INTERSTATE RIVER COMPACTS AND THEIR PLACE
IN WATER UTILIZATION

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Our nation is yet young. Definition of the respective powers of the nation and of the States is still in a state of flux. Our internal development has required solution of many conflicts between state and national jurisdictions, but we have solved only those problems which were pressing and have taken little thought of those yet to come. We have been too busy subduing the wilderness, reclaiming the desert and traversing our continent to give immediate concern to problems which may be passed on to future generations. Our States have been so engrossed with immediate necessities of growing communities, upbuilding of state institutions, formulating necessary rules of conduct to conform to our rapidly changing civilization, and with administering the internal affairs of each State, that the rapidly changing official personnel has given but passing consideration to the ultimate and external influence of internal developments or of the injurious effect of external developments upon the internal and general welfare of the State. Even where such matters have been brought to the attention of state officials, more immediate demands have caused them to defer such matters to the keeping and concern of future generations or, improperly, to the control of federal agencies with limited surrender of state sovereignty.

Likewise with our rivers. Nature placed them where they are and we have used their waters as we have found them. Each State, very properly, has regarded its rivers as a part of its territory and as its great natural resource for the benefit and well being of the State and its people, and for use as the State may elect, save for national
control of interstate and foreign commerce in conformity with the Constitution. Out of sheer necessity, each State has used, consumed or polluted the waters of the streams within its territory, to satisfy the ever increasing demands of its people, and, while a few conflicts have become acute, as between Kansas and Colorado, or Missouri and Illinois, in the main, state officials have been called upon to give little attention to the effect of activities in one State upon the quantity or quality of flow of the same stream within the territory of a neighboring State or States. Even where the situation has become acute, termination of official tenure has set for naught any contemplated activities.

Rivers are the fountain source from which both man and beast derive that natural element imperative to their very existence. Likewise, rivers are the carriers of all the mineral, plant and animal wastes of their drainage basins. Plants, animals and men must all drink of waters which carry the sewage of the territory. Artificial uses and interference with the natural flow either improve or impair the quantity or quality of the water. Changes wrought by the works of man in the upper part of a drainage area may prove a blessing or a curse to those below. Diversion, storage, or use of waters within the upper territory may equalize the otherwise erratic flow for the benefit of those below and without cost to them. Use in a given part of the drainage area may facilitate or prevent uses in other parts, according to the location and physical conditions surrounding the first use.

Self defense is the first law of man and nations. Man must have water or he will perish. Without water, man cannot exist nor States endure. Differences in necessity create natural differences in preference of rights to the use of the same natural element. These necessities may differ within the same drainage basin because of differences in climate, soil, and other natural conditions. Wasteful and extravagant use of waters for the mere
floating of the boats of commerce along the lower reaches of a stream should give way to more imperative demands for domestic, agricultural and power uses within the territory where the waters originate. If need be, uses by the irrigator must yield to the more imperative demands of cities diverting potable water for their inhabitants, and the power plant must stand idle to supply water for domestic and irrigation purposes. If either use must suffer, that should be first to suffer whose necessities are of the lowest order. In time of shortage both uses cannot be supplied. He whose necessity is least must give way to him whose necessity is greater.

Natural preferences in the use of water vary with each stream system and with each locality. While ordinarily power uses should be subordinated to domestic and irrigation demands, the location of the power plant and the periods of use of water may avoid all conflict and constitute a benefit to the uses below. The same water which returns from the irrigation of fields above may constitute a satisfactory domestic supply for cities. Raw sewage may be made potable by systems of treatment and dilution, and more than one municipal use may be made of the same particles of water. Water otherwise unfit may be treated and made the breeding ground of fishes. The varying conditions all require careful study and treatment by those resident within the territory involved.

The multitude of local river problems have been met and solved by the people of each State as occasion demanded. Each passing solution has established a precedent and given rise to a local custom, law or court decision applicable within the State, and these are the foundation of the rights of citizens to the use of the state resource, the waters of the stream. These usufructuary titles are held subject to the dominant will of the State and vary with the States. In any event, by exercise of eminent domain, the State may readjust uses of water to conform to the growing and ever changing
necessities of the State and its people.

But most of our rivers are interstate, and problems which are easy and simple of solution within a State present a different aspect when viewed from the standpoint of interstate relations. A State may provide that its citizens may use the waters of its streams under rules of prior appropriation, by which the first user is protected as against all subsequent users for the same purpose. Such a provision is but a rule of local administration by which the sovereign State provides an orderly system for uses of its limited water supply in a manner best calculated to benefit the State. But, for a first appropriator in a lower State to lay claim to all or a large part of the waters of a stream having its source in an upper State, is to assert a claim of foreign servitude upon the territory of the upper State without its consent and for the exclusive benefit of the lower State. For a lower State, thru its citizens thus to reach out and lay hold of the natural resource of an upper State, regardless of its necessities, would be equivalent to a permanent occupation of the territory of the upper State to its perpetual injury or destruction. Such a claim for power purposes, if enforced, would not only preclude the upper State from making subsequent power uses of the same water within her territory, but would prevent further diversions for domestic, irrigation and other uses of a higher order, and would subject the future development of the upper State to the dominant will of the lower. The stream has its sources within the upper State, and should constitute her most valued resource. Without the use of its precious waters, she cannot maintain her place in the family of States. If denied the use of such waters, her people must hunger while the people of the lower State grow fat by use of the waters rightly belonging to the upper State, and which, were it not for the dominance of the foreign servitude, could be used for the sustenance of her people and the upbuilding of her institutions.
Still another angle. Water diverted and consumed for domestic or irrigation purposes within an upper State in conformity with its laws, cannot serve the riparian demands of land owners along the same stream in a lower State. While the riparian law breeds most wasteful and extravagant methods of use because it had its origin in the humid region where drainage is a first consideration and the law is applicable to conditions there obtaining, the degree to which an upper State may exhaust a common water supply may well become a matter of inter-state conflict. The situation becomes more acute where both States recognize the law of prior appropriation for local administration of uses of water within each State and where the uses by the upper State are said to infringe upon the established rights of the lower State. Failure of the lower State to store the excess flow compounds the difficulty. While rivers are the natural resource of the territory which they drain, unreasonable pollution of the common water supply by an upper State to the detriment of a lower State, may well become an issue of vital importance. These examples are but a few out of the multitude of troubles which sooner or later will confront the State for solution, but they illustrate the fundamental fact that uses which are lawful, necessary and imperative within one State, may reach out in their influence and become damaging or destructive within another State. They should be anticipated and remedies provided before the damage is done.

While frequently similar, each conflict presents its individual characteristics and must be met and solved upon the facts peculiar to the case and by men thoroughly familiar with the facts and the legal principles involved. The laws of each State have no force beyond its borders. The laws of one State cannot regulate uses of water in another. One State cannot impress its eminent domain upon the resources of another. A State has a vital interest in all the air, the water and the earth within its borders, and the interests of its citizens collectively are the interests of the State. Whatever usufructuary right the citizen may have in the streams of his State, he derelicts from
his State, and his interest can be no greater than that of his grantor. Claims that the water user obtains his title from the United States and not from the State are founded solely upon bureaucratic desire, and are repugnant to our whole plan of government.

We have forty-eight States, each possessing all the inherent powers of an independent nation save as surrendered by the Constitution, and a national government of limited powers created by all the States for their common benefit but with sufficient interest (navigation) to be a factor. With each of these States developing its territory and using the waters of its streams in its own way and in a manner best calculated to serve its needs, without regard to the needs of neighboring States and indifferent to the fact that most of our streams are interstate in character, it is evident that the field literally bristles with potential interstate conflicts, or conflicts between the States and the United States respecting the utilization of the waters of our rivers.

Solution of these problems demands statesmanship of the highest order and exercise of common sense. Mere academic rules of law enacted by legislatures or worked out by judges ignorant of the natural factors and but partially informed of the facts are inadequate. Public policy always is an important factor and frequently controls the solution. To supinely turn over such matters for solution by the United States and its prejudiced bureaus, is not only beneath the dignity of the States, but the suggestion smacks too much of the whine of the defeated. Such a procedure is un-American and is directly contrary to our fundamental principles of government. Its suggestion is its own refutation. The States possess the powers to solve such problems. It is their duty to exercise those powers in harmony with the provisions of the Constitution, and to work out each problem in a manner calculated to preserve the political integrity of each sovereignty, and at the same time to do justice between them.
Certain fundamental principles control. Their recognition points the way of solution of interstate river problems in a statesmanlike manner. To ignore those principles is to defeat the desired end.

Each State of the Union possesses every power and attribute of sovereignty possessed by an independent nation, save as surrendered to the federal government by the Constitution. All inherent powers not expressly delegated or passing by necessary implications, are reserved to the States and to the people. Each State exercises the powers of a nation over the waters within its territory, save as surrendered to the United States.

Each State is equal in sovereignty with all the other States. Each new State came into being endowed with all the powers possessed by each of the original thirteen. In legal effect, the new State was in being on the day of the birth of the nation and not as of the day when Congress admitted it to the Union. Upon its admission, it simply came into possession of all the powers of a State which had always belonged to it and which had been held in trust pending the day when it should assume its duties and enjoy the privileges of a State of the United States. Conditions and limitations imposed upon the use of its territory and the exercise of sovereignty and jurisdiction, while under a territorial form of government, all ceased to operate upon admission. The new State was, and only could be, admitted upon an equality "in all respects whatsoever" with all the others. This equality of powers and jurisdiction over rivers facilitates the solution of interstate problems and prevents undue claims of preference.

The powers and jurisdiction of the United States over the waters within the territory of the new States wherever situated, are no greater than the jurisdiction over the same subject matter within each of the original States. In other words, Maine or Arizona both possess the same jurisdiction over their waters as that retained by New Jersey over the waters within her territory. Were it otherwise, the new States would be admitted upon an inequality with the
original thirteen. With a State like Arizona, where water is the first essential
to existence, such an inequality might destroy statehood.

Each State, in its sovereign capacity, owns and exercises jurisdiction
and control over all the waters within its territory subject only (1) to the
jurisdiction of the United States to regulate navigation, and (2) to adjustments
of interstate relations. As aptly stated "the States Have authority to establish
for themselves such rules of property as they may deem expedient with respect to the
streams of water within their borders, both navigable and non-navigable, 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." (United States vs. Cress 243 U.S. 316, and cases
cited.)

While the powers of the United States to regulate interstate and foreign
commerce are plenary, all other powers and jurisdiction over territorial waters
inherent with a nation remain with each State and are reserved by it. It may
take such measures as it sees fit to protect its property and jurisdiction. In
the language of the Supreme Court "the constitutional power of the State to insist
that its natural advantages shall remain unimpaired by its citizens is not depend-
ent upon any nice estimate of the extent of present use or speculation as to
future needs. The legal conception of the necessary is apt to be confined to
somewhat rudimentary wants, and there are benefits from a great river that might
escape a lawyer's view. But the State is not required to submit even to an
aesthetic analysis. Any analysis may be inadequate. It finds itself in possession
of what all admit to be a great public good, and what it has it may keep and give
no one a reason for its will." (Hudson Water Co. vs. McCarter, 209 U.S., 349.) The
rights of a citizen are deraigned from his State and can be no greater than the
rights of his grantor. Any limitation upon the jurisdiction of a State over its
territorial waters binds the water user (Kansas vs. Colorado, 206 U.S., 46.)
We are confronted with the fact that the settlement of interstate river problems is the settlement of controversies between sovereignties and not between mere individual appropriators or water users within either of the States. The problems involved are of an international character for each State is a nation within itself, except for federal purposes. The same rules and considerations of public policy are presented as would be involved in an international situation.

With the exceptions noted, each State possesses plenary powers over the waters within her borders. Each may use, pollute and control them and give no one a reason for her will. Yet the waters of her streams flow into other States where they must be used for their benefit. Those States have some interest in the river. The definition of that interest and the successful administration of the uses of the waters of interstate streams are matters for interstate consideration and adjustment. These States, of equal powers, sovereignty and dignity, all are entitled to live and prosper. The destiny of States should not be made to conform to the results of a mere contest of speed as between water users in the respective States. The equitable apportionment of the benefits between the States involves greater questions than the mere settlement of questions of first user. A State should not be fettered and her peace, prosperity and general welfare determined by activities within another State. But there must be some method of adjustment of their interstate problems.

Rivers have not been the cause of wars, probably by reason of the gradual changes or encroachments. River conditions might arise which would be considered sufficient cause for declaration of war. But our States are not interested in this method of settlement by reason of their surrender of the right to wage interstate warfare.

Congress has no power to settle interstate controversies (Kansas vs. Colorado, 206 U.S., 46.) Provision of the Articles of Confederation in these respects were superseded by the Constitution. Congress has no power to equitably apportion the water of a stream between the interested States, to allocate to any
one of them a definite portion of the common supply or to determine which one of many different uses shall have preference over the others or how the waters within a State should be administered. For Congress to attempt to expand her jurisdiction over navigable waters beyond the intendment of the Constitution would be an unconscionable federal encroachment upon State jurisdiction. To attempt to extend the federal jurisdiction over all streams merely because they constitute ultimate tributaries of navigable waters would be unconstitutional and federal encroachment by subterfuge. Such a policy would lead to complete federal usurpation of State jurisdiction, within all the States, over that element most vital to the welfare of the States.

The States are not without remedy. While Congress has no power to settle interstate controversies or to allocate the waters of an interstate stream between the interested States and while the States have surrendered their inherent right to settle their differences by resort to arms, they retained to themselves all inherent powers of entering into treaties or compacts with each other, subject only to consent of Congress, and they created for themselves a Supreme Court and endowed it with the powers of an international court with jurisdiction to both adjudicate all controversies between the States and to enforce its decrees. In other words, two methods for settlement of interstate controversies are available, (1) interstate treaties, compacts or agreements and (2) original suits between the States before the United States Supreme Court.

Original suits before the Supreme Court are of the highest order of litigation. They are our substitute for war between the States. While such suits afford a peaceful method of settlement, the tremendous importance of the issues involved and the consequent magnitude of the labors essential to a proper presentation of interstate water suits make them a proceeding of last resort. There could be no greater calamity than a decision of the Supreme Court in an interstate river dispute where the court has been misguided by reason of failure of the States to properly and completely enlighten the court respecting all matters pertinent to
the issues. To fully marshal all the facts and to clearly and tersely present
them to the court in a manner demanded by the importance of the issues, usually is
a herculean task requiring a decade and the best services of a considerable num-
ber of experienced lawyers, engineers and experts with a corps of assistants. The
attorney general of each State, by virtue of his office, is the chief counsel for
his State. But his tenure of office is short and all too frequently both he and
his successors are not only ignorant of the facts and the principles of law involved,
but their time while in office is so consumed with ordinary State affairs that they
are unable to give adequate attention to the more important interstate litigation.
There is nothing spectacular to excite frequent publicity in either the preparation
of the presentation of the evidence in an interstate water suit. While the issues
are wet the facts furnish very dry reading for even the best informed. The greatest
degree of foresight and prophetic vision of future needs and conditions are required.
In the time elapsing between the commencement and the final submission of the case,
human ills and unavoidable events incapacitate those engaged in the case and resort
frequently must be had to the services of subordinates or of new talent which must
be informed before becoming sufficiently advised to hazard active service. The
difficulty of conveying to the mind's eye of the court the natural conditions
calling for visual evidence frequently approaches the impossible. Without this
information the court is precluded from an enlightened consideration of the case
and its decision may be unjust because of the lack of adequate information. Judges
are only human. Even where good fortune permits a fairly comprehensive submission
of the facts, the enormity of the record and the multitude of collateral issues:
and legal principles involved, call for prolonged and uninterrupted consideration
by each of the nine judges called upon to decide the case. With a court already
overburdened with litigation, such a task approaches the impossible. This compels
the court to assign the major consideration of the case to a master in chancery
with power to consider the whole case and recommend a final decree. In other words,
while such cases are of first importance and constitute the highest order of liti-
gation and call for the first and best efforts of all the members of the court, the
very enormity of such cases cheats the litigant States. There are instances, such as in the recent Great Lakes case, where the court was generously granted the time and services of so eminent a lawyer, jurist and statesman as Charles E. Hughes, master in chancery, but such is not the usual good fortune of litigants. Added to all these factors is the ever present and, too frequently, controlling one of prolonged and burdensome expense upon the litigant States and those of their citizens and property owners who share in the undertaking. Prolonged and expensive litigation does not appeal to the generosity or even to the good judgment of the average member of state legislatures which must appropriate the money to foot the bills. The best interests of the State are defeated by a spirit of over-economy upon the part of its good intending legislators. In the final analysis, it is impossible for judges, however able or conscientious, to fairly and accurately decide the issues in a great interstate river case without the benefit of enlightenment thru personal observation and study of the physical facts first hand. This prevailing objection, with a multitude of others, calls for some more direct method of settlement where considerations of fact, law and public policy may be applied upon the ground by those best informed of the physical conditions and of the natural and artificial elements which should control an equitable determination of the whole question.

Interstate treaties afford such a method. The States still possess inherent treaty making powers, subject only to consent of Congress in order to avoid conflict between state and national jurisdictions. Article I, Section 10, paragraph 3 of the Constitution provides "No State shall, without consent of Congress, enter into any agreement or Compact with another State." Such consent of Congress may be obtained either before or after the conclusion of the compact and where the compact in no way involves federal jurisdiction it has been held that such consent may not be necessary (Virginia vs. Tennessee, 146 U.S., 503; Wharton vs. Wise, 153 U.S., 155). Interstate compacts may treat of any subject matter in which the signatory States are interested. Boundaries, fisheries, navigation, quarantine regulations and
other phases of interstate relations have been settled by this method (See Appendix). Such compacts may be between two or more States or between a State or States and the United States (U.S. vs. Texas, 143 U.S., 621). In either instance the high contracting parties are the signatory sovereignties and such treaties bind and are conclusive upon all their citizens (Rhode Island vs. Massachusetts, 12 Pet., 657, 723-731.)

Interstate river treaties are a recent application of a power which always existed. Compacts between States are not new. Such have been concluded before and after the formation of the Union respecting boundaries and other subjects (See Appendix). River compacts are but a new application of an old method.

Rivers have not caused wars, but international river disputes have always been recognized as a most important subject for international agreement. Even where an upper nation has been held to possess the right to wholly exhaust the water supply of an international river in order to satisfy the necessities of the nation of origin, that nation has equitably apportioned a part of the water supply to the lower nation by international treaty as a matter of policy and international comity (Malloy, Treaties, Vol.I. P. 1202). Such is the established American method. Even more appropriate is this method of settling disputes between States of our Federal Union or between a State or States and the United States. The States have renounced their right of warfare between themselves and have so placed themselves that they must either determine their respective rights in advance of conflict and settle any acute differences, by interstate compacts, or, failing so to do, undergo the pains and penalties or protracted, uncertain and unsatisfactory litigation. The wisdom of the treaty method should require no advocacy. Litigation should be considered only in extreme cases, where diplomacy has been exhausted or where the issue is the interpretation of the language of an agreement or the enforcement of its provisions.

Compacts are usually phrased in the manner of international treaties. The dignity and importance of the proceedings and the character of the contracting parties justify this custom. The signatory States are represented by one or more
commissioners who act for their States. They are assisted by expert advisers. The commissioners are appointed by the Governors of the States either with or without previous legislative authority. The appointment is usually under authority of legislative acts wherein provision is made for expenses of the commission and assistants. However, cases frequently arise during legislative recess, which demand immediate action and where it is appropriate that the Governors of the interested States appoint commissioners to proceed without delay, trusting to subsequent legislative approval to validate their acts and approve any treaty which may have been concluded. Effectiveness of interstate compacts is usually conditioned upon approval by the legislature of each of the signatory States and by the Congress. Where previous congressional consent has been obtained, it may not be necessary to submit the compact for final congressional approval although such is the better procedure.

Interstate compacts may be made by direct legislative acts. In such cases, one state legislature, by its act, makes an offer which is accepted by act of the legislature of the other State. The offer and acceptance taken together, constitute a compact between the States, with consent of Congress obtained either before or subsequent to legislative proceedings by the contracting States. This legislative method is usually availed of only where the interstate problem is simple. With the more complex problems, the States can ill afford to hazard their general welfare by proceeding other than by commissioners, surrounded by advisors. Such matters are of too great moment to be lightly considered and satisfactory results can be obtained only by protracted study, frequent discussions and frank understandings between skilled negotiators. Legislatures are too engrossed with ordinary state affairs to give appropriate time or thought to such matters and the members are not sufficiently advised to do justice to either State.

Interstate treaties, however phrased or formulated, when approved by the interested States and by the Congress become the law of the land and are binding both upon the contracting States and upon all persons and property within those
States. For illustration, the mere usufructuary rights of a local water user are not and cannot be greater than the rights of his State and such rights are subject to and are governed by interstate river treaties made by his State as fully and effectively as though the water user were a party signatory to the agreement. He took with full knowledge of and subject to any limitations upon or infirmities in the title of the State, his grantor, and with knowledge that the rights of the State were subject to interstate adjustments. The rights of the water user, however important they may be as regards the rights of other local water users, are subordinate to and included within the greater rights of his State and are bound by the compact.

Interstate river compacts possess a strong and convincing appeal to the practical American mind. Business men, engineers, lawyers, public officials and others all recognize in this sound and practical method a way out of both actual and potential difficulties. Capital cannot safely invest in securities based upon titles to the uses of water, whether for power, irrigation, domestic or other purposes, without permanence of titles. The magnitude of our undertakings demands such security. We can no longer build upon unsettled titles to the use of the waters of interstate rivers. Courts do not determine such matters in advance of acute conflict. The Supreme Court refuses to try most cases. Such was its ruling in the cases brought to test the validity of of the Federal Water Power Act. Litigation furnishes no method of determining in one proceeding all the problems respecting the future orderly administration of uses and the permanent division of the benefits from the waters of an entire stream system.

All problems respecting the use or disposition of the waters of an interstate river may be settled and usufructuary titles may be fixed in advance of conflict by interstate compacts and agreements. Preference of uses in times of scarcity; guaranty of the dominance of the more necessary uses over the less imperative; assurance to the States of origin of sufficient water from their streams to supply their future needs irrespective of the time or method of making such uses; assurances of the permanence of the water supply necessary to the operation of works
along the lower reaches of a river for municipal, agricultural, power or other purposes; comprehensive development of an entire river system in a manner best calculated to obtain the maximum benefits from the common water supply; making wasteful uses of water for purposes of navigation subservient to the more imperative needs of mankind; prevention of wastes; systematic regulation of all problems respecting the disposition, purification and other necessary control of sewage and other polluted waters; creation of interstate boards of control or authorities to permanently administer uses and enforce prohibitions and regulations upon a river system; all these and a hundred and one other desired objects may be speedily, economically and successfully accomplished by interstate compacts.

The dignity of States guarantees the fulfillment of their treaties. The very fact that each treaty came into being only by the unanimous consent of all the commissioners for the signatory States and upon legislative approval by those States and by the Congress, gives assurance of stability and good faith. The protracted study, research and investigation by each of the commissioners necessary to intelligent consideration of the problems involved, the absence of that bitterness and partisan prejudice usually engendered in the heat of conflict, the gradual removal of obstacles as the negotiations proceed, the period for rest and reflection between sessions of the commission and the other human factors that go to bring unanimity of thought and expression, all these and more assure justice, the protection of the interests of all and permanence of agreement.

Interstate river agreements not only define the rights of the signatories to beneficial uses of the common water supply and provide permanent means of administration of such uses but reduce to the minimum those acute conflicts which cause interstate litigation. The Supreme Court has jurisdiction to interpret every interstate compact and to enforce its provisions. The States not only have power to enter into treaties but have created a court with original and exclusive jurisdiction to enforce their agreements. Property rights founded upon the terms of interstate compacts are assured of protection by original proceedings before the greatest court in the world.
River treaties are not perfect. Like other agreements, their perfection depends upon the learning, skill and patient endeavor of those responsible for their formulation. The "do it now" fad prevalent in the present day business world has no place in council chambers of interstate river commissions. Common sense, practical and technical knowledge, infinite patience, mature reflection, kindly consideration of the rights of others and an appropriate degree of self defense, must there prevail. Academic minds are of small value. Even where well drawn, interstate compacts are not a panacea. They are only as good as the commissioners make them. A good compact is a blessing. A poor compact is worse than none, a curse to the signatories and a bad record for those who drew it. Compacts hastily drawn by bigoted, partisan and unskilled commissioners should not have been conceived. Although interstate river compacts were but recently adopted as a method of dealing with acute river situations, already there are signs of a disposition to hastily negotiate them in a wholesale fashion. Such efforts are premature and may result in more harm than good. But few of the citizens of any State are equipped or circumstances to represent their State upon interstate river treaty commissions. Our people think in local terms. Interstate or international relations are seldom within our range of thought or action. Our States have not developed a diplomatic service from which to draw. Safety demands that interstate compacts should evolve in step with the learning of the negotiators. We must proceed with caution. Undue haste is worse than no action at all. We must not go before we are ready. Methods of treatment of the problems pertinent to one river system may be out of place as regards another stream system. Water titles are perpetual in their nature and extreme caution should attend a definition of their limitations. Compacts fix the destinies of millions of people yet unborn. They deal with the future and not with the past. They are the basis of titles which will be of fabulous ultimate values. The whole future of our rivers and of the cities, farms, industries and institutions which will be founded upon the use of their waters, may depend upon the rightful use and not the abuse of the interstate compact method of dealing with interstate river problems.
We advocate its judicious use but earnestly protest against its promiscuous abuse.

Our Federal Union will endure or fail as the States are strong or weak. The autonomy of the States must be our first concern. Interstate litigation, strife, turmoil and uncertainties of titles and jurisdiction respecting our rivers will undermine our whole governmental structure. To nationalize our streams would tend to destroy our nation for, thereby, the States would be deprived of control of that natural element essential or imperative to their very existence. The agency which controls the element will control the States. To preserve to the States their jurisdiction over their rivers is to preserve the States. The interstate river treaty method preserves state sovereignty. It retains control of rivers with the States where it belongs. It encourages harmonious intercourse between the States and mutual regulation of their own interstate affairs. It keeps government with the States and not at Washington. It preserves the States and perpetuates the Nation.
APPENDIX

Interstate compacts respecting rivers of the western States are the evolution of experience with interstate river litigation over a quarter of a century. There water is scarce and land plentiful. Practically all of the rivers flow thru two or more States or are tributaries of such rivers. The waters from the mountains evaporate as the rivers pass over the plains. Colorado development was at the headwaters of the important rivers/followed by a cycle of dry years. This brought about conditions which provoked a series of interstate river suits against Colorado. This litigation was prolonged, very expensive and extremely unsatisfactory to all parties. All recognized that such suits were destructive of state autonomy and were opening the way to federal encroachment and usurpation of state sovereignty. This realization became acute when Attorney General Gregory announced the federal policy to be that the United States owns and may control and dispose of the waters of western rivers regardless of the will of the States and that such waters have been within the jurisdiction of the States.

These conditions demanded a more direct, immediate and comprehensive method of solving interstate river problems.

During the litigation between Wyoming and Colorado, respecting the Laramie River, there were informal conversations between some of the attorneys respecting interstate treaties and such a method is mentioned in the briefs for Colorado. The South Platte (Nebraska–Colorado) suit was commenced in 1916. At the outset, counsel for Colorado canals adopted a policy to facilitate conclusion of an interstate compact in lieu of pursuing the litigation. Altho this was the first western river respecting which an interstate compact was undertaken, the compact was not concluded until 1923 and approved by Congress until 1926. The Colorado River and the La Plata River Compacts resulted from the pioneer work of the South Platte and while initiated subsequently, were concluded at an earlier date. The joint engineering investigation between Wyoming and the United States
respecting the North Platte River was made in 1916 and 1919 and opened the way to negotiations for a three state compact.

The publicity pertinent to Colorado problems directed attention to the Colorado River Compact and caused recognition of the treaty method as an expeditious and comprehensive method of dealing with interstate river problems. This encouraged initiation of subsequent treaty negotiations.

Most of the large irrigation projects in the arid west are interstate in character. They are located upon interstate rivers and, frequently, the works and lands are located in two or more States. The North Platte and Rio Grande Projects and the proposed Boulder Canyon and the Columbia Basin developments are examples. Present and future development requires the fixing of rights by compact in advance of authorization or construction to avoid interminable litigation.

The South Platte River Compact (Colorado—Nebraska) concluded in 1922, and the La Plata River Compact (Colorado—New Mexico) concluded in 1922, have been approved by Congress and the interested States and are being successfully administered. Litigation on both rivers was either dismissed or avoided by the conclusion of the compacts which permanently determined the rights of the States and their water users. The Ohio Interstate Stream Conservation Agreement among Illinois, Indiana, Kentucky, New York, Maryland, Ohio, Pennsylvania, Tennessee and West Virginia, respecting phenol waters, is reported to be operating successfully.

EARLY COMPACTS CONSTRUED BY SUPREME COURT

Virginia vs. Pennsylvania, 1780, (11 Pet., 20);
Virginia and Pennsylvania, 1784, (3 Dall., 425);
Virginia and Tennessee, 1802 and 1856, (146 U.S., 503, 511, 516);
Virginia and Maryland, 1785, (153 U.S., 155, 162).

AGREEMENTS AND COMPACTS BETWEEN STATES TO WHICH CONGRESS HAS GIVEN ITS CONSENT

Boundary Conventions
New York and New Jersey: June 28, 1834. (Stat.L.vol.4, pp. 706ff.)
Virginia and Maryland: March 3, 1879. (Stat.L.vol.20, pp 481ff.)
New York and Vermont: April 7,1880. (Stat.L.vol.21,p.72.)
Connecticut and Rhode Island: October 12,1888. (Stat.L.vol.25,p.553.)

Protection of Fish in Boundary Waters


Jurisdiction over Boundary Waters for Specific Purposes

North Dakota, South Dakota, Minnesota, Wisconsin, Iowa, and Nebraska: March 4,1921. (Stat.L.vol.41,pp.1447ff.)

Construction and Operation of Tunnels

New York and New Jersey: July 11, 1919. (Stat.L.vol.41,p.156.)

Development of the Port of New York

New York and New Jersey: July 1, 1922. (Stat.L.vol.42,pp 822ff.)

Erection, Maintenance, and Operation of Waterworks

Kansas and Missouri: September 22,1922. (Stat.L.vol.42,p.1056ff.)

Apportionment of the Waters of Western Interstate Streams.

Colorado and New Mexico: The La Plata River Compact, January 29,1925. (Stat.L.vol.43, p.796ff.)

Colorado and Nebraska: The South Platte River Compact, 1926.
(Stat.L.vol. p. .)

INTERSTATE RIVER COMPACTS AWAITING APPROVAL

The Canadian River Compact, New Mexico, Oklahoma and Texas.
The Colorado River Compact, Arizona, California, Colorado, Nevada,
Nevada, New Mexico, Utah and Wyoming.
INTERSTATE RIVER COMPACTS UNDER NEGOTIATION

Arkansas River,
*Columbia River,
North Platte River,
Rio Grande,

COLORADO AND KANSAS.
Idaho, Montana, Oregon and Washington.
Colorado, Nebraska and Wyoming.
Colorado, New Mexico and Texas.

INTERSTATE RIVER COMPACTS AUTHORIZED BY CONGRESSIONAL OR LEGISLATIVE ACTS.

Belle Fourche 
Cheyenne 
Snake,

South Dakota and Wyoming.

POTENTIAL PROBLEMS

Artesian Basin Regulation,
Big Sioux,
Caney,
Grand,
James,

North Dakota and South Dakota.
South Dakota and Iowa.
Kansas, Arkansas and Oklahoma.
Kansas, Missouri and Oklahoma.
North Dakota and South Dakota.

*Congressional act of March 4, 1925: March 3, 1927, extended to December 31, 1930.

STATES INVOLVED

Of the twenty-two States west of the Mississippi River, twenty are or soon will be involved in interstate river compact negotiations. Of the twenty-six states east of the Mississippi, the rivers of ten are covered by compacts with potential negotiations respecting others.
INTERSTATE RIVER COMPACTS AND THEIR PLACE
IN WATER UTILIZATION

By
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Interstate Rivers Commissioner for Colorado,
Greeley, Colorado.

Presented by
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Before
The 48th Annual Convention
of
The American Water Works Association
at
San Francisco, California
June 15, 1928.
Our nation is yet young. Definition of the respective powers of the nation and of the States is still in a state of flux. Our internal development has required solution of many conflicts between state and national jurisdictions, but we have solved only those problems which were pressing and have taken little thought of those yet to come. We have been too busy subduing the wilderness, reclaiming the desert and traversing our continent to give immediate concern to problems which may be passed on to future generations. Our States have been so engrossed with immediate necessities of growing communities, upbuilding of state institutions, formulating necessary rules of conduct to conform to our rapidly changing civilization, and with administering the internal affairs of each State, that the rapidly changing official personnel has given but passing consideration to the ultimate and external influence of internal developments or of the injurious effect of external developments upon the internal affairs and general welfare of the State. Even where such matters have been brought to the attention of state officials, more immediate demands have caused them to defer such matters to the keeping and concern of future generations or, improperly, to the control of federal agencies with limited surrender of state sovereignty.

Likewise with our rivers. Nature placed them where they are and we have used their waters as we have found them. Each State, very properly, has regarded its rivers as a part of its territory and as its great natural resource for the benefit and well being of the
State and its people, and for use as the State may elect, save for national control of interstate and foreign commerce in conformity with the Constitution. Out of sheer necessity, each State has used, consumed or polluted the waters of the streams within its territory, to satisfy the ever increasing demands of its people, and, while a few conflicts have become acute, as between Kansas and Colorado, or Missouri and Illinois, in the main, state officials have been called upon to give little attention to the effect of activities in one State upon the quantity or quality of flow of the same stream within the territory of a neighboring State or States. Even where the situation has become acute, termination of official tenure has set for naught any contemplated activities.

Rivers are the fountain source from which both man and beast derive that natural element imperative to their very existence. Likewise, rivers are the carriers of all the mineral, plant and animal wastes of their drainage basins. Plants, animals and men must all drink of waters which carry the sewage of the territory. Artificial uses and interferences with the natural flow either improve or impair the quantity or quality of the water. Changes wrought by the works of man in the upper part of a drainage area may prove a blessing or a curse to those below. Diversion, storage, or use of waters within the upper territory may equalize the otherwise erratic flow for the benefit of those below and without cost to them. Use in a given part of the drainage area may facilitate or prevent uses in other parts, according to the location and physical conditions surrounding the first use.
Self defense is the first law of man and nations. Man must have water or he will perish. Without water, man cannot exist nor States endure. Differences in necessity create natural differences in preference of rights to the use of the same natural element. These necessities may differ within the same drainage basin because of differences in climate, soil, and other natural conditions. Wasteful and extravagant use of waters for the mere floating of the boats of commerce along the lower reaches of a stream should give way to more imperative demands for domestic, agriculture and power uses within the territory where the waters originate. If need be, uses by the irrigator must yield to the more imperative demands of cities diverting potable water for their inhabitants, and the power plant must stand idle to supply water for domestic and irrigation purposes. If either use must suffer, that should be first to suffer whose necessities are of the lowest order. In time of shortage both uses cannot be supplied. He whose necessity is least must give way to him whose necessity is greater.

Natural preferences in the use of water vary with each stream system and with each locality. While ordinarily power uses should be subordinated to domestic and irrigation demands, the location of the power plant and the periods of use of water may avoid all conflict and constitute a benefit to the uses below. The same water which returns from the irrigation of fields above may constitute a satisfactory domestic supply for cities. Raw sewage may be made potable by systems of treatment and dilution, and more than one municipal use may be made of the same particles of water. Water otherwise unfit may be treated and made the breeding ground of
fishes. The varying conditions all require careful study and
treatment by those resident within the territory involved.

The multitude of local river problems have been met and solved
by the people of each State as occasion demanded. Each passing
solution has established a precedent and given rise to a local
custom, law or court decision applicable within the State, and
these are the foundation of the rights of citizens to the use of
the state resource, the waters of the stream. These usufructuary
titles are held subject always to the dominant will of the State
and vary with the States. In any event, by exercise of eminent
domain, the State may readjust uses of water to conform to the
growing and ever changing necessities of the State and its people.

But most of our rivers are interstate, and problems which are
easy and simple of solution within a State present a different
aspect when viewed from the standpoint of interstate relations. A
State may provide that its citizens may use the waters of its
streams under rules of prior appropriation, by which the first
user is protected as against all subsequent users for the same
purpose. Such a provision is but a rule of local administration by
which the sovereign State provides an orderly system for uses of
its limited water supply in a manner best calculated to benefit the
State. But, for a first appropriator in a lower State to lay claim
to all or a large part of the waters of a stream having its source in
an upper State, is to assert a claim of foreign servitude upon the
territory of the upper State without its consent and for the ex-
clusive benefit of the lower State. For a lower State, through its
citizen, thus to reach out and lay hold of the natural resource of
an upper State, regardless of its necessities, would be equivalent to a permanent occupation of the territory of the upper State to its perpetual injury or destruction. Such a claim for power purposes, if enforced, would not only preclude the upper State from making subsequent power uses of the same water within her territory, but would prevent further diversions for domestic, irrigation and other uses of a higher order, and would subject the future development of the upper State to the dominant will of the lower. The stream has its sources within the upper State and should constitute her most valued resource. Without the use of its precious waters, she cannot maintain her place in the family of States. If denied the use of such waters, her people must hunger while the people of the lower State grow fat by use of the waters rightly belonging to the upper State, and which, were it not for the dominance of the foreign servitude, could be used for the sustenance of her people and the upbuilding of her institutions.

Still another angle. Water diverted and consumed for domestic or irrigation purposes within an upper State in conformity with its laws, cannot serve the riparian demands of land owners along the same stream in a lower State. While the riparian law breeds most wasteful and extravagant methods of use because it had its origin in the humid region where drainage is a first consideration and the law is applicable to conditions there obtaining, the degree to which an upper State may exhaust a common water supply may well become a matter of interstate conflict. The situation becomes more acute where both States recognize the law of prior appropriation for local administration of uses of water within each State and where the uses by the upper State are said to infringe upon the established
rights of the lower State. Failure of the lower State to store the excess flow compounds the difficulty. While rivers are the natural resource of the territory which they drain, unreasonable pollution of the common water supply by an upper State to the detriment of a lower State, may well become an issue of vital importance. These examples are but a few out of the multitude of troubles which sooner or later will confront the States for solution, but they illustrate the fundamental fact that uses which are lawful, necessary and imperative within one State, may reach out in their influence and become damaging or destructive within another State. They should be anticipated and remedies provided before the damage is done.

While frequently similar, each conflict presents its individual characteristics and must be met and solved upon the facts peculiar to the case and by men thoroughly familiar both with the facts and the legal principles involved. The laws of each State have no force beyond its borders. The laws of one State cannot regulate uses of water in another. One State cannot impress its eminent domain upon the resources of another. A State has a vital interest in all the air, the water and the earth within its borders, and the interests of its citizens collectively are the interests of the State. Whatever usufructuary right the citizen may have in the streams of his State, he derails from his State, and his interest can be no greater than that of his grantor. Claims that the water user obtains his title from the United States and not from the State are founded solely upon bureaucratic desire, and are repugnant to our whole plan of government.
We have forty-eight States, each possessing all the inherent powers of an independent nation save as surrendered by the Constitution, and a national government of limited powers created by all the States for their common benefit but with sufficient interest (navigation) to be a factor. With each of these States developing its territory and using the waters of its streams in its own way and in a manner best calculated to serve its needs, without regard to the needs of neighboring States and indifferent to the fact that most of our streams are interstate in character, it is evident that the field literally bristles with potential interstate conflicts, or conflicts between the States and the United States respecting the utilization of the waters of our rivers.

Solution of these problems demands statesmanship of the highest order and exercise of common sense. Mere academic rules of law enacted by legislatures or worked out by judges ignorant of the natural factors and but partially informed of the facts are inadequate. Public policy always is an important factor and frequently controls the solution. To supinely turn over such matters for solution by the United States and its prejudiced bureaus, is not only beneath the dignity of the States, but the suggestion smacks too much of the whine of the defeated. Such a procedure is un-American and is directly contrary to our fundamental principles of government. Its suggestion is its own refutation. The States possess the powers to solve such problems. It is their duty to exercise those powers in harmony with the provisions of the Constitution, and to work out each problem in a manner calculated to preserve the political integrity of each sovereignty, and at the same time to do justice between them.
Certain fundamental principles control. Their recognition points the way of solution of interstate river problems in a statesmanlike manner. To ignore those principles is to defeat the desired end.

Each State of the Union possesses every power and attribute of sovereignty possessed by an independent nation, save as surrendered to the federal government by the Constitution. All inherent powers not expressly delegated or passing by necessary implications, are reserved to the States and to the people. Each State exercises the powers of a nation over the waters within its territory, save as surrendered to the United States.

Each State is equal in sovereignty with all the other States. Each new State came into being endowed with all the powers possessed by each of the original thirteen. In legal effect, the new State was in being on the day of the birth of the nation and not as of the day when Congress admitted it to the Union. Upon its admission, it simply came into possession of all the powers of a State which had always belonged to it and which had been held in trust pending the day when it should assume its duties and enjoy the privileges of a State of the United States. Conditions and limitations imposed upon the use of its territory and the exercise of sovereignty and jurisdiction, while under a territorial form of government, all ceased to operate upon admission. The new State was, and only could be, admitted upon an equality "in all respects whatsoever" with all the others. This equality of powers and jurisdiction over rivers facilitates the solution of interstate problems and prevents undue claims of preference.
The powers and jurisdiction of the United States over the waters within the territory of the new States wherever situate, are no greater than the jurisdiction over the same subject matter within each of the original States. In other words, Maine or Arizona both possess the same jurisdiction over their waters as that retained by New Jersey over the waters within her territory. Were it otherwise, the new States would be admitted upon an inequality with the original thirteen. With a State like Arizona, where water is the first essential to existence, such an inequality might destroy statehood.

Each State, in its sovereign capacity, owns and exercises jurisdiction and control over all the waters within its territory subject only (1) to the jurisdiction of the United States to regulate navigation, and (2) to adjustments of interstate relations. As aptly stated "the States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders, both navigable and non-navigable, 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." (United States vs. Cress 243 U.S. 316, and cases cited.)

While the powers of the United States to regulate interstate and foreign commerce are plenary, all other powers and jurisdiction over territorial waters inherent with a nation remain with each State and are reserved by it. It may take such measures as it sees
fit to protect its property and jurisdiction. In the language of
the Supreme Court "the constitutional power of the State to
insist that its natural advantages shall remain unimpaired by its
citizens is not dependent upon any nice estimate of the extent of
present use or speculation as to future needs. The legal con-
cepation of the necessary is apt to be confined to somewhat
rudimentary wants, and there are benefits from a great river that
might escape a lawyer's view. But the State is not required to
submit even to an aesthetic analysis. Any analysis may be
inadequate. It finds itself in possession of what all admit to be
a great public good, and what it has it may keep and give no one a
reason for its will." (Hudson Water Co. vs. McCarter, 209 U.S.,
349.) The rights of a citizen are deraigned from his State and can
be no greater than the rights of his grantor. Any limitation upon
the jurisdiction of a State over its territorial waters bind the
water user (Kansas vs. Colorado, 206 U.S., 46.)

We are confronted with the fact that the settlement of inter-
state river problems is the settlement of controversies between
sovereignties and not between mere individual appropriators or water
users within either of the States. The problems involved are of an
international character for each State is a nation within itself,
except for federal purposes. The same rules and considerations of
public policy are presented as would be involved in an international
situation.

With the exceptions noted, each State possesses plenary powers
over the waters within her borders. Each may use, pollute and
control them and give no one a reason for her will. Yet the waters
of her streams flow into other States where they must be used for their benefit. Those States have some interest in the river. The definition of that interest and the successful administration of the uses of the waters of interstate streams are matters for interstate consideration and adjustment. These States, of equal powers, sovereignty and dignity, all are entitled to live and prosper. The destiny of States should not be made to conform to the results of a mere contest of speed as between water users in the respective States. The equitable apportionment of the benefits between the States involves greater questions than the mere settlement of questions of first user. A State should not be fettered and her peace, prosperity and general welfare determined by activities within another State. But there must be some method of adjustment of their interstate problems.

Rivers have not been the cause of wars, probably by reason of the gradual changes or encroachments. River conditions might arise which would be considered sufficient cause for declaration of war. But our States are not interested in this method of settlement by reason of their surrender of the right to wage interstate warfare.

Congress has no power to settle interstate controversies (Kansas vs. Colorado 206 U. S., 46.) Provisions of the Articles of Confederation in these respects were superceded by the Constitution. Congress has no power to equitably apportion the water of a stream between the interested States, to allocate to any one of them a definite portion of the common supply or to determine which one of many different uses shall have preference
over the others or how the waters within a State should be administered. For Congress to attempt to expand her jurisdiction over navigable waters beyond the intention of the Constitution would be an unconscionable federal encroachment upon State jurisdiction. To attempt to extend the federal jurisdiction over all streams merely because they constitute ultimate tributaries of navigable waters would be unconstitutional and federal encroachment by subterfuge. Such a policy would lead to complete federal usurpation of State jurisdiction, within all the States, over that element most vital to the welfare and existence of the States.

The States are not without remedy. While Congress has no power to settle interstate controversies or to allocate the waters of an interstate stream between the interested States and while the States have surrendered their inherent right to settle their differences by resort to arms, they retained to themselves all inherent powers of entering into treaties or compacts with each other, subject only to consent of Congress, and they created for themselves a Supreme Court and endowed it with the powers of an international court with jurisdiction to both adjudicate all controversies between the States and to enforce its decrees. In other words, two methods for settlement of interstate controversies are available, (1) interstate treaties, compacts or agreements and (2) original suits between the States before the United States Supreme Court.

Original suits before the Supreme Court are of the highest order of litigation. They are our substitute for war between the States. While such suits afford a peaceable method of settlement,
the tremendous importance of the issues involved and the consequent
magnitude of the labors essential to a proper presentation of
interstate water suits make them a proceeding of last resort. There
could be no greater calamity than a decision of the Supreme Court
in an interstate river dispute where the court has been misguided
by reason of failure of the States to properly and completely en-
lighten the court respecting all matters pertinent to the issues.
To fully marshal all the facts and to clearly and tersely present
them to the court in a manner demanded by the importance of the
issues, usually is a herculean task requiring a decade and the
best services of a considerable number of experienced lawyers,
engineers and experts with a corps of assistants. The attorney
general of each State, by virtue of his office, is the chief counsel
for his State. But his tenure of office is short and all too
frequently both he and his successors are not only ignorant of the
facts and the principles of law involved, but their time while in
office is so consumed with ordinary State affairs that they are
unable to give adequate attention to the more important interstate
litigation. There is nothing spectacular to excite frequent
publicity in either the preparation or the presentation of the
evidence in an interstate water suit. While the issues are wet
the facts furnish very dry reading for even the best informed.
The greatest degree of foresight and prophetic vision of future
needs and conditions are required. In the time elapsing between
the commencement and the final submission of the case, human ills
and unavoidable events incapacitate those engaged in the case and
resort frequently must be had to the services of subordinates or of
new talent which must be informed before becoming sufficiently advised to hazard active service. The difficulty of conveying to the mind's eye of the court the natural conditions calling for visual evidence frequently approaches the impossible. Without this information the court is precluded from an enlightened consideration of the case and its decision may be unjust because of the lack of adequate information. Judges are only human. Even where good fortune permits a fairly comprehensive submission of the facts, the enormity of the record and the multitude of collateral issues and legal principles involved, call for prolonged and uninterrupted consideration by each of the nine judges called upon to decide the case. With a court already overburdened with litigation, such a task is well-nigh impossible. This compels the court to assign the major consideration of the case to one or more of the judges or to a master in chancery with power to consider the whole case and recommend a final decree. In other words, while such cases are of first importance and constitute the highest order of litigation and call for the first and best efforts of all the members of the court, the very enormity of such cases cheats the litigant States. There are instances, such as in the recent Great Lakes case, where the court was generously granted the time and services of so eminent a lawyer, jurist and statesman as Charles E. Hughes, master in chancery, but such is not the usual good fortune of litigants. Added to all these factors is the ever present and, too frequently, controlling one of prolonged and burdensome expense upon the litigant States and those of their citizens and property owners who share in the undertaking. Prolonged and expensive litigation does not appeal to the
generosity or even to the good judgment of the average member of
state legislatures which must appropriate the money to foot the
bills. The best interests of the State are defeated by a spirit of
over-economy upon the part of its good intending legislators. In
the final analysis, it is impossible for judges, however able or
conscientious, to fairly and accurately decide the issues in a
great interstate river case without the benefit of enlightenment
through personal observation and study of the physical facts first
hand. This prevailing objection, with a multitude of others,
calls for some more direct method of settlement where considerations
of fact, law and public policy may be applied upon the ground by
those best informed of the physical conditions and of the natural
and artificial elements which should control an equitable
determination of the whole question.

Interstate treaties afford such a method. The States still
possess inherent treaty making powers, subject only to consent of
Congress in order to avoid conflict between state and national
jurisdictions. Article I, Section 10, paragraph 3 of the
Constitution provides "No State shall, without consent of Congress,
enter into any agreement or compact with another State." Such con-
sent of Congress may be obtained either before or after the con-
clusion of the compact and where the compact in no way involves
federal jurisdiction it has been held that such consent may not be
necessary (Virginia vs. Tennessee, 148 U.S., 503; Wharton vs. Wise,
153, U.S., 155). Interstate compacts may treat of any subject
matter in which the signatory States are interested. Boundaries,
fisheries, navigation, quarantine regulations and other phases of
interstate relations have been settled by this method (See Appendix). Such compacts may be between two or more States or between a State or States and the United States (U.S. vs. Texas, 143 U.S., 621). In either instance, the high contracting parties are the signatory sovereignties and such treaties bind and are conclusive upon all their citizens (Rhode Island vs. Massachusetts, 12 Pet., 657, 726-731).

Interstate river treaties are a recent application of a power which always existed. Compacts between States are not new. Such have been concluded before and after the formation of the Union respecting boundaries and other subjects (See Appendix). River compacts are but a new application of an old method.

Rivers have not caused wars, but international river disputes have always been recognized as a most important subject for international agreement. Even where an upper nation has been held to possess the right to wholly exhaust the water supply of an international river in order to satisfy the necessities of the nation of origin, that nation has equitably apportioned a part of the water supply to the lower nation by international treaty as a matter of policy and of international comity (Malloy, Treaties, Vol. I. P. 1202). Such is the established American method. Even more appropriate is this method of settling disputes between States of our Federal Union or between a State or States and the United States. The States have renounced their right of warfare between themselves and have so placed themselves that they must either determine their respective rights in advance of conflict and settle any acute differences by interstate compacts, or, failing so to do, to undergo the pains and penalties of protracted, uncertain
and unsatisfactory litigation. The wisdom of the treaty method should require no advocacy. Litigation should be considered only in extreme cases, where diplomacy has been exhausted or where the issue is the interpretation of the language of an agreement or the enforcement of its provisions.

Compacts are usually phrased in the manner of international treaties. The dignity and importance of the proceedings and the character of the contracting parties justify this custom. The signatory States are represented by one or more commissioners who act for their States. They are assisted by expert advisers. The commissioners are appointed by the Governors of the States either with or without previous legislative authority. The appointment is usually under authority of legislative acts wherein provision is made for expenses of the commission and assistants. However, cases frequently arise during legislative recess, which demand immediate action and where it is appropriate that the Governors of the interested States appoint commissioners to proceed without delay, trusting to subsequent legislative approval to validate their acts and approve any treaty which may have been concluded. Effectiveness of interstate compacts is usually conditioned upon approval by the legislature of each of the signatory States and by the Congress. Where previous congressional consent has been obtained, it may not be necessary to submit the compact for final congressional approval although such is the better procedure.

Interstate compacts may be made by direct legislative acts. In such cases, one state legislature, by its act, makes an offer which is accepted by act of the legislature of the other State.
The offer and acceptance taken together, constitute a compact between the States, with consent of Congress obtained either before or subsequent to legislative proceedings by the contracting States. This legislative method is usually availed of only where the interstate problem is simple. With the more complex problems, the States can ill afford to hazard their general welfare by proceeding other than by commissioners, surrounded by advisors. Such matters are of too great moment to be lightly considered and satisfactory results can be obtained by protracted study, frequent discussions and frank understandings between skilled negotiators. Legislatures are too engrossed with ordinary state affairs to give appropriate time or thought to such matters and the members are not sufficiently advised to to justice to either State.

Interstate treaties, however phrased or formulated, when approved by the interested States and by the Congress become the law of the land and are binding both upon the contracting States and upon all persons and property within those States. For illustration, the mere usufructuary rights of a local water user are not and can not be greater than the rights of his State and such rights are subject to and are governed by interstate river treaties made by his State as fully and effectively as though the water user were a party signatory to the agreement. He took with full knowledge of and subject to any limitations upon or infirmities in the title of the State, his grantor, and with knowledge that the rights of the State were subject to interstate adjustments. The rights of the water user, however important they may be as regards the rights of other local water users, are subordinate to
and included within the greater rights of his State and are bound by the compact.

*Interstate river compacts possess a strong and convincing appeal to the practical American mind.* Business men, engineers, lawyers, public officials and others all recognize in this sound and practical method a way out of both actual and potential difficulties. Capital cannot safely invest in securities based upon titles to the uses of water, whether for power, irrigation, domestic or other purposes, without permanence of titles. The magnitude of our undertakings demands such security. We can no longer build upon unsettled titles to the use of the waters of interstate rivers. Courts do not determine such matters in advance of acute conflict. The Supreme Court refuses to try moot cases. Such was its ruling in the cases brought to test the validity of the Federal Water Power Act. Litigation furnishes no method of determining in one proceeding all the problems respecting the future orderly administration of uses and the permanent division of the benefits from the waters of an entire stream system.

All problems respecting the use or disposition of the waters of an interstate river may be settled and usufructuary titles may be fixed in advance of conflict by interstate compacts and agreements. Preference of uses in times of scarcity; guaranty of the dominance of the more necessary uses over the less imperative; assurance to the States of origin of sufficient water from their streams to supply their future needs irrespective of the time or method of making such uses; assurances of the permanence of the water supply necessary to the operation of works along the lower reaches of a river for municipal, agricultural, power or other
purposes; comprehensive development of an entire river system in a manner best calculated to obtain the maximum benefits from the common water supply; making wasteful uses of water for purposes of navigation subservient to the more imperative needs of mankind; prevention of wastes; systematic regulation of all problems respecting the disposition, purification and other necessary control of sewage and other polluted waters; creation of interstate boards of control or authorities to permanently administer uses and enforce prohibitions and regulations upon a river system; all these and a hundred and one other desired objects may be speedily, economically and successfully accomplished by interstate compacts.

The dignity of States guarantees the fulfillment of their treaties. The very fact that each treaty came into being only by the unanimous consent of all the commissioners for the signatory States and upon legislative approval by those States and by the Congress, gives assurance of stability and good faith. The protracted study, research and investigation by each of the commissioners necessary to intelligent consideration of the problems involved, the absence of that bitterness and partisan prejudice usually engendered in the heat of conflict, the gradual removal of obstacles as the negotiations proceed, the period for rest and reflection between sessions of the commission and the other human factors that go to bring unanimity of thought and expression, all these and more assure justice, the protection of the interests of all and permanence of agreement.

Interstate river agreements not only define the rights of the
signatories to beneficial uses of the common water supply and provide permanent means of administration of such uses but reduce to the minimum those acute conflicts which cause interstate litigation. The Supreme Court has jurisdiction to interpret every interstate compact and to enforce its provisions. The States not only have power to enter into treaties but have created a court with original and exclusive jurisdiction to enforce their agreements. Property rights founded upon the terms of interstate compacts are assured of protection by original proceedings before the greatest court in the world.

River treaties are not perfect. Like other agreements, their perfection depends upon the learning, skill and patient endeavor of those responsible for their formulation. The "do it now" fad prevalent in the present day business world has no place in council chambers of interstate river commissions. Common sense, practical and technical knowledge, infinite patience, mature reflection, kindly consideration of the rights of others and an appropriate degree of self defense, must there prevail. Academic minds are of small value. Even where well drawn, interstate compacts are not a panacea. They are only as good as the commissioners make them. A good compact is a blessing. A poor compact is worse than none, a curse to the signatories and a bad record for those who drew it. Compacts hastily drawn by bigoted, partisan and unskilled commissioners should not have been conceived. Although interstate river compacts were but recently adopted as a method of dealing with acute river situations, already there are signs of a disposition to
hastily negotiate them in a wholesale fashion. Such efforts are premature and may result in more harm than good. But few of the citizens of any State are equipped or circumstanced to represent their State upon interstate river treaty commissions. Our people think in local terms. Interstate or international relations are seldom within our range of thought or action. Our States have not developed a diplomatic service from which to draw. Safety demands that interstate compacts should evolve in step with the learning of the negotiators. We must proceed with caution. Undue haste is worse than no action at all. We must not go before we are ready. Methods of treatment of the problems pertinent to one river system may be out of place as regards another stream system. Water titles are perpetual in their nature and extreme caution should attend a definition of their limitations. Compacts fix the destinies of millions of people yet unborn. They deal with the future and not with the past. They are the basis of titles which will be of fabulous ultimate values. The whole future of our rivers and of the cities, farms, industries and institutions which will be founded upon the use of their waters, may depend upon the rightful use and not the abuse of the interstate compact method of dealing with interstate river problems. We advocate its judicious use but earnestly protest against its promiscuous abuse.

Our Federal Union will endure or fail as the States are strong or weak. The autonomy of the States must be our first concern. Interstate litigation, strife, turmoil and uncertainties of titles and jurisdiction respecting our rivers will undermine our
whole governmental structure. To nationalize our streams would tend to destroy our nation for, thereby, the States would be deprived of control of that natural element essential or imperative to their very existence. The agency which controls the element will control the States. To preserve to the States their jurisdiction over their rivers is to preserve the States. The interstate river treaty method preserves state sovereignty. It retains control of rivers with the States where it belongs. It encourages harmonious intercourse between the States and mutual regulation of their own interstate affairs. It keeps government with the States and not at Washington. It preserves the States and perpetuates the Nation.
APPENDIX.

Interstate compacts respecting rivers of the western States are the evolution of experience with interstate river litigation over a quarter of a century. There water is scarce and land plentiful. Practically all of the rivers flow through two or more States or are tributaries of such rivers. The waters from the mountains evaporate as the rivers pass over the plains. Colorado development at the headwaters of the important rivers was followed by a cycle of dry years. This brought about conditions which provoked a series of interstate river suits against Colorado. This litigation was prolonged, very expensive and extremely unsatisfactory to all parties. All recognized that such suits were destructive of state autonomy and were opening the way to federal encroachment and usurpation of state sovereignty. This realization became acute when Attorney General Gregory announced the federal policy to be that the United States owns and may control and dispose of the waters of western rivers regardless of the will of the States and that such waters never have been within the jurisdiction of the States.

These conditions demanded a more direct, immediate and comprehensive method of solving interstate river problems.

During the litigation between Wyoming and Colorado, respecting the Laramie River, there were informal conversations between some of the attorneys respecting interstate treaties and such a method is mentioned in the briefs for Colorado. The South Platte (Nebraska-Colorado) suit was commenced in 1916. At the outset,
counsel for Colorado canals adopted a policy to facilitate conclusion of an interstate compact in lieu of pursuing the litigation. Although this was the first western river respecting which an interstate compact was undertaken, the compact was not concluded until 1923 and approved by Congress until 1926. The Colorado River and the La Plata River Compacts resulted from the pioneer work of the South Platte and while initiated subsequently, were concluded at an earlier date. The joint engineering investigation between Wyoming and the United States respecting the North Platte River was made in 1918 and 1919 and opened the way to negotiations for a three state compact.

The publicity pertinent to Colorado River problems directed attention to the Colorado River Compact and caused recognition of the treaty method as an expeditious and comprehensive method of dealing with interstate river problems. This encouraged initiation of subsequent treaty negotiations.

Most of the large irrigation projects in the arid west are interstate in character. They are located upon interstate rivers and, frequently, the works and lands are located in two or more States. The North Platte and Rio Grande Projects and the proposed Boulder Canyon and the Columbia Basin developments are examples. Present and future development requires the fixing of rights by compact in advance of authorization or construction to avoid interminable litigation.

The South Platte River Compact (Colorado-Nebraska) concluded in 1923, and the La Plata River Compact (Colorado-New Mexico) concluded
in 1922, have been approved by Congress and the interested States and are being successfully administered. Litigation on both rivers was either dismissed or avoided by the conclusion of the compacts which permanently determined the rights of the States and their water users. The Ohio Interstate Stream Conservation Agreement among Illinois, Indiana, Kentucky, New York, Maryland, Ohio, Pennsylvania, Tennessee and West Virginia, respecting phenol waters, is reported to be operating successfully.

EARLY COMPACTS CONSTRUED BY SUPREME COURT

Virginia vs. Pennsylvania, 1760, (11 Pet., 20);
Virginia and Pennsylvania, 1784, (3 Dall., 425);
Virginia and Tennessee, 1802 and 1856, (148 U.S., 503, 511, 516);
Virginia and Maryland 1785, (153 U.S., 155, 162).

AGREEMENTS AND COMPACTS BETWEEN STATES TO WHICH CONGRESS HAS GIVEN ITS CONSENT

Boundary Conventions

Kentucky and Tennessee; May 12, 1820. (Stat. L. vol. 3, p. 609).
New York and New Jersey: June 28, 1834. (Stat. L. vol. 4, pp. 708ff.)
Virginia and Maryland: March 3, 1879. (Stat. L. vol. 20, pp. 481ff.)
New York and Vermont: April 7, 1880. (Stat. L. vol. 21, p. 72.)
Connecticut and Rhode Island: October 12, 1881. (Stat. L. vol. 25, p. 553.)
New York and Pennsylvania; August 19, 1890. (Stat. L. vol. 26, pp. 329ff.)
Protection of Fish in Boundary Waters

Jurisdiction over Boundary Waters for Specific Purposes
North Dakota, South Dakota, Minnesota, Wisconsin, Iowa, and Nebraska; March 4, 1921. (Stat. L. vo., 41, pp. 1447ff.)

Construction and Operation of Tunnels

Development of the Port of New York

New York and New Jersey: July 1, 1922. (Stat. L. vol. 42, pp. 822ff.)

Erection, Maintenance, and Operation of Waterworks
Kansas and Missouri: September 22, 1922. (Stat. L. vol. 42, p. 1058ff.)

Apportionment of the Waters of Western Interstate Streams.
Colorado and New Mexico: The La Plata River Compact, January 29, 1925. (Stat. L. vol. 43, p. 796ff.)

Colorado and Nebraska: the South Platte River Compact, 1925.
(Stat. L. vol. p

INTERSTATE RIVER COMPACTS AWAITING APPROVAL
The Canadian River Compact, New Mexico, Oklahoma and Texas.
The Colorado River Compact, Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming.
The Delaware River Compact, New York, New Jersey and Pennsylvania.
INTERSTATE RIVER COMPACTS UNDER NEGOTIATION

Arkansas River,
*Columbia River,
North Platte River,
Rio Grande River,
(Colorado and Kansas.
Idaho, Montana, Oregon and Washington.
Colorado, Nebraska and Wyoming.
Colorado, New Mexico and Texas.

INTERSTATE RIVER COMPACTS AUTHORIZED BY CONGRESSIONAL OR LEGISLATIVE ACTS.

Belle Fourche
Cheyenne
Snake,
(South Dakota and Wyoming.

POTENTIAL PROBLEMS

Artesian Basin Regulation,
Big Sioux,
Caney,
Grand,
James,
(North Dakota and South Dakota.
South Dakota and Iowa.
Kansas, Arkansas and Oklahoma.
Kansas, Missouri and Oklahoma.
North Dakota and South Dakota.

*Congressional act of March 4, 1925; March 3, 1927, extended to December 31, 1930.

STATES INVOLVED

Of the twenty-two States west of the Mississippi River, twenty are or soon will be involved in interstate river compact negotiations.
Of the twenty-six States east of the Mississippi, the rivers of ten are covered by compacts with potential negotiations respecting others.