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Daniel Tyler, *Silver Fox of the Rockies: Delphus E. Carpenter and Western Water Compacts*

## BOOK REVIEW

DANIEL TYLER, *SILVER FOX OF THE ROCKIES: DELPHUS E. CARPENTER AND WESTERN WATER COMPACTS*, University of Oklahoma Press: Norman (2003); 392pp.; \$34.95; ISBN 0-8061-3515-8, hardcover.

REVIEWED BY JUSTICE GREGORY J. HOBBS, JR.<sup>†</sup>

Professor Dan Tyler tells a remarkable story of a remarkable man, Delph Carpenter, a small town water lawyer who became a national statesman of rivers.

Architect of the “compact idea” for settling interstate water allocation disputes, Carpenter was born to a nineteenth century pioneering family in Horace Greeley’s Union Colony, founded in 1870. Carpenter grew up working water with his father from the irrigation ditches that tap the Poudre River, which flows east from its source in what is now the Rocky Mountain National Park.

Carpenter’s life mirrored the Great Divide he revered. He loved the shining mountains and the Great Plains that take one inevitably to them. He drew from their strength as a husband, father, lawyer, legislator, and craftsman of treaties. When litigating for Colorado against Wyoming in the United States Supreme Court, for example,<sup>1</sup> he climbed to the source of the Laramie River to understand the lay of the land and how the waters flow. He wanted to leave his name on the mountains he had climbed with the district water commissioner:

Carpenter wanted precise information on the Laramie River’s origins, but he also enjoyed the adventure of planting the first American flag on these unnamed peaks. Having deposited a record of their ascent in a Prince Albert tobacco can at the summit, Carpenter later asked the U.S. Geological Survey to recognize these mountains henceforth as the Carpenter Peaks.<sup>2</sup>

There are no Carpenter Peaks. But, Carpenter’s work is indelible in the day-to-day, year-in-year-out administration of four great rivers from source to mouth—the Platte, the Arkansas, the Rio Grande, and the Colorado. His signature and mark are upon the 1922 Colorado

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<sup>†</sup> Greg Hobbs is a Justice of the Colorado Supreme Court. He is the author of the *Citizen’s Guide to Colorado Water Law* recently published by the Colorado Foundation for Water Education.

1. Wyoming v. Colorado, 259 U.S. 419 (1922).

2. DANIEL TYLER, *SILVER FOX OF THE ROCKIES: DELPHUS E. CARPENTER AND WESTERN WATER COMPACTS* 163 (2003).

River Compact, the 1922 La Plata River Compact, and the 1923 South Platte River Compact. His groundwork prepared the way for the 1938 Rio Grande River Compact, the 1942 Republican River Compact, the 1948 Arkansas River Compact, and the 1948 Upper Colorado River Compact.

Carpenter was a local northern Colorado ditch company lawyer and one-term state Senator who became the state's equitable apportionment litigator in the United States Supreme Court. His decade-long scorching struggle against Wyoming from 1911 to 1922 converted him from a state-of-origin win-at-all-costs litigator into a patient-and-tireless negotiator of durable interstate agreements.

Ironically, Carpenter became a peacemaker because the reality of water scarcity and necessity—upon which the prior appropriation doctrine turns—applies with equal logic to interstate rivers, if litigation in the United States Supreme Court is the only device for resolving water disputes between states.

Colorado had won against downstream Kansas in their 1907 equitable apportionment case, on the basis of Colorado's settled equity in continuing established water uses over prospective Kansas water uses.<sup>3</sup> When Wyoming brought the same argument to bear against Colorado, Carpenter initially resorted to claiming sovereignty over waters originating in the headwaters state. He knew the argument was likely a loser, and—while the Supreme Court was busy taking evidence and briefs, hearing oral argument, ordering further briefs, convening re-argument, and then pondering its decision for years—Carpenter was busy formulating the “compact idea.”

With clarity, scholarship, and a profound understanding of Carpenter's keen passion and intellect, Professor Tyler explains that Carpenter's water compact brainstorm derived from his understanding of “river culture”:

The culture of rivers and streams is dictated by geographical location. Upstream residents tend to manifest an attitude of superiority. Their connection to reliable water is guaranteed, especially during periods of drought. Their major concern comes from the fact that most western states accept the principle of first in time, first in right. Economic development downstream, where warmer temperatures encourage agriculture and population growth, results in a prior use of water and therefore a potential legal claim to that water in times of scarcity. Downstream residents worry excessively about upstream transfers of water out of the river basin and upstream consumption that diminishes downstream flows at critical times.<sup>4</sup>

Experience with interstate water litigation had taught Carpenter three great lessons. When the United States Supreme Court exercises its original jurisdiction to resolve an interstate water dispute: (1) the

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3. *Kansas v. Colorado*, 206 U.S. 46, 117-18 (1907); David W. Robbins & Dennis M. Montgomery, *The Arkansas River Compact*, 5 U. DENV. WATER L. REV. 67 (2001).

4. TYLER, *supra* note 2, at 8.

doctrine of equitable apportionment governs; (2) what is an equitable apportionment in one decade may not be so in another; and (3) the upstream state can lose to a downstream state whose development occurs first, if not now then later.

Carpenter had two primary fears, that California would preempt Colorado by its capacity for early development and that the federal government through the Bureau of Reclamation would command all western rivers to the detriment of individual states.

Carpenter's fears were real. In *Kansas v. Colorado*, the Supreme Court—citing section 8 of the 1902 Reclamation Act deferring to state water law—rejected the Government's contention that Congress had reserved all unappropriated western waters for use as the United States saw fit.<sup>5</sup> Yet, the Government proceeded to embargo Colorado from getting federal right-of-way approvals necessary for additional water development of Rio Grande River and Platte River water, in favor of assuring water supply for the federal Elephant Butte Project in New Mexico and the Pathfinder Project in Wyoming.<sup>6</sup>

California's demand for a mainstream Colorado River dam for flood control, power production, and irrigation water was long, loud, and compelling, and its Congressional delegation insistent.

In this maelstrom, Carpenter refined and forwarded his principle of interstate comity based on the Constitution's Compact Clause<sup>7</sup> and federalism guarantees.<sup>8</sup> To Carpenter, "comity" meant that states sharing an interstate stream system would apportion the waters between themselves in perpetuity, respecting each other's legitimate present and future needs. Of course, Carpenter knew that Congressional assent was necessary to make the apportionments legally effective and enduring.

By the time the Supreme Court recognized Wyoming's interstate Laramie River priority, leaving only 15,500 acre-feet per year for additional Colorado use,<sup>9</sup> Carpenter had convinced the powerful League of the Southwest to endorse the "compact idea" for the Colorado River, and Congress had enacted legislation for a seven-state Colorado River Compact Commission, whose Chair became Commerce Secretary Herbert Hoover.

5. *Kansas v. Colorado*, 206 U.S. at 92-93.

6. TYLER, *supra* note 2, at 8, 119, 154, 169, 314 n.58; William A. Paddock, *The Rio Grande Compact of 1938*, 5 U. DENV. WATER L. REV. 13 (2001).

7. U.S. CONST. art. I, § 10, cl. 3; art. VI, cl. 2.

8. Carpenter was a "literal, strict constructionist" in his view that the Tenth Amendment to the U.S. Constitution:

provided parameters for his recognition of limited state sovereignty and a guarantee of states' rights against illegal federal usurpation. . . .

Although an interstate compact would diminish state sovereignty to some extent, it would supersede state laws and assure signatory states the comity necessary to avoid conflict (war) in the Supreme Court.

TYLER, *supra* note 2, at 19-20.

9. *Wyoming v. Colorado*, 259 U.S. 419, 496 (1922).

Professor Tyler's story of Delph Carpenter is a marvelous biography of national significance culminating with particular resonance in the telling of Carpenter's key Colorado River Compact role. Following Professor Donald Pisani's Foreword and Professor Tyler's Introduction, this biography includes chapters devoted to: (1) Lineage and Love Letters; (2) Education and the Beginnings of a Career; (3) The Making of an Interstate Stream Commissioner; (4) The Colorado River Compact: Phase I; (5) The Colorado River compact: Phase II; (6) The Struggle for compact Ratification; (7) Last Years as Interstate Streams Commissioner; (8) Vindication; and (9) Carpenter and the Compact Legacy. Extensive notes and a bibliography document Professor Tyler's ten-year successful effort to bring Delph Carpenter to life.

Carpenter was sick at the time of his greatest achievement. Advocacy and negotiation wore him down. He suffered from Parkinson's disease aggravated by stress.

Aided by the first-ever access to Carpenter's personal and professional papers—made available by the Carpenter family—Professor Tyler tells how a stern-minded adversary of the federal government became a close personal friend of the future president and former state opponents in reaching monumental agreements.

These agreements are essential to the needs of a growing and diverse western United States. In the twenty-first century, rapid western urbanization—and the need to protect all creatures who share this harsh and magnificent environment we love and depend on—will test the durability of the river compacts. Because the states and their citizens have placed great reliance on the guarantee that their water compact apportionments will be available to them for beneficial use when needed, continued decision-making within the compact framework appears to be a well-counseled choice.

Ultimately, Delph Carpenter learned that there is no substitute for hard work and good will. His love for the land of the Great Divide and his dear wife, Dot, welled up in these verses:

From the blackest clouds come the brightest rains  
 The tree that is most exposed to wind and storm is the strongest.  
 The best fish come from the purest waters.  
 Circumstances must be turned and are not anxious to turn  
 themselves.<sup>10</sup>

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10. TYLER, *supra* note 2, at 50 (quoting Delphus E. Carpenter).