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The Colorado River Compact: Effective or Obsolete?

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effect in 2006. Additionally, Colorado passed Senate Bill 04-222, which prohibited the State Engineer from curtailing ground water withdrawals in Division Three wells that are part of a ground water management sub-district. The Colorado Supreme Court characterized SB 04-222 as an alternative to court approved augmentation plans. So far the water court has only approved one sub-district, Special Improvement District One, although five other sub-districts are planned for Water Division Three. Currently, approximately three thousand wells located outside Sub-district One are depleting stream flows in Division Three. The depletions are not being replaced and the State Engineer is not curtailing the wells.

Gabriel Kester

THIRD ANNUAL CARVER COLLOQUIUM

Denver, Colorado November 12, 2013

THE COLORADO RIVER COMPACT: EFFECTIVE OR OBSOLETE?

Lawyers, students, scientists, and the general public gathered to watch the 3rd annual Carver Colloquium, an Oxford-style debate about the future of the Colorado River Compact ("Compact"). The event followed two years of stellar debates on timely topics—namely the push to build transmission lines for renewable energy sources and the question of who has primacy when it comes to regulating hydraulic fracturing of oil and gas wells. Professor Jan Laitos, holder of the John A. Carver Jr. Chair, hosted the debate and served as a moderator. Speaker-debaters included CEO and Manager of Denver Water, Jim Lochhead, and Assistant Provost of IE Research and Curriculum Initiatives for the University of Denver Sturm College of Law, Tom I. Romero.

Mr. Lochhead is recognized as one of the nation's foremost water rights and natural resources attorneys. He is the former executive director of the Colorado Department of Natural Resources and past shareholder at Brownstein Hyatt Farber Schreck, where he worked on issues relating to water rights, interstate water matters, the Endangered Species Act, public lands and natural resources, zoning, land use, and real estate development. Professor Romero teaches and researches in the areas of the legal history of the American West, land use, water law, urban development, and local government, and has published extensively on these topics in prestigious law reviews.

Introducing the issue to the crowd, Professor Laitos discussed the value of Colorado River water in the past, today, and moving into the future. The river is an incredibly important source for water needs in Colorado and beyond. As the lifeblood of the West, especially the Southwest, the Colorado River serves seven states and two countries. Past intelligent management of the river allowed for economic growth in the arid west.

The Compact, signed in 1922 at the Bishops Lodge in Santa Fe, brought all seven Colorado River Basin states into agreement as to the allotment of Colorado River water. It has served as the foundation for the "law of the river" ever since, but has many noted shortcomings. It famously overestimated the amount of water available from the Colorado River and failed to anticipate

certain demographic and climatic trends within the Colorado River Basin. While the agreement has served a noble purpose over the years, many have questioned the Compact's continued viability. To start the debate Professor Laitos asked the question: "Is the Compact still relevant; or should we throw it away and start over?"

Format for Oxford debates allots each speaker twenty minutes to make their case; afterward, each speaker has the opportunity for a five-minute rebuttal before the speakers accept questions from the audience. Professor Romero opened with the argument that the Compact signatories need to replace the Compact with a new system. To follow, Mr. Lochhead took the position that the agreement maintains viability in today's world.

Professor Romero highlighted the crisis; no other water body has been the source of more controversy. The Colorado River provides water to over 40 million people, 5.5 million acres of land, Native American tribes, national parks, wildlife refuge areas and more. The Compact was the first negotiation of its kind to agree upon water distribution. In the words of Professor Romero, it is "thus far the most ambitious illustration of interstate agreement."

Professor Romero explained that compacts, like contracts, can change by mutual consent or judicial decree and are not as resistant to change as constitutions. Although the Compact's format implicitly allows some change, barriers to such changes exist. Comparing the challenge of amending the Compact to the Constitution, Professor Romero noted that Congress has amended the Constitution significantly in the past ninety-one years and could likewise amend the Compact. In fact, Professor Romero explained that the expectation that future generations would amend the Compact is evident in the words of Compact signatory and Secretary of Commerce Herbert Hoover who, noting that the Compact had ample provision for readjustment at a later date, stated:

It seems to me almost fantastical to be fighting in the shadows of what may happen ...in seventy-five years hence....If we can provide for equity for the next 40 to 75 years, we can trust the generation after the next to be as intelligent as we are today. They will settle it in the light of the forces of their day.

Professor Romero argued that the forces of our day clearly indicate it is time to make a change. We need a new compact sufficiently nimble, adaptive, and responsive to changing times.

Professor Romero based his argument on three factors. First, the Compact is based on inadequate understanding of hydrology and an inadequate historical record. Compact participants relied on 1899-1920 records when precipitation and flows were unusually high/wet. They estimated the Colorado River's flow to be 16 million acre-feet annually. However, the reality is that severe drought has plagued the river since 1999, with annual flows averaging barely 12 million acre-feet. Worse, lower average flows are predicted in the future. At the time of the Compact, none of the signatories could foresee the effects of climate change – less snow, decreased groundwater, and increased rates of evaporation—which over time may be potentially catastrophic. Professor Romero noted that the National Academy of Sciences has predicted that by 2060 water sources will experience a thirty percent decline. Under current

Compact parameters, the upper basin will bear the brunt of these impending shortages.

Second, Professor Romero argued the economic and social context of the Colorado River Basin was unsettled at the time of Compact formation. Although some locations of growth were predictable, for example southern California, the signatories could not have easily anticipated urban booms in Nevada and Arizona. Furthermore, in general the basin has experienced a shift from agricultural to urban needs. In a similar but distinct way, user valuation has changed; people now appreciate the canyons, river and water for what they are and not their water consumption.

Third, and finally, Professor Romero argued the Compact failed to include important sovereign interests—namely, Native Americans and Mexico. Despite the notion of equity, fairness, and commitment governing the use of Colorado River system, neither Mexico nor American tribes had a seat at the original negotiation table. Compact commissioners felt no legal obligations to their riparian neighbor to the south. It was not until 22 years later, in 1944, that the United States and Mexico entered into a contract guaranteeing 1.5 million acre-feet per year (forty percent of the 3.6 million acre-feet Mexico sought), a contract that left no room for future growth. Unfortunately, U.S. tribes received even less acknowledgement. From a purely structural perspective, American tribes arguably deserved similar status as states. In fact, fifteen years before the signing of the Compact, the Supreme Court case *Winters v. United States* determined that the federal government impliedly reserved water for needs of native communities at the establishment date of the reservation.

Professor Romero left the audience with the argument that, ultimately, the basin states need the courage to re-think the Compact, whose shelf-life has expired, and, at a minimum, the agreement warrants amendments in the face of significant economic, environmental, and political shifts.

From the other perspective, Jim Lochhead fully supported the Colorado River Compact as it stands. He pointed out that Denver Water serves over 1.3 million customers, and half of the water comes from the Colorado River. Much of what drives both the Colorado and U.S. economy is at stake with the Compact. Mr. Lochhead explained that the basic Compact obligation of Upper Basin states is not to deplete flows to the Lower Basin below 75 million acre-feet over a ten-year average.

In his argument, Mr. Lochhead made four main points. First, if we were to follow Professor Romero's suggestion and re-negotiate the Compact, the Upper Basin states could potentially end up with a reduced Compact allocation. As it stands, the Upper Basin has the right to use 7.5 million acre-feet in a given year, but currently fails to put that entire amount to beneficial use. This is especially true in drought years, when the water simply isn't physically available. The Compact also allocates 7.5 million acre-feet to the Lower Basin, plus an additional 1 million acre-feet for tributary inflow. Unlike the Upper Basin, the Lower Basin regularly uses its entire Compact allocation. This raises the question - if we were to renegotiate the Compact based on the historic consumptive use of the Upper and Lower basins, how would allocations differ? Mr. Lochhead believes that the odds are likely that Lower Basin econo-

mies would demand a larger share of the allocation and the Upper Basin would be left with less water to develop in the future.

Next, Mr. Lochhead argued the political process required to amend the Compact makes continued innovation within the current framework a logical choice. Within the Compact, it explicitly states that Congress needs to give its consent to any amendment, and then it becomes federal law. Such amendment would also require the approval of seven states legislatures. Noting Congress' recent performance, Mr. Lochhead believes that amending the Compact is an unlikely outcome. Given the potential for gridlock, Mr. Lochhead argued we frankly do not have time for this political process to unfold. The last fourteen years are the driest in history. For example, Lake Powell, the main storage facility for the upper basin—yet, is approaching the minimum power pool of the reservoir. If drought continues and the water falls below the power generation level, then low water levels will compromise operational integrity and the Glen Canyon Dam will not be able to physically move the required 7.5 million acre feet of water owed to the lower basin states.

Third, alterations in the Compact would undermine nearly 100 years of law that has come to be known as the “law of the river”. States have developed statutory frameworks and organized agencies around the Compact. Significant case law at the state and federal level interprets Compact obligations. In short, a lot is dependent on the Compact. Amending the Compact would be a complex, time consuming and overwhelming exercise.

Lastly, Mr. Lochhead argued that “if it aint broke don't fix it.” Mr. Lochhead believes that the Compact is not as rigid an agreement as detractors often proclaim. Instead, he believes it is simple and places minimal constraints on the Department of Interior. Because the document's provisions are clearly articulated and set forth, it gives states the ability to adapt and be nimble. For example, states and Department of Interior have implemented important environmental programs in the areas surrounding the Colorado River (e.g. the Grand Canyon Protection Act protects fish, beaches, and other conservation goals). Another example of flexibility is the fact that in 2007, basin states negotiated a coordinated operation allowing amazing flexibility through water banking and importation agreements. Mexico is now included in water quality and quantity agreements. As a highlight, Minute 319, signed by the U.S. State Department and Mexico last year, negotiated water quantity and quality rights amongst basin states, NGOs, and the Mexican government. The agreement provides Mexico access to U.S. reservoirs for pulse and base flows, joint projects, desalination, and other projects. Such cooperation allows stakeholders to provide for environmental, agricultural, and municipal needs in United States and Mexico. While the world faces enormous challenges ahead, this document is one of the best examples of effective management.

After the rebuttal, Professor Laitos opened the debate for questions. With overwhelming participation, Professor Laitos asked each debater six questions at the close of rebuttal. *The Colorado River Compact: Effective or Obsolete?* proved to be yet another successful event for the Carver Colloquium.

Heidi Ruckriegle