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Consequences of Rio Grande Compact Noncompliance

What is an interstate compact? It is a federal law that preempts state law. It also is a contract enforceable in the U.S. Supreme Court by specific performance and by damage awards. These are very important facts we need to know when evaluating the possible remedies under the Rio Grande Compact.

The obvious purpose of an interstate compact is to allocate some quantity of water to each state that reflects their equitable share. The allocation mechanism that accomplishes that purpose is important, and there are essentially three, maybe four options.

One option is to decide that the upstream state will deliver a certain quantity of water every year–a certain number of acre-feet no matter what–at a delivery point. Another option is to apportion the total yield of the basin by percentage. A third option is to place a cap on consumption by the upstream states. Yet another option is to allocate a particular delivery requirement between one point and another, as was done in the Rio Grande Compact. To illustrate, I thought it would be interesting to look at the New Mexico compact allocations that reflect this point:

Discharge of Rio Trande at Otowi Bridge and Elephant Butte Effective Supply
(quantities in thousands of acre-feet)

Otowi Index Supply	Elephant Butte Effective Index Supply
100	57
200	114
300	171
400	228
500	286
600	345
700	406
800	471
900	542

(continued)

Otowi Index Supply	Elephant Butte Effective Index Supply
1,000	621
1,100	707
1,200	800
1,300	897
1,400	996
1,500	1,095
1,600	1,195
1,700	1,295
1,800	1,395
1,900	1,495
2,000	1,595
2,100	1,695
2,200	1,795
2,300	1,895
2,400	1,995
2,500	2,095
2,600	2,195
2,700	2,295
2,800	2,395
2,900	2,495
3,000	2,595

Figure 1 contains relevant language of the Upper Colorado River Compact. When possible, this is the preferred allocation method. The unknown factor, of course, is the total yield of the basin. At a minimum, everyone gets its share by percentage. Since everyone is involved in negotiating and working on the percentage allocations, you are not in a situation where people are going to go to court to fight over whether they are in compliance with the Compact. As a result, there has been no litigation of the Upper Colorado River Compact. I would not expect there to be because the Compact uses a percentage allocation system.

But now consider Figure 2, which is part of the Colorado River Compact. The top provision indicates a delivery requirement of around 7.5 million acre-feet a year. That provision has not been to court yet because, although there are a number of ambiguities elsewhere in the Compact, the lower basin states have been successful in foreclosing projects in the upper basin states so that the upper basin states cannot use their share of water. Hence, the upper basin states have naturally delivered the required quantities at the

UPPER COLORADO
RIVER BASIN COMPACT
ARTICLE III

(a) Subject to the provisions and limitations contained in the Colroado River Compact and in this compact, there is hereby apportioned from the upper Colorado river system in perpetuity to the states of Arizona, Colorado, New Mexico, Utah and Wyoming, respectively, the consumptive use of water as follows:

(2) to the states of Colorado, New Mexico, Utah and Wyoming, respectively, the consumptive use per annum of the quantities resulting from the application of the following percentages to the total quantity of consumptive use per annum apportioned in perpetuity to and available for use each year by upper basin under the Colorado River Compact and remaining after the deduction of the use, not to excee 50,000 acre-feet per annum, made in the state of Arizona.

state of Colorado....................51.75 percent
state of New Mexico.............11.25 percent
state of Utah...........................23.00 percent
state of Wyoming..................14.00 percent

Figure 1. Upper Colorado River Basin Compact, Article III.

Colorado River Compact
Article III

(a) There is hereby apportioned from the Colorado river system in perpetuity to the upper basin and to the lower basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

Figure 2. Colorado River Compact delivery requirement as per Article III

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delivery point. But again, the Compact is clear that you must deliver a specific amount of water over a specific period of time at a particular point.

This option is a very interesting way to do things because it gives complete and total flexibility to the upper basin states–as long as they deliver *X* amount at point *X*, how they get it there is their business.

Another option is one that seems like it would generally work but it has, in fact, generated the most litigation, not only in New Mexico but also between Kansas and Colorado, for example. This option limits the amount of water the upper states can consume by putting a cap on man-made depletions.

The Pecos River Compact, Article 3A states, "New Mexico shall not deplete by man's activities the flow of the Pecos River at the New Mexico - Texas line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition." Now that provision makes a lawyer's heart warm. The statement contains ambiguities fraught with the potential for litigation. What was the 1947 condition exactly? What did it mean? Was it referring to the beginning of the year or to the end of the year? What about growth in water wells? What constitutes "man's activities"? And so on. The result of that provision's interpretation–and I'm sorry to confess that partly due to my own efforts–is that it is now possible for downstream states to sue upstream states for non-delivery and get damage awards.

In the Pecos litigation, after a great deal of negotiation, Special Master Myers came up with a draconian decision that would require the retirement of large amounts of water to meet delivery requirements and make up for past under-deliveries under the Compact. The decision also included the concept of water interest. The result of this decision was very bad for New Mexico. Steve Reynolds, Peter White, and I worked with others to determine whether or not it would be possible to simply pay off the damages in dollars, rather than water. That issue went to the United States Supreme Court where it was ruled that because the Compact is essentially a contract, we might have the option of paying damages in dollars. When that decision came out, Texas argued that there should be close to a billion dollars in past damages for opportunities lost. One of the arguments I made was that because of the inefficiencies associated in raising crops in Texas, and because of the opportunity cost of labor, Texas should actually pay New Mexico for not allowing Texas farmers to farm and instead letting Texans work the oil fields!

Somewhere between those two extremes came out a fair compromise, I think. The parties negotiated with the excellent lawyers and hydrologists for Texas, and on the other side, New Mexico received some very good private counsel. Given what we learned from the Pecos litigation, let's look at the Rio Grande Compact.

The good news on the Rio Grande Compact is that it is simple, that is to say, the delivery requirement is simple: if X amount of water passes a particular point, Y amount of water must arrive at another point. The amount is a ratio which is balanced 43 percent at the low end and 13-14 percent at the high end. That way, New Mexico gets the benefit of low flows. Thus, if X amount passes Otowi gauge, and Y arrives at Elephant Butte, the difference is the amount of water the middle valley gets to keep. If we don't get the required amount to the downstream point, then we are in violation of the Compact, which is something I will talk about momentarily.

We looked closely at the Pecos type of compact in our work designing compacts in the southeastern United States and rejected it, because the problem with this kind of compact is that it presumes constancy and an understanding of the operation of surface-river systems. There are a host of things that the upstream states cannot control, that nevertheless dramatically affect their ability to deliver water under the Compact. On the Pecos River, not only is New Mexico responsible for man's activities, but it is responsible for God's activities, and that is a pretty substantial task. Turning back to the Rio Grande Compact, what if New Mexico under-delivers? Is there a possibility that in the future there could be an action for damages against New Mexico? Look at the provision in Article 6:
"...in a year in which there is an actual spill of useable water or at the time of hypothetical spill, all accrued debits of New Mexico or Colorado or both, at the beginning of the year shall be canceled."

What does "all accrued debits" mean? If you look at another section of the Compact, it says,

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"...accrued debits shall not exceed 200,000 acre-feet at anytime" along with some modifying language about reservoir levels, and so on. If an accrued debit means all under-deliveries are forgiven upon a spill, then there would be no actual damages because all the debits are wiped out. If it means all legal debits under the Compact are wiped out, but not excessive debits, then a different result might be obtained.

If you will recall, historically, there have been substantial under-deliveries over the amount authorized by the Compact. Litigation resulted, but the litigation in the 1950s was dismissed for lack of an indispensable party. The same result might not be obtained today. And so it is in my view, an open question remains: What does the *Texas v. New Mexico* damages ruling mean in the future for New Mexico Rio if there are under-deliveries under the Rio Grande Compact?

Suppose you are on the Interstate Stream Commission, or supposed you are the Governor of New Mexico, or you are the New Mexico State Engineer, and you read a Compact provision that says, "...accrued debits shall not exceed 200,000 acre-feet at any time." Suppose you have someone else saying that if you do exceed 200,000 acre-feet and you cause damage in Texas, you are subject to substantial damages? And suppose a federal agency is telling you that you are obligated to adjust the hydrograph on the river to protect endangered species and the adjustment may cause you to accrue debits that violate the Compact? You would be between a rock and a hard place certainly, because on one hand if you violate the Endangered Species Act, you can be fined or jailed, and on the other hand, if you follow the ESA, you will subject NM to damages under the Compact for under delivery to Texas. This would be an interesting exercise of choices assuming Mother Nature plays the cards that she has played historically, such choices may face New Mexico in the near future.

In addition to the remedies of damages, there are related issues. It is possible to obtain injunctive relief under a compact. Ideally, the downstream state in the lower Rio Grande would seek injunctive relief if there were any kind of accrued departures in excess of what is allowed. With respect to water quality, downstream states will maintain their rights to seek some kind of equitable proportional relief in the Supreme Court–assuming that such relief exists, I'm not sure that it does in the area of water quality.

However, such relief is outside the Compact and is beyond the scope of this discussion. With respect to damages, a number of cases are pending before the Special Master. These cases ask the following interesting legal questions, the answers to which could substantially limit the right to damages. One very intriguing question involves the 11th Amendment of the U.S. Constitution, which precludes citizens of one state from suing citizens of another state. If the theory of damages is that the State–in the Pecos case we are referring to Texas–represents the citizens of the State as *Parens Patriae*, and it wants money for the damages, can one state require the other state to pay damages to them as trustee for its citizens? Would such an action violate the 11th Amendment? Can you make a state pay damages to individuals if the 11th Amendment would have precluded the individuals from suing the state in the first place? What about the situation where a state intentionally delays because it wants money rather than water? Can you get prejudgment interest if you are the downstream state? Can you consider secondary losses? To what degree might laches play a roll?

Finally and most significantly, one question that will be answered by the Supreme Court is whether the upstream state will have the option to choose to deliver water for damages or will that be a choice for the downstream state to make? How will that issue actually unpackage when it gets to the U.S. Supreme Court?

The point I want to stress here is that the Rio Grande Compact means what it says. The Compact specifies that if a particular amount of water passes a gage at one point, a certain amount of water must arrive at another point. The good news is that when it rains between the two gages or other nice things happen, a state is able to deliver water that wasn't anticipated. The bad news is that Mother Nature can change her mind–we have our knowledge of the historic hydrograph and the relationship between the river and its tributary inflows between those two points to remind us of that. And trouble may, not necessarily will, mean damages and that is a very significant fact about which we should all be concerned.