

Appendix 214

**THE COLORADO RIVER COMPACT:
REPORT OF FRANK C. EMERSON, COMMISSIONER
FOR WYOMING**

To the Honorable William B. Ross, Governor, and to the Honorable Senate and House of the Seventeenth Wyoming Legislature.

SIRS: I have the honor to submit herewith for your consideration my report upon the Colorado River Compact as negotiated between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, including such explanation and comment as seems at this time proper.

Believing that a treaty based upon this Compact would inure to the lasting benefit of the State of Wyoming, it is my earnest recommendation that the Compact be ratified by appropriate action of your honorable bodies with the approval of the Governor.

Respectfully,

FRANK C. EMERSON,
Commissioner for Wyoming.

CHEYENNE, WYOMING, *January 18, 1923.*

(Mr. Emerson's report contains the full text of the compact, followed by comments. The text is omitted here, to avoid duplication. The comments follow.)

COMMENT

Chapter 120, Session Laws of Wyoming, 1921, sets forth in its title the purpose of negotiating a compact concerning the use and distribution of the waters of the Colorado River System, as follows:

AN ACT Providing for the appointment of a Commissioner on behalf of the State of Wyoming to negotiate a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, and between said States and the United States, respecting the use and distribution of the waters of the Colorado River and tributaries, and the rights of said States and the United States thereto.

By appointment of Governor Robert D. Carey, State Engineer Frank C. Emerson became the duly authorized Commissioner for Wyoming and represented this State upon the Colorado River Commission, which, on November 24, 1922, at Santa Fe, New Mexico, unanimously

subscribed to the Colorado River Compact. The statute referred to contains the following provision:

provided, however, that any compact or agreement so entered into by said States and the United States shall not be binding or obligatory upon any of the high contracting parties thereto unless and until the same shall have been ratified and approved by the legislature of each of said States and by the Congress of the United States.

In order that the material facts may be known, and a general understanding of the Compact reached by all interested, I take the liberty of presenting the following explanation and comment.

Physical situation.—At the end of the Mexican War a treaty was entered into between Mexico and the United States whereby Mexico ceded to the United States a great arid territory. A portion of this territory embraced the area drained by the Colorado River, the third largest river in America and the largest river in the arid West. The drainage area of this great river includes portions of what are now the seven States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming. The United States failed to acquire by the said treaty the territory surrounding the lower ninety miles of the Colorado River, and this stretch of river therefore remains in Mexico. The Colorado River problem therefore has an important international as well as interstate aspect.

The Colorado River Basin in the United States naturally divides itself into two great basins separated by hundreds of miles of deep barren canyon cutting through high and rough plateaus. The Upper Basin embraces areas in the four States of Colorado, New Mexico, Utah, and Wyoming, and these States furnish about 85 percent of the flow of the river. Millions of acres of land are irrigable in the Upper Basin, and possibilities exist for large developments of hydro-electric power. Throughout the canyon region separating the two basins large power possibilities also exist although it is impractical to divert water in amount for irrigation. The Lower Basin comprises areas chiefly in the States of Arizona, California, and Nevada, supplying only about 15 percent of the water to the river, but which have extensive possibilities for the use of water for domestic, agricultural, and power purposes. The agricultural and economic conditions in the Upper and Lower Basins are entirely different. Development of the water supply for the benefit of the Lower Basin will be much more rapid than for the Upper. Conflict of interest therefore arises between the two basins, and the logical plan of solution is an apportionment of water between them.

The Green River rising in the mountains of Wyoming is one of the most important tributaries of the Colorado River. The Little Snake is also a Wyoming tributary. These two streams drain about one-fifth the area of Wyoming, and furnish about 14 percent of the total

flow of the Colorado River System. Present irrigation from these streams in Wyoming cover areas of about 435,000 acres. Additional irrigation possibilities to the extent of 765,000 acres are estimated. We therefore have a possible total development of 1,200,000 acres upon Wyoming tributaries of the Colorado. The developments of the future will not be rapid, but will be none the less desirable as our projects become feasible. Wyoming has therefore looked with much concern upon the proposed large developments on the lower Colorado River that would establish priorities to the use of water from the river that might well cause an embargo against future developments in this State.

Wyoming's own contention in regard to the doctrine of the priority of appropriation was upheld by the Supreme Court of the United States in the now famous case of Wyoming vs. Colorado in reference to the use of water from the Laramie River. The following excerpt from the opinion of the Court illuminates the point:

The contention of Colorado that she as a State rightfully may divert and use, as she may choose, the waters flowing within her boundaries in this interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary, cannot be maintained. The river throughout its course in both States is but a single stream wherein each State has an interest which should be respected by the other.

By this, and other argument the Court definitely establishes the principle that "he who is first in time is first in right." Even though Wyoming may contribute a large supply of water to the Colorado River it would be entirely possible that the early developments in the Lower Basin would establish priority rights to the use of water that would place effective embargo against the more tardy developments in this State.

Adoption of Treaty Plan.—No other stream in the arid West affects so many states as does the Colorado River. Extensive additional uses of water, beyond the important uses now established, are proposed. Another element of material importance entering into the problem is that of the necessity of flood-control measures in order to relieve the menace of floods to the valleys upon the lower river. Conflict of interests between states in relation to these and other phases of the Colorado River problem have led to the adoption of the treaty plan of solution. Without an agreement between states there is little question but that the river system would be involved in litigation for years in event any large additional developments were attempted upon any section of the river. By treaty between states, following the ratification of the form of compact that has now been agreed upon, the way will be cleared for all practical developments that may be proposed.

Movement toward the end of securing a treaty between states was started at the meeting of the League of the Southwest, in Denver during August 1920. This Denver meeting brought to the forefront the important interests of the upper river which had received but little attention at the previous meetings of the League in California and Arizona, although these meetings had primarily been held for consideration of Colorado River problems. As a result of the Denver meeting a Commission was constituted as composed of the State Engineers, or similar officials, of each of the seven States in interest, together with the Director and Chief Engineer of the U. S. Reclamation Service, with the delegated purpose to study the physical phases of the whole Colorado River problem and suggest basis and principles for solution. After carefully considering the matter, this Engineering Commission, following further the plan proposed by the Denver meeting, drafted uniform legislation for the creation of a treaty or compact commission which became known as the Colorado River Commission. This Commission was duly authorized by proper legislative enactment by each State and by the United States, and the several representatives appointed.

Proceedings of Colorado River Commission.—The first session of the Colorado River Commission was held in Washington, D. C., in January 1922. No definite plan of solution of the complex problems presented could be determined at this meeting. It was then decided to hold a series of public hearings at different points in the Southwest in order to give all parties an opportunity to present their plans and projects, to advise the Commission as to their ideas of the form an agreement between the States should take, and otherwise be fully heard. Following this plan public hearings were held by the Commission during the month of March at Phoenix, Arizona; Los Angeles, California; Salt Lake City, Utah; Grand Junction and Denver, Colorado; and upon April 2 at Cheyenne, Wyoming. El Centro, California, and Las Vegas, Nevada, were also visited but no special hearings were held. During the series of hearings the Commission received a large amount of information and many suggestions as to a proper solution of problems involved. Adjournment was then taken by the Commission in order that all matter might be carefully considered by the members. The final meeting of the Commission was held at Santa Fe, New Mexico, beginning upon November 9, 1922. After eighteen days of continuous session, the Commission was able to unanimously agree upon a form of Compact, and in the historic Palace of the Governors, in the City of Santa Fe, the "Colorado River Compact" was subscribed to on the 24th day of November 1922 by all the Commissioners. Upon ratification by the several State Legislatures, and the approval by the Congress of the United States, this Compact will become a treaty between the seven States and will be the water law of the

Colorado River Basin so far as interstate matters are concerned, and the terms and provisions of the agreement apply. The document comprises some one thousand eight hundred words contained in eleven articles of agreement.

The Compact.—The form of Compact was only determined after a most thorough study of the many different phases of the problems presented in connection with the apportionment and use of the water of the great Colorado River System. It was the endeavor of the Commission to frame a document that would be as concise as possible without sacrifice of clarity. Every word and phrase was carefully considered with a view of obtaining a final form that would not be misinterpreted. One of the virtues of the Compact may well be found in the fact that it does not attempt to do too much. Certain broad basic principles to govern the apportionment and use of the waters of the Colorado River System are laid down by plain statements that can be understood by the laymen, without the necessity of complete information concerning the involved technical and legal phases of the whole problem. The following amplification upon the provisions of the Compact may assist toward a proper understanding.

Article I well states that—

the major purposes of this Compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River System; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies; and to secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters, and the protection of life and property from floods.

This article further presents the logical plan of dividing the Colorado River Basin into the two great basins arranged by nature, and making an apportionment of water to each.

Article II is devoted to terminology and contains definitions used in the Compact, as well as setting forth the uses of water that shall be included under the head of "domestic use." The several definitions, and the statement concerning domestic use, allow simplification as to verbiage and [sic] repetition in the Compact that might well have otherwise been confusing. The Colorado River Basin is divided geographically according to the lines laid down by nature into the "Upper Basin" and the "Lower Basin."

It will be noted that the term "basin" is to a certain extent a misnomer in each instance, as the term is used to mean not only the natural drainage area but also other territory to which water shall be beneficially applied. The Strawberry Project in Utah, and the Imperial Valley in California, now receive water from the Colorado River System. The legality of such diversions is definitely established by the principle laid down by the United States Supreme Court in the

Wyoming v. Colorado case. The practice of interwatershed diversion is extensively followed in Wyoming, and this State itself has limited possibilities for diversions of water from the Green River Basin. The proposed diversion from the Colorado watershed for use by the City of Denver and adjacent country is the only other diversion of any size. The natural limitations are such as to prevent any material amount of water from being diverted from the Colorado watershed, and the question need therefore give no concern.

For the purpose of making the Compact effective a political division of the interested States is made by grouping Colorado, New Mexico, Utah, and Wyoming as the "States of the Upper Division," and Arizona, California, and Nevada as the "States of the Lower Division," these groups representing, respectively, the interests of the Upper Basin and the Lower Basin. The term "Lee Ferry" is used to designate a natural point of demarcation upon the main Colorado River between the Upper Basin and the Lower Basin as located near the upper end of the Grand Canyon.

Article III contains the important provisions as to the apportionment of the waters of the river, the agreement as to the delivery by the Upper Division of certain amounts of water at Lee Ferry, and provision for further equitable apportionment of the unapportioned water of the Colorado River System whenever the need for same might become apparent. It was the endeavor of the Commission at its first session to arrive at a basis whereby a definite apportionment of the use of water could be made to each of the seven States. After extended consideration this plan was found to be impractical by reason of the facts that accurate determination could not now be made as to the possibilities of development in the different States, and agreement could not be reached upon any relative figures. By reason of the fact that the great conflict arises between the interests in the Upper Basin and the Lower Basin, it was finally agreed that apportionment between the two should form the basis of the Compact so far as the division of water was concerned. The apportionment of water allowed to each division is more than sufficient for the ultimate use of water in each so far as same is determined by the present estimates of the United States Reclamation Service. To Wyoming the grouping of the States into the two divisions appears of especial advantage as the possibilities of future development in this State, compared to the amount of water Wyoming contributes to the Colorado River, is greater than for any of the other three States of the Upper Division.

The average flow of water available for use in the entire Colorado River System is estimated at about twenty million acre-feet annually. Sixteen million acre-feet are allocated under the terms of the Compact, leaving a residue of four million acre-feet to be apportioned at a future date. Development in the Upper Basin will be much slower than in

the Lower Basin, but will be nonetheless desirable when same can be accomplished. The present apportionment of the use of 7,500,000 acre-feet per annum to the Upper Basin is "in perpetuity." These two words are of especial significance as their use means that Wyoming and the other States of the Upper Division will find water supply available for the developments of the future whenever our projects may become economically feasible of undertaking, and whether the time be in the near future or a century or more from now. The Lower Basin is allowed to increase its use of water one million acre-feet per annum in addition to the 7,500,000 acre-feet apportioned for its use by reason of the possible developments upon the Gila River, and the probable rapid development generally upon the lower river. This additional development is at the peril of the lower division as no provision is made for delivery of water at Lee Ferry for this additional amount.

The Compact provides that further apportionment of the use of water cannot be made prior to 1963. During the period of the next forty years Wyoming will have opportunity to develop as far as possible, and be able to determine any future possibilities of the use of the waters of the Green and Little Snake Rivers and tributaries that may not now be foreseen. Then when further apportionment is considered Wyoming will be in position to present any additional claims for use of water that may have been determined.

The States of the Upper Division agree that the flow of the Colorado River at Lee Ferry shall not be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years. This is an agreement that can surely be performed. Over 18,500,000 acre-feet of water is contributed annually to the river by the Upper Basin, and all of this amount could be once diverted and the return flow would still be sufficient to supply the specified delivery at Lee Ferry. The fact that the agreement for delivery of water is for a period of ten consecutive years places the burden of reservoir construction upon the lower river, and protects the Upper Division against years of low flow by full allowance for years of large discharge.

Article III further makes provision for the supply of water to Mexico in event it is determined that Mexico has any rights to the use of water of the Colorado River. The Commission was very careful not to place any provisions in the Compact that would embarrass the international situation, but at the same time it was felt necessary to provide for any grant that might be made to Mexico through treaty between that country and the United States. The international situation is therefore left in statu quo, and no opposition from Mexico to the Compact need therefore be expected.

Article IV provides for what may be termed "preferred uses" of water. As the Colorado River has ceased to be navigable in practical

fact the use of its waters for the purposes of navigation are made subservient to other uses. The use of the water for the generation of electrical power is made subservient to the use of water for agricultural and domestic purposes. Both of these provisions of the Compact are much in favor of Wyoming interests. The installation of great power plants upon the lower river will cause no call to be made upon us for water, and if Congress approves of the provision for the subserviency of navigation we need have no fear that the regulations of the War Department, or other agency at Washington, will interfere in any way with the use of water above.

Article V provides for the cooperation of State and Government officials in the gathering of authentic data in regard to the Colorado River Basin, and the determination of facts generally as they apply to the matter of Compact. As these officials act *ex officio* no new Commission is set up for the purposes described, nor will any expense of amount attach to the work.

Article VI sets up a plan for the solution of any claims or controversies that may arise between any two or more of the States in respect to the provisions of the Compact, or other matters concerning the use of water in the Colorado River Basin. By the appointment of Commissioners opportunity would be given for the consideration of such questions as might arise without resort to court action. As is true of this compact any action by such Commissioners would be subject to ratification by the legislatures of the States affected.

Article VII provides that the Compact shall have no effect upon the obligations of the United States to Indian tribes. This provision was deemed advisable by reason of the fact that the United States has heretofore entered into certain treaties with the different Indian tribes that must be respected, and can in no manner be affected by any later agreement.

Article VIII provides that all present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this Compact. It is, of course, true that all rights perfected heretofore could not be prejudiced in any way by a Compact entered into at this time. This provision is therefore but a statement of fact to reassure the many parties now having water rights in the Colorado River Basin that the validity of any rights established to date is not in any way threatened. *Article VIII* further provides that any claims appropriators or users of water in the Lower Basin might have against appropriators or users of water in the Upper Basin shall attach to and be satisfied from stored water, whenever storage capacity of five million acre-feet shall have been provided for the benefit of the Lower Basin. This provision was entered into the Compact by reason of the concern of the Imperial Valley in regard to the low-water situation that now exists. During two different seasons heretofore

it has been claimed by Imperial Valley that the supply of water at the intake on the Colorado River of the Canal serving this valley has been deficient, and that appropriators in the valley were entitled to more water under the priorities of their appropriations than they were able to obtain from the river. They therefore are of the opinion that they have a right of action against junior appropriators of water above. Any such right or claim they may have would not be affected by the Compact. This article of the Compact provides in effect, however, that such claims would cease whenever storage capacity to the specified amount is created by the construction of a reservoir or reservoirs.

Article IX speaks for itself in providing that any State will have the right of court action in enforcing any of the provisions of the Compact, or protecting any right established thereunder.

Article X also speaks for itself in providing for the termination of the Compact at any time by unanimous consent, further providing, however, that all rights that might have been established at the time of such termination would continue unimpaired.

Article XI provides that the Compact shall become effective only after approval by the seven State Legislatures and by the Congress of the United States. The article further sets forth the method of notification, concerning legislative action, between the several States and the United States. Further provision is made for the disposition and care of copies of the Compact.

Through these eleven articles of agreement it is believed that broad basic principles for the equitable apportionment and use of the waters of the Colorado River System will be established. The function of the Compact was not to provide for the construction of any particular project or projects. Its main purpose was to afford the means of clearing the way for any developments that may be practically undertaken at any time in any section of the Colorado River Basin, by removing cause for artificial restriction or interference from other sections of the river. This purpose a treaty between States based upon this form of Compact will no doubt accomplish.

It would seem that the interests of the upper States were well protected during the negotiations of the Colorado River Commission by reason of the personnel and qualifications of the four State Commissioners. Colorado was represented by the Honorable Delph E. Carpenter, and New Mexico by Stephen B. Davis, Jr., Associate Justice of the Supreme Court. Both of these prominent attorneys have had a wide experience in irrigation law and interstate water matters. Wyoming and Utah were represented by their State Engineers, both of whom are men of large experience in the practical field. The Colorado River Compact as a whole is the result of the labors of qualified legal, engineering, and other talent, all engaged in

a sincere effort to prepare a practical workable agreement that would largely solve the Colorado River situation. It is believed that the Compact will speak well for itself.

There is no question but that it is to the material interest of each of the States in interest to ratify the form of Compact that is now presented with the unanimous approval of the several State Commissioners. Wyoming particularly would have much to gain through the proposed treaty. It took the Supreme Court of the United States many years to decide interstate questions arising between only the two States of Wyoming and Colorado, upon the Laramie River, a comparatively small stream. While the main points in the decision of the Court in this case were in principle in favor of Wyoming, the practical effect has been found to be of but little advantage. As a matter of actual fact, both Wyoming and Colorado expended much of both time and effort in contesting an interstate water situation that finally brought but an empty victory to the winner. Then again, upon the North Platte River, Wyoming found larger developments in this State effectively prevented for a period of over twelve years because a proper understanding had not been reached concerning the water supply of this river and of its use between the States of Wyoming and Nebraska. An amicable agreement through cooperative effort finally brought solution. The Colorado is a great river in which many important and powerful interests are concerned, and presents problems of much greater complexity than those encountered upon these other two streams as mentioned. The Colorado River Compact offers a plan of basic principles which in effect will guarantee to Wyoming water supply sufficient for the development of all our possibilities to the limits that can be foreseen.

General Observation.—The ratification of the Colorado River Compact will be one of the most important and far-reaching questions to be considered by this Legislature. It is well then that all take an active interest and study the question thoroughly. It is not only proper, but it is in reality your duty, to become acquainted with the material facts, to subject the Compact to the most searching criticism, and to obtain such information as may enable you to act to the best interests of Wyoming.

Although the legal and technical phases of the Colorado River problem are many and important, there come out of the whole question certain fundamental principles applying to the situation which can be well understood by anyone interested. All can realize the natural physical situation which causes the division of the river into two great basins; that the economic conditions that apply to the two basins are entirely different, and that therefore a division of water between the two basins is a very logical plan; that the additional development of the Green River and the Little Snake River basins in Wyoming will

be very tardy as compared with development in California; that if proper agreement can now be had between the great conflicting interests upon the Colorado River this accomplishment would be most desirable for all.

We do need to clear our vision if only in the light of the protection of Wyoming interests. We need to realize that, instead of the Colorado River Compact being negotiated for the benefit of California as some would believe, the facts will in reality show that the compact idea was initiated by the Upper States for their own protection. Interests upon the lower river have consistently opposed the compact plan believing that their development would be rapid and assurance of water supply would come to them through priority of use. The real main incentive the lower river has in agreeing to compact grows out of the fact that they wish, and to a certain extent need, the support of the upper river, in order that their projects may be put over in the most competent manner through national legislation or otherwise. The Upper States' support must be largely contingent upon an agreement that will protect our water supply against the lower developments; therefore the conception of the treaty plan of solution of the Colorado River situation at the Denver meeting of the League of the Southwest in August 1920.

We cannot lose sight of the situation on the lower river with its economic phase that will force early development whether we support or oppose, and its humanitarian phase in relation to the flood menace. Whether we look at the question from the standpoint of our own selfish interests, or whether we have the desire to extend our reasonable aid to a serious situation, the question demands our attention. To properly protect Wyoming interests we must know conditions that apply to other sections of the river.

To our own State we have a dual responsibility: first, that we must be convinced that we are not jeopardizing any of the material interests of Wyoming either now or for the future; second, that we do not miss the opportunity that now appears to be knocking at our door. As serious a responsibility as is the first, the second is fully as important. Wyoming and the other Upper States are in a strategic position today that we will never have again. Once means is provided for the construction of a great control reservoir on the lower Colorado the need for support from the Upper States will be largely gone; once the Colorado River bursts through the man-made levees that stand between it and the great Imperial Valley, as it may now do any day, public sentiment will force a bill through Congress providing for relief. A great reservoir will come with its threat to establish priority to use of water and to build up powerful interests on the lower river that will not look with favor upon developments in the upper reaches. Despite any opposition we may present, either the economic or the

flood situation, or both, will force development upon the lower river. Then our real opportunity for a protecting agreement will have passed.

Presented to this Legislature is a comparatively simple workable agreement that will protect Wyoming interests in the water supply of the Colorado River. Let the Compact speak largely for itself through its provisions that must on the whole be clear to all who study the essential facts. For your consideration, however, I take the liberty to present the following general conclusions that are clearly apparent to me in relation to the Compact:

The Upper States, by the allocation of 7,500,000 acre-feet of water for annual use, have reserved to them for all future time an amount of water sufficient for all requirements.

The Upper Basin is now enjoying a use of water exceeding 2,000,000 acre-feet. This amount never reaches Lee Ferry. The Upper States are only agreeing to allow to pass Lee Ferry less than one-half the amount that now actually reaches that point.

The Upper States will have the privilege of once diverting all of the over 18,000,000 acre-feet of water supplied by the Upper Basin, and the return flow alone from this amount will provide the entire delivery at Lee Ferry; under the provisions of the Compact it will be noted that the Lower Basin is only assured the amount of 7,500,000 acre-feet at Lee Ferry.

By reason of the extent of our possibilities of development as compared with water supply furnished, Wyoming is in a very advantageous position by reason of being one of the group of four Upper States. According to figures presented by Colorado, based upon very liberal estimates of their future possibilities, that State will contribute 8,400,000 acre-feet of water per annum after all future requirements are satisfied. This amount alone would more than satisfy the delivery at Lee Ferry.

The menace coming from the development of great power projects upon the river below Wyoming will be removed, as under the Compact power will have no call on the use of water exercised in this State.

Navigation rights that might otherwise be asserted by the War or some other Department of our national government would not interfere with our water supply.

Such a situation as the Pathfinder Reservoir created upon the North Platte River would not be repeated upon the Colorado.

Wyoming would be in position to avoid the spending of large sums of money and years in the courts in an interstate water suit upon the Colorado River, such as we have experienced upon the Laramie.

Generally speaking, Wyoming would continue the full enjoyment of our own good laws and practice within our State and at the same time not suffer from embargo or interference from without.

These matters are presented to you for your careful consideration. Every proper criticism should be brought to bear upon the Compact, but at the same time its essential merits should not be overlooked. I am convinced that the Compact as a whole is very favorable to Wyoming interests. I commend it to you for the most earnest consideration, trusting that the action you may see fit to take may be for the lasting benefit of our State.