REPORT
OF
DELPH E. CARPENTER
COMMISSIONER FOR
THE STATE OF COLORADO

In Re
LA PLATA RIVER COMPACT

With
REPORT OF
DELPH E. CARPENTER
COMMISSIONER FOR COLORADO
LA PLATA RIVER COMPACT.

Hon. Oliver H. Shoup, Governor of Colorado, Capitol Building, Denver.

In re La Plata River Compact.

Sir: I have the honor to report that a compact was signed by Commissioners for the States of Colorado and New Mexico, at Santa Fe, November 27, 1922, providing for the equitable distribution of the waters of the La Plata River. The compact was executed by me as Commissioner for the State of Colorado, by your appointment, under authority of Chapter 244, Session Laws of 1921, and by Honorable Stephen B. Davis, Jr., Commissioner for the State of New Mexico, acting by appointment by the Governor of New Mexico under authority of similar legislation.

The compact was executed in duplicate originals, one of which has been deposited with the Secretary of State of each of the signatory States. It shall become operative when approved by the Legislatures of both States and by the Congress of the United States.

I herewith transmit a copy of the compact. It provides in substance as follows:

By Article I, it is provided that two permanent stream-gauging stations shall be maintained by Colorado upon the La Plata River at Hesperus, Colorado, and at the interstate line, respectively. These stations are to be constructed and maintained for the purpose of measuring the flow of the river, and of making deliveries in conformity with the compact.

Article II provides for apportionment of the waters of the river between the two States in the following manner:

(1) Each State shall have the unrestricted right to the use of all water which may flow within its boundaries between December 1st and February 15th.

(2) Between February 15th and December 1st of each year:

(a) Colorado shall have the unrestricted right to use all waters within its boundaries on each day when the mean flow at the interstate station is 100 cubic feet per second or more.
(b) On all other days Colorado shall deliver to New Mexico a quantity of water equivalent to one-half of the mean flow at Hesperus for the preceding day, but in no event shall be required to deliver more than 100 cubic feet per second.

(3) The extremely low flow of the river may be rotated between users in the two States for such periods and for such times as the State Engineers may hereafter determine.

(4) Colorado shall not at any time be required to deliver any water to New Mexico not then necessary for beneficial use in that State.

(5) Substantial compliance with the provisions of the article shall be sufficient.

Article III provides that the State Engineers of the two States may formulate rules and regulations for carrying out the provisions of the compact, which shall binding until amended or abrogated.

Article V provides that the compact shall not establish any general principle or precedent and is based upon the facts peculiar to the stream.

By Article VI the compact may be modified or terminated at any time by mutual consent.

FURTHER COMMENT

The La Plata River rises in the mountains of Colorado and flows south into New Mexico, where it joins the San Juan. It has a rapid flow and has eroded a deep valley. It passes through table lands from which tributary waters enter through gulches and arroyos. Most of the water supply comes from the high mountains, but a considerable flow enters the stream from the mesa areas in Colorado. There is a considerable flow of waste and return waters from the irrigated lands between Hesperus and the Interstate Line. This flow will increase with expansion of the irrigated area in Colorado.

A considerable part of the irrigation in New Mexico was prior to that in Colorado. Most of the Colorado area was a part of the Ute Indian Reservation during the development in New Mexico. The Colorado area was developed, in large part, after the reservation was opened for settlement. The diversions in New Mexico aggregate about 120 cubic feet per second, but there is about 20 second feet of increment to the flow of the river (in New Mexico) from seepage and waste.

The major part of the flow from the mountains in Colorado passes the village of Hesperus. Between Hesperus and the Interstate Line various gulches and arroyos deliver more or less water. With the opening of Spring, the snows on the lower mesas are the
first to melt and the flow from this source then exceeds the flow from the mountains. As the season advances the higher snows melt and produce the annual rise, during the month of May, which is followed by a sudden recession and low river flow during the remainder of the summer, except for "flash flows" from heavy rains.

No storage works have been provided in either State. There are several available sites in Colorado and reservoir construction should precede further agricultural development in Colorado. The winter and flood flows will be available for storage. Reservoir development will result in expansion of the irrigated area and will increase the flow of return and seepage waters entering the stream between Hesperus and the Interstate Line.

By the compact, the winter flow (December 1st to February 15th) and all of the flood flow in excess of 100 cubic feet per second, may be used or stored in Colorado. During the early spring the flow at the Interstate Line, resulting from the melting of snows on the lower mesas, is greater than the flow from the mountains above Hesperus, and hence no administration will be required to comply with the compact during this early flow.

After the flood season the flow at the Interstate Line, on any day, shall be a quantity equivalent to one-half the mean flow at the Hesperus Station for the preceding day (but in no event to exceed 100 cubic feet). This enables Colorado to receive full credit for all seepage, waste, and other waters entering the stream between Hesperus and the Interstate Line and permits diversion in Colorado of an additional amount equal to the total flow from such return, seepage, and other sources. As such waters increase the burden upon the mountain flow will decrease correspondingly. When the inflows below Hesperus equal 100 cubic feet or one-half the mountain flow on any day when less than 100 cubic feet is to be delivered, no further delivery of mountain waters will be required.

Colorado gets full credit for all "flash flows" (from heavy rains) entering the stream between Hesperus and the Interstate Line. These flash flows may be stored, diverted by ditches, or otherwise utilized in Colorado and Colorado will get credit for parts thereof which flow across the Interstate Line.

The State Engineers are authorized to rotate the whole flow between the areas in the two States whenever the river is so low that diversion of the water would cause unnecessary waste. This method may never be availed of and, if tried, may be terminated at any time if it proves unsatisfactory. Neither State is obliged to continue its use. If successful, it may be put into operation whenever conditions require.

Colorado is not required to deliver any water to New Mexico which is not then needed for beneficial use. If, by reason of heavy
rains, the washing out of diversion works or other causes, the New Mexico ditches are unable to use water, Colorado may use the water, otherwise due New Mexico, until such causes are removed. This water does not have to be repaid. It may be stored or used for direct irrigation in Colorado.

By reason of the varying conditions which affect the flow at the Interstate Line, it is recognized that an exact delivery of water cannot be made and that a reasonable compliance with the compact will be sufficient. Under this clause shortage of one day may be compensated by additional flows on another day. This and similar features will be covered by rules and regulations to be adopted by the State Engineers as experience requires.

More economical use of water by the users in New Mexico will increase the development in that State. The amounts to be delivered by Colorado, under the compact, plus excess quantities which will pass to New Mexico, will be sufficient to meet present and future requirements in that State. Large additional areas may be developed in Colorado by storage and use of the winter and flood flows. Delivery of water under the compact will not deplete the water supply for the present development in Colorado during the spring and early summer. It now will diminish slightly the available supply during the late summer and autumn, but this condition will gradually disappear as the return flow increases.

Under the compact the Colorado ditches may construct reservoirs and deliver stored waters in exchange for flow of the river. There is no restriction or limitation upon the character or source of the waters to be delivered to New Mexico. Water from any source satisfies the compact.

Broadly speaking, the compact protects the present development in Colorado and reserves the first use of surplus waters for the benefit of Colorado lands. The areas in New Mexico are protected and expansion in both States is permitted. All controversy is settled and water titles for future development are determined.

Ralph I. Meeker, Civil Engineer, was in charge of investigations as the expert for Colorado and is entitled to a large measure of credit for the adjustment between the States. I append hereto a memorandum prepared by him.

I trust the compact will meet with your favorable consideration, and I respectfully request that it be submitted to the Legislature for its early approval.

Respectfully submitted,

DELPH E. CARPENTER,
Commissioner for Colorado.
Denver, Colorado, December 15, 1922.

LA PLATA RIVER BASIN
(Ralph I. Meeker)
ACRES IRRIGATED
(1919)

<table>
<thead>
<tr>
<th></th>
<th>Acres</th>
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<tbody>
<tr>
<td>Colorado</td>
<td>19,000</td>
</tr>
<tr>
<td>New Mexico</td>
<td>4,100</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>23,100</strong></td>
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Additional acres that may be irrigated provided water is available:

<table>
<thead>
<tr>
<th></th>
<th>Acres</th>
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<tbody>
<tr>
<td>Colorado</td>
<td>40,000</td>
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<tr>
<td>New Mexico</td>
<td>12,000</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>52,000</strong></td>
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</table>

Note: The irrigable area is greater than the surplus waters of the La Plata Basin. In Colorado trans-mountain diversions from the Animas River and its tributaries will be made (ultimately) for the benefit of the La Plata lands.

WATER SUPPLY (Approximate)

WATER PRODUCED

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>Colorado Area</td>
<td>60,000</td>
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<tr>
<td>New Mexico Area</td>
<td>10,000</td>
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<tr>
<td><strong>Total</strong></td>
<td><strong>70,000</strong></td>
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WATER NOW CONSUMED

<table>
<thead>
<tr>
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<tr>
<td>Colorado Lands</td>
<td>24,000</td>
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<tr>
<td>New Mexico Lands</td>
<td>7,000</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>31,000</strong></td>
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Acre-Feet

<table>
<thead>
<tr>
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<th>Quantity</th>
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<td>70,000</td>
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<tr>
<td>Total Water Consumed</td>
<td>31,000</td>
</tr>
<tr>
<td>Surplus Flow</td>
<td>39,000</td>
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</table>

Note: Reservoir development needed to control a large part of surplus water. This development will be in Colorado.

LA PLATA RIVER COMPACT.

The State of Colorado and the State of New Mexico, desiring to provide for the equitable distribution of the waters of the La Plata River and to remove all causes of present and future controversy between them with respect thereto, and being moved by considerations of interstate comity, pursuant to Acts of their respective Legislatures, have resolved to conclude a compact for these purposes and have named as their Commissioners:

Delph E. Carpenter, for the State of Colorado; and Stephen B. Davis, Jr., for the State of New Mexico; who have agreed upon the following Articles:

ARTICLE I

The State of Colorado, at its own expense, shall establish and maintain two permanent stream-gauging stations upon the La Plata River for the purpose of measuring and recording its flow, which shall be known as the Hesperus Station and the Interstate Station, respectively.

The Hesperus Station shall be located at some convenient place near the village of Hesperus, Colorado. Suitable devices for ascertaining and recording the volume of all diversions from the river above Hesperus Station shall be established and maintained (without expense to the State of New Mexico), and whenever in this compact reference is made to the flow of the river at Hesperus Station, it shall be construed to include the amount of the concurrent diversions above said station.

The Interstate Station shall be located at some convenient place within one mile of, and above or below, the interstate line. Suitable devices for ascertaining and recording the volume of water diverted by the Enterprise and Pioneer Canals, now serving approximately equal areas in both States, shall be established and maintained (without expense to the State of New Mexico), and whenever in this compact reference is made to the flow of the river at the Interstate Station, it shall be construed to include one-half the volume of the concurrent diversions by such canals, and also the volume of any other water which may hereafter be diverted from said river in Colorado for use in New Mexico.
Each of said stations shall be equipped with suitable devices for recording the flow of water in said river at all times between the 15th day of February and the 1st day of December of each year. The State Engineers of the signatory States shall make provision for co-operative gauging at two stations, for the details of the operation, exchange of records and data, and publication of the facts.

ARTICLE II

The waters of the La Plata River are hereby equitably apportioned between the signatory States, including the citizens thereof, as follows:

1. At all times between the first day of December and the fifteenth day of the succeeding February each State shall have the unrestricted right to the use of all water which may flow within its boundaries.

2. By reason of the usual annual rise and fall, the flow of said river between the fifteenth day of February and the first day of December of each year, shall be apportioned between the States in the following manner:

   (a) Each State shall have the unrestricted right to use all the waters within its boundaries on each day when the mean daily flow at the Interstate Station is one hundred cubic feet per second, or more.

   (b) On all other days the State of Colorado shall deliver at the Interstate Station a quantity of water equivalent to one-half of the mean flow at the Hesperus Station for the preceding day, but not to exceed one hundred cubic feet per second.

3. Whenever the flow of the river is so low that in the judgment of the State Engineers of the States the greatest beneficial use of its waters may be secured by distributing all of its waters successively to the lands in each State in alternating periods, in lieu of delivery of water as provided in the second paragraph of this Article, the use of the waters may be so rotated between the two States in such manner, for such periods, and to continue for such time as the State Engineers may jointly determine.

4. The State of New Mexico shall not at any time be entitled to receive nor shall the State of Colorado be required to deliver any water not then necessary for beneficial use in the State of New Mexico.

5. A substantial delivery of water under the terms of this Article shall be deemed a compliance with its provisions and minor and compensating irregularities in flow or delivery shall be disregarded.
ARTICLE III

The State Engineers of the States, by agreements from time to time, may formulate rules and regulations for carrying out the provisions of this compact, which, when signed and promulgated by them, shall be binding until amended by agreement between them or until terminated by written notice from one to the other.

ARTICLE IV

Whenever any official of either State is designated to perform any duty under this contract, such designation shall be interpreted to include the State official or officials upon whom the duties now performed by such official may hereafter devolve.

ARTICLE V

The physical and other conditions peculiar to the La Plata River and the territory drained and served thereby constitute the basis for this compact, and neither of the signatory States concedes the establishment of any general principle or precedent by the concluding of this compact.

ARTICLE VI

This compact may be modified or terminated at any time by mutual consent of the signatory States and upon such termination all rights then established hereunder shall continue unimpaired.

ARTICLE VII

This compact shall become operative when approved by the Legislature of each of the signatory States and by the Congress of the United States. Notice of approval by the Legislatures shall be given by the Governor of each State to the Governor of the other State, and the President of the United States is requested to give notice to the Governors of the signatory States of approval by the Congress of the United States.

In witness whereof, The Commissioners have signed this compact in duplicate originals, one of which shall be deposited with the Secretary of State of each of the signatory States.

Done at the City of Santa Fe, in the State of New Mexico, this twenty-seventh day of November, in the year of our Lord One Thousand Nine Hundred and Twenty-two.

DELPH E. CARPENTER.
STEPHEN B. DAVIS, Jr.
POWERS OF STATES TO ENTER INTO COMPACTS.

Compacts or agreements between the States are recognized by Article I, section 10, paragraph 3, of the Constitution of the United States, which provides:

"No State shall, without consent of Congress, * * * enter into any agreement or compact with another State. * * *"

Interstate controversies and differences respecting boundaries, fisheries, etc., have been frequently settled by interstate compact.

Among the many boundary disputes so settled may be mentioned the following: Virginia and Pennsylvania, 1780 (11 Pet., 20); Virginia and Pennsylvania, 1784 (3 Dall., 425); Kentucky and Tennessee, 1820 (11 Pet., 207); Virginia and Tennessee, 1802 and 1856 (148 U. S., 503, 511, 516); Virginia and Maryland, 1785 (153 U. S., 155, 162).

Of the compacts between States respecting the taking of fish in rivers forming the boundary between the two disputant States may be mentioned: Washington and Oregon, Columbia River; Maryland and Virginia, Potomac River. (153 U. S. 155.)

It is currently reported that recently the States of New York and New Jersey settled their harbor differences by interstate compact.

While all compacts which would in any way involve the Federal Government or its jurisdiction, property, etc., must be made with consent or approval of Congress in order to be binding, it has been suggested by the Supreme Court that compacts made between two States respecting matters in which the States alone are interested might be taken as binding without consent or approval by Congress. (Stearns v. Minnesota 179 U. S., 223, 245; Virginia v. Tennessee, 148 U. S., 503; Wharton v. Wise, 153 U. S., 155.)

For a full discussion respecting the rights of the States to enter into treaties or compacts, with consent of Congress, see Rhode Island v. Massachusetts (12 Pet., 657, 725-731).

In the case just cited the Supreme Court observed that when Congress has given its consent to two States to enter into a compact or agreement, "then the States were in this respect re-
stored to their original inherent sovereignty; such consent, being the sole limitation imposed by the Constitution, when given, left the States as they were before, as held by this court in Poole v. Fleeger (11 Pet., 209); whereby their compacts became of binding force, and finally settled the boundary between them; operating with the same effect as a treaty between sovereign powers. That is, that the boundaries so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights, and are to be treated to all intents and purposes, as the true real boundaries. * * * The construction of such a compact is a judicial question,” for the United States Supreme Court. (12 Pet., 725.)


In other words, the States of the Union, by consent of Congress, have the same power to enter into compacts with each other as do independent nations, upon all matters not delegated to the Federal Government.

INTERNATIONAL RIVERS.

Controversies respecting international rivers have been settled by treaty. (Heftier Droit Ind., Appendix VIII; Hall, International Law, sec. 39.)

While the right of the United States to the use and benefit of the entire flow of the Rio Grande River irrespective of any former uses made in Mexico was upheld by the opinion of the Attorney General in 1895 (21 Ops. Atty. Gen., 274, 282), the rights of the two nations were settled by a “convention providing for the equitable distribution of the waters of the Rio Grande for irrigation purposes” made May 21, 1906. (Malloy, Treaties, Vol. I, p. 1202.)

That the United States has a perfect right to divert the waters of the Colorado River at any point above the international boundary with Mexico irrespective of the effect of such diversion upon the flow of the river in Mexico or along that part of its course which forms the boundary between the two nations was held by the Attorney General September 28, 1903. (Rept. to Atty. Gen. of U. S., Colorado River in California, p. 58; Opinion of Atty. Gen., Aug. 20, 1919.)

The above opinion is in harmony with the decision in the Rio Grande case, wherein it was held (quoting from syllabus):

“The fact that there is not enough water in the Rio Grande for the use of the inhabitants of both countries for irrigation purposes does not give Mexico the right to subject the United
States to the burden of arresting its development and of de­
nying to its inhabitants the use of a provision which nature has
supplied entirely within its territory. The recognition of such a
right is entirely inconsistent with the sovereignty of the United
States over its national domain.

"The rules, principles, and precedents of international law
imposed no duty or obligation upon the United States of deny­
ing to its inhabitants the use of the water of that part of the Rio
Grande lying entirely within the United States although such
use results in reducing the volume of water in the river below
the point where it ceases to be entirely within the United States."
(21 Ops. Atty. Gen., 274.)

For a full discussion of international rights upon the Colo­
rado River, see Appendix, pages 318-343, part 2, Hearings Be­
fore Committee on Irrigation of Arid Lands, House of Repre­
sentatives, Sixty-sixth Congress, first session.

While by all rules of international law the upper nation is
entitled to make full use of the waters of an international stream
rising wholly within the borders of the upper nation, neverthe­
less such matters are usually settled by treaty in the same man­
ner as the settlement between the United States and Mexico re­
specting the use and benefit of the waters of the Rio Grande
(above cited), wherein it is provided for an "equitable ap­por­
tionment" of the waters of the stream between the two Govern­
ments.

The rule of equitable apportionment applies to the settle­
men by the Supreme Court of controversies between States over
rivers common to two or more States of the Union. (Kansas v.
Colorado, 206 U. S., 46, 117.)

This equitable apportionment of the waters of an interstate
river may be made by one of two methods:

(1) By interstate "compact or agreement" between the
States, by consent of Congress; and

(2) By suit between the States before the United States Su­
preme Court.

The latter method is the substitute, under our form of gov­
ernment, for war between the States. In other words, were it
not for the provisions of our Constitution the States might set­
tle their differences over interstate rivers by resort to arms. But
by the terms of the Constitution the right to resort to settlement
by force was surrendered, and in lieu thereof was substituted
the right to submit interstate controversies to the Supreme Court
in original proceedings between the States. (Kansas v. Colo­
rado, 206 U. S., 46; Rhode Island v. Massachusetts, 12 Pet., 657.)
A suit between the States is but a substitute for war. It is the last resort, and should not be resorted to until all avenues of settlement by compact have been exhausted. It has been suggested that the Supreme Court should announce the principle that no suit between States would be entertained without a preliminary showing that reasonable efforts had been made by the complaining State to compose the differences between it and the defendant State by mutual agreement or interstate compact. It would appear that the rule of settlement by treaty of international disputes over rivers common to two nations should likewise apply to settlements of controversies present or possible, between States of the Union.

The object of the present legislation is to follow the international principle of settlement.

INTERSTATE COMPACTS RESPECTING USE OF WATERS OF INTERSTATE RIVERS.

While, as we have already observed, various of the States have settled their controversies respecting boundaries, fisheries, etc., by interstate compact or by concurrent State legislation, having the same effect, this method of settlement of pending or threatened controversies respecting the use and distribution of the waters of interstate streams for irrigation and other beneficial purposes, has not been availed of. The right of adjoining States to the use and benefit of the waters of the streams common to both States has been considered by the court in the case of Kansas v. Colorado (185 U. S., 125; 206 U. S., 46), in which case it was held that the respective States were each entitled to an equitable portion of the waters of the common river, the extent of the use in each State to be determined upon the facts and circumstances of each particular case.

In the above-mentioned case the right of the United States to the use of the waters of the western streams was also considered and determined (pp. 87-93).

An equitable apportionment or allocation of the use and distribution of the waters of western interstate streams may be best accomplished through the efforts of the States represented by commissioners fully acquainted with the facts and the surrounding conditions, as well as with the future possibilities of use of water from the streams.

Principles of international law are applicable to the use and distribution of waters of interstate streams, and as regards compacts between the States, "the rule of decision is not to be collected from the decisions of either State, but is one, if we may so speak, of an international character." (Marlett v. Silk, 11 Pet., 1, 23.)
The rights of the nation in whose territory an international stream has its rise to the use and benefit of its waters for the development of its territory, irrespective of the effect upon the territory of a lower nation through which the stream passes on its way to the sea, were fully considered by Attorney General Judson Harmon, with respect to the claims made by the Republic of Mexico to damage by depletion of the waters of the Rio Grande, occasioned by uses in the United States. After exhaustive consideration of the various authorities upon the subject, he arrived at the conclusion that, while the United States had the right to utilize the entire flow of the Rio Grande in the necessary reclamation of the lands near the source of the stream, and while "precedents of international law imposed no liability or obligation upon the United States" to permit any of the water of the stream to flow to El Paso, nevertheless, he advised that the matter be treated as one of policy and settled by treaty with Mexico. (21 Ops. Atty. Gen., 274, 280-283.)

It is safe to predict that most of the past controversies respecting the waters of Western interstate streams could have been avoided had the matters in dispute been first submitted to competent compact commissioners. Friction between the Federal departments and the State authorities should be avoided by proper compacts between the States before construction proceeds upon rivers where such controversies may arise.

The Colorado River is still "young," as regards utilization of its water supply. Conditions look to enormous development during the next quarter of a century. Nature facilitates an easy allocation and settlement of all matters pertaining to the future utilization of the waters of this stream, if means to that end are taken prior to further construction and before friction develops. All apprehension of interference with the gradual and necessary future development upon the upper reaches of the stream by reason of earlier construction of enormous works on the lower river may be avoided by compact and agreement entered into prior to any future construction.

In fact, settlement of possible interstate controversies by interstate compacts is recommended by the United States Supreme Court. (Washington v. Oregon, 214 U. S., 205, 218.)

COMPACT BY "JOINT COMMISSION" BETWEEN STATES AND UNITED STATES.

In another section we observe that the States, with consent of Congress, have full powers to make compacts with each other. Treaties between States are designated as agreements or compacts. (Art. I, section 10, par. 3, Constitution.)

The United States, in the exercise of its sovereign powers,
may enter into compacts or agreements with one or more of the States, acting in their sovereign capacities.

The usual method of formulating such compacts or agreements, either between the States or between the States and the United States, is through the instrumentality of joint commissions thereunto duly constituted by legislative enactments and appointment by the executives of the State or the States and of the Nation. Such joint commissions are in all respects similar to the joint commissions constituted by separate Governments for formulation of treaties between independent nations. The term does not refer to a joint commission consisting only of members of one sovereignty and created by joint action of two or more legislative branches, but refers to that character of commission formed by two independent powers for the purpose of joint action to a common end.

Of the available examples of settlements of controversies between the United States and one or more of the States through the instrumentality of joint commissions, the most convenient example is that of the attempts at settlement of the boundary between the United States and Texas. Here two joint commissions, duly constituted by the National and State Governments, sought to settle the boundary line. The history of these attempts is found in the reports of the United States Supreme Court in the case of United States v. Tevas (143 U. S., 621; 162 U. S., 1).

Throughout the many pages of the reports covered by the decisions in this case, the representative of the Government of the United States on the one hand and that of the State of Texas on the other, are designated as commissioners, and the common agency for settlement of the controversy is designated as the joint commission or joint boundary commission.

Lest there be some question respecting the use of the term "joint commission." the following references to the opinions in the above case may be profitable:

By a treaty concluded August 25, 1838, between the United States and the Republic of Texas (8 Stat., 511), each of the contracting parties agreed to appoint "a commissioner" for the purpose of jointly agreeing upon the line between the two Republics;

By the act of June 5, 1858, chapter 92 (11 Stat., 310), enacted in harmony with the act of the Legislature of the State of Texas, February 11, 1854, it was provided that the President should appoint a representative to act in harmony with one from the State of Texas for the purpose of definitely locating the boundary between the Indian Territory and the State of Texas. The following references to the representatives so appointed and the name of the body so constituted appear in the decisions in the
above case at the following pages: "A commissioner was appointed on behalf of the United States" (162 U. S., 1, 65); "the commissioners of the two Governments"—i.e., the Government of Texas and the Government of the United States (162 U. S., 1, 66); "a joint commission on the part of the United States and Texas commenced the work," etc. (143 U. S., 621, 635); "the commissioner on the part of the United States" (id.); "the commissioners of the United States and Texas" (id.);

By the act of January 31, 1885, chapter 47 (23 Stat., 296, 297), it was provided that the United States should appoint a representative who should work in conjunction with a representative to be appointed by the State of Texas, for the purpose of ascertaining the boundary. The following references appear as descriptive of the person and the agency:

"The two Governments (United States and State of Texas) appointed commissioners" (162 U. S., 1, 76); the joint body so constituted is defined as "the Joint Boundary Commission" (162 U. S., 1, 21); in the act by the Legislature of Texas authorizing the appointment of its commissioner, the combined representation of the two Governments (State and National) is designated a "joint commission" (162 U. S. 1, 73); by the act authorizing the suit between the United States and Texas (26 Stat., 81, 92, chap. 182, sec. 25) the commission formed under the act of 1885 with the State of Texas is designated as "the joint boundary commission under the act of Congress," etc. (143 U. S., 621, 622); and by the act of 1885 "a joint commission was organized" (143 U. S., 621, 636);

Without further multiplication of examples, it would appear that where two representatives of the United States and of a State are duly appointed for the purpose of settling a boundary or some other dispute, such persons are "commissioners" and are collectively a "joint commission." and as the court said (162 U. S., 76), "Under the act of Texas of 1882 and the act of Congress of 1885, the two Governments appointed commissioners," and the body so constituted was a "joint commission."

This exercise of the treaty-making powers of the two separate Governments (National and State) necessarily proceeds upon the fundamental fact that there are two separate and distinct Governments, each having its attributes of sovereignty. Of this we shall make mention in a separate memorandum.

COMPACTS BETWEEN STATE AND NATIONAL GOVERNMENTS.

Controversies arising between two States or between the United States and a State or States may be settled by compact or agreement or by judicial determination by the United States Supreme Court. Diplomacy failing, the suit before the court is
the substitute for war. In either event the high contracting or
litigating parties proceed upon the basis of sovereignties, each
exercising independent and separate powers, and each exclusive
within its proper sphere. As said by Mr. Justice Harlan in
United States v. Texas (143 U. S., 621, 646):

"The submission to judicial solution of controversies arising
between these two Governments, 'each sovereign with respect to
the objects committed to it, and neither sovereign with respect to
the objects committed to the other,' McCulloch v. State of Mary­
land (4 Wheat, 316, 400, 410), but both subject to the supreme
law of the land, does no violence to the inherent nature of sover­
eignty. The States of the Union have agreed, in the Constitu­
tion, that the judicial power of the United States shall extend to
all cases arising under the Constitution, laws, and treaties of
the United States, without regard to the character of the parties
(excluding, of course, suits against a State by its own citizens or
by citizens of other States, or by citizens or subjects of foreign
States), and equally to controversies to which the United States
shall be a party, without regard to the subject of such contro­
ersies, and that this court may exercise original jurisdiction in
all such cases 'in the which a State shall be party,' without ex­
cluding those in which the United States may be the opposite
party."

The power to enter into compact between a State or States
and the United States is founded upon the same principle as the
power in the Supreme Court to settle controversies between
States, as said by Mr. Justice Harlan in the foregoing case (p.
644), "We can not assume that the framers of the Constitution,
while extending the judicial power of the United States to con­
troversies between two or more States of the Union and between
a State of the Union and foreign States, intended to exempt a
State altogether from suit by the General Government."

The above statement followed an analysis of the position
taken by Texas (p. 641):

"Texas insists that no such jurisdiction has been conferred
upon this court, and that the only mode in which the present
dispute can be peaceably settled is by agreement, in some form,
between the United States and that State. Of course, if no such
agreement can be reached—and it seems that one is not probable
—and if neither party will surrender its claim of authority and
jurisdiction over the disputed territory the result, according to
the defendant's theory of the Constitution, must be that the
United States, in order to effect a settlement of this vexed ques­
tion of boundary, must bring its suit in one of the courts of
Texas * * * or that, in the end, there must be a trial of physical
strength between the Government of the Union and Texas."

The court decided that, inasmuch as the State and the United
States did not settle their controversy by compact, the Supreme Court had the power to determine the controversy between the United States and the State.

The right to settle by compact proceeds upon the sovereignty of the State and the sovereignty of the Nation. As stated regarding another matter, "It is a matter between two sovereign powers." (U. S. v. La., 127 U. S. 182, 189.)

The following quotations bear upon this general subject of power and separate sovereignty:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." (Constitution of the United States, tenth amendment.)

"It must be recollected that previous to the formation of the new Constitution we were divided into independent States, united for some purposes, but in most respects sovereign." (Chief Justice Marshall in Sturges v. Crowninshield, 4 Wheat., 122, 192.)

"Reference has been made to the political situation of these States, anterior to its (Constitution) formation. It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true." (Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat., 1, 187.)

"The United States are sovereign as to all the powers of Government actually surrendered. Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them. Of course, the part not surrendered must remain as it did before." (Chisholm v. Georgia, 2 Dall., 419, 435.)

"In America the powers of sovereignty are divided between the Government of the Union and those of the States. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. (Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat., 316, 410.)

"Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still all powers not delegated to the United States, nor prohibited to the States, are reserved to the States, respectively, or to the people. And we have already had occasion to remark at this term, that 'the people of each State compose a State, having its own government and endowed with all the functions essential to separate and independent existence,'
and that 'without the States in union there could be no such political body as the United States.' Not only therefore can there be no loss of separate and independent autonomy to the States through their Union under the Constitution, but it may be not unreasonably said that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." (Chief Justice Chase in Texas v. White, 7 Wallace, 700, 725, decided in 1868.)

"The General Government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, "reserved," are as independent of the General Government as that Government within its sphere is independent of the States." (Mr. Justice Nelson in Collector v. Day, 11 Wallace, 113, 124, decided in 1870.)

"We have in this Republic a dual system of government, national and state, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two Governments and hold each in its separate sphere is the peculiar duty of all courts, preeminently of this—a duty oftentimes of great delicacy and difficulty." (Mr. Justice Brewer in South Carolina v. United States, 199 United States, 437, 448, decided in 1905.)

"Each State is subject only to the limitations prescribed by the Constitution and within its own territory is otherwise supreme. Its Internal affairs are matters of its own discretion." (Id., 454.)

"The powers affecting the internal affairs of the States not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and all powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States." (Justice Brewer in Kansas v. Colorado, 206 U. S., 46, 90.)

In the case of Kansas v. Colorado, last above cited, the United
States intervened, in effect claiming national control of the waters of Western streams to be administered under the doctrine of prior appropriation. In answer to the primary question of national control, regardless of the rights of the States, inter sese, Justice Brewer, after observing that the United States had an interest in the public lands within the Western States and might legislate for their reclamation, subject to State laws, thus disposed of the claim of national control of Western interstate streams:

"Turning to the enumeration of the powers granted to Congress by the eighth section of the first article of the Constitution, it is enough to say that no one of them by any implication refers to the reclamation of arid land. * * * No independent and unmentioned power passes to the National Government or can rightfully be exercised by the Congress. * * * But it is useless to pursue the inquiry further in this direction. It is enough for the purpose of this case that each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters. (Citing cases). * * * It may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress can not enforce either rule upon any State. * * * One cardinal rule, underlying all the relations of the States to each other, is that of the equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none." (Kansas v. Colorado, 206 U. S., 46, 87-97.)

In concluding the above decision, the Supreme Court dismissed the case without prejudice to the right of Kansas to institute new proceedings, "whenever it shall appear that through a material increase in the depletion of the waters of the Arkansas by Colorado * * * the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of the benefits between the two States resulting from the flow of the river." (206 U. S., 46, 117.)

(Note: Since the foregoing memorandum was written the U. S. Supreme Court decided, in Wyoming v. Colorado, that in cases between two States both of which recognize the doctrine of prior appropriation as a matter of local law, the Court will apply the fundamental principles of the doctrine in the allocation of the waters of a river common to the two States and will so apportion the dependable average annual flow between the States that the older established uses in both States will receive first protection. The doctrine so announced leaves the Western States to a rivalry and a contest of speed for future development. The upper State has but one alternative, that of using every means to retard development in the lower State until the uses within
the upper State have reached their maximum. The States may
avoid this unfortunate situation by determining their respective
rights by interstate compact before further development in either
State, thus permitting freedom of development in the lower
State without injury to future growth in the upper.

By the attached compact the objectionable features of leaving
the destiny of the States to a wild scramble in a contest of speed
for first development are avoided. The future uses within the
upper State, according to its growing necessities, are protected
without interfering with a similar growth in the lower state. Each
State may proceed in an orderly manner in pace with the normal
course of events, free from any cloud of threatened penalties.)
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