Denver Law Review

Volume 21 | Issue 4 Article 1

July 2021

# Recent Developments in the Use of Interstate Water Compacts

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DICTA

Vol. XXI APRIL, 1944 No. 4

# Recent Developments in the Use of Interstate Water Compacts

BY GAIL L. IRELAND*

I am especially pleased to have the opportunity to speak on the subject of Interstate Water Compacts, because of the fact that Colorado is a party to five of the ten interstate water compacts now in operation and effect in the United States. Ten other compacts among various states have been formulated in recent years, but for various reasons they have not yet become effective. Colorado at this time is making the necessary studies and conducting negotiations for the formulation of two more compacts, one on the Costilla River with New Mexico and one on the Little Snake River with Wyoming. Obviously, the reason why Colorado has been a pioneer and now is a leader in this activity is because the headwaters of nearly every major stream in the United States arise in Colorado and we haven't been able to devise any scheme to keep water from flowing down hill.

In America's early years, the advisability and feasibility of such compacts were recognized, as evidenced by the Virginia and Maryland Agreement of 1785, the South Carolina and Georgia Agreement of 1788, and the New York and New Jersey Compact of 1833. Then for eighty-three years not another interstate water compact was formulated in the United States.

Recent developments began with the signing of the Colorado River Compact at Santa Fe, New Mexico, in 1922, allocating such waters and defining the rights of the seven states in the river basin; namely, Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming. Congress approved the compact in 1928 and the Boulder Canyon Project Act became effective in 1929 by presidential proclamation. Then followed the La Plata River Compact between Colorado and New Mexico, approved in 1925. Next was the South Platte River Compact between Colorado and Nebraska, approved in 1926. Then Colorado, New Mexico and Texas entered into the original Rio Grande River Compact in 1930, which was discontinued in 1937, but followed by the present Rio

*Attorney General of Colorado. Speech delivered before the National Association of Attorneys General at Chicago, Illinois, November 15, 1943.

Grande River Compact, approved in 1939. The Tri-state Compact, between New York, New Jersey and Connecticut, was approved in 1935, the Pymatuning Lake Agreement between Pennsylvania and Ohio, approved in 1937, the Red River of the North Compact between North Dakota, South Dakota and Minnesota, approved in 1938, the Alamogordo Reservoir Compact (a temporary agreement) between Texas and New Mexico, ratified by Texas in 1939, the Potomac River Compact, between Maryland, West Virginia, Virginia, Pennsylvania and the District of Columbia, approved in 1940, and finally the Republican River Compact between Colorado, Kansas and Nebraska, approved in 1943.

The original Republican River Compact had been ratified by the three states in 1941, passed by both Houses of Congress, but vetoed by the President in 1942.

Compacts formulated but not yet effective are:

1. Ohio River Valley Water Sanitation Compact between Illinois, Indiana, Kentucky, New York, Ohio, Pennsylvania, Tennessee and West Virginia, which will become effective when Pennsylvania ratifies.

2. Tri-state Compact (a supplemental compact to the Colorado River Compact) between Arizona, California and Nevada.

3. Delaware River Compact (1925) between New York, New Jersey and Pennsylvania.

4. Delaware River Compact (1927) between the same states, but only New York ratified.

5. Connecticut River Compact (1937) between Massachusetts, Connecticut, New Hampshire and Vermont, rejected by Congress.

6. Merrimack River Compact (1937) between Massachusetts and New Hampshire, rejected by Congress.

7. Yellowstone River Compact (1935) between Wyoming and Montana, not ratified by either state.

8. Snake River Compact (1933) between Wyoming and Idaho, not ratified by Wyoming.

9. Canadian River Compact (1926) between New Mexico, Texas and Oklahoma, not ratified by Texas.

10. Belle Fourche River Compact (1943) between South Dakota and Wyoming, ratified by both states and now pending approval in Congress.

Colorado has also been a party to more litigation in the United States Supreme Court involving the allocation and use of the waters of interstate streams than any other state in the Union and experience has proved that the judicial process is often too fixed to meet changing social

and economic issues in a given region made up of two or more states. Too often litigation has resulted only in confusion, delayed development and large expenditures of public funds and all too often ended with a judicial decree which was unworkable and a breeder of further litigation. There has been practically a continuous series of law suits between Kansas and Colorado or their citizens over the waters of the Arkansas River since 1901 and at this time the United States Supreme Court is attempting to decide a case of original jurisdiction between the two states. Conditions resulting from forty-two years of bitter litigation have definitely prevented the two states compromising their differences by compact. However, I feel that much more of a constructive nature could be accomplished in this case by compact, even at this late date, than either state can ever expect to obtain by court decree. The North Platte River case, also pending in the United States Supreme Court between Nebraska, Wyoming, Colorado and the United States, is another example of years of litigation, expenditures of enormous sums, and an ultimate court decree which cannot possibly comprehend and equitably settle the dispute as satisfactorily as could be done by compact. However, this is another case where compact appears to be impossible.

Basic compact procedure was originally recognized by the Federal Constitution, Section 10 (2) of Article I thereof, providing that:

> "No state shall, without the consent of Congress * * * enter into any agreement or compact with another state * * *."

This has been construed to mean definite authorization to compact, but the authority is put in the negative so as to express the limitation imposed upon its exercise.

Compacts are negotiated by commissioners appointed by the governors of the participating states, either under a special law for specific negotiations or under general statutory provisions. The negotiated compact signed by the commissioners must then be submitted to the legislatures of the signatory states for ratification.

The validity of such compacts was sustained in the case of *Hinderlider, et al. v. La Plata River and Cherry Creek Ditch Company*. 320 U. S. 646 (1937). Important principles were therein recognized, namely:

> "(a) 'As each State is entitled only to an equitable share of the water of an interstate stream, an adjudication decree in either State cannot confer rights in excess of such share, and parties in the other State are free to challenge claims that under the decree all the water can be taken from the stream.'
>
> "(b) 'Adjustment of controverted rights may be made by compact without a judicial or quasi-judicial determination of existing rights, as well as by a suit in the Supreme Court. The Court

has recommended that such matters be adjusted by compact, in order to avoid the difficulties incident to litigation.'

"(c) 'Whether such apportionment be made by compact with the consent of Congress, or by decree of the Supreme Court, the apportionment is binding upon the citizens of each State and upon all water claimants, even where the State had previously granted water rights.'

"(d) 'The apportionment may provide either for a continuous equal division of water or for rotation in use of the stream.'

"(e) 'As no claimant has any right greater than the equitable share to which the State is entitled, no vested right is taken away by the apportionment if there was no vitiating infirmity in the proceedings leading up to the compact or in its application.'

"(f) 'The assent of Congress to a compact does not make it a "treaty or statute of the United States" within the meaning of the Judicial Code, so that a decision of a State court against its validity is not appealable to the Supreme Court, nor is a claim based on the equitable interstate apportionment of water the subject of appeal. However, the decision of the Colorado Supreme Court restraining the State engineer from taking action required by the compact, denied an important claim under the Constitution, which may be reviewed on certiorari. Whether the waters of an interstate stream must be apportioned between two States presents a Federal question, and the fact that the States are not parties to the suit does not deprive the Supreme Court of jurisdiction.' "

It should be noted that in this case the question of whether or not the compact made an equitable apportionment was not raised.

Two different methods of obtaining congressional consent have been recognized. One procedure calls for passage of an act by Congress granting its consent to make a compact. Then follows negotiation, state legislative ratification and final submission to Congress for approval. The other procedure eliminates congressional consent in the first instance and final approval implies previous consent. In any event, the required constitutional consent is not effectuated until the full text of the compact is before Congress and approved by it.

Experience teaches us that previous congressional consent should be obtained, especially where federal interests are involved, and should therein designate, directly or through authorized appointment, a federal representative to participate in the negotiations. It should be clearly understood, however, that the states by following such procedures are not waiving their right to compact originally or admitting that Congress can curb and limit them in their legitimate activities.

Adequate studies, joint investigations and thorough knowledge of water resources involved, together with sound conclusions of the most efficient use thereof, must be made prior to negotiating. It is also a necessity that adequate administration provisions are written in any water compact, with as much flexibility as possible to meet changing administration conditions, provided, however, that powers cannot be delegated to administrative officials which in their exercise would transcend specific or implied compact terms. Changes in provisions can only be made by unanimous approval of the signatory states with consent of Congress. Adjustment of disputes can be encouraged in an extra-legal fashion (see Article VI of the Colorado River Compact) by providing for appointment of commissioners to consider and adjust specified claims or controversies, subject to legislative ratification. Periodic review of provisions by administrative commissioners is most advisable, but should not cover basic principles upon which the compact is founded. I am not aware of any case where there has been legislative interference in compact administration. An administrative commission should not be granted and from a legal standpoint could not be given judicial functions such as the authority to settle disputes on an interstate stream within the political and legal concept of federal and state constitutions. Only the Supreme Court of the United States can by appropriate action resolve interstate controversies involving alleged failure to comply with compact terms on a question of their interpretation. Therefore, a compact commission's powers must necessarily be limited to those of an administrative nature.

More and more we find it necessary to correlate federal and state interests in, and jurisdiction over, interstate waters. In some instances certain federal as well as state jurisdiction must be recognized, and since the federal government is not a necessary party to a compact, this can be accomplished as was done through Articles X and XI of the recent Republican River Compact, which provides as follows:

"ARTICLE X

"Nothing in this compact shall be deemed:

"(a) To impair or affect any rights, powers or jurisdiction of the United States, or those acting by or under its authority, in, over, and to the waters of the Basin; nor to impair or affect the capacity of the United States, or those acting by or under its authority, to acquire rights in and to the use of waters of the Basin;

"(b) To subject any property of the United States, its agencies or instrumentalities, to taxation by any State, or subdivision thereof, nor to create an obligation on the part of the United States, its agencies or instrumentalities, by reason of the acquisition, construction, or operation of any property or works of whatsoever

kind, to make any payments to any State or political subdivision thereof, state agency, municipality, or entity whatsoever in reimbursement for the loss of taxes;

"(c) To subject any property of the United States, its agencies or instrumentalities, to the laws of any State to any extent other than the extent these laws would apply without regard to this compact.

"ARTICLE XI

"This compact shall become operative when ratified by the Legislature of each of the States, and when consented to by the Congress of the United States by legislation providing, among other things, that:

"(a) Any beneficial consumptive uses by the United States, or those acting by or under its authority, within a State, of the waters allocated by this compact, shall be made within the allocations hereinabove made for use in that State and shall be taken into account in determining the extent of use within that State.

"(b) The United States, or those acting by or under its authority, in the exercise of rights or powers arising from whatever jurisdiction the United States has in, over, and to the waters of the Basin shall recognize, to the extent consistent with the best utilization of the waters for multiple purposes, that beneficial consumptive use of the waters within the Basin is of paramount importance to the development of the Basin; and no exercise of such power or right thereby that would interfere with the full beneficial consumptive use of the waters within the Basin shall be made except upon a determination, giving due consideration to the objectives of this compact and after consultation with all interested federal agencies and the state officials charged with the administration of this compact, that such exercise is in the interest of the best utilization of such waters for multiple purposes.

"(c) The United States, or those acting by or under its authority, will recognize any established use, for domestic and irrigation purposes, of the waters allocated by this compact which may be impaired by the exercise of federal jurisdiction in, over, and to such waters; provided, that such use is being exercised beneficially, is valid under the laws of the appropriate State and in conformity with this compact at the time of the impairment thereof, and was validly initiated under state law prior to the initiation or authorization of the federal program or project which causes such impairment."

Therefore, supplemental federal legislation is absolutely necessary to bind the United States and its agencies and instrumentalities. To date we have no United States Supreme Court decision holding that mere assent by the federal government and its agencies can in any way bind it or them. The Boulder Canyon Project gives us ample precedent supporting the power of Congress to effectuate the provisions of Article XI of the Republican River Compact above set forth. I believe it a fair statement to say that the particular formula worked out in the Republican River Compact can and will serve as the most sensible and effective method to be followed in compacts yet to be made in the various river basins in attempting to prevent clashes between federal and state jurisdictions. In fact, this formula has already been used in the Belle Fourche Compact between Wyoming and South Dakota.

In a general way, it can be said that compacts of twenty-five years ago, and until the last few years, have been very helpful in providing for an amicable division of water between states and have eliminated many causes which would otherwise have led to disputes and litigation. However, in more recent years extremely troublesome and difficult problems have arisen because of the clash between federal and state jurisdictions. Today we face multiple use projects in many basins, calling for intelligent coordination of plans and programs of federal agencies engaged in the work of water resource development. While domestic, irrigation and industrial uses of water are controlled and regulated in the West by state laws, the control of water in the interest of navigation comes under federal jurisdiction by virtue of the Commerce Clause of the Constitution, and the recent interpretation of this clause by the federal courts, as well as its application by federal agencies under various congressional acts, has been extended to cover flood control and hydroelectric production. These developments, coupled with the fact that future water projects, particularly in the West, will no doubt be federally financed, present most difficult problems to compose, and it is very necessary that compact terms should be imposed on federal agencies and that provisions be made insuring recognition by the federal government of applicable state laws. Many interesting and intricate problems must be faced and solved by the states of the Missouri River Basin when Congress passes the recently introduced bill granting permission to negotiate a compact in that basin.

A real and serious argument is brewing at this time which emphasizes the marked differences between federal and state viewpoints as to procedure and subject matter of future compacts. The states insist, and rightly so, that preservation of the integrity of state water laws is of paramount importance, whereas the federal government, through certain of its agencies and mouthpieces, insists that under no circumstances should states even initiate negotiations without the consent of Congress

being first secured; further, that federal participation in negotiations is absolutely necessary, whether or not federal interests are involved, as well as federal representation on the administrative commission when the compact has been finally consummated. And finally, the federal theory which is most dangerous and uncalled for, namely, that the federal government owns and has the exclusive right to control and administer all of the unappropriated waters in our western states. This last federal viewpoint, which to me is absolutely un-American and unconstitutional, must be forever stubbornly and successfully resisted by every state.

In conclusion, permit me to make a personal observation which goes to the very existence of our form of government. Regardless of what state we are from or what our party politics may be, we are all deeply and seriously concerned over the rapid development of centralized government and destruction of state's rights. If states were able to settle interstate differences with reasonable dispatch and with a minimum of litigation, the main excuse upon which the federal government relies to inject itself into state's affairs and attempt to take over strictly state functions would not arise. If our states are to maintain their quasi-sovereignty and independence, they must continue to demonstrate the fact that they can shoulder their own responsibilities and get along in a peaceful manner with each other.

To the seventeen western, so-called Reclamation States, water for beneficial consumptive use is their life blood. Judicial process cannot envision future development programs and provide by a declaratory judgment equitable apportionment of unused waters. The conference table offers the only safe and intelligent solution.

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A few years ago, while sitting as a lawyer-spectator in Justice Court in a small mining town, presided over by a very Irish, and considerably inebriated Justice of the Peace, I witnessed the following incident.

The justice had just finished listening to a civil case, without benefit of jury, and in which neither of the contesting parties had counsel. The evidence closed, the court declared a momentary recess while he dipped his head behind his large desk, and took another nip from his bottle there concealed. Straightening up in his chair again, he declared himself ready to announce his judgment.

"Judgment for the defendant," he said.

Whereupon the plaintiff jumped to his feet, and angrily said, "But Judge, that isn't what you told me you were going to do last night at your house."

The Judge replied, "Aw, ye make me tired. Court wasn't in session when I told you that."

JAMES M. NOLAND in *The Docket*.

# DICTA

*Published monthly by the Denver and Colorado Bar Associations.*

20 cents a copy $1.75 a year



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Editorial matters of the Denver Bar Association, to Dicta, George A. Trout, Editor-in-Chief, 214 State Capitol, Denver 2, Colo.

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## HONOR ROLL

Members of the Denver Bar Association Who Have Lost Their Lives in the Service of the United Nations

**Alvin Rosenbaum.** First Lieutenant, United States Army Air Forces, August 2, 1943.

# Roberts' Rules of Order

BY NORRIS C. BAKKE*

I did not choose this title for the sole purpose of misleading you into a hopeful state of better informing yourself in the field of parliamentary procedure, nor do I want to convey the impression that the court of which I now happen to be a member has suddenly awakened to a new lack of order in its judicial processes.

My use of the subject is the result of what I hope is a proper application of what is known in literature as poetic license. If I am wrong in assuming that what I write is literature, forgive me. Anyway, the rules

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