INTERSTATE COMPACTS

RESPECTING

WESTERN RIVERS
Water controls the destinies of the States of the Arid West. Water is necessary to reclaim the deserts and to maintain life and agriculture. States, cities and communities were founded and prosper by use of water. Preservation of control of water by the States is necessary to preservation of the States and their institutions.

Most western rivers are fed by waters from the snows and rains in the mountains but gradually disappear as they flow across arid plains. Others enter deep and inaccessible canyons, there to remain almost to the sea. Still others are but courses of sands which carry occasional torrents of silt-burdened storm waters for brief intervals. Nearly all these rivers flow into or through two or more States which control and administer uses of the waters as they flow. State boundaries are established without respect to the inter-
state rivers or the beneficial uses of their waters. Cities, towns and supporting communities in a State have been founded and exist upon use of waters and a continuation of such use, without regard to present or future necessities of other States which must use some of the waters to build and to sustain their own institutions. New cities and new communities increase the burden upon the common water supply. The limited supplies of water available necessitate restriction of uses to a relatively small number of appropriators whose rights of use are vested, controlled and administered according to local law. These local laws with each state both in principle and application. Growth of population and ever changing local conditions and necessities within each state require substitution of new forms of use and extinguishment of established usufructuary rights by exercise of eminent domain.
Ever increasing demands upon interstate water supplies coupled with hourly, daily and seasonal variations in stream flow and wide variations in water supply due to climatic conditions and many other causes, all lead to inevitable conflicts among the States and their inhabitants.

Early solution of these controversies, both present and potential, is of first importance with the interested States and with the nation. Water is the life-blood of statehood. Claim by one State, of prefered and exclusive right of control of waters rising or flowing within another State and rightfully belonging to the latter State, is an assertion of an exclusive foreign servitude upon its territory, the enforcement of which would be as detrimental as would be a permanent occupation of its stream by force. The strength of our nation is in the strength of the States. The weakening or destruction of any State is of first concern of the United
States. Interstate river controversies prevent growth and development of the States involved and give rise to a multitude of evil results. Actual present controversies of this character may be settled by interstate suits in the Supreme Court of the United States but that Court will not entertain potential controversies (—) and the magnitude and character of actual controversies cause their submission to masters appointed by the Court. Fortunately, the States may define their respective and relative rights in the waters of interstate streams without awaiting actual conflict, and may settle controversies by exercise of their inherent sovereign power to enter into compacts.

This inherent sovereignty of the States respecting waters is fundamental with any consideration of interstate river compacts.
OUR FEDERAL UNION

Our Nation is not only a Union of States but, most important, it is a Union of equal States. Equality among the States is the cardinal principle of the Union. Equality in power and sovereignty. No State or group of States is endowed with any power or attribute of sovereignty not possessed by each and all the other States. Each new State is equal in powers and sovereignty with each of the original thirteen States. The last to be admitted (Arizona and New Mexico) are endowed with all the powers and attributes of sovereignty possessed by any of the original thirteen. The original States existed before the formation of the Union. Equality among the States requires that, all the newer States admitted since the formation of the Union, in legal effect, existed as free and independent States before the Constitution. In other words, the rights, powers and jurisdiction of each
new State, upon admission, related back to the formation of the Union. The new State did not enter the Union as a weakling or subservient but in all the strength and vigor of a State existant at the time of the Declaration of Independence. Any attempt to provide otherwise by the act of admission would have been void and ineffectual. It came into the Union not as a new State, but rather, as a State which had always existed as a State.(-)

The act of admission served to pass to the new State the territory, waters, jurisdiction, dominion sovereignty and all the attributes of statehood, coequal with the other States, which in effect had been held by the United States in trust for it since the formation of the Union. (-) The Act of admission was not a grant of statehood but, rather, a recognition of a State which had existed since the Declaration of Independence. All measures taken by Congress for its government while in a territorial
state, were nullified by such admission. Otherwise, the State would not have been admitted upon equality with the other States of the Union.(-)

No grant from the United States to the new State of the waters and other property, was necessary to pass title, dominion and sovereignty already belonging to the State. The State took over its own property and any grant would have been superfluous.(-)
THE ORIGINAL STATES

The States admitted to the Union since the adoption of the Constitution, commonly termed the "new States", being co-equal with the original thirteen States, a definition of the powers of each of the original thirteen is a definition of the powers of each and all of the remaining forty seven, old and new alike.(-)

Most of us are citizens of a "new State" which has passed through the territorial status, and we are prone to an improper conception of statehood. We are inclined erroneously to regard each State as the recipient by grant from the federal government, of inferior and subordinate sovereignty and erroneously to assume that all powers were dereigned from the United States. The term "State" and the term "nation," are synonmous. A nation such as France is a State. As we shall more fully observe, each
State of our Union, old and new alike, is an independent nation with full national sovereignty, except for those powers and attributes granted by the forty-eight States to the United States as expressed by the Constitution. (-)

With the Declaration of Independence, each of the original thirteen colonies became a separate and independent State or nation, possessing all the inherent sovereignty of any other nation. These thirteen independent nations first formed a confederacy and, thereafter, created the United States of America to which the States granted only those powers enumerated by the Constitution and the States specifically reserved to themselves and to the people, all powers not so enumerated. (-) These thirteen original States did not receive their powers from any foreign nation and could not receive them from the United States of America, not then created. It required no foreign source of grant.
Each independent State of itself and of its own right, possessed all powers and sovereignty inherent with every other independent nation of the earth. Each was accountable to none of the other twelve or to any foreign power. Each stood alone with all the complete and inherent sovereignty of a nation. Each so remains except for those powers granted by all the States to the United States, or prohibited the States, by the Constitution. Admission of a State to the Union is rather a joining by an already self-existent State than the creation of a new one.
TITLE OF WATERS

An independent nation has complete sovereignty respecting its waters navigable and non-navigable, to the exclusion of all other nations, except as voluntarily modified by treaties. It may wholly exhaust the waters of its streams. Foreign servitudes are not recognized. One nation cannot interfere with the waters of another nation or withdraw the same or claim a preferred right to the use thereof, by prior appropriation or otherwise. So to do would make the latter nation subservient to a dominant servitude for benefit of the other nation.(-)

Each State of the Union, regardless of time of admission, owns the waters of the streams within its borders, both navigable and non-navigable, and has authority to establish for itself such rules of property as it may deem expedient with respect to such waters and the ownership of the lands forming their beds and banks;(-) subject however, in the
case of navigable streams, to the paramount authority of Congress to control the navigation so far as may be necessary for the regulation of commerce among the States and with foreign nations;(-) and subject, further, to the rights of neighboring States to demand equitable apportionment of the waters of those of its streams which are interstate in character.(-)

With the exceptions noted, which hereafter are discussed, each of the original thirteen States of the Union possesses the exclusive property and dominion of an independent nation in respect of its waters. Congress is without authority. It may use such waters as it may choose. It may wholly exhaust the same. It may provide its own laws and rules respecting uses of such waters by its inhabitants and for administration of such uses, upon which rules and laws are founded the usufructary "rights" of the water users.

It is required to follow no established doctrines or systems
of water laws and regulations. It may change such laws to conform with its changing necessities, at its own election. Laws and rules of administration of other States have no force or effect within its territory. No other State or its inhabitants may claim servitudes upon its territory or waters without its consent. The sources from which its territory was derived are immaterial. It may prevent withdrawal of its waters by other States and it may abolish established withdrawals regardless of contracts with its inhabitants of of effect upon "vested rights" and without compensation. It is bound to yield to none. It may keep its waters and no one may ask the reason for its will.

Each of the States, east or west, which has joined the Union since its formation and commonly termed "the new State" possesses the same property, dominion and sovereignty respecting its waters as those possessed by each of the original thirteen States. Were it otherwise, the State would not
have joined the Union upon an equality with the other States. With many of these States water is the basis of life and statehood and control of water is control of autonomy. Like the original States, each of the newer States, in virtue of its inherent sovereignty, need yield to none and may keep its waters and give no one a reason for its will. (-)
WATERUSERS

The rights of the inhabitant of a State to use waters of his State, are such, and only such, as his State grants to him by local law. These are mere rights of use and apply only to waters belonging to his State including the State's equitable portion of the waters of its interstate streams. Such rights do not attach to waters belonging to other States, or to their share of the waters of such interstate streams. The State retains ownership of the water. As such owner it may establish, for itself such laws respecting the uses of its waters as it may elect. It may change its laws as frequently as it may desire. It may retake and reposess the usufructuary rights of its waterusers, by exercise of its eminent domain, at its election, to conform with changing conditions, and to satisfy changing necessities. The State may authorize and administer uses of water under the system of prior
appropriation. It may follow the common-law system of local riparian rights. It may adopt a system of local administration combining riparian and appropriation systems. It may create any system or plan differing altogether from any former system. It may change systems whenever and wherever it may will. Subject, only, to the right of compensation for property taken or damaged. The usufructuary rights of the wateruser must conform to such changes. No other State or the United States may determine the system of local administration of uses of water among the inhabitants of any State.(-)

The wateruser owns no water and the waterusers collectively do not own the waters of the streams from which they divert.(-) At most, they possess mere rights of use. These usufructuary rights may attain the dignity of freeholds among the several waterusers of a State in determining their relative rights of use among themselves,
but always are inferior to the title and ownership of the State. The local laws governing such uses are the rules established by the State for administration of uses of the property of the State. (-)

This applies with respect to appropriations and uses by whomsoever made.
INTERSTATE WATERS

The otherwise exclusive sovereignty of each State of the Union (east or west) in respect of its interstate waters, is subject to the paramount right of control of navigation by the United States, and is subject to the rights of other interested States to receive equitable shares of such waters. The States made no other grants to the United States, respecting their waters and, otherwise retain title, cominioin and sovereignty.

All the States, by the commerce clause of the Constitution, have granted to the United States paramount authority to regulate navigation among the States and with foreign nations. This authority is dominant and plenary(-). This grant of power to the United States is becoming a source of conflict between the States and the United States and, unless wisely handled may lead to results never contemplated or intended by the framers of the Constitution.
The waters of a navigable river are supplied by non-navigable tributaries. These tributaries are subject to the authority of the States through which they flow and their use is the first essential to the growth, preservation and general welfare of those States and their inhabitants. Such uses change the character of flow and the quantity of the waters naturally contributed to the navigable portion of the river system. The States must use these waters or perish. The United States might complain of the effects of such uses and might seek their abatement as injurious to navigation. If successful in such proceedings, the paramount authority of the United States would extend over all the tributaries to their sources and would divert the States of the control of the waters necessary to their self preservation. While navigation is the most wasteful of the uses of water and such a deplorable policy is
not now contemplated, the creeping activities of federal bureaus is gradually tending in that direction.(-)

The Colorado River is such a stream and all probability of such a destructive conflict of jurisdiction was avoided by conclusion of the Colorado River Compact. Such compacts would define the relative interests and jurisdiction of the States and the United States in respect of the waters of all other navigable rivers and should be concluded.
EQUITABLE APPORTIONMENT

A claim by one State to the intrastate waters of a neighboring State would be an assertion of a foreign servitude upon the former for the exclusive benefit of the latter and, if enforced, would be as devastating as would be an occupation by force. Such servitudes are not recognized among States of the Union, except where created by compact. Waterusers cannot contract away the paramount title and control of their state and the State may abate, without compensation, works established and operated for the purpose of withdrawing waters from the State without its consent. (-)

We have observed that owing to the complete independence and sovereignty of each State, except for those limited powers granted to the United States or prohibited the States, by the Constitution, our interstate rivers, in fact, are
international streams for every purpose. These waters are governed by principles and precedents of international law and not by local laws.

External and foreign servitudes are not recognized by international law, except those established by treaties or arbitral awards. Enforcement of involuntary servitudes would be accomplished only by force.

The States of the Union, by the Constitution, have relinquished their inherent rights of settlement of interstate controversies by war and have substituted decisions of an interstate (international) Court of their own creation, the Supreme Court of the United States, in original suits where the contending States appear as the parties litigant. A number of such suits respecting interstate rivers, have been decided and these decisions have established the fundamental principle that each State through which an interstate river flows is entitled to an
equitable portion of the waters of the river, such equitable portion to be determined only after full and complete consideration of all the facts and conditions of each particular case. No formula applies to all cases.

Ownership and dominion of each interested State attaches to its equitable portion or share of the water supply of the river, in the same manner as with waters located entirely within its territory, but that State has no interest in the equitables shares of other States even though such waters are flowing within its territory. Usufructuary rights of the inhabitants of each State necessary attach only to the equitable share belonging to that State and are limited thereby. Otherwise, the rights of the inhabitant would override and exceed the title of his State and that of the other interested States.

Equitable apportionment of the waters of an inter-state river is made by compacts among the States involved.
or by decisions of the Supreme Court of the United States. Congress is without authority in such matters.

The Supreme Court refuses to entertain suits among States respecting rivers, until actual controversies exist. Potential controversies may not be the basis of suit. The already overburdened Court has not sufficient time at its disposal for adequate consideration of such suits, which frequently involve the destinies of the litigant States. Such suits are comparable with international proceedings before a World Court and should receive equal consideration.

All the judges must thoroughly and completely consider each case. Reference to a master would not be in keeping with the importance of the case. When the States created the Court and granted it original, complete and final jurisdiction of suits between States, it was contemplated that such suits would receive that degree of consideration commensurate with the importance and character of the litigation.
Furthermore, interstate river controversies involve so much territory and such a multitude of facts that justice requires a thoroughgoing view of the territory by all the judges. Such a view is impossible. Testimony is not given in Court in the presence of the judges. In an effort to overcome these difficulties, voluminous records and prolonged proceedings result, during which several changes in political administrations may occur with the litigant States, with resultant confusion.

However, delaying equitable apportionment and settlement of the relative rights of the interested States until actual controversies develop is insufficient to meet the needs of the States. Pending that time, local development within the States may give rise to claims which may result unsatisfactorily to one or more of the States, or knowledge of the interstate character of a stream with its potential controversies may prevent necessary development. For these
and other reasons, interstate suits should be the last resort and a more expedite methods of solution is advisable.

Interstate compacts provide an immediate, practical and comprehensive method of equitable apportionment of the waters of interstate streams and of settlement of all problems, present and potential, respecting such waters. By this method, the orderly development of entire stream systems may be planned and executed or lesser problems solved. Such compacts define and quiet the respective and relative rights and titles of the interested States in advance of construction or development, after such development or at any intermediate stage. They assure security of investments. They may deal with problems local to certain districts or with tributaries or with portions or the whole of the territory included within the drainage area of entire stream systems. They may deal with any and every
phase or problem relating to such waters. Their field of application is practically without limit while a suit is limited by the issues. They are negotiated, locally, by those familiar with the territory and the problems involved. There is full opportunity of view of the premises and of consultation with expert advisers. Under our plan of Union, interstate compacts are equivalent to treaties between independent nations. They may cover any subject matter within the jurisdiction of the states signatory thereto. The only limitation upon complete freedom and scope of action is the constitutional provision requiring consent of the Congress to those compacts which involve the property or the jurisdiction of the United States. Such consent may be expressed or implied and may precede or follow the conclusion of a compact by the signatory States are restored to their original and complete inherent sovereignty in respect of those matters under consideration. A
nation has no right to enter another nation and use its waters or to withdraw the same or to claim any part thereof by prior appropriations.