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THE FIFTY-SECOND ANNUAL CONVENTION OF THE COLORADO WATER CONGRESS: COLORADO COMPACTS WORKSHOP

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DAY 1: WEDNESDAY, JANUARY 27, 2010

The Fifty-Second Annual Convention of the Colorado Water Congress's Colorado Compacts Workshop provided informative discussion on the history and current relevance of Colorado's interstate water compact obligations. The workshop consisted of four sessions.

Nicole Seltzer, Executive Director of the Colorado Foundation for Water Education ("CFWE") presented the first session. Ms. Seltzer introduced the newly-released CFWE's *Citizen's Guide to Colorado's Interstate Compacts* ("the Guide"), the ninth in a series of Citizen's Guides. The CFWE designed the Guide to provide a big picture understanding of compacts and their importance.

Ms. Seltzer explained that Colorado, as a headwater state, shares water with nineteen downstream states, as well as Mexico. Although this water originates in Colorado, the amount of water Colorado is entitled to use and consume within its boundaries is determined by nine interstate compacts (formed between 1922 and 1948), two memos of understanding, and two Supreme Court equitable decrees. For Colorado, the downside to its involvement in compacts is, of course, that it may not use all of the water originating within its borders. However, Ms. Seltzer points out an upside to Colorado's water compacts: Coloradans can use compact arrangements to promote certainty about how much water exists in the state and how Coloradans can preserve it in perpetuity.

The next session's speaker was Justice Gregory Hobbs of the Colorado Supreme Court. Justice Hobbs discussed the early legal background of water compacts, especially the Colorado River Compact. Justice Hobbs explained how early legal thinking regarding water in the Western States, especially in those states benefiting from the Colorado

River, involved a number of complex and sometimes conflicting legal perspectives. Under the equal footing doctrine and Colorado's state constitution, which rejected riparianism in favor of the doctrine of prior appropriation, Colorado has claim to title to all of the water arising within her borders. However, when Colorado's neighbor-state of Kansas entered the union, it used riparianism to govern its water. On the one hand, the federal government claimed rights to waters flowing interstate under the doctrine of equitable apportionment. On the other hand, federal laws, such as the 1866 Mining Law, suggested that each state could have its own water law. Additionally, Justice Hobbs stated that, when examining the legal background of water compacts, one must consider the Native Americans' "reserved rights doctrine." In 1908, the Supreme Court held in *United States v. Winters* that when the government created these reservations, it did so with a reserved amount of water rights recognizable by all states independent of use. For example, as Justice Hobbs noted, the Ute tribe has an 1868 reserved water right.

In 1922, in order to make sense of this "confusion" of early law, the United States Secretary of Commerce, Herbert Hoover, called negotiators from Arizona, California, Colorado, Nevada, Utah, and Wyoming to the first meeting of the Colorado River Compact Commission ("CRCC"). The CRCC negotiation was the first negotiated water compact of its size in the United States. The Boulder Canyon Project Act of 1928 ratified the 1922 compact, authorized construction of the Hoover Dam in the lower basin, and apportioned the lower basin's allotment of water among the states of Arizona, California, and Nevada. In 1948, the Upper Colorado River Commission apportioned the upper basin's allotment among Colorado, New Mexico, Utah, Wyoming, and a portion of Arizona. Ultimately, the Colorado River Compact allowed Colorado to use only one-third of the water that its watersheds produce. However, guided by the able representation of its commissioner, Delph Carpenter, Colorado won the perpetual right to take water from the Colorado River and distribute it to other parts of the state.

Next, a trio of water professionals spoke on the topic of "Administration of Colorado's East Slope Compacts: Case Studies on South Platte and Republican Rivers." The first speaker in this session was Peter Ampe of the Colorado Office of the Attorney General. Mr. Ampe focused on the Republican River Compact.

The Republican River Compact Administration ("RRCA") administers the Republican River Compact, effective 1943. The compact provides for the efficient use of the waters of the Republican River and its tributaries for multiple purposes, including the equitable allocation of what the compact calls a "virgin" water supply (or, water that is "undepleted by the activities of man") to the three states that share the Republican River Basin: Colorado, Kansas, and Nebraska. Drainage basin calculations help allocate virgin water—one modifies

the allocation if the amount varies more than ten percent each year. The compact allocates a total of 54,100 acre feet of virgin water to Colorado. Additionally, the compact has some unallocated waters that it gives to the first appropriator.

Mr. Ampe described Kansas's discontent with the regulation of the compact—an unease that it began to vocalize in the 1980s. Finally, in 1998, Kansas filed suit against Nebraska for overuse of the basin's groundwater. Kansas named Colorado as a defendant, but Kansas sought no relief from Colorado. In 1999, the Supreme Court appointed a special master to investigate the case. Nebraska eventually counterclaimed against Kansas and cross-claimed against Colorado, alleging that if all groundwater connected to the Republican River is subject to the compact's allocation, then Colorado had consumed more water per year than the compact had allocated it. In 2002, the special master negotiated a settlement in the case under which the states barred all claims going forward, stream-flow depletions caused by well pumping would be determined using a ground water model, and the compact's accounting would be done on a five-year running average. The final settlement included a procedure for bringing disputes to the RRCA that would involve nonbinding arbitration. Mr. Ampe suggested that this process helps states fully understand what the other compact states want and allows a neutral arbitrator to decide what is truly fair; in addition, the process could also help smooth more minor discussions, such as the placement of gauges. Since signing the agreement in 2002, Colorado has been out of compliance every year. Mr. Ampe suggests that this may well be because changes in use are not reflected in actual amount fluctuations for decades.

Mike Sullivan, Colorado Deputy State Engineer, spoke next about the Rio Grande River Compact. Giving a brief overview of the history of the compact, Mr. Sullivan explained that the Rio Grande Compact came about because of development along the Upper Rio Grande and the need to divide the upper Rio Grande water between Colorado, New Mexico, and Texas. The Upper Basin saw the construction of the San Luis People's ditch in 1852 and the appropriation of the first surface water right from the Conejos River in 1855. In 1866, the Rio Grande River had its first water right appropriation. From 1880 to 1890, the area experienced the most extensive development of surface water irrigation systems in the area with approximately 200 artisan wells drilled during that time. Downstream water users started experiencing water shortages, and by 1896, the Rio Grande had dried up. As a result, Mexico filed a complaint.

In 1906, the United States signed a treaty with Mexico to divide the waters of the Rio Grande. To allocate water between southern New Mexico and Texas, Congress authorized the Rio Grande Project that built the Elephant Butte and Caballo dams in 1916. From 1928 to 1937, Colorado, New Mexico, and Texas conducted a joint investigation to negotiate a permanent compact between the three states that would

reach all of their water needs from the Rio Grande. In 1938, the three states reached an agreement and signed the Rio Grande River Compact.

Mr. Sullivan continued discussing the basics of the Rio Grande River Compact, stating that the Compact has many objectives: it establishes the Rio Grande Commission; apportions the Rio Grande water between Colorado, New Mexico, and Texas; establishes delivery schedules for the states; and establishes credit and debit limits. The compact also eliminates obligations of the states during spill years, restricts the storage of upstream states in dry years, and allows for trans-mountain and closed basin project diversions.

Mr. Sullivan explained that in the beginning of the Rio Grande Compact, Colorado ran a credit and a little bit of a water debt. Then Colorado went into greater debt. In 1976, New Mexico and Texas told Colorado that the state was not living up to the compact, so Colorado starting honoring its obligations. Colorado curtailed water use in order to make deliveries. The state came out of debt in 1985 and since that year Colorado has had little debt.

The compact is an annual delivery obligation. The reservoir development never came to fruition so the compact is run future forward. Colorado must look at the forecast, including snowmelt, to figure out how much water the state thinks it will receive and how much the state will have to deliver. Mr. Sullivan concluded by saying that Colorado currently enjoys a good working relationship with the downstream states under the Rio Grande Compact.

Jim Hall, Division Engineer for Water Division 1, concluded the East Slope Compacts Administration Primer with a presentation addressing the South Platte River Compact. In contrast to the Rio Grande River Compact, the South Platte Compact only involves two states: Colorado and Nebraska. Mr. Hall stated that the South Platte Compact is similar to the prior appropriation system and is much more straightforward than other compacts.

The events leading to the South Platte River Compact started with a lawsuit from Nebraska concerning the Western Canal in 1916, alleging that irrigated farms in Colorado deprived Nebraska of water at the state line. The two states investigated the issue and came up with an agreement in 1923. Mr. Hall noted that there are several key provisions of the compact. First, Colorado has full right to the use of the flow in the upper section of the South Platte River, which is the portion of the river in Colorado that is upstream of the west boundary of Washington County. Second, Colorado has full right to use of the flow in the lower section of the river between October 15 and April 1. The lower section is the portion of the South Platte in Colorado that is between the west boundary of Washington County and the state line. The last key provision of the compact states that from April 1 to October 15 each year, Colorado must curtail all diversions of water in the lower section of the river that impact flows at the state line and whose priority dates are junior to June 14, 1897, when the flow is less than 120 cubic feet per

second.

There are also several lesser-known provisions of the South Platte Compact. One provision states that Colorado must make up flow shortfalls to Nebraska within 72 hours. In addition, Nebraska may use water diverted through Peterson ditch and other ditches in the Julesburg Irrigation District that flow to Nebraska. The compact also divides the waters of Lodgepole Creek (a tributary of the South Platte) at a point two miles north of the state line, with Nebraska having exclusive use of the water above and Colorado having exclusive use of the water below the division point. Finally, the two states can implement extra provisions under the compact should Nebraska build the Perkins County Canal near Ovid.

Mr. Hall also addressed why Colorado has to curtail only the flows in the lower section of the river. He stated two points: First, water rights senior to 1897 control the upstream portion of the river and in years when it matters there are rights that dry up the river four or five times above the point of the senior rights. Second, there are mainly 1882 and 1888 water rights in District 1 and mainly 1897 water rights in District 4. Because these rights irrigate and have return flows, the compact drafters chose to develop the compact the way that it is.

Looking back on recent years of the river flow, Mr. Hall stated that going into 2002 things looked good, but it was not long before it turned bad. Colorado had thirteen days total that the river was above 120 cubic feet per second. In 2008, it was still dry but it was much better than in 2002. The South Platte had a great year in 2009 and Colorado exceeded its compact requirement by quite a bit during that year.

In conclusion, Mr. Hall addressed the operational concerns of the South Platte River Compact. He stated that measurement concerns do exist and every change in flow changes the relationship between stage and flow; thus, Colorado has to measure the flow in Julesburg. Mr. Hall also said that Colorado does not have to curtail surface water rights to assure compact compliance; the reservoir is generally full so that is not a problem. Finally, Mr. Hall concluded by stating that it is a real challenge to assure that Colorado curtails in time in order to maintain the flow at 120 cubic feet per second or above.

The final presentation of the workshop was the "Legal Background for Litigating a Compact, Case Study: *Kansas v. Colorado*," presented by David Robbins, attorney for Hill and Robbins. Giving a brief overview of interstate compacts, Mr. Robbins stated that the compacts are both a contract and a law of the United States. Unless the compact is somehow unconstitutional, no court may order relief that is inconsistent with the express terms of the compact. The United States Supreme Court has no jurisdiction to resolve controversies between two or more states, including a dispute over a compact. Contract remedies are generally available to remedy a breach of a compact, including damages. Equitable remedies, such as specific performance, may also be available. Finally, states cannot enter into compacts without the

consent of Congress.

In 1907, Congress authorized the negotiation of a compact between Colorado and Kansas for the equitable apportionment of interstate rivers. The purpose of the Arkansas River Compact is to allocate consumption. The compact tells each state how much water it can consume; what each state is not entitled to consume has to pass by gravity downstream.

In 1948, the Arkansas River Compact Commissioners signed the compact and Congress approved it in 1949. Mr. Robbins explained that in 1984, the Kansas Commissioner felt that Colorado had breached its deal on how the state would administer the Purgatory project and consequently was depriving Kansas of water. The Kansas Commissioner hired engineers who conducted a study that suggested that there was damage to Kansas from winter water storage projects and post-project well pumping in the basin, as well as damage from the Purgatory project. Kansas told Colorado to shut down the projects.

By 1985, Kansas claimed that Colorado was in violation of the compact and requested an investigation. Kansas filed a complaint with the United States Supreme Court and the Court accepted the complaint in early 1986. Colorado and Kansas litigated the case from 1985 to 2009, during which there was a lengthy discovery period, five reports from the special master, four arguments before the Supreme Court, and over 270 days of actual trial. The Supreme Court entered a final decree in March 2009.

Mr. Robbins offered several general truths about river compacts. First, all water compacts limit and allocate consumption. Second, it is hard to live with limits on consumption. Mr. Robbins stated that under most conceivable circumstances, when a compact controversy arises, Colorado will be on the defense. Furthermore, other states are not as impressed with Colorado and its growing need for water as Colorado citizens are themselves. Finally, for every compact there is a lot of folklore and coffee shop wisdom that is frequently off the mark about how the compact came to be and how the compact should work.

Next Mr. Robbins went over the process for dealing with water compact litigation. As a first step, the parties must learn the applicable law and remember that Colorado's internal law may be relevant and can work against you. In addition, it helps to learn the history; it is beneficial to hire a historian and to study the state's own records of the negotiations and subsequent interactions. Lawyers must review the public records in the other state(s) and review the public records of federal agencies, including those in the National Archives and the Library of Congress. Third, the lawyer must learn the facts by studying what has occurred in his or her state that has raised the ire of his or her neighbor. Assemble all the available information, including but not limited to climate data, stream flows, diversion records, water rights decrees, well records, pumping data, and land use data. Last, in water compact litigation, each party must determine the best tools to use. It is

important to decide whether to model or not to model, what techniques are best for finding missing data, and the appropriate equations to estimate the unmeasured or the unknown. The lawyers must also determine the tools for discovery, pre-trial maneuvers, trial to the Master, and exceptions to the Supreme Court.

Talking specifically about *Kansas v. Colorado*, Mr. Robbins discussed the trial phases that he experienced. First, Colorado had to determine liability by determining if the state did anything wrong. Next, Mr. Robbins needed to examine the extent of Colorado's wrongdoing. The Court needed to determine the extent of the remedy and if it would be a water remedy or a dollar remedy. In this case, the Master agreed with Kansas that a dollar remedy would be appropriate. Finally, Mr. Robbins determined how Colorado would ensure future compliance and what the costs would be.

In conclusion, Mr. Robbins discussed why interstate water compact litigation is so complicated. He stated that it is inevitability a basin-scale problem. There are data gaps, uncertainty, and multiple interests; there are also expectations and political requirements that play a role. On one hand, to admit you are wrong means that some citizens must give up water that they rely on, and that position is difficult to take. On the other hand, once the sense of outrage rises, it is hard to accept less than what you have convinced your water users and politicians is fair. Lastly, there is a lot of money at stake. For example, Mr. Robbins explained that in *Kansas v. Colorado*, Kansas originally wanted $300 million in damages. Colorado reduced its damage request to $68 million dollars, and, ultimately, the Court awarded Kansas $21 million. Kansas also claimed about $11 million in costs, of which the Court awarded the state $1 million.

In sum, the Colorado Compacts Workshop of the Colorado Water Congress Fifty-Second Annual Convention provided an informative discussion of Colorado's interstate water compacts.

The sessions included an overview of the Citizen's Guide to Colorado's Interstate Compacts, a discussion of the legal background for creating and litigating a compact, and a primer on east slope compact administration. The workshop provided great insight into the historical and legal framework used to develop and maintain Colorado's interstate water compacts.

Sarah Felsen and Tracy Taylor