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STATE ENGINEERS' PERSPECTIVES ON THE ADMINISTRATION OF INTERSTATE WATER COMPACTS

Historically in the arid American West, explosive population growth and increased drought sparked a series of intense legal and political battles. These disputes are not confined to state or country boundaries and often turned on who controlled an increasingly valuable resource: water. Water shortages result in complex and heated disputes between states which take years – sometimes decades – to resolve.

With such high stakes on the line, it is common for stakeholders to turn to the legal system for redress. However, the laws that govern most of the West's water systems, such as the prior appropriation doctrine rule ("first in time, first in right"), appear tailor-made for conflict. While the prior appropriation system appeared to work in the in the past because arid climates still had enough water for all parties, those days ceased to exist as populations increased. The booming West is now an environment ripe for fighting.

Recognizing the prior appropriation system was not sustainable between states, state engineers, the individuals charged with the responsibility for administering water rights, turned to interstate compacts for a solution. Interstate compacts are used as an instrument for state cooperation in carrying out affirmative programs for solving common problems; here, ensuring water reaches downstream states while also securing water for each states' constituents.

Such high stakes in the allocation of scarce water resources, further emphasize the importance of the state engineer's role in this administration. State engineers have the responsibility and authority to administer water rights and to realize the benefits and exercise the obligations of numerous interstate compacts that form the backbone for allocating water throughout the West. State engineers are critical players in the process, making decisions, advising attorneys, and oftentimes deciding if an issue is worth litigation or can be settled through negotiation.

The *University of Denver Water Law Review* brought together a panel of current and former state engineers from Kansas, Wyoming, Colorado, and Nebraska to discuss their experience with interstate compacts. Specifically, the panel explained how interstate compacts work; the challenges state engineers face implementing the terms of the compact; how state engineers protect their state's interests; and the best way to achieve the benefits bargained for in the compacts. While tensions exist in every river basin, the "State Engineers' Perspectives on the Administration of Interstate Water Compacts" panel, moderated by Colorado's First Assistant Attorney General, Karen Kwon, was more like a reunion of old friends. The panel included David Barfield, Dick Wolfe, Patrick Tyrrell, and Jeff Fassett who represent competing interests in the interstate compact disputes, but who have developed friendships over the years they have worked together. While each state has different perspectives on administering the compacts, the panelists all agreed that *cooperation* is essential to effective administration of interstate compacts.

The panelists primarily focused on the Republican River Compact. The water at issue in the Republican River Compact flows through Colorado, Nebraska, and Kansas. Over the past few decades, it has been the center of a

number of political disputes. In the latest entry of this saga, the dispute turned on the 1943 interstate compact for the Republican River. David Barfield, the Chief Engineer for the Kansas Division of Water Resources, began the discussion with a brief overview of the dispute. He noted that those who formed the compact accounted for the developments they assumed would occur. Based on that accounting they created an allocation framework which theoretically would ensure that each state maintained the appropriate allocation of water. Like all interstate compacts, however, the interstate compact did not account for every possible problem that could arise.

In this dispute over states' rights to the waters of the Republican River Basin, the Supreme Court adopted the special master's recommendations that Nebraska had "knowingly failed" to comply with the Republican River Compact. The Court awarded Kansas $3.7 million for its losses and $1.8 million in partial disgorgement. It declined to order an injunction against Nebraska and found that Nebraska should decide how to achieve compliance. Since the holding, both Colorado and Nebraska have taken significant actions towards compliance including: (i) groundwater retirements; (ii) surface water buy-outs; and (ii) draining Bonny Reservoir and, most importantly, developing augmentation projects. There continue to be some disputes over developing augmentation projects as these need compact administration approval.

The Republican River Basin case, like most interstate compact disputes, often has contentious legal rhetoric surrounding the conflict. However, all of the state engineers emphasized that the states have established a close working relationship in recent years that should keep water in the river and the neighboring states out of the courts. It is this collaborative effort to settle conflicts outside of court that the panel said is key to the successful allocation of limited water resources.

In discussing the dispute, Barfield highlighted several recurring issues state engineers face in administering interstate compacts. This dispute underscores the difficulties of administering the water rights when compacts created by one generation and left to the next generation to administer. Barfield emphasized that the personalities and personal relationships that helped (or in some cases prevented) a compact's formation, are different than those which administer the agreed-upon terms. This separation could lead to unexpected conflicts simply because there was a change in the players involved. In these situations, cooperation is the key to success.

Barfield, like the rest of the panelists, said that unexpected change further complicates the administration of these interstate compacts. If unanticipated change did not happen, he stated, the interstate compacts would work "just fine." However, interstate compacts are created with limited information about the future –which leads to challenges later in administration. For example, significant ground water development connected to the surface water system creates a technical challenge for the administration of the compacts when the interstate compact is silent on the matter. Barfield has worked on finding a solution to this problem for decades and has made some progress. He concluded by noting that his job as state engineer is to identify when there is a dispute and work through the appropriate dispute mechanism to ensure his state gets its share of water.

Patrick Tyrrell, the State Engineer for the Wyoming State Engineer's Office, spoke after Barfield. Tyrrell said that state engineers can either initiate interstate litigation over the administration of a compact or they can work to prevent litigation and resolve disputes without resorting to the judicial process. To refuse to regulate under an interstate compact will invariably result in a lawsuit. The state engineer is responsible for implementing language of a compact that is oftentimes unclear and antiquated, and must navigate the differences in state water laws. These administrative challenges can, and often do, contribute to very different opinions at compact commission meetings. For example, Tyrrell noted that there may be differences across state lines as to what constitutes a reservoir. Tyrrell noted that when it comes to implementing and administering these vague and outdated compacts, it is easy to lawyer-up and end up in court. Again, echoing Barfield, Tyrrell stressed that it is in all parties' best interest to settle any water dispute outside of court. The onset of litigation signals that the parties have actually failed in their primary role of addressing and resolving water disputes.

Tyrrell also noted that states are naturally skeptical of their neighbors and cautioned that this skepticism leads to distrust, which further complicates discussions on water administration. He pointed to the clash between Montana and Wyoming over the North Platt twenty to thirty years ago, which ended in a lawsuit, as an example. To combat distrust and skepticism, Tyrrell noted the importance of communication and the monthly meetings he has with other states to create a transparent relationship. He concluded by reiterating that a state engineer's primary (and perpetual) responsibility is to educate constituents about what compacts will allow state engineers to do and not do—something he called "minding your manners at home."

Dick Wolfe, the State Engineer for the Colorado Division of Water Resources, followed Tyrrell. Wolfe highlighted the critical point that interstate compacts were created as an alternative to litigation. Wolfe also highlighted the practical limitation of compacts insofar as they do not anticipate some of the challenges that arise in the future. Rather, they were designed to establish a structure and set of principles for implementing the compact. Specifically, Wolfe referenced the challenges that arose due to the development of groundwater between the 1950s and 1980s: (i) climate change; (ii) the implementation of the Endangered Species Act; and, (iii) bypass flows. None of these developments were considered when the interstate compacts were originally developed. While these challenges are not directly addressed in many interstate compacts, the compacts and those charged with administering them need to be flexible and seek out practical solutions with the advancing age of the compacts.

In determining how to resolve unanticipated changes, Wolfe quoted Albert Einstein: "A clever person solves a problem; a wise person avoids it." Wolfe said that through the dispute over the Arkansas Compact and Republican Compact as it relates to ground water pumping, Colorado has learned – the hard way – that ignoring facts does not make the problem go away. He said that by channeling the "clever person" we can, and should, work cooperatively in addressing potential conflicts, thereby avoiding much larger problems later.

Through water commissions the state engineer has the power to amend the interstate compact to some degree without having to actually amend the entire

compact. Through these commissions the state engineer has addressed the alleged violations of the interstate compact and brought them to the attention of state officials before they file a lawsuit. Therefore, commissions allow the state engineers the flexibility to work *within* the compact and *cooperate* with neighboring states, rather than allowing parties to become polarized and lawyer-up. Litigation only complicates the actual allocation of water.

In concluding his portion of the talk, Wolfe stressed the importance of collaboration beyond anything else. He pointed to the settlement over the Arkansas River as an example of where the states worked together on developing the issues. Moreover, Colorado has tried to become more transparent by providing data to check what the state is doing. By working hard to take these steps to a more transparent relationship, state engineers can build the trust which is essential to dealing in interstate compacts

Jeff Fassett is the former state engineer of Wyoming and current Director of the Nebraska Department of Natural Resources. Fassett began his speech by recognizing the friendships between the panel members – but joked "all good friends have to keep an eye on each other." Fassett drew on his past experiences to highlight that interstate compact disputes are not hard to start, but are very difficult to stop once initiated. Moreover, because these cases take place in the United States Supreme Court, the parties have one chance to get it right – something that makes all parties nervous.

Citing the immense amount of time and resources expended in reaching the settlement between Wyoming and Nebraska, Fassett noted that there were five attempts to settle the case before it reached oral arguments. Each attempt failed, in part because of the poor relationships between the parties. He emphasized that at the end of the day it took a change in the players to reach a solution. Ultimately, it came down to the water officials, like the state engineers' office, to develop the final settlements.

At the end of the panel discussion, moderator Karen Kwon commented that some of the panelists seemed less than excited about opening compacts. She asked how the panelists maintain copasetic relationships and implement the compacts as the relationships change. All of the panelists stressed the importance of meeting regularly to maintain open lines of communication. This transparency and communication mitigates any natural skepticism of neighboring parties, which leads to more cooperative allocation of water. The panelists highlighted that an often overlooked aspect of their job is their role as an ambassador. It is necessary and essential to engage with neighboring states. Cooperation is key.

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THE COLORADO RIVER SYSTEM: PERSPECTIVES FROM THE LOWER BASIN

Ted Kowalski, Chief of the Interstate, Federal & Water Information Section of the Colorado Water Conservation Board, moderated a panel at the Symposium featuring three speakers addressing different perspectives from the