

WATER COMPACTS - Experiences and Mechanics

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Although negotiated and executed by sovereign states, interstate water compacts directly or indirectly affect the rights of individual inhabitants within the respective states, and it is therefore fitting that a discussion and consideration of the mechanics of and problems inherent in such compacts be a part of any program under the theme of this conference of "Water for New Mexico - Your Problem and Mine".

Before proceeding, may I briefly review the basic legal concept and procedure involved in compact making. Sec. 10 (2) of Art. I of the Federal Constitution provides: "No State shall, without the Consent of Congress ... enter into any Agreement or Compact with another state..." This provision has been construed to mean that the Constitution authorizes a state to enter into any agreement or compact with another state with the consent of Congress. In practice a compact is negotiated by commissioners designated by the participating states. Its binding effect on signatory states is accomplished through ratification by their respective legislatures. Under existing New Mexico law, the Interstate Streams Commission, among other things, is authorized to negotiate compacts with other states to settle interstate controversies or looking toward an equitable distribution and division of waters in interstate stream systems, subject, in all cases, to final approval by the legislature of New Mexico. Ordinarily, the consent of Congress to negotiate a compact is first sought by the interested states. The Congressional Act granting such consent in nearly every case designates a federal representative to serve on the compact commission, and in the case of most if not all of New Mexico's compacts such federal representative serves as chairman, without vote. States may enter into a compact without first obtaining the consent of Congress to negotiate, but subsequent Congressional approval of the compact arrangement implies previous consent.

It may be well to note here that both the interstate compact and interstate litigation over water matters are twentieth century phenomena. Among early cases was Mississippi River litigation in 1901 and 1906 in Missouri v. Illinois, and Arkansas River litigation in 1902 and 1907 in Kansas v. Colorado. The earliest compact dates back to 1922. Both result from pressing claims being made upon our streams and the end of a period when each State could determine for itself, without regard to its sister States, what and how much use it would make of

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interstate waters. The power of a state over the waters within its borders is limited by vested rights therein of other states, and one state may not unreasonably appropriate the waters of a river within its borders, to the injury of another state through which such river flows. Interstate compacts and interstate litigation reflect, in essence, two different approaches to the problem -- one the cooperative, horse-trading approach, the other, a strictly legalistic and usually contentious approach. But either may give way to the other, as witness the Rio Grande Compact, which upon conclusion in 1938 terminated pending U S. Supreme Court litigation between Texas v. New Mexico for alleged excessive diversions of water in New Mexico in violation of a 1929 Compact, followed in 1951 by a suit in the same court between the same parties for enforcement of the Rio Grande Compact.

As of 1956 there were twenty interstate water compacts in effect, in seven of which New Mexico was a signatory, indicating we are disposed to approach the problem from a cooperative, horse-trading angle rather than on a strictly legalistic or contentious basis. The earliest in which New Mexico was a party was the Colorado River Compact in 1922 and the last the Canadian River Compact in 1950. One or more of the following major purposes and objectives are stated in the seven existing New Mexico compacts: to provide for the equitable division and apportionment of the use of the waters of a particular stream; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies; to secure the expeditious agricultural and industrial development of a particular basin, the storage of its waters, and the protection of life and property from floods; to assure the most efficient utilization of the waters of a named stream; to provide for the integrated operation of existing and prospective irrigation facilities on the stream in two compacting states; to adjust the conflicting jurisdictions of two states over irrigation works and facilities diverting and storing water in one state for use in both states; to equalize the benefits of water from a named stream, used for the irrigation of contiguous lands lying on either side of the boundary, between the citizens and water users of one state and those of the other, and to place the beneficial application of water diverted from a named stream for irrigation by the water users of two states on a common basis; to make secure and protect present development within the states; to facilitate the construction of works for, (a) the salvage of water, (b) the more efficient use of water, and (c) the protection of life and property from floods; and to provide for the construction of additional works for the conservation of the waters of a named stream.

With the above as a general background, a brief review and discussion of each New Mexico compact in chronological sequence follows.

Colorado River Compact, 1922

Entered into by the states of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, and covers waters of the "Colorado River System" and "Colorado River Basin". It was the first interstate water compact negotiated in the United States. Division is made into the "Upper Basin", which means

those parts of the States of Arizona, Colorado, New Mexico, Utah and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above Lee Ferry; and the "Lower Basin" which means those parts of the States of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry. As will be noted, New Mexico is concerned with both the Upper and Lower Basin provisions of this compact, its share of the waters of the San Juan, Little Colorado, and Gila River Basins being involved; and directly related thereto is the subsequent Upper Colorado River Basin Compact of 1948, hereinafter summarized, to which New Mexico is also a party.

No provision is made in the Colorado River Compact for a compact commission, but Article V imposes upon the chief official of each signatory state charged with the administration of water rights, along with federal agencies in an ex-officio capacity, certain responsibilities under the compact. Likewise, Article VI provides for the appointment of Commissioners by the respective legislatures, to resolve controversies and disputes arising under the compact.

Interestingly, this Compact provides that use of the waters of the Colorado River for navigation purposes shall be subservient to domestic, agricultural, and power purposes, and that impounding and use of any waters for the generation of electrical power shall be subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes.

Litigation under this compact has been primarily between Arizona as plaintiff against California and other defendants from time to time. The first was in 1931 when Arizona sought to enjoin storage facilities authorized by the Boulder Canyon Project Act; second was an action by Arizona in 1934 against California and others to perpetuate testimony arising out of the Boulder Canyon Project Act for use in contemplated later litigation; and third, an action in 1936 by Arizona against California and others for a partition of the right to appropriate in the future waters of the Colorado River not as yet appropriated. In 1952 a fourth action by Arizona was filed against California and seven municipalities or political subdivisions within that state and later the United States and Nevada became parties by intervention. New Mexico and Utah became parties involuntarily by order of the Supreme Court in their capacities as Lower Basin states. New Mexico's interest primarily relates to the use of the waters originating within its boundaries of the Gila and Little Colorado Basins, and if proper agreement with Arizona relative thereto cannot be effected, such rights will be actively litigated in the pending Arizona v. California suit, which in Western Water News has been reported from time to time as "The Long Suit".

La Plata River Compact, 1922

Entered into by Colorado and New Mexico, and providing for the equitable distribution of the waters of the La Plata River, a tributary of the San Juan which is a tributary of the Colorado. Administration is vested in the State Engineers of the signatory states, or their successors. The rotation provision of the Compact gave rise to litigation which has become a landmark case in interstate water law, being *Hinderlider v. La Plata River and Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), where in the Supreme Court of the United States determined, among other things: (1) that "whether the apportionment of the water of an interstate stream be made by compact between the upper and lower states with the consent of Congress or by a decree of this Court, the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact,"; (2) that "As the States had power to bind by compact their respective appropriators by division of the flow of the stream, they had power to reach that end either by providing for a continuous equal division of the water from time to time in the stream, or by providing for alternate periods of flow to the one State and to the other of all the water in the stream" and (3) that "As Colorado possessed the right only to an equitable share of the water in the stream, the decree of Jan. 12, 1898, in the Colorado water proceeding did not award to the Ditch Company any right graded than the equitable share" and that, therefore, "the apportionment made by the Compact cannot have taken from the Ditch Company any vested right, unless there was in the proceeding leading up to the Compact or in its application some vitiating infirmity."

Rio Grande Compact, 1938

Entered into by the States of Colorado, New Mexico and Texas with respect to the use of the waters of the Rio Grande and Rio Grande Basin in Colorado, New Mexico and Texas above Fort Quitman, Texas. Administration under Article XII is vested in a commission consisting of the state engineers of Colorado and New Mexico and duly designated representatives of Texas and the United States. The United States representative is chairman, without vote. The compact is unique in that it does not apportion the waters between New Mexico and Texas, but between water users in New Mexico above Elephant Butte on the one hand and water users in New Mexico and Texas below Elephant Butte on the other hand. The compact and the stream over which it has jurisdiction affects perhaps the largest and most populous agricultural areas of the state, and, of course, is of particular importance and significance to the inhabitants within the Middle Rio Grande Conservancy District and Rio Grande Projects. The compact is subject to the Rio Grande Convention of 1906 between the United States and Mexico, which obligates the United States to deliver to Mexico from the bed of the Rio Grande at El Paso 60,000 acre-feet of water annually. This Convention incidentally was the forerunner of the ultimate construction of Elephant Butte and Caballo reservoirs and other structures under the Rio Grande Project. Interestingly in this connection, a suit was instituted in 1889 entitled the *United States v. Rio Grande Dam and Irrigation Company*, 174 U.S. 690, allegedly upon complaint

of the Mexican authorities, to investigate and prevent erection of storage facilities at the approximate present site of Elephant Butte and appropriation of waters of the Rio Grande upon the ground that there would be substantial diminishment of the navigability of the stream. The action was dismissed, with a finding that the Rio Grande was not navigable for a considerable distance below the proposed dam site.

As heretofore noted, adoption of the Rio Grande Compact terminated then pending litigation between Texas and New Mexico, but in 1951 Texas (which in effect were all water users below Elephant Butte reservoir) filed suit in the United States Supreme Court against New Mexico and the Middle Rio Grande Conservancy District to restrain the defendants from storing waters of the Rio Grande and its tributaries in reservoirs in New Mexico constructed after 1929 above San Marcial, except to the extent permitted by the Compact, and from diverting and using in New Mexico waters of the Rio Grande and its tributaries allocated to Texas by the Compact, and to deliver water in the Rio Grande at San Marcial in the quantities specified by the Compact, and otherwise to comply with the terms of the Compact. Various legal attacks were interposed to the complaint by the respective defendants, numerous hearings before a Special Master were held, ultimately resulting in dismissal of the action due to absence of the United States as an indispensable party defendant because of involvement of Indian rights. The proceeding never reached a trial or hearing on the basic issues complained of. The extreme continuing drouth perhaps was a contributing factor to the origin of the controversy, but the basic issues still remain unresolved and undetermined and will require further unrelenting study, consideration and cooperation to fairly and equitably protect all inhabitants of the state and permit continuance of the compact as a practical and workable document.

Costilla Creek Compact, 1944

Entered into by Colorado and New Mexico and pertaining to Costilla Creek, a tributary of the Rio Grande which rises on the west slope of the Sangre de Cristo range in the extreme southeastern corner of Costilla County in Colorado and follows in a general westerly direction crossing the Colorado-New Mexico boundary three times above its confluence with the Rio Grande in New Mexico. Administration is vested in the state engineers of the two states, constituting the Costilla Creek Compact Commission, and daily handling of water is accomplished by a watermaster appointed by the New Mexico commissioner. The compact affects a limited area and population, and no significant litigation has arisen therefrom to date.

Upper Colorado River Basin Compact, 1948

Entered into by Arizona, Colorado, New Mexico, Utah and Wyoming, covering equitable division and apportionment of the use of the waters of the Colorado River System, the use of which was apportioned in perpetuity to the Upper Basin by the Colorado River Commission, consisting of a commissioner representing each signatory state and a commissioner representing the United States, the latter of whom is the presiding officer with all powers and rights vested in the commissioners of the respective states. Four members of the commission constitute a quorum. Much time and effort of the Commission along with other groups and agencies, has been devoted to the ultimate successful enactment of legislation authorizing the Colorado River Storage Project and Participating Projects. No significant litigation has arisen directly involving this compact, but as hereinbefore noted certain of the signatory states in the Colorado River Compact are indirectly involved in the pending Arizona v. California suit. Of greatest importance to New Mexico will be the ultimate determination as to use within the basin or diversion to other basins of waters of the San Juan River.

Pecos River Compact, 1948

Entered into by Texas and New Mexico, pertaining to the Pecos River, a tributary of the Rio Grande which rises in north-central New Mexico and flows in a southerly direction through New Mexico and Texas and joins the Rio Grande near the town of Langtry, Texas, including all tributaries thereof. Administration is vested in the Pecos River Commission, consisting of a commissioner from each of the signatory states designated by the President representing the United States. The United States representative is chairman, but without vote. All members must be present to constitute a quorum. Activities under the compact to date have been primarily devoted to determining and attempting to secure financing for construction of a low-water channel through the delta area from a point opposite Artesia to the head of Lake McMillan and a levee and floodwater channel lying along the east side of the valley, through the same area; also, a program to relieve the artesian pressure on the salt brine which discharges in the Malaga Ben area, thus preventing an average of about 370 tons of salt per day from entering the river at this point, the brine to be pumped into a nearby disposal area. No significant litigation arising under the compact has occurred to date.

Canadian River Compact, 1950

Finally is the above compact, entered into by New Mexico, Texas and Oklahoma, covering waters of the Canadian River, a tributary of the Arkansas River which

rises in northeastern New Mexico and flows in an easterly direction through New Mexico, Texas and Oklahoma and including the North Canadian River and all other tributaries of said Canadian River. Administration is in the Canadian River Commission, consisting of commissioners of each of the three signatory states designated or appointed in accordance with the laws of the state, and a representative or commissioner from the United States designated by the President, the last named to be the presiding officer, without vote. All members must be present to constitute a quorum, and a unanimous vote of the Commissioners for the three signatory states is necessary to all actions taken by the Commission. Under Article IV New Mexico has free and unrestricted use of all waters originating in the drainage basin of the Canadian River above Conchas Dam; it has free and unrestricted use of all waters originating in the drainage basin in New Mexico below Conchas Dam, but conservation storage of such waters shall be limited to an aggregate of 200,000 acre-feet; and the right to provide conservation storage in the drainage basin of the North Canadian River but limited to the storage of such water as at the time may be unappropriated under the laws of New Mexico and Oklahoma. The compact was negotiated subsequent to the construction of the Conchas Dam and Reservoir and the Arch Hurley Conservancy District. The compact defines the term "conservation storage" and excludes any portion of the reservoirs allocated solely to flood control, power production, and sediment control. Although embracing a rather large but somewhat erratic water supply, the same has remained undeveloped primarily because there is very little irrigable acreage below Conchas Dam along the Canadian or its tributaries other than what is under the Arch Hurley Conservancy District.

No significant litigation has as yet occurred under this compact.

Conclusion

Compacts, like individual contracts, are no better than the conscience and willingness of the parties to mutually and constantly strive for their practical and workable administration. At best they can contain only basic general policies and principles which may assume new aspects and necessitate re-evaluation and redrafting in the light of day to day administration and changing conditions. Our United States Supreme Court, no less, has approved and recommended them in preference to long, expensive and uncertain litigation. Thus in *Colorado v. Kansas*, 320 U.S. 393,392 (1943), it said:

"The reason for judicial caution in adjudicating the relative rights of States in such 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. We say of this case, as the court has said of interstate differences of like nature, that such mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power."

BIBLIOGRAPHY

Constitution and Statutes:

Constitution of the United States, Art. I, Sec. 10

New Mexico Statutes 1953 Anno., Vol. 11, Secs. 75-34-1 through 75-34-8, Interstate Stream Commission and Protection of Interstate Streams

Texts, Papers and Reports:

Am. Jur., Vol. 49, States, Territories and Dependencies, Sec. 11

Am. Jur., Vol. 56, Waters, Secs. 373 and 374

Compact Commissions and Interstate Committees, 22nd Biennial Report of the State Engineer of New Mexico (1954-1956) p. 275

Documents on the Use and Control of the Waters of Interstate and International Streams, Compacts, Treaties and Adjudications, compiled and edited by T. Richard Witmer, U. S. Dept. of the Interior (1956)

Interstate Water Compacts, Clifford H. Stone (1951) Rocky Mountain Law Review, Vol. 24, N. 2, P. 141

New Mexico Water Resources, S. E. Reynolds, Annual New Mexico Water Conference, N.M.A.&M.A. (1956) p. 6

Water Use and Water Control Planning on the Rio Grande, Harold B. Elmendorf, Annual New Mexico Water Conference, N.M.A.&M.A. (1956) p. 98

Cases:

Arizona v. California (1931) 283 U.S. 423

Arizona v. California (1934) 292 U.S. 341

Arizona v. California (1936) 298 U.S. 558

Arizona v. California (1956) 351 U.S. 977

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

Hinderlider v. La Plata River and Cherry Creek Ditch Co. (1938) 304 U.S. 92

Kansas v. Colorado (1902) 185 U.S. 125

Kansas v. Colorado (1907) 206 U.S. 46

Missouri v. Illinois (1901) 180 U.S. 208

Missouri v. Illinois (1906) 200 U.S. 496

Texas v. New Mexico (1939) 308 U.S. 510

Texas v. New Mexico (1957) (No. 9 Original) 1 L Ed 2d 541

United States v. Rio Grande Dam and Irrigation Co. (1899)
174 U. S. 690