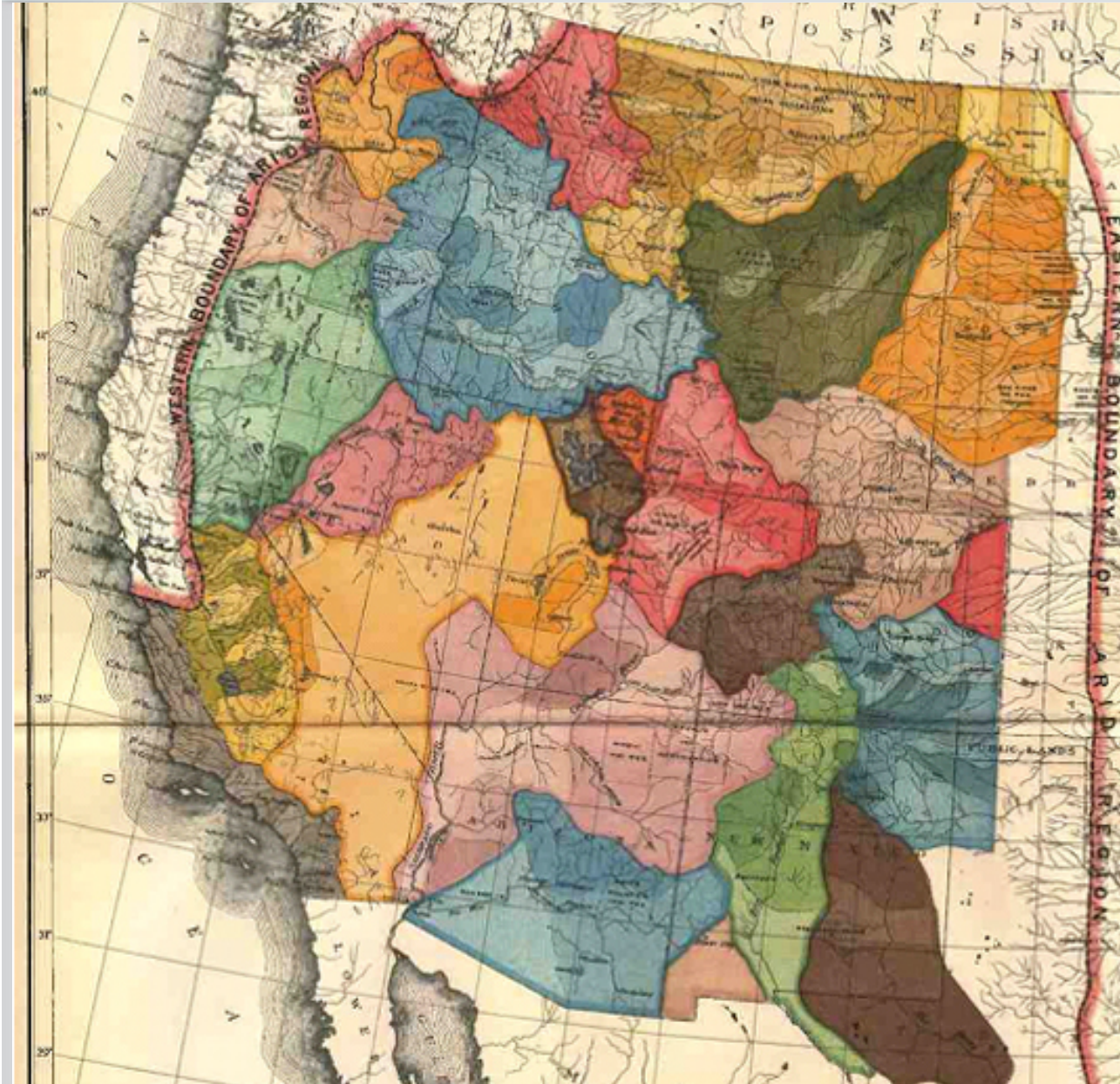


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JOHN WESLEY POWELL



- Civil War Veteran
- Explorer
- Scientist
- USGS Director
- Water management guru?



Powell's 1878 proposal:
New states' boundaries should be based on watersheds

IDEAL WATER BASIN MANAGEMENT

- Manage the entire basin
- Manage surface and groundwater conjunctively
- Monitor and protect water quantity and quality
- Single responsible authority
- Binding dispute resolution

IN THE REAL WORLD:

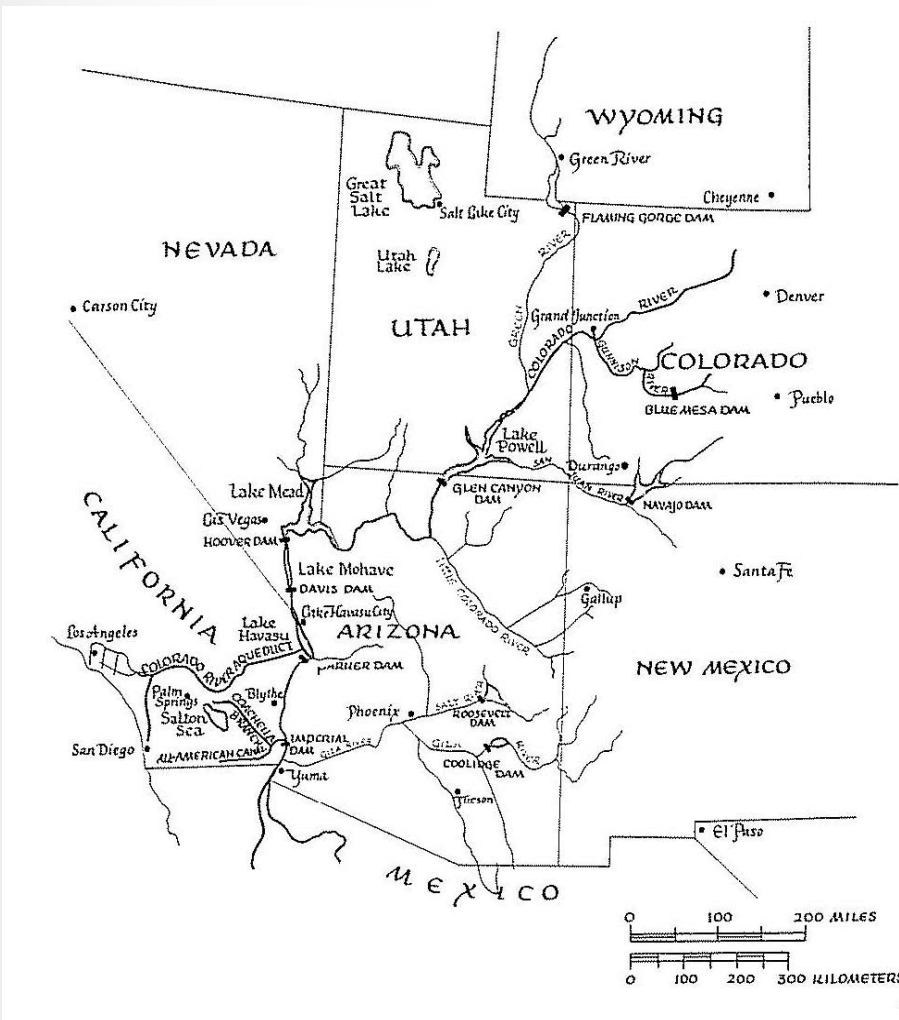
- Political boundaries
- Change in water use
 - Change in methods (surface to groundwater)
 - Increased efficiency: less return flow
 - Change in use (agriculture, industry, municipal)
 - Population growth
 - Climate change (increased volatility of amount and distribution of precipitation)
- Poor monitoring/measurement of water use
- Poor management

INTERSTATE WATER CONFLICT

United States v. Arizona (1935)

- The Governor of Arizona sends armed national guardsmen to stop the U.S. government's construction of a reservoir on the Colorado River along the California-Arizona border designed to benefit only California.

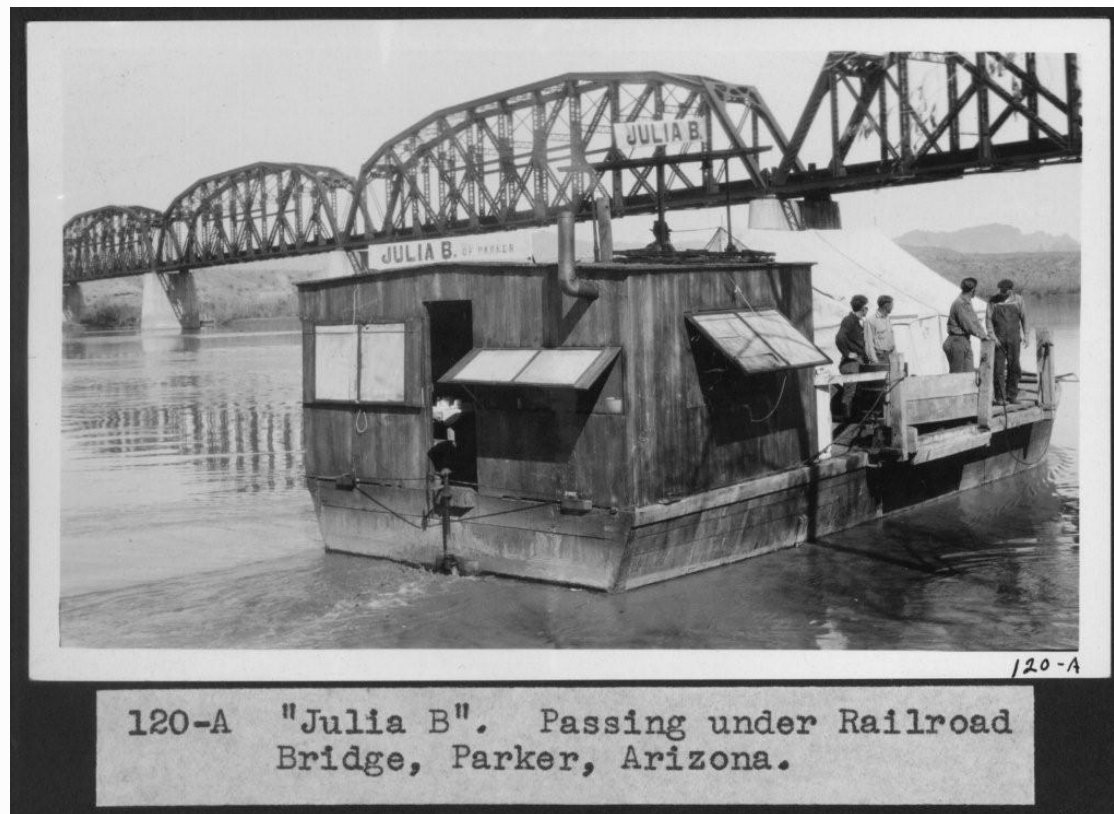
US v. ARIZONA



“We may get licked in the affair, but
we will go down fighting.”
Arizona Gov. Benjamin Moeur

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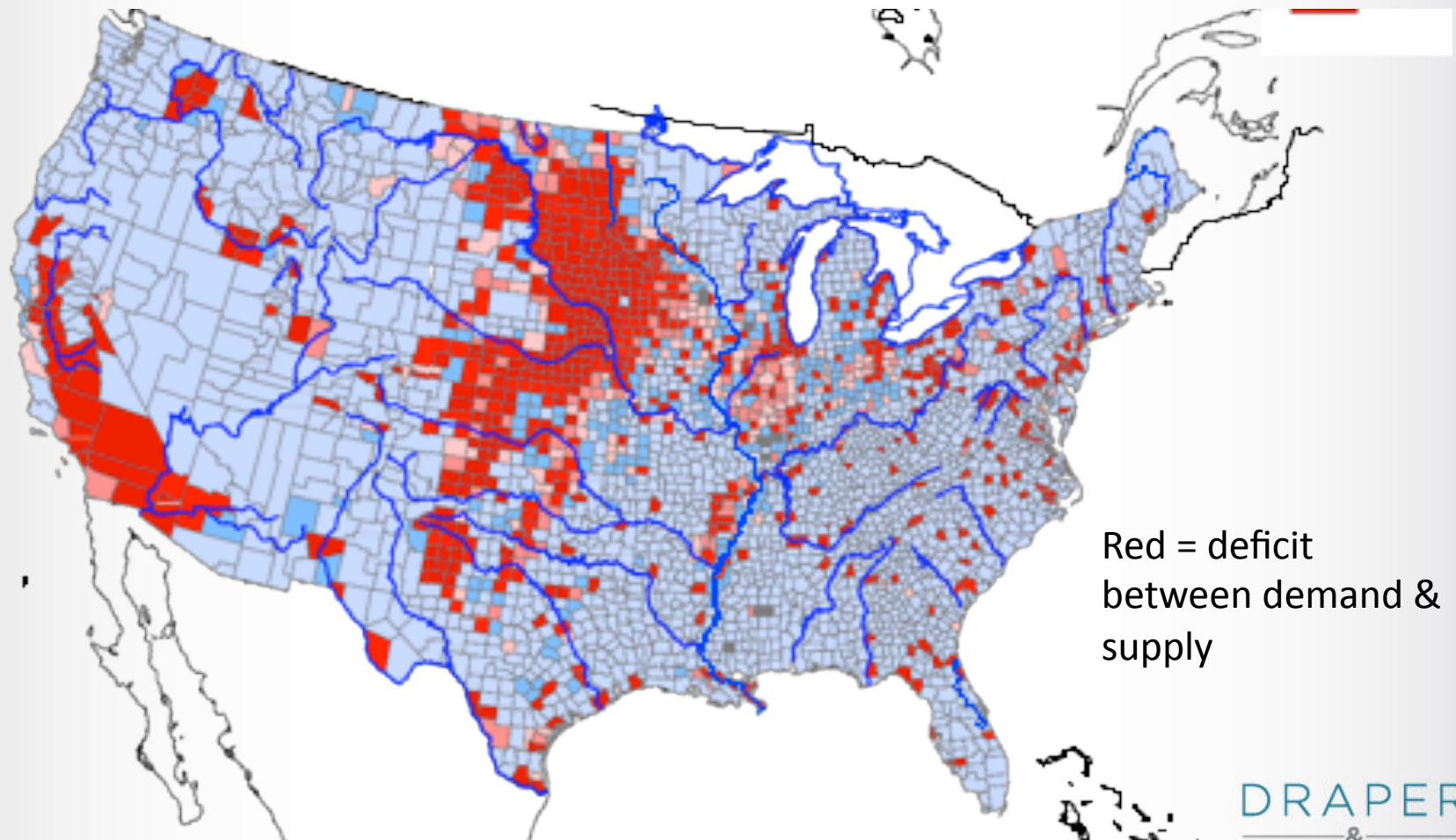
THE "ARIZONA NAVY"



Source: Metropolitan Water District of Southern California

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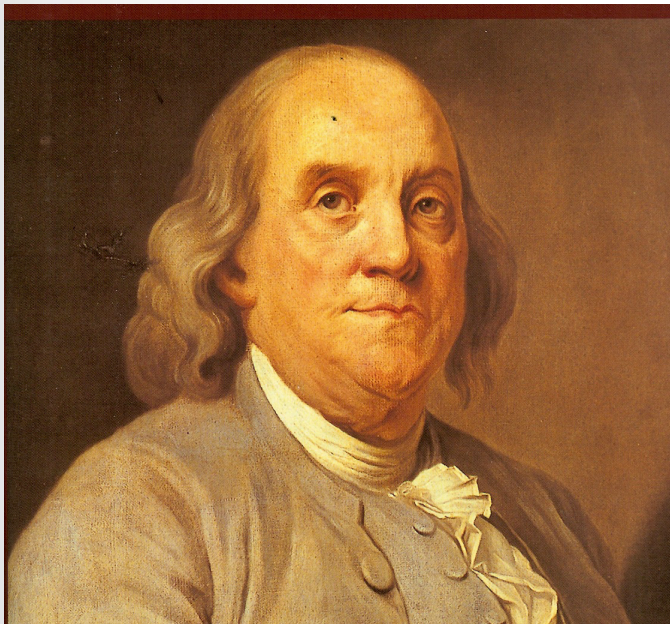
MORE TROUBLE TO COME?



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Source: Columbia Water Stress Index

BENJAMIN FRANKLIN



*1775: Congress should
have the power to settle
all disputes between
colony and colony.*

ARTICLES OF CONFEDERATION, ART. IX

- Congressional court
- Compulsory jurisdiction
- Judgment of court “final and conclusive”
- One Interstate Case Litigated:
Pennsylvania v. Connecticut (1782)

PENNSYLVANIA V. CONNECTICUT (1782)



U.S. CONSTITUTION

ART. III, SEC. 2, CL. 2

“In all cases...in which a State shall be
Party, the supreme Court shall have original
Jurisdiction.”

JUDICIARY ACT OF 1789

- Made Supreme Court original jurisdiction over interstate controversies exclusive
- Codified at 28 U.S.C. §1251(a)

METHODS FOR ALLOCATING INTERSTATE WATERS

1. Apportionment by Congress
2. Equitable apportionment by the Supreme Court
3. Compact

APPORTIONMENT BY CONGRESS

- Authority derived from the Congress' power to regulate interstate commerce.
- Colorado River: ***Arizona v. California (1963)***
- Example: **1905 Rio Grande Project Act**

APPORTIONMENT BY SUPREME COURT

- Initiation
 - “[N]o one State can control the power to feed or starve, possessed by a river flowing through several states.” - Justice Frankfurter & Landis
 - Casus Belli: *Texas v. New Mexico* (1983)
 - No Alternative Forum
- Non-State Parties Are Rare
 - *South Carolina v. North Carolina* (permitted)
 - *Montana v. Wyoming & North Dakota* (rejected)
 - *Texas & United States v. New Mexico & Colorado* (pending)

APPORTIONMENTS BY SUPREME COURT

- Delaware River (1931)
 - Laramie River (1922)
 - North Platte River (1945)
 - Vermejo River (1982, 1984)
- ➔ Impetus for interstate compacts

PROCEDURE: SPECIAL MASTERS

- Special Masters are Often Water Law Specialists
- Conduct Trial
 - U.S. Federal Rules of Civil Procedure and Evidence Do Not Strictly Apply
- Submit to Court a Report Containing Findings of Fact and Recommendations on Points of Law
- Court May Accept and Reject Findings at Its Discretion

APPORTIONMENT BY COMPACT

Compact Clause:

“No State shall, without the Consent of Congress, . . . enter into Agreement or Compact with another State.”

U.S. Constitution, Art. I, § 10, cl. 3:

COMMON ELEMENTS OF INTERSTATE WATER COMPACTS

- Allocation
- Administration

SUPREME COURT PREFERS COMPACTS

“The reason for judicial caution in adjudicating the relative rights of states in [water] cases is that, while we have jurisdiction of such disputes, they involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the Federal constitution.”

Colorado v. Kansas, 320 U.S. 383, 392 (1943)

SPECIAL MASTERS ENCOURAGE SETTLEMENT BY COMPACT

“Whatever the result is ... we are talking a lot of money and a result you may not like.... Again and again and again I’m going to urge you to discuss a settlement seriously.”

- Special Master Ralph Lancaster, *Florida v. Georgia* (June 2, 2015)

FEDERAL GOV'T ENCOURAGES COMPACTS

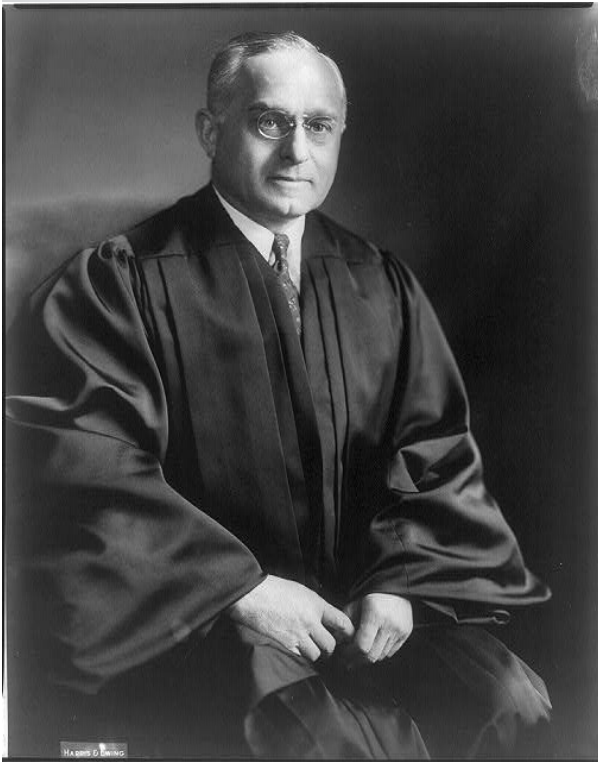
Compact is often a precondition for Federal water projects. E.g.:

- Republican River
- Yellowstone River

U.S. RIVERS SUBJECT TO INTERSTATE COMPACTS

- | | |
|------------------------|--------------------------|
| 1. Arkansas River | 12. Pecos River |
| 2. Bear River | 13. Red River |
| 3. Belle Fourche River | 14. Republican River |
| 4. Big Blue River | 15. Rio Grande River |
| 5. Canadian River | 16. Sabine River |
| 6. Colorado River | 17. Snake River |
| 7. Costilla Creek | 18. South Platte River |
| 8. Delaware River | 19. Upper Niobrara River |
| 9. Klamath River | 20. Yellowstone River |
| 10. La Plata River | |
| 11. Ohio River | |

COMPACT DISPUTES



“[A] compact is after all a legal document.

Though the circumstances of its drafting are likely to assure great care and deliberation, all avoidance of disputes as to scope and meaning is not within human gift.”

Justice Frankfurter

W. Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 28 (1951)

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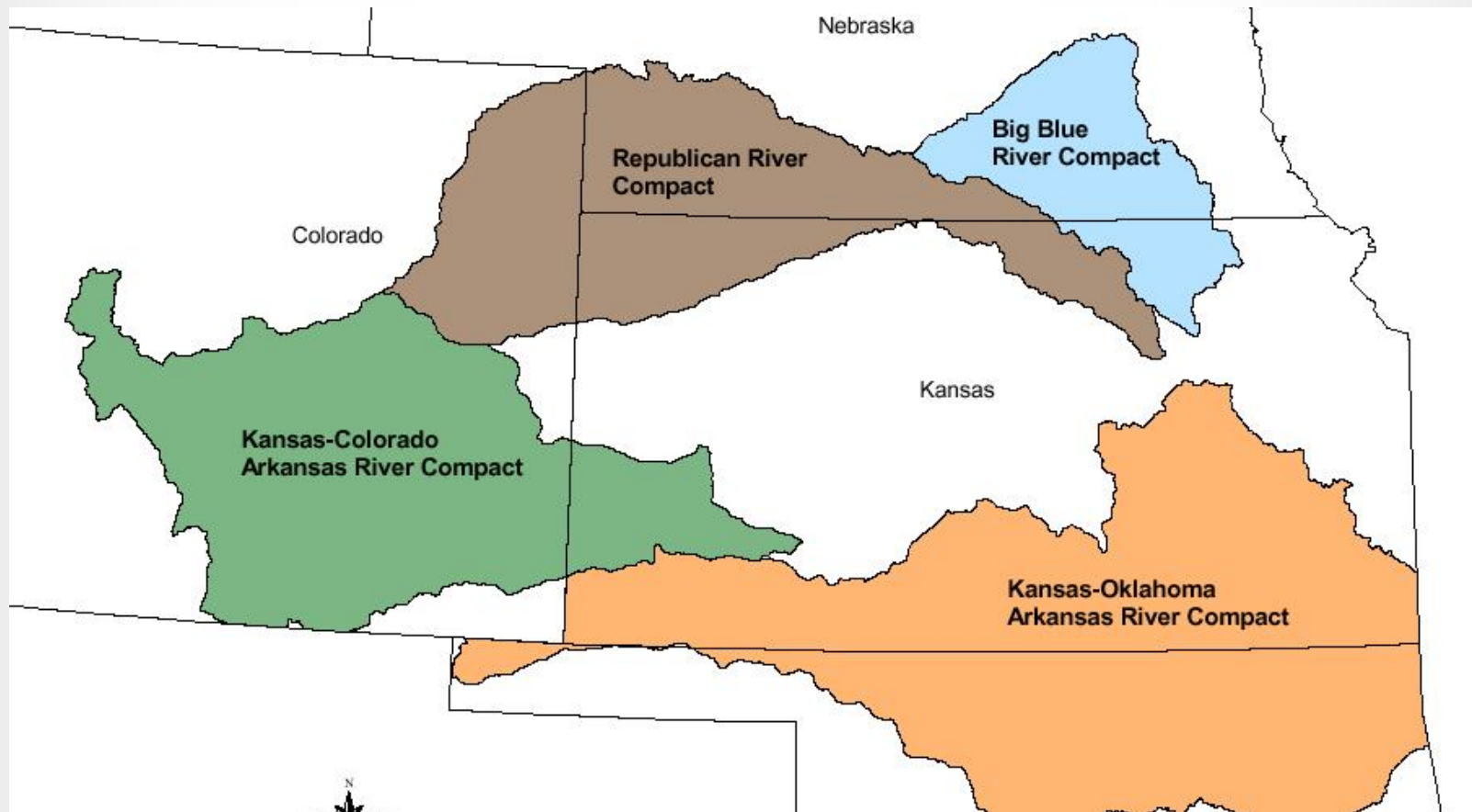
SUPREME COURT'S ENFORCEMENT OF ALLOCATIONS

- Laramie Decree (1932, 1936, 1940)
- North Platte Decree (1993, 1995)
- Pecos River Compact (1983, 1987)
- Republican River Compact (2003, 2015)
- Arkansas River Compact (1995, 2001, 2004, 2009)
- Yellowstone River Compact (2011)

PENDING SUPREME COURT ENFORCEMENT OF ALLOCATIONS

- Yellowstone River Compact
 - *Montana v. Wyoming & North Dakota*
No. 137, Orig.
- Rio Grande Compact
 - *Texas & United States v. New Mexico & Colorado*
No. 141, Orig.

KANSAS' COMPACTS



CASE STUDY: ARKANSAS RIVER

KANSAS V. COLORADO



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CASE STUDY: ARKANSAS RIVER

KANSAS V. COLORADO

- 1901 - Kansas Files Suit to Enjoin Upstream Diversions
- 1902 - Colorado's Demurrer is Denied
- 1907 - Kansas is Denied Relief
- 1910-1928 - Lower Court Interstate Litigation
- 1928 - Colorado Files Suit to Enjoin Lower Court Suits;
Kansas Counterclaims for Injunction
- 1943 - Supreme Court Rules for Colorado

(Cont....)

CASE STUDY: ARKANSAS RIVER *KANSAS V. COLORADO (CONT.)*

- 1944-1948 - Compact Negotiations
- 1949 - Compact Approved
- 1950-1965 - Major Well Development Along the River
- 1985 - Formal Compact Investigation
- 1985 - Kansas Files Suit
- 1995, 2001 } Supreme Court Issues Opinions
- 2004, 2009 }
- 2009 - Entry of Judgment & Decree

DISPUTE RESOLUTION METHODS USED IN THE ORIGINAL JURISDICTION

- Mediated Settlement
 - *Kansas v. Nebraska & Colorado*, No. 126 Orig.
- River Master
 - Pecos River; Delaware River
- Arbitration
 - Non-binding arbitration (*Kansas v. Nebraska & Colorado* 2003 Decree)
- Expert Negotiation
 - *Kansas v. Colorado*

SUPREME COURT STILL MUST DECIDE ALL MAJOR CONTROVERSIES

“[T]he Court has often expressed a preference that, where possible, States settle their controversies by mutual accommodation and agreement but the Court does have a serious responsibility to adjudicate cases where there are actual, existing controversies between the States over the waters in interstate streams. There is no doubt that such a dispute exists in this case.... Thus, we see no legal basis for the Master refusing to decide the question and instead sending it to the Commission.”

Oklahoma v. New Mexico, 501 U.S. 221, 241 (1991)

Thank you

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