

FROM WATER BATTLES TO PEACE TREATIES: COLORADO'S WATER COMPACTS WITH OTHER STATES

By Justice Greg Hobbs

Colorado straddles the Continental Divide, giving birth to four great rivers - the Platte, the Arkansas, the Rio Grande and the Colorado. As snow melts and trickles off the Rocky Mountains, the water gathers into great rivers that collect their tributaries and flow toward the Atlantic and Pacific oceans. Lifeblood of the environment, they nourish cities and farms, industry and recreation. The rivers shape the land and charge our spirits. They provide sustenance to tens of millions of Americans living in 18 states. But in the arid West, there is rarely enough water to satisfy all desires.

Colorado and its neighboring states have argued for more than a century over who gets how much water from these rivers. The spirited battle among states began with lawsuits filed in the U.S. Supreme Court. Within two decades, efforts to make peace began. The compact clause of the U.S. Constitution became the way states could conclude treaty-like agreements to share the most vital of all resources, the public's water.

The state of Colorado has rights and obligations at the headwaters as the mother of rivers. Nine interstate compacts and two U.S. Supreme Court equitable decrees govern how much water Colorado is entitled to use and consume within its boundaries. These water-sharing charters have fashioned enduring relationships between sister states. How they came into being, how they succeed and fail, how we adjust to them -- and they to us -- will continue to be a measure of our past, present and future.

FINDING A BETTER WAY THE HARD WAY

Delph Carpenter had a map and a plan.

Carpenter knew water, loved Colorado and feared for its future.

A Greeley resident, lawyer, former state senator and first generation descendent of original settlers of the 1870 Union Colony, Carpenter inherited the water creed of early Coloradans: because we are higher up, we get all the water we need, and states downstream can have what's left.

Under the equal footing doctrine of the U.S. Constitution, by which states are admitted on the same basis as every other state, Colorado cited its 1876 state constitution to claim title to all the water arising in its borders.

But by the early 20th century, this idea proved unworkable. Water battles were breaking out among the young states of the West. They took their disputes over their most precious resource straight to the U.S. Supreme Court. Things weren't looking good.

Carpenter stepped in at just the right time to help create lasting solutions that provide a framework still shaping how Coloradans and residents of downstream states use water.

Carving up the West

Congress created the territories and states west of the Mississippi River from public domain obtained through the 1803 Louisiana Purchase, the 1846 Oregon Treaty, and the 1848 Treaty of Guadalupe Hidalgo.

The 1862 Homestead Act allowed settlers to obtain rights to land owned and regulated by the United States under the property and commerce clauses of the U.S. Constitution. Affirmed by a series of subsequent land and water acts, the 1866 Mining Act allowed the territories and states to establish rights to water in the public domain that had not already been claimed.

Congress created Colorado Territory at the outset of the Civil War in 1861 when Kansas became a state. At that time, Kansas Territory had extended up the Arkansas River to the Continental Divide. Nebraska Territory extended up the South and North Platte rivers to the divide. New Mexico Territory extended up the Rio Grande River into the San Luis Valley. Utah Territory encompassed the Colorado River and its tributaries west of the Divide.

Across the headwaters of these four great rivers, the creation of Colorado Territory cut a rectangular swath encompassing the great bend of the Continental Divide.

Drought and Flood: the Bitter Teachers

When decades of drought hit the Southwest in the settlement years of the 1870s and 1890s, spiked by intervening floods, Western irrigators grew convinced they needed federal financial assistance to build storage and flood control works to tame nature's "erratic" ways.

Along with this cry for help came a "butt out" insistence on as much sovereignty as the states could maintain over the creation and administration of water rights within their own boundaries. Yet the states came to realize they needed one another and the federal government if they were to preserve a share of interstate waters for their own uses.

The opening salvo was a lawsuit. Kansas sued Colorado in the U.S. Supreme Court in 1902, contending that Colorado was illegally consuming Arkansas River water that Kansas owned under its riparian water law. If Kansas prevailed, Colorado would have had to pass the entire flow of the river to Kansas essentially undiminished in quantity or quality.

But Colorado fought back, claiming under its prior appropriation water law that it owned all water arising within its boundaries.

Under the Constitution, lawsuits between states fall under the original jurisdiction of the U.S. Supreme Court. The federal government joined the fray. It claimed that the 1902 Reclamation Act reserved all remaining unappropriated water in the Western states for future reclamation projects.

None of these positions prevailed to the complete exclusion of the other. In its 1907 decision, *Kansas v. Colorado*, the Supreme Court enunciated the equitable apportionment doctrine. It ruled that states sharing an interstate river system may invoke the jurisdiction of the high court to adjust, or readjust from time to time, the relative share of water each may use and consume.

That same year, the high court held in the *Winters* case that Indian reservations carried with them implied federal reserved water rights dating to the establishment of each reservation. Subsequent cases extended the reserved rights doctrine to national parks and monuments.

In sum, the Supreme Court held that the states and the federal government share jurisdiction over how water can be used. When states come into conflict with each other over their share of an interstate stream, continuing jurisdiction resides in the Supreme Court to treat each state fairly.

Right Man at the Right Time

Delph Carpenter was well positioned to help find the way out of the legal battles between states. He had already established his reputation as "the water man" in the Colorado Senate. When Carpenter lost his Senate seat in 1911, his former colleagues appointed him their interstate litigator and negotiator. Several water battles were pending or threatening: against Kansas over the Arkansas River; against Wyoming in the U.S. Supreme Court over the Laramie and the North Platte; against New Mexico and Texas over the Rio Grande; and against California and Arizona over the Colorado.

Early briefs and rulings in the Wyoming case came to Carpenter as an especially ominous thunderclap. The court seemed headed toward applying prior appropriation across state lines when each of the warring states uses this doctrine internally. That doctrine holds that the first to actually use the water has first rights to it. If that principle held, a race to develop would be on, and California would win. California had more people, more development and more resources.

At the invitation of the warring states, the federal government stepped in to help sort out the conflicts. Herbert Hoover, then secretary of commerce, called the negotiators for Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming to Washington, D.C., for the first meeting of the Colorado River Compact Commission in January of 1922.

Divide the Waters First, Get the Reservoirs Later

Congress had formed the commission to negotiate an agreement among the states on use of the waters of the Colorado River. Lawmakers invoked a clause in the Constitution that allows states to make treaty-like agreements called compacts. If negotiators reached agreement, their state legislatures would have to approve the deals. Congress and the President would have to give consent as well.

Carpenter was thrown to his most imaginative and scholarly devices. He determined that only through compacts would equity, stability, and reliability be secured for the future of the states and the nation.

Carpenter came to the Colorado Compact negotiations armed with a map and a plan for sharing the resources of the mighty Colorado River. His map showed a 50 million acre-foot reservoir site above Lee's Ferry in Glen Canyon, Arizona and a 31 million acre-foot reservoir below the dividing line. His plan was to divide the waters at Lee's Ferry and to get the reservoirs needed to operate the compact later. Carpenter and many others succeed in achieving this outcome.

Success with negotiating the 1922 Colorado River Compact led to eight more 20th century compacts to which Colorado is a party. But, entering into a compact requires compliance, as demonstrated by the recently concluded *Kansas v. Colorado* compact litigation. Colorado lost and paid Kansas \$34 million in damages.

agreements governing colorado rivers (for 3-page spread map)

International Treaties

- **Mexican Treaty on the Rio Grande, Tijuana, and Colorado Rivers (1945)**

Guarantees delivery of 1.5 million acre-feet of Colorado River water per year to Mexico. If the river does not have adequate water, the Upper and Lower Basins must share the obligation of reducing uses to make up deficiencies.

- **Convention with Mexico on the Rio Grande above Ft. Quitman, Texas (1906)**

The United States must deliver 60,000 acre-feet of water annually at the International Dam at Ciudad Juarez, except during periods of extreme drought. Elephant Butte Reservoir in New Mexico was constructed in part to meet this obligation.

Interstate Compacts

- **Colorado River Compact (1922)**

Allocates 75 million acre-feet during each 10-year period to the Lower Colorado River Basin. The rest of the available water supply, about 7.5 million acre-feet per year, is granted to the Upper Basin. Lake Powell is operated to annually deliver 7.5 million acre-feet plus a portion of the flow required to meet Mexican Treaty obligations.

- **La Plata River Compact (1922)**

Grants Colorado and New Mexico unrestricted use of the river between Dec. 1 and Feb. 15. At other times, each state can use the flow of the river at the state line if the flow is in excess of 100 cubic feet per second. If the flow is less, Colorado must ensure delivery of flow equal to one-half the flow of the river at Hesperus, Colo.

- **South Platte River Compact (1923)**

Divides the waters of the South Platte River between Colorado and Nebraska, giving Colorado the right to fully use the water between Oct. 15 and April 1. During the irrigation season, Colorado will deliver 120 cfs to Nebraska at Julesburg.

- **Rio Grande River Compact (1938)**

Details obligations of Colorado and New Mexico to deliver water for downstream users, including Mexico. Sets forth system of debits and credits and rules to account for fluctuations in stream flow. A commission is established to administer terms.

- **Republican River Compact (1942)**

Divides the waters of the Republican River Basin between Colorado, Kansas and Nebraska. Colorado is granted a total of 54,100 acre-feet of water each year. The compact allocates to Kansas 190,300 acre-feet of water each year and to Nebraska 234,500 acre-feet of water each year. If the water supply of any source varies, the allocations also change.

- **Costilla Creek Compact (1944; Rev. 1963)**

Establishes uses, allocations and administration of the waters of Costilla Creek in Colorado and New Mexico. A commission oversees compliance. Later amendments specify rights to water in specific facilities.

- **Upper Colorado River Compact (1948)**

Allocates a percentage of available river water to each Upper Basin state as follows: Arizona - 50,000 acre-feet/year; Colorado - 51.75%, Utah - 23%, Wyoming - 14%, New Mexico - 11.25%.

- **Arkansas River Compact (1948)**

Divides the waters of the river between Colorado and Kansas primarily based on 1948 conditions. An administrative agency is established to include all interests. Principles adopted in 1980 provide for storage accounts in John Martin Reservoir for water users in both states.

- **Animas-La Plata Project Compact (1969)**

Unusual because it addresses a water project rather than dividing river waters, the compact gives New Mexico and Colorado equal priority in rights to store and divert project water. The ambitious project has been repeatedly scaled back. The one remaining reservoir started filling in 2009.

U.S. Supreme Court Cases

- **Nebraska v. Wyoming, 325 U.S. 589 (1945) (North Platte River)**

Divides water in the North Platte River between Colorado, Nebraska and Wyoming. Limits total irrigation in Jackson County to 145,000 acres and 17,000 acre-feet of storage for irrigation in each season. Limits total water exports from the North Platte River in Colorado to no more than 60,000 acre-feet during any 10-year period.

- **Wyoming v. Colorado, 353 U.S. 953 (1957) (Laramie River)**

Establishes the two states' rights to water in the Laramie River Basin. Limits total diversions from the Laramie River in Colorado to 39,750 acre-feet.

Agreements

- Pot Creek Memorandum of Understanding (1958; Rev. 2005)
- Sand Creek Memorandum of Agreement (1997)