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IN TRIBUTE



DELPHUS EMORY CARPENTER

DELPUS EMORY CARPENTER "THE SILVER FOX OF THE ROCKIES"

DANIEL TYLER[†]

When the United States Supreme Court ruled in 1938 that vested water rights in the states were subject to the terms and conditions agreed to in interstate water compacts,¹ engineer Ralph I. Meeker, wrote to congratulate Delph Carpenter in a letter in which he referred to his long time friend as the Silver Fox of the Rockies. Meeker liked to call himself the lone wolf. The two men had worked together on many interstate compacts, and they respected each other's talents. Meeker knew that the Court's decision validated Carpenter's interstate compact work, laying to rest future challenges by private interests who believed their water rights could not be qualified by interstate agreements.

By 1938, Carpenter had been bed ridden for four years with symptoms of Parkinson's disease. It is not completely clear how he contracted the disease that wracked his body, but his diaries indicate that he began to suffer from influenza-like symptoms in 1918 when the "Spanish Flu" was taking its toll on hundreds of thousands of Americans across the country. He first referred to his malady as a kind of muscular neuritis, causing pains in his neck and shoulders. Later he developed a hand tremor that became visible in his signature after 1922. By the early 1930s, he was having difficulty feeding himself. His throat tightened up, preventing all but whispered speech. His wife, Dot, served as his amanuensis, taking dictation so Carpenter could respond to the many queries he received about new compacts and the proper interpretation of those already approved by Congress. When the Parkinsonian symptoms were especially severe, Carpenter could only communicate with Dot by winking his eyes to spell letters. Through such efforts, Carpenter managed to stay in touch with the western water community. Speaking for many who came to appreciate his contributions, Colorado Congressman Edward T. Taylor sent a personal photograph and signed it to Delph Carpenter, "the father of interstate water compacts."

The phrase was certainly an accurate and just reflection of Carpenter's contribution to the West. Having grown up in a pioneer family that came to the Union Colony of Greeley in 1872, Carpenter soon became aware of the need to comprehend the nature of water rights as he worked on his father's irrigated farm north of Greeley. After graduation from Greeley High School, he attended the University of Denver to earn a law degree. His father, Leroy, told him that if he wanted knowledge of water law, he would have to write his own books, but Carpenter had already learned by experience that the

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1. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), *reh'g denied*, 305 U.S. 668 (1938).

doctrine of prior appropriation was sacred to the farmers in his area.

When he became the first native born Coloradan elected to the Colorado Senate, he brought with him a determination to defend the prior appropriation system at all costs. Because of his oratorical skills and his knowledge about water, the Colorado Assembly asked him to complete a report on the state's water supply. Many in state government had been shaken by the United States Supreme Court decision in *Kansas v. Colorado*.² The Court's ruling had suggested that contrary to traditional beliefs, Colorado and other basin of origin states might not own all the water flowing in their rivers. Instead, said the Court, a doctrine of "equitable apportionment" should prevail between states sharing the same surface water. Carpenter's report, delivered to the Assembly in 1911, emphasized the importance of defending the priority doctrine and establishing a "Defense Fund" to withstand expected interstate litigation.

But in the moment of his most unbending commitment to prior appropriation, Carpenter's thoughts on water changed. To his everlasting credit, he saw the *Kansas v. Colorado* decision as a "firebell in the night." If the Court was saying that Upper Basin states of origin would have to share their water with neighbors, and if there was an implication that states operating under the prior appropriation doctrine would have to honor the first-in-time, first-in-right principle in their relations with one another, Colorado would be forever weighed down by the "servitude," or obligation, to provide water to neighboring states who had earlier priority dates and who most probably had the potential to expand economically much faster than Colorado.

Kansas v. Colorado called for an imaginative response. Carpenter, a student of the Constitution with a philosophical opposition to the federal government's expanding powers after World War I, interpreted the Court's decision as encouragement to the states to make treaties on interstate streams, so long as such agreements were submitted to Congress for approval.³ The worst thing that could happen, he believed, was for Colorado to do nothing and let the Court impose the principle of priority across state lines. Consequently, while he continued to maintain a resolute commitment to prior appropriation as the most equitable principle in intra-state water matters, he embraced the compact theory as a way to (1) enable western states to settle their own conflicts; (2) maintain state control of their water; and (3) keep the federal government at a safe distance until compacts were written and approved by Congress. Only at that time, Carpenter believed, should the Bureau of Reclamation and Army Corps of Engineers begin construction of their projects, thus avoiding the kind of problems that had occurred on the North Platte in 1909 and the Rio Grande in 1916.

Both these rivers originate in Colorado. Construction downstream of Pathfinder Reservoir in Wyoming on the North Platte and Elephant Butte Dam downstream on the Rio Grande in New Mexico had placed Colorado in the position of having to provide water to federal projects in neighboring states before any discussion of Colorado's future needs.

2. *Kansas v. Colorado*, 206 U.S. 46 (1907).

3. U.S. CONST. art. 1, § 10, cl. 3.

The Elephant Butte project was especially galling, because its authorization came with an embargo on additional development of Rio Grande waters in Colorado's San Luis Valley, a prohibition that remained in force until 1925. Carpenter could clearly see that if this pattern were to continue on the South Platte, La Plata, Republican, Arkansas, Colorado, and other interstate streams, Colorado would be presented with a *fait accompli*: a huge burden to provide water to other states that had established prescriptive claims through diversion and beneficial use. Under this scenario, Colorado would be forever in court defending its rights and expending large sums of money in a "war" that might have been avoided by compact negotiation. Although he may have exaggerated the situation, Carpenter saw that Colorado would be under constant attack. He equated the compact process to the diplomatic efforts to which civilized nations subscribe as a first step in their efforts to avoid war.

With this commitment to negotiation, and as Colorado's duly appointed interstate streams commissioner, Carpenter first tried out his compact approach in 1916 when Nebraska sued Colorado for a guaranteed supply of water from the South Platte River. Although his life was complicated by Wyoming's challenge to Colorado on the Laramie River,⁴ where he served as lead counsel, Carpenter poured himself into research on the South Platte. He found a Nebraska historian who could help him locate living pioneers who remembered the South Platte as a much more unreliable stream prior to the beginning of irrigation upstream in Colorado. He interviewed dozens of these freighters, hunters, and soldiers. With affidavits in hand, he overcame Nebraska's political bias against Colorado and negotiated a compact, signed in 1923, that allocated a division of water between upper and lower basins. It was an important principle used to even greater benefit in later negotiations on the Colorado River.

1922 was the year of the Colorado River Compact, for which Carpenter is best known, it is also the year of decision in *Wyoming v. Colorado*.⁵ Five months prior to meetings of the Colorado River Compact Commission in Santa Fe, the United States Supreme Court ruled that if two states recognized the doctrine of prior appropriation, that doctrine should apply across state boundaries in a dispute over interstate water. The decision was a crushing blow to Carpenter, but he viewed it in a positive light. After all, the Court had recognized Colorado's right to an equitable share of water on the Laramie River, although it found Wyoming's claims to that river senior. The decision meant, Carpenter argued, that priority by date was not the only measure of an interstate water right; equity, as emphasized in both the *Kansas* and *Wyoming* decisions, required the recognition of a state's potential to grow and develop and to do so without feeling the need to divert water prematurely in a race that would exhaust local treasuries.

It was this interpretation of *Wyoming v. Colorado* that he took with him to Santa Fe in the fall of 1922 when he met with commissioners of the Colorado River Basin states and the federal representative, Herbert Hoover. At Bishop's Lodge, adjacent to the home and chapel of New Mexico's first Catholic Bishop Jean Baptiste Lamy, the seven

4. *Wyoming v. Colorado*, 259 U.S. 419 (1922).

5. *Id.*

commissioners, under Carpenter's leadership, and with considerable help from Hoover, negotiated the Colorado River Compact. After failing in their attempt to divide the river according to estimates of each state's maximum irrigable acreage, Carpenter drew up a plan based on a fifty-fifty division of the river at Lee's Ferry. Because the Colorado River received most of its flow above Lee's Ferry, it seemed to him that the Lower Basin states (Arizona, California, and Nevada) should be willing to accept a compact based on the Upper Basin states' (Colorado, Wyoming, Utah, and New Mexico) obligation to deliver a certain amount of water to Lee's Ferry over a ten year period. The big question was, how much water? Heated discussions ensued, but the commissioners eventually adopted the fifty-fifty idea. The Upper Basin agreed to deliver 75,000,000 acre-feet over a ten year period, calculated using a running average. Experts who advised the commissioners believed the Colorado River flowed at an average annual rate of 20,000,000 acre-feet, about one-third more than its proven average. When Arizona showed signs of backing out, it was agreed that the Lower Basin could divert an extra 1,000,000 acre-feet annually, a recognition, in fact, that Arizona had already diverted for consumptive use all the water in the Gila River. The Colorado River Compact was signed by all seven commissioners on November 24, 1922, at the old Spanish Palace of the Governors in Santa Fe. Three days later, again as a result of Carpenter's work, New Mexico and Colorado signed a compact governing allocations of the La Plata River.

Because the political winds shifted in Arizona during negotiation of the Colorado River Compact, the Arizona legislature refused to ratify the document its commissioner had negotiated in good faith. Additional ratification problems developed, especially in California where Congressman Phil Swing wanted a guarantee of a dam on the lower river before California would ratify. Carpenter played an important role in the six year long ratification squabble among the states, all of whom recognized that Congress would not authorize construction of a dam at Boulder (or Black) Canyon until the states had completed the ratification process. Because he believed Arizona needed time to put its political house in order, Carpenter suggested the compact go into effect with six, rather than seven, ratifications. The states approved this change. Early in President Herbert Hoover's first year in office, and under authority of the Boulder Canyon Project Act, Congress approved funds to begin construction of Hoover Dam.

Construction began in 1931 and ended in 1935. One of the greatest engineering projects of the United States would not have happened without the Colorado River Compact. California's Imperial Valley was protected from future floods, and hydroelectric power generated at the dam site contributed significantly to the success of war industries in the Southwest and to the post-war growth of this area after 1945. Carpenter did not end his compact work in Santa Fe. He provided much of the groundwork leading to the 1938 Rio Grande Compact, and he contributed to compact discussions on the Arkansas River, the North Platte, and the Upper Colorado River Basin. In 1933, however, with Democratic Governor Edwin C. Johnson in office, Republican Carpenter was seen as an expense the state could ill afford. Johnson fired his interstate streams commissioner and assigned Carpenter's duties to state engineer Michael C. Hinderlider. The

state's budgetary constraints were such that his removal came with little warning and without a pension. Debilitated physically by his disease, and emotionally drained by Johnson's precipitous act, Carpenter retired to his home in Greeley, depressed by a fear that his accomplishments would be relegated to the trash heaps of history.

He was wrong. His colleagues wrote constantly to thank him for his pioneering work in interstate water compacts. Even Governor Johnson underwent a "burning bush" experience following his election to the United States Senate. As a member of the committee on irrigation and reclamation, he spoke out on Carpenter's important achievements, and became a strong advocate of the states' rights views of his one-time interstate streams commissioner. The National Reclamation Association provided a tribute to Carpenter in 1943, and the University of Colorado awarded Carpenter its medal of service for work on interstate compacts.

Indeed, Carpenter left a proud legacy for the modern West. His work on the Colorado River Compact made it possible for Colorado and the other Upper Basin states to develop economically at their own pace. His opposition to federal agencies interested in constructing water projects to meet multi-purpose and maximum use goals was based on his belief that the system of dual government in the United States—federal and state—was established by the Founding Fathers to preserve a balance of state sovereignty and national security. If the federal government took control of the states' natural resources, they would upset this balance and create a situation that would involve the states in endless litigation. Far better, he believed, was a federal government participating in the negotiation process and responsive to state laws. The federal republic, as set forth in the Constitution, was sacrosanct. It could not survive if national centralization of power replaced state sovereignty.

Carpenter was a second-generation pioneer. There were far fewer virgin lands to open by the time he became an adult, and the intellectual life appealed more to him than the life of a farmer. That said, he was also a great proponent of pioneer values: hard work, individualism, strong family ties, local boosterism, and service to the state. He believed that society was progressing upward, and he lived the words of Colorado poet Thomas Hornsby Ferrill, who noted above the murals of the rotunda in Denver's capitol building, "This is the land where men shall fashion glaciers into greenness and harvest April rivers in autumn."

What Hoover wrote to him in 1929, right after Congress agreed to proceed with construction of Hoover Dam, was probably Carpenter's most appreciated accolade. "I am not so much interested in my worries," Hoover said, "as I am in expressing to you the feeling I have over the consummation of the Colorado River Compact. That compact was your conception and your creation, and it was due to your tenacity that it has succeeded. Sometime I want to be able to say this and say it emphatically to the people of the West."