Litigating the Groundwater Revolution: Past, Present, and Future

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The Equal Footing Doctrine

Madison denied, 1788-89

Article IV, Sec. 3, Cl. 1: No help at all.


“Life is a Fountain.”*
The United Watershed States of America
The proper borders of Kansas, 1859
Arkansas River, near Headwaters
Arkansas River Basin
Arkansas River, Lakin, Kansas
Peace in our time?
Technological revolutions render traditional warfighting obsolete.
Western waterfights are no different.

Frank Zybach’s first center-pivot irrigation system, near Strasburg, Colorado. He started with a low pipe that was later raised to run over corn fields. UNL.
Res Ipsa Loquitur
Nebraska: the hydrological problem – the cause
Nebraska: the hydrological problem– the effect
Peace in our time?
Litigating *Kansas v. Nebraska*

- Water Resources Engineers
- Groundwater Modelers
- Hydrogeologists
- Agronomists
- Agricultural Economists
- Lawyers
  - To connect Kansas’ experts, and destroy Nebraska’s
- Appearances also by: Historians, Mathematicians
Special Master’s Report, 11/15/2013

• For Kansas:
  – “reckless indifference” by Nebraska
  – Disgorgement award, + damages = $5.5M. More than Kansas v. Colorado.

• For Nebraska:
  – No injunction, contempt finding, or river master
  – Entitled to a change in Compact Accounting Procedures (10k AF/yr)

• The Indifferent:
  – What is the federal role? SM unconcerned with whether NE’s conduct to comply violates federal law.

• Exceptions briefing complete as of 4/30; Oral argument in fall
Means of Compliance, I: The Draining of Bonny Reservoir (note absence of endangered species)
Nebraska “Augmentation”
Means of Compliance, II: “Augmentation”

- A Colorado concept
- Applied to an interstate compact, using Ogallala-High Plains Aquifer water
- Colorado: CCCP, North Fork Republican, 15k AF
- Nebraska: Platte and Republican, 20-30k AF
- Groundwater becomes Surface Water. Through a process of Augmentation by Subtraction. Paging Mr. Orwell . . . .
1. Gravity > Equal Footing Doctrine, So Litigation is an Imperative.

“Hypotheses non fingo.”*

\[ F = G \left( m_1 \times m_2 \right) \]; ergo, \[ d^2 \]

“Water flows downhill. I am not interested in the Equal Footing Doctrine. I have never heard of it. The laws of the universe trump all human doctrines, even those ‘discovered’ by the United States Supreme Court, whatever that is.”**

*Isaac Newton, *Principia Mathematica* (1688)

**Newton did not actually say this. Powerpoint, Microsoft Word, and Google constructed this sentence in response to a search query.

- Water has a substitute. It’s called Money.
- The need for transactional sophistication and better water markets
- Technology and Infrastructure raise the stakes of interstate conflict.
- How will the Federal Government invest?
- CO and NE have spent $200m on the Republican (not counting litigation). Kansas?
3. As the law breaks down, will traditional boundaries hold?

- Law = Compact + other Federal and State Laws of the River
- Water supply > State identity?
  - Kansas and Nebraska on the Republican
  - Kansas and Colorado on the Arkansas
  - Texas and New Mexico on the Rio Grande
  - CBM interests and Tribal interests on the Yellowstone
- Balkanization and Stranger Bedfellows?
  - Water Quality on the Arkansas
  - Recreational and Environmental Interests actually harmonizing with downstream irrigation interests (don’t get too excited)
- The Future of Federalism on the Great Plains?
The Ogallala as an Interstate Resource?

- 276 MAF withdrawn
- 8.3 MAF/year—half of the Colorado River
- Declines as high as 150 feet—permanent
- Compact?
- National Aquifer?
“Thank you for making this day necessary.”

• Yogi Berra