
Chapter 2: The Legal & Institutional Setting

INITIAL DRAFT 2.2: Interstate Compacts and Equitable Apportionment Decrees

Colorado is a headwaters state from which all major rivers flow outward to downstream states, all of which place demands upon the water that reaches them. As Colorado and the downstream states developed increased use of those rivers in the late nineteenth and early twentieth century, disputes arose among the states regarding the authority of one state to control use of an interstate stream within another. Initially, downstream states sought to resolve those disputes through litigation conducted before the United States Supreme Court. Two cases decided by that court persuaded Colorado's water leaders that formal arrangements were necessary to fairly apportion the use of interstate streams, and that negotiation presented a better option than litigation to achieve that apportionment.

In the 1907 case of *Kansas v. Colorado*, arising from the contention that water users in Colorado were depriving users in Kansas their accustomed share of flows in the Arkansas River, the Supreme Court announced the doctrine of equitable apportionment. The doctrine provides that the principle of "equality of right" should apply to determine how the states should share the river, with the result that each should receive equal benefit. The court dismissed Kansas' claim because it could not show sufficient injury from Colorado's diversions but allowed Kansas to bring a new action in the event of a "material increase in the depletion of the waters of the Arkansas by Colorado." The result was that resolution of future disagreements about river use were left to the uncertain and expensive process of litigation.

A similar dispute over Colorado's proposed diversions from the Laramie River to the detriment of downstream senior appropriators in Wyoming led to the case of *Wyoming v. Colorado*. Resolving the dispute in Wyoming's favor, the Supreme Court ruled in 1922 that between two states utilizing the prior appropriation doctrine to administer water rights, the doctrine should be applied to determine relative priorities on an interstate basis. Thus the junior appropriators in Colorado were required to honor the senior water rights of the Wyoming irrigators.

One of the attorneys representing Colorado in the Wyoming litigation was a visionary who recognized that the law resulting from the *Kansas* and *Wyoming* decisions put Colorado's future at great risk. Delph Carpenter of Greeley, an experienced irrigation litigator as well as a rancher and former state senator, was appointed interstate streams commissioner in 1913. During the ensuing years his work as attorney for the state and negotiations with Nebraska regarding the South Platte River led him to formulate a theory of interstate compacts that provided guidance for the nine compacts ultimately signed by Colorado.

Carpenter became especially concerned about the Colorado River. California, a prior appropriation state, was growing rapidly and Carpenter feared that without an agreed apportionment California

farmers and municipalities would appropriate so much of the river that none would be left for future development in Colorado. To protect Colorado, Carpenter became the principle force in the negotiation of the Colorado River Compact, completed in 1922, and went on to negotiate additional compacts on behalf of Colorado. Others followed¹ guided by Carpenter's model, providing certainty to water users in all participating states that is rarely achieved through litigation.

The compacts are contracts among the participating states, authorized by the United States Constitution, that have been ratified by the legislatures of the states and the United States Congress. Thus ratified, compacts become both state and federal law. The nine compacts, along with two consent decrees, are fundamental elements of Colorado's water plan because they dictate how the water is shared among the states and thus impose limitations on use and future development of every stream in Colorado.

Overview of Colorado's Interstate Compacts and Interstate Equitable Apportionment Decrees

Colorado River Compact

The Colorado River Compact, signed on November 24, 1922, was the first interstate water compact approved by the U.S. Congress. Ratified by Congress in 1929 in the Boulder Canyon Project Act, it serves as the foundation for a complicated set of legal requirements regarding use and management of the Colorado River, known as the "Law of the River."

Generally, the compact apportions the right to consume water for beneficial use from the Colorado River between the Upper Basin states (Colorado, Utah, Wyoming, and New Mexico) and the Lower Basin states (California, Arizona, Nevada). The dividing point between the basins is Lee Ferry, Arizona. The compact recognizes each basin's right to the beneficial consumptive use of 7.5 million acre-feet of water per year in perpetuity. The Lower Basin's may increase its beneficial consumptive use by one million acre-feet per year. The compact also obligates the Upper Division states to "not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years." Anticipating a potential treaty between the United States and Mexico, the compact further specifies that the states are to address any obligation to deliver water to Mexico under a future treaty by using water surplus to the apportionments between the basins. If no surplus exists, the Upper and Lower Basins are to share equally in meeting any such deficiency. In addition to the apportionment provisions, the Colorado River Compact provides that present perfected rights are not affected by the compact and recognizes the states' respective authority to regulate and control the appropriation, use and distribution of water within their boundaries. Complete text of the compact can be found [here](#).

Upper Colorado River Basin Compact

¹ Carpenter also negotiated the South Platte River Compact and the La Plata River Compact. Other negotiators of interstate water compacts include: Clifford H. Stone (Upper Colorado River Compact and original Costilla Creek Compact); M.C. Hinderlinder (Rio Grande River Compact and Republican River Compact); J.E. Whitten (amended Costilla Creek Compact); Henry C. Vidal, Gail L. Ireland and Harry B. Mendenhall (Arkansas River Compact); and multiple negotiators (Animas La-Plata Compact)

The Upper Colorado River Basin Compact was signed by Colorado, Wyoming, Utah, New Mexico and Arizona signed on October 11, 1948, and ratified by Congress in 1949. The compact apportions the right to beneficial consumptive use of Colorado River water apportioned to the Upper Basin by the Colorado River Compact among the signatory states. The compact allocates the consumptive use as follows: Colorado 51.75%, New Mexico 11.25%, Utah 23%, Wyoming 14%, and Arizona 50,000 acre-feet per year. In addition to the allocation provisions, the compact outlines parameters for the Upper Division states to assure compliance with the flow obligation at Lee Ferry under the Colorado River Compact, and establishes a Commission to implement and administer the compact. Each of the four Upper Division states and the federal government may appoint a Commissioner to the Commission.

The Upper Colorado River Basin Compact also sets forth specific terms for apportioning the use among the states of interstate tributaries to the Colorado River, including the Yampa, San Juan, Little Snake and Henry's Fork. The compact also recognizes water use according to the La Plata River Compact and accounts for such uses as part of the Upper Colorado River Compact. Complete text of the compact can be found [here](#).

Arkansas River Compact

The Arkansas River Compact was signed by Colorado and Kansas on December 14, 1948 and ratified by Congress in 1949. This compact does not impose any fixed delivery obligation. Instead, it protects water uses in existence in 1949, and limits future development in either Colorado or Kansas to the extent it would cause any material depletion of useable stateline flow. The compact also addresses allocation of benefits from use of storage at John Martin Reservoir, which was completed in the same year the compact was approved. Specifically, the compact directs that John Martin Reservoir be operated for the benefit of both states and provides specific terms for operation. Based on the compact, storage periods are divided between winter (November 1 to March 31) when all inflows are stored and summer (April 1 to October 31), when generally only large flood flows are stored. The compact also establishes the Arkansas River Compact Administration with certain designated roles and responsibilities.

Based on its authorities and obligations, the Administration adopted the 1980 Operating Plan for John Martin Reservoir, which substantially modifies the storage and release of water from the reservoir, to improve the efficiency of water delivery to users in both states. Recent litigation in *Kansas v. Colorado* provides more specific guidance for administration of the river, within the framework established in the compact and Operating Plan. Complete text of the compact can be found [here](#).

Animas-La Plata Project Compact

Signed on June 7, 1969, this compact between Colorado and New Mexico is designed to inform the operation of the Animas-La Plata Project. This compact recognizes New Mexico's right to divert and store water from the Animas and La Plata Rivers with the same priority as those diversions under the Animas La Plata Project for Colorado users. The compact further clarifies that any use by New Mexico of these waters is counted toward its allocation under the Upper Colorado River Basin Compact. Complete text of the compact can be found [here](#).

La Plata River Compact

Following on the heels of the Colorado River Compact, the La Plata River Compact was signed by New Mexico and Colorado on November 27, 1922, and approved by Congress in 1925. The La Plata River Compact designates the location and operation of two gages on the river and defines the calculation for the flows of the La Plata River. This compact allows both states unrestricted use of the river between December 1 and February 15 of each year. During the rest of the year, each State shall have unrestricted use of the water when the Interstate gage station is greater than 100 cfs. When the interstate gage station is less than 100 cfs, Colorado must deliver half of the mean flow measured at the Hesperus gage Station (but no more than 100 cfs) to New Mexico. Additionally, the compact allows for alternating periods of use between the two states in times of low flow and specifies that minor deviations from the required water deliveries will not be considered a violation. Complete text of the compact can be found [here](#).

Republican River Compact

The Republican River Compact was signed by Colorado, Kansas, and Nebraska on December 31, 1942 and ratified by Congress in 1943. The compact quantifies the average annual “Virgin Water Supply” (defined as water within the basin “undepleted by the activities of man”) within the basin and its tributaries as 478,900 acre-feet of water per year. For beneficial consumptive use, the compact allocates from the Virgin Water Supply in the basin and tributaries 54,100 acre feet of water each year in Colorado, 190,300 acre-feet of water each year to Kansas, and 234,500 acre-feet of water in Nebraska. In addition, the entire water supply originating in the basin downstream from the lowest crossing of the river at the Nebraska-Kansas state line is allocated for beneficial consumptive use in Kansas. If the water supply of any sub-basin varies by more than 10 percent of the period of record used as a basis for the compact, the allocations also change by the same percentage.

Instead of setting forth principles for dispute resolution, the compact calls for each state to administer the compact through its respective water administration officials, and acknowledges that those three officials can, by unanimous action, adopt rules and regulations consistent with the compact. Consequently, in 1959 the states established the Republican River Compact Administration (“RRCA”). The three RRCA members by unanimous action compute each year the Virgin Water Supply within the Basin, and the beneficial consumptive use of each state. Under the accounting procedures established by the RRCA, Colorado’s allocation for beneficial consumptive use in the Republican River sub-basins under normal conditions includes 10,000 acre-feet from the North Fork of the Republican, 15,400 acre-feet from the Arikaree River, 25,400 acre-feet from the South Fork of the Republican, and 3,300 acre-feet from Beaver Creek. Kansas and Nebraska may each consume 190,300 acre-feet and 234,500 acre-feet of water, respectively.

Despite efforts to avoid litigation and promote interstate comity by entering into the Republican River Compact, the states have been involved in formal disputes regarding compact compliance and interpretation since 1999. Currently, the lack of unanimity regarding accounting procedures and compact compliance has formed the bases of several non-binding arbitrations and litigation pending before the U.S. Supreme Court. Complete text of the compact can be found [here](#).

Rio Grande Compact

The Rio Grande Compact was signed by Colorado, New Mexico, and Texas on March 18, 1938, and approved by Congress in 1939. The compact defines the boundaries of the Rio Grande River Basin and

establishes the operation of six gage stations and recorders near reservoirs built after 1929. The compact requires that Colorado deliver a certain amount of water at the New Mexico/Colorado state line annually based on an index schedule, and includes provisions for New Mexico to deliver certain amounts to Elephant Butte Reservoir based on a similar but separate index schedule. The compact envisions a “normal release” of 790,000 acre feet from Elephant Butte to irrigate lands in southern New Mexico and Texas and provide water to Mexico consistent with the 1906 Treaty. Additionally, this compact creates a system of water credits and debits, storage, spills, and releases from the Rio Grande Project at Elephant Butte and further places restrictions on storage within Colorado and New Mexico. The compact also establishes a Commission for compact administration purposes. Colorado’s State Engineer serves as Colorado’s Commissioner to the Commission. Complete text of the compact can be found [here](#).

South Platte River Compact

Colorado signed the South Platte River Compact shortly after the La Plata River Compact on April 27, 1923, but Congress did not fully ratify the compact until 1926. This compact allocates the waters of the South Platte River between Colorado and Nebraska. It relies on the west boundary of Washington County to separate the Upper and Lower Sections of the South Platte River within Colorado and establishes a gage at Julesburg to measure flow. The South Platte Compact gives Colorado unrestricted use of water in the Lower Section between October 15 and April 1 with several provisions relating to Nebraska’s canals. Between April 1 and October 15, the compact stipulates that Colorado must curtail diversions in the Lower Section by appropriators with decrees junior to June 14, 1897 when the mean flow as measured at the Julesburg gage is less than 120 cfs. Like the La Plata Compact, the South Platte Compact specifies that minor irregularities in water delivery will not constitute a violation of the compact. Complete text of the compact can be found [here](#).

Amended Costilla Creek Compact

Colorado and New Mexico signed the Costilla Creek Compact on September 30, 1944, and amended the compact in 1963. The Costilla Creek Compact is intended to establish integrated operations between Colorado and New Mexico for existing and prospective irrigation facilities and to equalize the benefits of the water and its beneficial use between the two states. The compact defines May 16 to September 30 as the irrigation season, designates October 1 to May 15 as the storage season, and prohibits direct flow diversions during the storage season. The compact further sets forth the amount of water to be delivered among the water users of both states, and provides for allocation of surplus flows and storage in reservoirs constructed after the compact took effect. Deliveries to water users in Colorado are to be made from flows of Costilla Creek downstream of where it leaves the mountains. Moreover, the compact allocates 36.5 percent of the usable capacity of the Costilla Reservoir to Colorado and 63.5 percent to New Mexico. The 1963 amendment to the compact allowed for a change in point of diversion for the Cerro Ditch, where delivery from Costilla Reservoir is made. A commission comprised of the State Engineers for both Colorado and New Mexico oversee the compact. Complete text of the compact can be found [here](#).

Laramie River Decree

The decree in *Wyoming v. Colorado*, 353 U.S. 953 (1957), permits Colorado to divert 49,375 acre-feet of water per calendar year, from the Laramie River and its tributaries provided that no more than 19,875 acre-feet per calendar year of that total amount of water may be diverted by Colorado outside

the Laramie River basin. Further, no more than 1,800 acre-feet can be diverted by Colorado after July 31st of each year for use within the basin. All waters diverted for use within the Laramie River basin in Colorado are restricted to irrigation use on those lands designated by the court at the time of the decree, while waters diverted for use outside the basin are not subject to that restriction. The waters of Sand Creek are specifically excluded from the operation of this decree. Complete text of the decree can be found [here](#).

North Platte Decree

The amended decree in *Nebraska v. Wyoming*, 534 U.S. 40 (2001), equitably apportions water in the North Platte River between Colorado, Nebraska and Wyoming. The decree limits Colorado's diversion of water from the North Platte River in Jackson County for irrigation of no more than 145,000 acres during one irrigation season (May 1st to September 30th) and from storing no more than 17,000 acre-feet of water for irrigation purposes between October 1st of any year and September 30th of the following year. The decree also limits total water exports from the North Platte River Basin in Colorado to no more than 60,000 acre-feet during any 10-year period. The decree does not affect or restrict the use or diversion of water for ordinary and usual domestic, municipal, and stock watering purposes. Complete text of the decree can be found [here](#).

Recent Developments [this section may need to be re-worked, or relocated to another section of the Water Plan, but the information contained herein should be included somewhere within Colorado's Water Plan]

In addition to the compacts and interstate equitable apportionment decrees described above, Colorado has remained actively involved in interstate and federal water matters. In some cases, developments between states must be handled by the Supreme Court. As a state to state controversy, all interstate compact cases go directly to the U.S. Supreme Court and inevitably result in expensive, protracted litigation. With this in mind, the last decade has seen an unprecedented amount of cooperation between the State of Colorado, the federal government, and downstream states. Their actions have allowed for many disagreements to be handled in a cooperative manner.

Within the Colorado River Basin, there have been extraordinary strides towards cooperation in the last several decades. For example, the Upper Colorado River Recovery Program and the San Juan River Recovery Implementation Program provide for the ability of Colorado to fully use its compact entitlements while striving to achieve the recovery of endangered fish species. These programs are further described in this water plan.

In 2007, the states navigated significant disagreement to collectively support the Bureau of Reclamation's Record of Decision on Interim Guidelines for Lower Basin Shortages and Coordinated Operation of Lakes Powell and Mead through 2026. Among other things, these guidelines: 1) set forth coordinated, operational protocols between Lakes Mead and Powell to allow the system to operate more efficiently during drought; 2) establish shortage guidelines in the Lower Basin; and 3) implement the Intentionally Created Surplus mechanism for banking water in Lake Mead.

Continued cooperative efforts have helped Lower Basin interest to use water more efficiently. Such efforts include the creation of Intentionally Created Surplus, the pilot operation of the Yuma Desalting Plant, and the construction and operation of Brock Reservoir.

Under the leadership of Secretary Salazar, the states and federal government have also continued to develop a working relationship with Mexico, resulting in Minutes 316-319 to the 1944 Water Treaty.

These Minutes identify and implement voluntary options for creating more system water, enhancing environmental values, providing Mexico access to storage in the United States, providing better management of drought for both countries, and establishing the foundation for developing and implementing cooperative projects for the benefit of both countries.

The Colorado River Basin States currently are collaborating on contingency planning to meet certain reservoir thresholds in the event of continued drought conditions; protecting power generation and ensuring the continued use and development of existing water supplies.

On the South Platte River, the three states of Colorado, Wyoming, and Nebraska are currently working with the Department of the Interior to collectively manage the river with the dual goals of endangered species recovery and water development protection. The Platte River Recovery Implementation Program has been in place since 1997, seeking to restore habitat, provide for increased stream flows, and encourage an adaptive management approach to river operations. This program is further described in this water plan.

Within the Republican River Basin, the state of Colorado continues to be involved with Colorado water users, as well as Nebraska and Kansas, to identify reasonable methods for future compact compliance. This includes negotiating, and in some instances litigating, appropriate changes to compact accounting procedures and implementation of new operations in the Basin.

On the Rio Grande, the state continues to work with issues related to groundwater administration through the establishment of basin sub-districts, and ongoing efforts to finalize groundwater administration rules for the basin. Additionally, the state is a named party to an interstate lawsuit, involving New Mexico and Texas, regarding compact administration.