REPORT

AND

SUPPLEMENTAL REPORT

OF

DELPH E. CARPENTER

COMMISSIONER FOR COLORADO

ON THE

COLORADO RIVER COMMISSION

Also

PARTS OF MESSAGES OF GOV. SHOUP AND GOV. SWEET TO THE 24TH GENERAL ASSEMBLY OF THE STATE OF COLORADO; MEMORANDUM OF LEGISLATIVE PROCEEDINGS; HISTORICAL MEMORANDA; BRIEF ON LAW OF INTERSTATE COMPACTS; COPY OF FEDERAL ACT AUTHORIZING COMPACT; COPY OF COMPACT, ETC.

On same subject see:

"Hearings in re H. R. 6821," Jud. Com. H. R., June 4, 1921, Serial 6, 67th Cong., 1st Sess.

Extended Remarks, with attached memoranda, letters, etc., of Hon. Carl Hayden of Ariz., before H. R. 67th Cong., 4th Sess., Cong. Record of Jan. 30, 1923.

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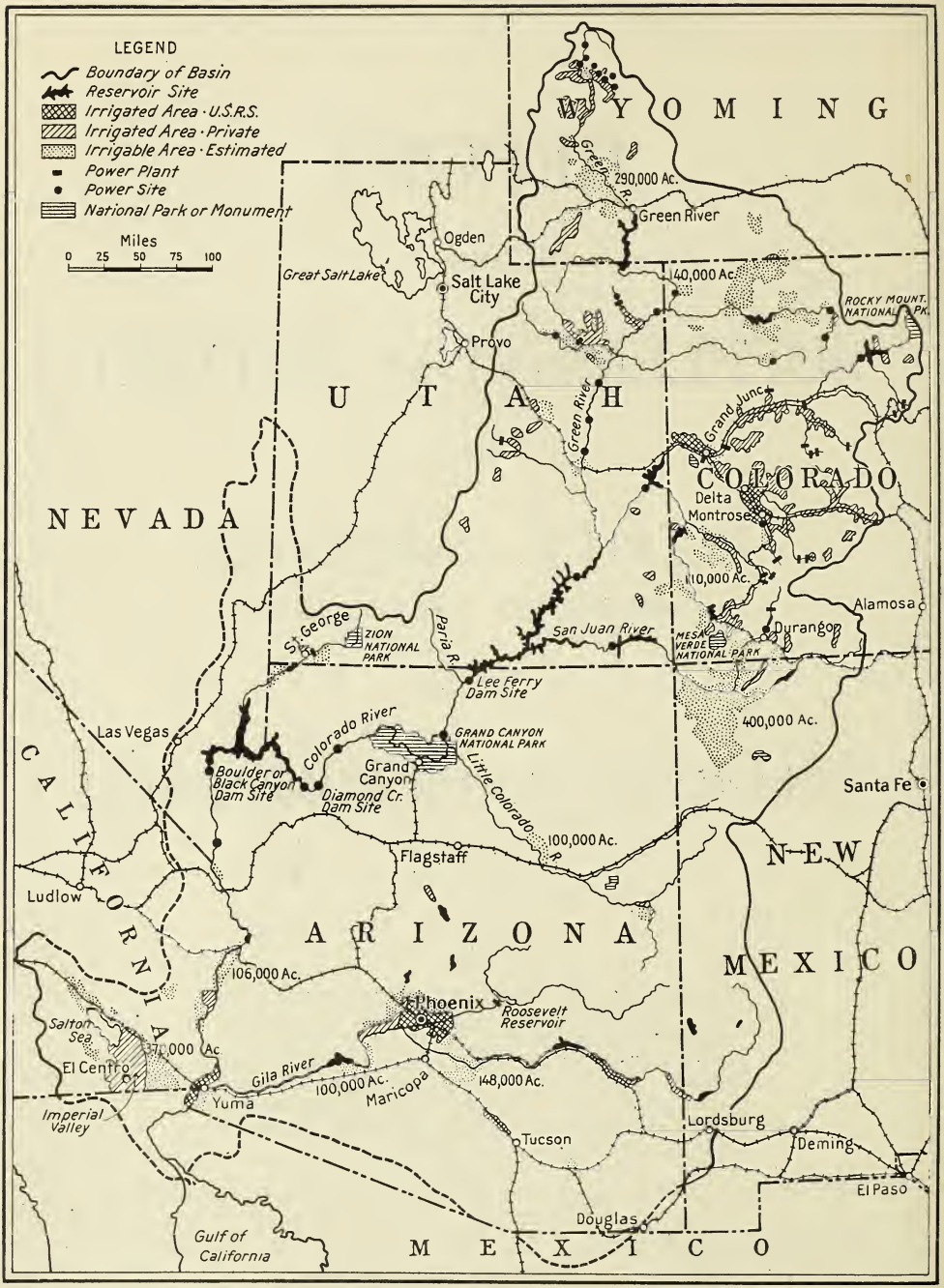

THE AREA AFFECTED BY THE COLORADO RIVER PROJECT

Hundreds of thousands of acres of arid land will be made into fertile farms by the development of the Colorado River, and great hydro-electric plants will distribute power from Los Angeles to Denver

PARTS OF

MESSAGES

OF

GOVERNOR OLIVER H. SHOUP

AND

GOVERNOR WILLIAM E. SWEET

TO

24th General Assembly of Colorado,

Respecting

Interstate Waters and Compacts Between Interested States

ALSO SPECIAL MESSAGE OF GOV. SHOUP TRANSMITTING COLORADO RIVER COMPACT AND REPORT OF COMMISSIONER FOR COLORADO TO THE SENATE AND REFERENCE MEMORANDUM OF SUBSEQUENT LEGISLATIVE PROCEEDINGS.

Message of Gov. Shoup, Senate Journal, pp. 37-8, is as follows:

INTERSTATE RIVERS.

"There is no question of more vital importance to the future welfare of our state than that of water. The fact is too evident and too well understood by all to necessitate extended comment—excepting to outline some of the conditions surrounding and governing this most important problem.

"The streams which rise in our state unite to form interstate rivers. The principal ones are the Colorado, Rio Grande, Arkansas, South Platte and North Platte. During the past generation the right of Colorado to utilize the waters of these rivers has been frequently challenged, and, in several instances, such controversies have taken the form of litigation. Succeeding legislatures have wisely provided financial and other assistance to aid in the defense of this litigation, which has not only involved the interests of our citizens but has struck at the very foundation of our sovereignty, and has challenged the rights of the state to utilize its natural resources for its self-preservation and the general welfare of its people. But the evils of prolonged and increasing litigation have demanded some more direct method of determining the rights of the respective states to the use of the waters of these interstate rivers, and Colorado and other Western states are adjusting their relations by exercise of the treaty powers of the states.

"Our last legislature directed the Governor to appoint a Commissioner for Colorado to act as a member of five separate Joint Commissions to adjust our interstate relations with respect to the Colorado, La Plata, Arkansas, South Platte and Laramie rivers; and it afforded me a privilege to concur with the recommendations of the members of the legislature in the selection of Delph E. Carpenter as Commissioner for Colorado. His prominent identification with the early development of our irrigation enterprises, his experience with interstate river litigation, and his pioneer suggestion of the application of the treaty powers of the states to the solution of interstate river problems, made him perhaps the best fitted to undertake this important task.* A subsequent message will discuss the work of the Commissioner, and will submit the compacts concluded by him, for your consideration.

"The preservation and promotion of our agriculture, the growth of our cities, the future necessities of our people, and the general welfare of our commonwealth, require constant vigilance in

*Delph E. Carpenter presented University Recognition Gold Medal by University of Colorado, June 11, 1923, on account his services to Colorado and western states, in proposing and causing the successful application of the interstate treaty method of adjustment and determination of rights to use of waters of western streams. See his suggestion of this method in Vol. I, P. 328, Supp. Brief for Colorado (1917) in case Wyoming vs. Colorado, and at P. 114 Brief for Colorado (1918) in Weiland vs. Pioneer Co. (both U. S. Sup. Ct.). Also see his resolutions adopted Denver Conf. Governors, Aug. 27, 1920, calling for creation Colorado River Commission; bills prepared by him and subsequently enacted by Congress and Colorado River States; his appearance before Jud. Comm. H. of Rep., 67 Cong., 1st Sess., reported in Serial 6—June 4, 1921—"Hearings in re H. R. 6821," and brief there presented; his address before Colo. Bar Assn., July 29, 1921; his services as Commissioner for Colorado on four separate interstate river compact commissions, etc.

the protection of our water supplies, and justify reasonable expenditures of public funds. Appropriations for a hydro-graphic department of the State Engineer's office should be made, and sufficient appropriation to enable that office to carry on the necessary hydrographic work incident to interstate river problems without depending upon water defense appropriations, and the emissaries of the state dealing with interstate relations should not be embarrassed or hampered in their efforts by inadequate funds. The liberal appropriation for water defense made by the last legislature has been conserved, and the record of past administrations justifies similar future provision for such purposes."

Special message of Gov. Shoup, transmitting Colorado River Compact and report of Commissioner for Colorado, Sen. Jour., p. 55, is as follows:

"To the Honorable Senate of the Twenty-fourth General Assembly.

"GREETINGS:

"We have the honor to herewith transmit to your Honorable Body, for consideration by the General Assembly, the Colorado River Compact, or treaty between the States of Colorado, Arizona, California, Nevada, New Mexico, Utah and Wyoming; and also the report covering in detail the same matter from Delph E. Carpenter, Commissioner for Colorado.

"In our opinion the situation worked out, as shown by the treaty, is the best solution of that very important matter and trust that your careful consideration of it will result in such action as shall be for the benefit of our state for all time.

Respectfully submitted,

OLIVER H. SHOUP,
Governor."

Inaugural Address of Gov. William E. Sweet, Sen. Jour., p. 148, is as follows:

"INTERSTATE WATERS.

"The interstate streams arising in this state must be saved for the people of Colorado so far as this may be done consistently with fair treatment to our sister states.

"Our present irrigated area in round numbers is about three and one-half million acres. We must extend this area and thereby increase our agricultural output and our rural population, thus building up our towns and cities.

"In some respects during the past years our water interests have been well protected; in others, neglected. We should formulate a centralized and comprehensive program of action with respect to our different interstate streams and proceed to carry out that program step by step.

"The Colorado River Compact negotiated with the consent of the Federal government by the seven states drained by the Colorado River and having for its purpose a division of the waters of that river among the four upper states on the one hand and the three lower states on the other, seems to effect a division that is fair and at the same time gives to private and public capital that degree of certainty necessary to investment in enterprises depending upon water supply from that source. This Compact should be promptly ratified. We should also seriously consider whether the compact principle may not be extended to some of our other interstate streams, thus saving several decades of litigation with its accompanying expense and delay of industrial and agricultural development. The best time to settle litigation is before it arises but if a fair settlement cannot be made, then we should take up with courage every weapon that the law allows us. An adequate appropriation should be made for the protection of our water interests."

MEMORANDUM OF SUBSEQUENT PROCEEDINGS BEFORE COLORADO LEGISLATURE

(In re S. B. 410, By Senators Tobin, Callen, Follett, Bannister and Saunders, "A Bill for an Act to Approve the Colorado River Compact.")

Sen Jour. Page	Date	
255	1-17-23	Introduced and ref. to Comm. on Ag. & Irr.
270	1-19-23	Comm. orders bill printed.
271	1-19-23	Senate orders printed 1,500 copies report of Commissioner for Colorado, for distribution.
310	1-29-23	Comm. on Printing reports bill printed.
655	3- 6-23	Comm. on Ag. & Irr. reports and recommends bill do pass, with certain clerical amendments.
887-895	3-21-23	Senate adopts committee report (on second reading) and receives Supplemental Report of Commissioner for Colo.
908	3-21-23	Comm. on revision and engrossing reports bill revised and engrossed.
911	3-22-23	Passed second reading in Senate.
920	3-23-23	Passes third reading in Senate. (32 ayes, no nays, 2 ab.)

House Jour.

1109	3-23-23	Transmitted to House where read first time and ref. to Comm. on Ag. & Irr.
1110	3-23-23	Comm. on Ag. & Irr. makes favorable report on bill.
1164	3-28-23	Passes second reading in House.
1184-5	3-30-23	Passes third reading in House (Dr. Calkins name added). (52 ayes, no nays, 13 absent.)

Sen. Jour.

990	3-30-23	House transmits bill to Senate.
991	3-30-23	Ref. to Sen. Comm. on Enrollment.
996	3-31-23	Reported enrolled.
999	3-31-23	Bill signed by Pres. of Sen.

House Jour.

1256	4- 2-23	Signed by Speaker of House.

Sen. Jour.

1223	4- 2-23	Approved by Governor Sweet.

REPORT

OF

DELPH E. CARPENTER

COMMISSIONER FOR

THE STATE OF COLORADO

In Re

COLORADO RIVER COMPACT

With

COPY OF THE COMPACT AND THE FEDERAL ACT AUTHORIZING THE COMPACT; ALSO THE HISTORICAL MEMORANDUM AND BRIEF OF THE LAW RESPECTING INTERSTATE COMPACTS SUBMITTED TO THE JUDICIARY COMMITTEE OF THE HOUSE OF REPRESENTATIVES, 67TH CONGRESS, 1ST SESSION, AT THE HEARING ON JUNE 4, 1921, IN RE H. R. 6821. : : :

REPORT OF
DELPH E. CARPENTER

COMMISSIONER FOR COLORADO

COLORADO RIVER COMMISSION

IN RE COLORADO RIVER COMPACT

Denver, Colorado, December 15, 1922.

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

Sir: I have the honor to report that a compact between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, providing for the equitable division and apportionment of the use of the waters of the Colorado River, was signed at Santa Fe, New Mexico, November 24, 1922, by the Commissioners for said States, and was approved by the Honorable Herbert Hoover, Secretary of Commerce, representative for the United States of America upon said Commission.

I signed the compact as Commissioner for the State of Colorado, by your appointment, under authority of Chapter 246, Session Laws, 1921, and the Commissioners for the other States acted under authority of similar legislation. The Honorable Herbert Hoover approved the compact, as the representative of the United States, under authority of the Act of Congress approved August 19, 1921 (42 Statutes at Large, page 171).

The compact was executed in a single original, which has been deposited in the archives of the Department of State of the United States, and a duly certified copy has been forwarded to the Governor of each of the signatory States. It shall become binding and obligatory upon the signatories when approved by the Legislature of each of said States and by the Congress of the United States.

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

All territory within the United States of America, to which the waters of the Colorado River and its tributaries are or may be beneficially applied, is designated as "the Colorado River Basin." The drainage area of the river consists of two great natural subdivisions, viz., the upper region, located above the head of the

great canyon, and the lower region below the great canyon (including the territory drained by the Gila, Little Colorado, and other lower tributaries). Lee Ferry is situated at the head of the canyon, in the State of Arizona, a few miles southerly from the intersection of the Colorado River with the boundary common to the States of Arizona and Utah, and is the natural point of demarcation between the upper region and the lower region.

All waters of the entire river system within the upper region (including those returning to the river from irrigated lands) unite to form a single stream at Lee Ferry, where the flow may be measured and recorded.

The compact conforms to this natural division. The upper region, plus all lands outside the drainage area which may be beneficially served by waters diverted from the river, is designated as the "Upper Basin." The lower region is designated as the "Lower Basin."

The seven States are grouped into two political divisions. Colorado, New Mexico, Utah, and Wyoming, constitute the "States of the Upper Division." The States of Arizona, California and Nevada constitute the "Lower Division."

7,500,000 acre-feet exclusive annual beneficial consumptive use is set apart and apportioned in perpetuity to the Upper Basin and a like amount to the Lower Basin.

Any waters necessary to supply lands in the Republic of Mexico (hereafter to be determined by international treaty) shall be supplied from the surplus flow of the river. If the surplus is not sufficient, any deficiency shall be borne equally by the Upper Basin and the Lower Basin.

By reason of development upon the Gila River and the probable rapid future development incident to the necessary construction of flood works on the lower river, the Lower Basin is permitted to increase its development to the extent of an additional one million acre-feet annual beneficial consumptive use before being authorized to call for a further apportionment of any surplus waters of the river.

No further apportionment of surplus waters of the river shall occur within the next forty years. At any time after forty years, if the development in the Upper Basin has reached 7,500,000 acre-feet annual beneficial consumptive use or that of the Lower Basin has reached 8,500,000 acre-feet, any two States may call for a further apportionment of any surplus waters of the river, but such supplemental apportionment shall not affect the perpetual apportionment of 7,500,000 acre-feet made to each basin by this compact.

The States of the Upper Division shall not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,-

000,000 acre-feet for any period of ten consecutive years (7,500,000 acre feet average annual flow over any ten year period) if necessary for use in the Lower Basin. This is approximately fifty per cent. of the river flow at Lee Ferry during the lowest ten-year period of which we have a record.

Navigation is made subservient to all other uses. Power is made subservient to domestic and agricultural uses.

State control of the appropriation, use, and disposition of water within each State is left undisturbed.

Present perfected appropriations of water are not disturbed, but such rights take their water from the apportionment to the basin in which they are located.

All future controversies between two or more States of each group are specifically reserved for separate consideration and adjustment by separate commissions, or by direct legislation, whenever such questions may arise, if ever they do.

Records of the river flow at Lee Ferry are under the control of the State Engineers of the seven States and two representatives of the United States, but the authority of such officials terminates with the ascertainment and publication of the facts.

The compact may be terminated at any time by the unanimous agreement of the signatory States.

FURTHER COMMENT

I take the liberty of offering the following observations:

The Upper Basin constitutes the principal source of the water supply. All waters returned to the river from irrigated lands within the Upper Basin will pass Lee Ferry and be measured as a part of the water to be delivered to the Lower Basin. The upper States guarantee somewhat less than one-half the average annual flow of the river (at Lee Ferry) during the ten year period from 1902 to 1911, inclusive, which was the period of the lowest recorded river flow. All water, both natural and return flow, which passes Lee Ferry will be credited to the delivery by the upper States. There is no minimum or maximum requirement for any particular year. The compact is satisfied by an aggregate delivery of 75,000,000 acre feet of water during any ten year period.

The topography of the upper basin limits the extent to which each of the upper States may go in its development and its corresponding consumption of river flow. As the various tributaries leave Colorado and Wyoming they have already entered into deep canyons and their waters are not available for diversion in Utah. The Utah development will be confined to

tributary streams and the waters of such are no longer available to Utah lands after they have entered the Green or Colorado Rivers. The waters of the San Juan are no longer available for diversion in Utah after they have served lands in Colorado and New Mexico. These natural limitations upon the use of the waters within each of the upper States will always afford ample assurance against undue encroachment upon the flow at Lee Ferry by any one of the four upper States. Colorado cannot divert 5% of its portion of the river flow to regions outside the river basin.

All development in Utah and New Mexico, requiring diversions from streams in Colorado, shall be subject to separate adjustment with Colorado before construction occurs.

The term "beneficial consumptive use" is to be distinguished from the amounts diverted from the river. It does not mean headgate diversions. It means the amount of water consumed and lost to the river during uses of the water diverted. Generally speaking, it is the difference between the aggregate diverted and the aggregate return flow. It is the net loss occurring through beneficial uses.

The apportionment of 7,500,000 acre feet exclusive annual beneficial consumptive use to the Upper Basin means that the territory of the Upper Basin may *exhaust* that much water from the flow of the stream each year. The aggregate annual *diversions* in the Upper Basin are unlimited. The limitation applies only to the amount *consumed,* and all waters which return to stream are not "consumed".

The apportionment to the upper territory is perpetual. It is in no manner affected by subsequent development. It is not required that the water shall be used within any prescribed period. Further development on the lower river will in no manner affect this apportionment or impair the right of the upper States to consume their apportionment whenever their necessities require. Any immense reservoir hereafter constructed on the lower river cannot be the basis of a preferred claim which will interfere with the future development of the Upper Basin. The development in the Lower Basin will be confined to the apportionment made to that basin, with the permissible increase. Any excess of development cannot infringe upon the reservation perpetually set apart to the upper territory. There can be no rivalry or contest of speed in the development of the two basins. Priority of development in the Lower Basin will give no preference of right as against the apportionment to the Upper Basin.

The 7,500,000 acre feet annual beneficial consumptive use apportioned to each basin includes the water necessary to supply present perfected uses in each of the basins. Such present uses

consume but a small part of the apportionments. By reason of a fear that further upper development might temporarily deplete the low flow of the river in the autumn and early winter of dry years, it is provided by Article VIII that present perfected appropriations upon the lower river shall not be precluded from protecting any such appropriations from encroachments upon their supplies until reservoirs have been constructed to store a definite part of the water apportioned to the Lower Basin.

There is no treaty between the United States and Mexico fixing any right in Mexico to the use of waters of the Colorado River. All such matters must depend upon future treaties. The compact provides that water, if any, necessary to supply the obligations of any such teraty shall be taken first from any surplus after meeting the apportionments (and right to increase) already made to the Upper and Lower Basins. If the surplus is inadequate any deficiency shall be borne equally by the two basins.

If the time arrives when the development in either of the basins requires a supplemental apportionment (which probably will never occur) the water available for such purposes will be the surplus remaining after deducting the perpetual apportionments (and right to increase) now made plus any possible international burden. The supplemental apportionment will not disturb or impair the perpetual apportionment made by the present compact.

The repayment of the cost of the construction of necessary flood-control reservoirs for the protection of the lower river country, probably will result in a forced development in the Lower Basin. For this reason a permissible additional development in the Lower Basin to the extent of a beneficial consumptive use of one million acre-feet, was recognized in order that any further apportionment of surplus waters might be altogether avoided or at least delayed to a very remote period. This right of additional development is not a final apportionment. This clause does not interfere with the apportionment to the Upper Basin or with the right of the States of the Upper Basin to ask for further apportionment by a subsequent commission.

The compact provides that the Upper Basin shall not be required to deliver any water to the Lower Basin which cannot be beneficially applied to domestic and agricultural uses. Power claims will always be limited by the quantity of water necessary for domestic and agricultural purposes. The generation of power is made subservient to the preferred and dominant uses and shall not interfere with junior preferred uses in either basin.

Article VII, protecting the obligations of the United States to the Indian tribes, avoids necessity of conditional ratification of the compact by the Congress. Such rights are negligible and

the apportionment to each basin includes all such necessary diversions.

Broadly speaking, from a Colorado viewpoint, the compact perpetually sets apart and withholds for the benefit of Colorado a preferred right to utilize the waters of the river within this State to the extent of our present and future necessities. It protects our development from adverse claims on account of any great reservoir or other construction on the lower river. It removes all excuses for embargoes upon our future development and leaves us free to develop our territory in the manner and at the times our necessities may require.

It affords me pleasure to call attention to the distinguished services of Ralph I. Meeker, Engineering Expert for the State of Colorado, whose comprehensive knowledge of the entire Colorado River basin commanded the attention of the Commission and facilitated its labors. I append hereto a table prepared by Mr. Meeker showing the estimated annual water supply of the Colorado River (including the amount at present consumed) and the disposition of such water by the compact.

I trust the compact will meet 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.

PHYSICAL DATA

COLORADO RIVER BASIN

Table 1

	Acre Feet
Estimated average annual water supply	20,500,000
Estimated average annual water consumption, 1921	7,000,000
Present unused surplus wasting to Pacific Ocean	13,500,000

Table 2

Upper Basin Water Supply	17,500,000
Lower Basin Water Supply	3,000,000
Total water supply of Basin	20,500,000

Table 3

Present unused surplus wasting to Pacific Ocean	13,500,000
Estimated future water requirements,	
Upper Basin	5,000,000

		Acre Feet
Estimated future water requirements, Lower Basin (Includes Gila)	4,000,000	
Estimated future water requirements	9,000,000	9,000,000
Approximate surplus		4,500,000

Table 4

Estimated average annual water supply.....20,500,000

	Acre Feet	
Upper Division Allocation, includes present consumption	7,500,000	
Lower Division Allocation, includes present consumption	7,500,000	
Lower Division permissible increase in water consumption	1,000,000	
Total allocated or permitted	16,000,000	16,000,000
Unallotted surplus		4,500,000

Table 5

Upper Basin water allotment.....7,500,000

	Acre Feet	
Estimated present consumption, Upper Basin	2,500,000	
Estimated future water requirements, Upper Basin, including trans-mountain diversions	5,000,000	
	7,500,000	7,500,000

Table 6

COLORADO RIVER AREA IN THE STATE OF COLORADO (WESTERN SLOPE).

	Acre-Feet
Estimated average yearly water supply, Western Slope	12,100,000
Estimates present consumptive use per year on 859,000 acres irrigated land	1,100,000
Unused water passing out of Colorado, average yearly flow	11,000,000
Estimates future requirements all new lands Western Slope (1,500,000 acres) and future transmountain diversions	2,600,000
Average annual surplus water to main Colorado River.	8,400,000

COLORADO RIVER COMPACT

The States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, having resolved to enter into a compact under the Act of the Congress of the United States of America, approved August 19, 1921 (42 Statutes at Large, page 171), and the Acts of the Legislatures of the said States, have through their Governors appointed as their Commissioners:

W. S. Norviel, for the State of Arizona;

W. F. McClure, for the State of California;

Delph E. Carpenter, for the State of Colorado;

J. G. Scrugham, for the State of Nevada;

Stephen B. Davis, Jr., for the State of New Mexico;

R. E. Caldwell, for the State of Utah;

Frank C. Emerson, for the State of Wyoming;

who, after negotiations participated in by Herbert Hoover, appointed by the President as the representative of the United States of America, have agreed upon the following Articles:

ARTICLE I

The major purposes of this contract are to provide for the equitable division and apportionment of the use of the waters of the Colorado River System; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies, and to secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters and the protection of life and property from floods. To these ends the Colorado Basin is divided into two Basins, and an apportionment of the use of part of the water of the Colorado River System is made to each of them with the provision that further equitable apportionment may be made.

ARTICLE II

As used in this compact:

(a) The term "Colorado River System" means that portion of the Colorado River and its tributaries within the United States of America.

(b) The term "Colorado River Basin" means all of the drainage area of the Colorado River System and all other territory within the United States of America to which the waters of the Colorado River System shall be beneficially applied.

(c) The term "States of the Upper Division" means the States of Colorado, New Mexico, Utah and Wyoming.

(d) The term "States of the Lower Division" means the States of Arizona, California and Nevada.

(e) The term "Lee Ferry" means a point in the main stream of the Colorado River one mile below the mouth of the Paria River.

(f) The term "Upper Basin" means those parts of the States of Arizona, Colorado, New Mexico, Utah and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above Lee Ferry.

(g) The term "Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry.

(h) The term "domestic use" shall include the use of water for household, stock, municipal, mining, milling, industrial and other like purposes, but shall exclude the generation of electrical power.

ARTICLE III

(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-feet per annum.

(c) If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River System, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at the Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

(d) The States of the Upper Basin will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,-

000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

(e) The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses.

(f) Further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b) and (c) may be made in the manner provided in paragraph (g) at any time after October first, 1963, if and when either Basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b).

(g) In the event of a desire for a further apportionment as provided in paragraph (f) any two signatory States, acting through their Governors, may give joint notice of such desire to the Governors of the other signatory States and to the President of the United States of America, and it shall be the duty of the Governors of the signatory States and of the President of the United States of America forthwith to appoint representatives, whose duty it shall be to divide and apportion equitably between the Upper Basin and the Lower Basin the beneficial use of the unapportioned water of the Colorado River System as mentioned in paragraph (f), subject to the legislative ratification of the signatory States and the Congress of the United States of America.

ARTICLE IV

(a) Inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its basin, the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural and power purposes. If the Congress shall not consent to this paragraph, the other provisions of this compact shall nevertheless remain binding.

(b) Subject to the provisions of this compact, water of the Colorado River System may be impounded and used for the generation of electrical power, but such impounding and use shall be subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes.

(c) The provisions of this article shall not apply to or interfere with the regulation and control by any State within its boundaries of the appropriation, use and distribution of water.

ARTICLE V

The chief official of each signatory State charged with the administration of water rights, together with the Director of the United States Reclamation Service and the Director of the United States Geological Survey shall co-operate, ex officio:

(a) To promote the systematic determination and co-ordination of the facts as to flow, appropriation, consumption and use of water in the Colorado River Basin, and the interchange of available information in such matters.

(b) To secure the ascertainment and publication of the annual flow of the Colorado River at Lee Ferry.

(c) To perform such other duties as may be assigned by mutual consent of the signatories from time to time.

ARTICLE VI

Should any claim or controversy arise between any two or more of the signatory States: (a) with respect to the waters of the Colorado River System not covered by the terms of this compact; (b) over the meaning or performance of any of the terms of this compact; (c) as to the allocation of the burdens incident to the performance of any article of this compact or the delivery of waters as herein provided; (d) as to the construction or operation of works within the Colorado River Basin to be situated in two or more States, or to be constructed in one State for the benefit of another State; or (e) as to the diversion of water in one State for the benefit of another State; the Governors of the States affected, upon the request of one of them, shall forthwith appoint Commissioners with power to consider and adjust such claim or controversy, subject to ratification by the Legislatures of the States so affected.

Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method or by direct future legislative actions of the interested States.

ARTICLE VII

Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian Tribes.

ARTICLE VIII

Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators

or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate.

ARTICLE IX

Nothing in this compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under this compact or the enforcement of any of its provisions.

ARTICLE X

This compact may be terminated at any time by the unanimous agreement of the signatory States. In the event of such termination all rights established under it shall continue unimpaired.

ARTICLE XI

This compact shall become binding and obligatory when it shall have been 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 signatory State to the Governors of the other signatory States and to the President of the United States, 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 a single original, which shall be deposited in the archives of the Department of State of the United States of America and of which a duly certified copy shall be forwarded to the Governor of each of the signatory States.

Done at the City of Santa Fe, New Mexico, this twenty-fourth day of November, A. D. One Thousand Nine Hundred and Twenty-two.

(Signed W. S. NORVIEL
(Signed) W. F. McCLURE
(Signed) DELPH E. CARPENTER
(Signed) J. G. SCRUGHAM
(Signed) STEPHEN B. DAVIS, JR.
(Signed) R. E. CALDWELL
(Signed) FRANK C. EMERSON

Approved:

(Signed) HERBERT HOOVER.

FEDERAL ACT AUTHORIZING COLORADO RIVER COMPACT

An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes.

WHEREAS the Colorado River and its several tributaries rise within and flow through or from the boundaries between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming; and

WHEREAS the territory included within the drainage area of the said stream and its tributaries is largely arid and in small part irrigated, and the present and future development, necessities and general welfare of each of said States and of the United States require the further use of the waters of said streams for irrigation and other beneficial purposes, and that future litigation and conflict respecting the use and distribution of said waters should be avoided and settled by compact between said States; and

WHEREAS the governors of said several States have named and appointed their respective commissioners for the purposes aforesaid, and have presented their resolution to the President of the United States requesting the appointment of a representative on behalf of the United States to participate in said negotiations and to represent the interests of the United States; Now, therefore,

Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That consent of Congress is hereby given to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming to negotiate and enter into a compact or agreement not later than January 1, 1923, providing for an equitable division and apportionment among said States of the water supply of the Colorado River and of the streams tributary thereto, upon condition that a suitable person, who shall be appointed by the President of the United States, shall participate in said negotiations, as the representative of and for the protection of the interests of the United States, and shall make report to Congress of the proceedings and of any compact or agreement entered into, and the sum of $10,000, or so much thereof as may be necessary, is hereby authorized to be appropriated to pay the salary and expenses of the representative of the United States appointed hereunder; PROVIDED, That any such compact or agreement shall not be binding or obligatory upon any of the parties thereto unless and until the same shall have been approved by the legislature of each of said States and by the Congress of the United States.

Sec. 2. That the right to alter, amend, or repeal this Act is herewith expressly reserved.

Approved, August 19, 1921.

HISTORICAL MEMORANDUM IN RE COLORADO RIVER, AND BRIEF OF LAW OF INTERSTATE COMPACTS.

Submitted by Delph E. Carpenter to Judiciary Committee House of Representatives 67th Congress 1st Session, on June 4, 1921, at hearing in re H. R. 6821.

Historical Memorandum

The object of the pending legislation is to permit a settlement respecting the future utilization and disposition of the waters of the Colorado River, and of the streams tributary thereto, by compact between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming.

The object is to determine the respective rights of the States to the use and disposition of the waters of this great river prior to any further large construction or extensive utilization of these waters, in order that the rights of the States and the Government may be settled and determined in advance of construction and before interstate or other controversies may arise.

The pending bill was introduced pursuant to resolution adopted and signed by the governors of the seven States above named at Denver, Colo., May 10, 1921, wherein it is recited that each of the seven States, whose territory includes in part the drainage of the Colorado River, has already provided for adjustment respecting the future utilization and disposition of the waters of the stream and has appointed its commissioner to serve with commissioners from other interested States and with a commissioner to be appointed for the United States for this general purpose.

The resolution reads as follows:

"Whereas the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming have by appropriate legislation authorized the governors of said States to appoint commissioners representing said States for the purpose of entering into a compact or agreement between said States and between said States and the United States respecting the future utilization and disposition of the waters of the Colorado River and the streams tributary thereto; and

"Whereas the governors of said several States have named and

appointed the commissioners contemplated by the legislative acts aforesaid: Now, therefore, be it

"*Resolved,* That the Congress of the United States be, and is hereby, requested to provide for the appointment of a commissioner on behalf of the United States to act as a member of said commission; and be it further

"*Resolved,* That the proposed draft of a bill for presentation to Congress, a copy of which is hereto attached, be offered as a suggestion for legislation for the purposes aforesaid; and be it further

"*Resolved,* That Gov. Thomas E. Campbell, of Arizona, and the governors of the other States in the Colorado River Basin, or such representatives as they may severally designate, be and they hereby are, authorized to present his resolution to the President and to the Congress of the United States."

We, the undersigned, do hereby certify that the foregoing resolution was adopted by unanimous vote at a meeting of the governors of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, held at the capitol at Denver, in the State of Colorado, on the 10th day of May, 1921.

THOMAS E. CAMPBELL,
Governor of Arizona.

WILLIAM D. STEPHENS,
Governor of California.

By W. F. McCLURE,
State Engineer.

OLIVER H. SHOUP,
Governor of Colorado.

EMMET D. BOYLE,
Governor of Nevada.

MERRITT C. MECHAM,
Governor of New Mexico.

CHARLES R. MABEY,
Governor of Utah.

ROBERT D. CAREY,
Governor of Wyoming.

HISTORY OF PROCEEDINGS BY COLORADO RIVER STATES LEADING TO INTERSTATE COMPACT LEGISLATION—COLORADO RIVER.

Salt Lake Conference.

January 18-21, 1919, a conference between the representatives of the seven Colorado River States, to wit, Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, was called by the governor of Utah for the purpose of discussing questions

relating to the utilization of the water supplies of the Colorado River and its tributaries, and especially in connection with a law then proposed by Secretary Lane relating to soldiers' and sailors' settlement.

Hon. W. J. Spry, ex-governor of Utah, present Commissioner of the General Land Office, presided over the meeting and was made permanent chairman of a continuing organization.

The other Colorado River Basin States above noted were represented. The meeting of the seven States resolved itself into a permanent organization to be known as "The League of the Southwest."

As a result of the sessions the following resolutions, inter alia, were adopted:

"The history of irrigation throughout the world has shown that the greatest duty of water is had by first using it upon the upper reaches of the stream and continuing the use progressively downward. In other words, 'The water should first be captured and used while it is young,' for it can then be recaptured as it returns from the performance of its duties and thus be used over and over again.

"Attention is further directed to the fact that many of these irrigation projects, of a magnitude to be developed only by the Federal Government, can be properly carried on without interferring with smaller developments which should be undertaken by individual and corporate initiative, and we therefore urge upon the Interior and Agricultural Departments the adoption of a liberal and sympathetic policy in the granting of rights of way for reservoirs and ditches upon the public domain, where the same are essential to the development of such private projects.

"We further urge the liberal administration of all land laws of the United States looking to the end of placing the lands of the United States in the actual posession and occupation of its citizens in order that the citizens may have a home and that the lands may go upon the tax rolls of the various States in which they may be located in order that they may bear their just portion of the expense of State administration.

"Along the lines set forth in these resolutions, we pledge ourselves to a hearty cooperation with the representatives of the Federal Government in order that the desired end may be attained at the earliest possible moment consistent with a wise administration of the affairs of the Nation and of States.

"In the carrying out of all reclamation projects in which the the Federal Government may become interested, its activities should ever be in conformity with the laws of the State in which the project under development is located. In the arid States

of the West the irrigation projects undertaken by or with the aid of the Federal Government should in every instance be based upon a full compliance with the laws of the State wherein the projects are located so far as the appropriation of water and other matters of purely State control are concerned."

Subsequent meetings of the league were held at Los Angeles where resolutions of a similar character were adopted.

Denver Conference.

A subsequent meeting of the league was held at Denver August 25-27, 1920, at which the desirability of encouraging the construction of large reservoirs in the Canyon of the Colorado River for purposes of flood control, power, and irrigation was discussed, and at which the Director of the Reclamation Service assured the representatives of the seven States that the construction of such reservoirs need in no manner interfere with the future development of the upper reaches of the streams within the States of origin of the waters to be impounded by the reservoirs situate in the lower States.

The following resolutions were unanimously adopted:

"*Be it resolved,* That the resolution, adopted at the conference of the league, held at Salt Lake City, January 18-21, 1919, and the proceedings of the third convention of the League of the Southwest, held at Los Angeles, April 2-3, 1920, be, and the same are, hereby ratified, approved, and reaffirmed.

> "Whereas it is the understanding of this league, from information presented by Hon. Arthur P. Davis, director of the United States Reclamation Service, that the water supply of the Colorado River drainage is sufficient to supply the present and future necessities of all of the States whose territory is involved and that all present and future interference with development upon or from the upper reaches of the stream should be avoided; now, therefore, be it

"*Resolved,* That the league favors the early development of all possible beneficial uses of waters of the stream upon the upper reaches of the stream and its tributaries along the lines set forth in the resolutions adopted at the Salt Lake conference of January 28-31, 1919, and that the present and future restrictions upon such development by withholding or conditional granting of applications for rights of way across public lands for irrigation works should be discountinued and that such applications should be granted with that degree of dispatch will permit the construction of all such projects while financial and other means are at hand and opportunity for construction exists; be it further

"*Resolved,* That it is the sense of this conference that the present and future rights of the several States whose territory is in whole or in part included within the drainage area of the Colorado River, and the rights of the United States, to the use and benefit of the waters of said stream and its tributaries, should be settled and determined by compact or agreement between said States and the United States, with consent of Congress, and that the legislatures of said States be requested to authorize the appointment of a commissioner for each of said States for the purpose of entering into such compact or agreement for subsequent ratification and approval by the legislature of each said States and the Congress of the United States."

Pursuant to the last-quoted resolution, and at the request of the governor of Arizona, president of the League of the Southwest, bills were drawn and submitted to the legislatures of the seven States involved, and were thereafter enacted by all of said States.

Each of said bills provide for the appointment of a commissioner for each of said States by the respective governors for the purpose of formulating the compact or agreement provided for by the concurrent legislation.

The legislation by each of the States also provided for a representative of the United States to act on behalf of the Federal Government in the formulation of the interstate compact or agreement.

Pursuant to the above legislation, the governors of each of the States have appointed their respective commissioners.

May 10, 1921, the governors of the seven States, or their duly accredited representatives, met at the city of Denver and there formulated resolutions calling upon the President of the United States and upon Congress to provide for the appointment of a representative for the United States in harmony with the above-mentioned legislation by the States, and directed that the resolution so formulated be laid before the President and Congress by the governors of the States. The resolution adopted by the governors at Denver was presented by the governors, or their duly accredited representatives, to the Secretary of the Interior, at Washington, May 17, and to the President of the United States, May 19, 1921.

BRIEF ON LAW OF INTERSTATE COMPACTS.

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 restored 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.)

See also discussion of the same subject in Stearns v. Minnesota (179 U. S., 223); Virginia v. Tennessee (148 U. S., 503, 5171528); Wharton v. Wise (153 U. S., 155).

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. (Heffter 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 denying 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 denying 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 Colorado River, see Appendix, pages 318-343, part 2, Hearings Before Committee on Irrigation of Arid Lands, House of Representatives, 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, nevertheless such matters are usually settled by treaty in the same manner as the settlement between the United States and Mexico respecting the use and benefit of the waters of the Rio Grande (above cited), wherein it is provided for an "equitable apportionment" of the waters of the stream between the two Governments.

The rule of equitable apportionment applies to the settlemen 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 Supreme Court.

The latter method is the substitute, under our form of government, for war between the States. In other words, were it not for the provisions of our Constitution the States might settle 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. Colorado, 206 U. S., 46; Rhode Island v. Massachusetts, 12 Pet., 657.)

A suit between the States is but a subtitute 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.

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 controveries 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 legislatice 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. Texas (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 Goverments 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 Maryland (4 Wheat, 316, 400, 410), but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty. The States of the Union have agreed, in the Constitution, 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 controversies, and that this court may exercise original jurisdiction in all such cases 'in the which a State shall be party,' without excluding 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 controversies 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 question 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 apear 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.)

The United States has large interests in the form of public lands within the Colorado River area, and has already constructed large irrigation works near Yuma, Ariz., and is engaged in irrigation of large areas along the lower portion of the stream and in the vicinty of the Salton Sea. The seven Colorado River States have already enacted legislation authorizing a commissioner for each of the States, to meet with a representative of the United States, for the purpose of formulating and entering into a compact or agreement respecting the future utilization and disposition of the waters of the Colorado River and its tributaries. Any such compact will be of no binding force or effect until ratified by the legislatures of each of the States and by the Congress of the United States. The seven State sovereignties have legislated. The governor of each has appointed a commissioner pursuant to the legislation. The governors have collectively waited upon the President and presented their written request for national legislation authorizing the appointment by the President of a representative for the United States.

(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.)

SUPPLEMENTAL REPORT

OF

DELPH E. CARPENTER

COMMISSIONER FOR COLORADO,

COLORADO RIVER COMMISSION

Printed in full in Senate Journal (Colo., 1923, pp. 888-895, incl.) as a part of the proceedings in re second reading of S. B. 410—A Bill for an Act to Approve the Colorado River Compact.

Original Report printed in Senate Journal of January 5, 1923, pp. 75-86, inclusive.

Denver, Colorado,
March 20, 1923.

Senator M. E. Bashor, Chairman
Senate Committee on Agriculture and Irrigation; and
Honorable Royal W. Calkins, Chairman
House Committee on Agriculture and Irrigation,
Denver, Colorado.

Gentlemen:

Pursuant to your request I respectfully submit the following observations respecting certain provisions of the Colorado River Compact:

First and foremost, it should be ever kept in mind that the intent of the compact is to be ascertained from a consideration of the entire instrument and that each clause must be considered in connection with other clauses.

Article III, Paragraph (b). Paragraph (b) of Article III does not authorize a cumulative increase of beneficial consumptive use of waters to the extent of 1,000,000 acre-feet per annum. This paragraph means that the Lower Basin may increase its annual beneficial consumptive use of water 1,000,000 acre-feet and no more.

Paragraph (a) of said article permanently apportions to the Lower Basin the annual beneficial consumptive use of 7,500,000 acre-feet of water which includes all water necessary for the supply of any rights which may now exist.

Paragraph (b) permits the Lower Basin to increase its annual beneficial consumptive use of water 1,000,000 acre-feet. The two paragraphs permit an aggregate annual beneficial consumptive use of 8,500,000 acre-feet, and no more. The words "per annum," as used in paragraph (b) are not synonymous with the word "annually." No cumulative increase is intended by that paragraph.

ARTICLE VIII.

Article VIII is not intended to authorize, constitute or result in any apportionment of water to the Lower Basin beyond or in addition to that made in paragraphs (a) and (b) of Article III.

The Imperial Valley project which diverts water below Yuma, Arizona, is said to have diverted the entire low flow of the river for a period of several days in October during three of the past ten years. Those in control of that project feared that additional development in the Upper Basin (before storage facilities had been provided for the Lower Basin) would materially decrease the October flow of the river at Yuma. Storage facilities constructed in the great canyon of the river will care for the entire supply necessary for the Imperial Valley. While the Imperial Valley probably has no legitimate claim which it may enforce against the Upper Basin, it was urged, nevertheless, that whatever rights such users may claim should not be disturbed until time and opportunity may afford the building of storage works.

The apportionment to the Lower Basin by Paragraph (a) of Article III, provides that such apportionment "shall include all water necessary for the supply of any rights which may now exist". Any claims of the Imperial Valley therefore would be satisfied out of such apportionment of water. The storage of water in reservoirs, as provided in Article VIII, must be made "not in conflict with Article III." After storage is provided, water stored in harmony with Article III will be available to the Imperial Valley project and "present perfected rights" on the Lower river shall thereafter be satisfied from the water stored in harmony with Article III and their claims, if any, against the Upper Basin are thereafter cut off by the substitution of stored water for direct flow.

Article I provides that "an apportionment of the use of part of the water of the Colorado River system is made to the Upper Basin and also to the Lower Basin with provision that further equitable apportionment may be made."

Paragraph (f) of Article III provides that "further equitable apportionment of the beneficial uses of the waters of the Colorado System unapportioned by paragraphs (a), (b) and (c) may be made * * * if and when either basin shall have reached its

total beneficial consumptive use as set out in paragraphs (a) and (b)''. The storage of water under Article VIII must be in harmony with paragraph (f) of Article III, as well as with paragraph (a), and the latter paragraph provides that the apportionment to the lower basin ''shall include all water necessary for the supply of any rights which may now exist'' and the second paragraph of Article VIII provides that all other rights (than present perfected rights) ''shall be satisfied solely from the water apportioned to that Basin in which they are situate''.

Taking the compact as a whole and construing its provisions together, Article VIII does not authorize, constitute or result in any apportionment of water to the Lower Basin beyond that made in paragraphs (a) and (b) of Article III.

It will be noted that Article VIII does not concede that ''present perfected rights'' in the Lower Basin have any claims against the Upper Basin, the language being ''claims of such rights, if any, by appropriators or users of water in the Lower Basin against the appropriators or users of water in the Upper Basin''. In other words any such claims are neither acknowledged nor denied and their legal status, whatever it may be, is temporarily left as it was at the time of the compact. But when the reservoir is constructed, any claims against the Upper Basin by such ''present perfected rights'' are thereafter cut off.

ARTICLE III PARAGRAPH (e).

Paragraph (e) of Article III is reciprocal. It should be construed with paragraph (b) of Article IV. The states of the Lower Division cannot require the delivery of water at Lee Ferry, by the Upper Division, which cannot be reasonably applied to domestic and agricultural uses in the Lower Basin. The clause preserves the dominent rights of agricultural and domestic uses over power uses and only prevents the withholding of water for power development within the Upper Basin to the extent that such withholding may encroach upon the supply necessary for agricultural and domestic uses in the Lower Basin. In other words the compact means that power claims by the Lower Basin cannot compel the Upper Basin to turn down any water which cannot reasonably be applied to domestic and agricultural uses in the Lower Basin. This permits the first use of the waters of the Upper Basin for the generation of power, limited only by the agricultural and domestic demands in the Lower Basin. All power uses in both Basins are made ''subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes'' (referring to agricultural and domestic uses).

ARTICLE III PARAGRAPH (f).

The compact reserves for future apportionment (between the two Basins of the river) all of the waters of the river and its tributaries unapportioned by paragraphs (a), (b) and (c) of Article III. This is specifically provided in paragraph (f) of Article III. No such apportionment can occur (except by unanimous consent) until after October 1, 1963 (40 years). If at any time after forty years either Basin shall have reached its total beneficial consumptive use, as provided in paragraphs (a) and (b) of Article III, either Basin may demand an equitable apportionment of the beneficial uses of the remainder of the water of the river. This does not prevent a diversion and use of water in either Basin in excess of the apportionment but all such excess diversions will be made at the peril of the users. This applies to the excess uses made either before or after the expiration of the forty-year period. The apportionment of water to supply any such excess uses will be a matter entirely within the keeping and jurisdiction of the new Compact Commission and will require its unanimous approval.

By the compact the unapportioned waters are reserved for "further equitable apportionment" between the two Basins. This negatives any suggestion that excess uses in either Basin will be regarded as legal "appropriations". Any such excess uses will be by sufferance and without legal foundation but such users will not be prevented from pressing their equitable claims in the future apportionment provided for in paragraph (g) of Article III. This will apply to all excess uses made by means of enormous reservoirs in the Lower Basin capable of storing and beneficially using (for power or other uses) all of the flow of the river which may pass Lee Ferry. All such uses, made by means of such structures, are and will be subject to the Colorado River Compact and can perfect no claim which will prevent further "equitable apportionment" between the Basins at any time after forty years.

ARTICLE IV PARAGRAPH (c).

Intrastate control of appropriations made within the apportionments provided by the compact is specifically reserved by paragraph (c) Article IV. This includes such regulations as each state may provide by its constitution and laws respecting the preference of one class of use over other classes of use. In other words the constitution and laws of Colorado control the details of appropriation, use and distribution of water within the state. The compact does not attempt to invade such matters of local concern. When approved, the compact will be the law of the river as between the states. It deals wholly with interstate relations. This paragraph refers to intrastate control. What-

ever the intrastate regulation and control may be it cannot effect the interstate relations. No law of any state can have extraterritorial effect or interfere with the operation of the compact as between the states.

"BENEFICIAL CONSUMPTIVE USE".

In my original report (printed in the Senate Journal of Jan. 5, 1923) I discussed and defined the term "beneficial consumptive use". In addition to the discussion there contained, I might add there is a vast difference between the term "beneficial use" and the term "beneficial consumptive use". A use may be beneficial and at the same time non-consumptive or the use may be partly or wholly consumptive. A wholly consumptive use is a use which wholly consumes the water. A non-consumptive use is a use in which no water is consumed (lost to the stream). "Consume" means to exhaust or destroy. The use of water for irrigation is but partially consumptive for the reason that a great part of the water diverted ultimately finds its way back to the stream. All uses which are beneficial are included within the apportionments (i. e. domestic, agricultural, power, etc.). The measure of the apportionment is the amount of water lost to the river. The "beneficial consumptive use" refers to the amount of water exhausted or lost to the stream in the process of making all beneficial uses. As recently defined by Director Davis of the U. S. Reclamation Service, it is the "diversion minus the return flow". (Congressional Record, Jan. 31, 1923—p. 2815.)

AMOUNT OF FLOW AT LEE FERRY.

The net measured flow of the Colorado River at Lee Ferry (after all uses above) was 16,000,000 acre-feet from September 30, 1921, to September 30, 1922, according to the report of the Director of the U. S. Geological Survey. The net flow of the whole river (after all uses above Yuma) has been measured and recorded at Yuma, Arizona (below all tributaries including the Gila River) since 1899. The mean or average flow at Yuma for the twenty-year period 1903-1922 is 17,400,000 acre-feet per annum. The flow September 30, 1921, to September 30, 1922, at Yuma was 17,600,000 acre-feet. This was 200,000 acre-feet (1%) greater than the twenty-year average. (See Congressional Record, Jan. 31, 1923—p. 2819). In other words the flow of the river for that period was 101% of normal. The flow of 16,100,000 acre-feet at Lee Ferry therefore represents 101% of the average annual net flow of the river at that point (after deducting all water consumed during uses in the entire Upper Basin). Assuming that 2,500,000 is now annually consumed during uses in the Upper Basin, we would obtain a "reconstructed river" by

adding that amount to 16,100,000 acre-feet, making an aggregate of 18,600,000 acre-feet annual discharge, which is 101% of the twenty-year annual average.

It is evident that the States of the Upper Basin may safely guarantee 75,000,000 acre-feet aggregate delivery at Lee Ferry during each ten-year period. This would mean an average annual delivery of 7,500,000 acre-feet as against 15,940,594 acre-feet present net annual average flow (100%) at Lee Ferry or 18,415,842 acre-feet natural average annual flow (100%) on the basis of a "reconstructed" river.

I herewith attach for your information, copies of certain telegrams which will be self-explanatory.

Very truly yours,
DELPH E. CARPENTER,
Commissioner for Colorado.

WESTERN UNION TELEGRAM

Capitol Bldg.,
Denver, Colo., Feb. 10, 1923.

Hon. Herbert Hoover,
Chairman Colorado River Comm.
Washington, D. C.

Do you concur with me that the intent of the commission in framing the Colorado River Compact was as follows:

That paragraph b of article three means that the Lower Basin may increase its annual beneficial consumptive use of water one million acre-feet and no more.

That article eight is not intended to authorize, constitute or result in any apportionment of water to the Lower Basin beyond that made in paragraphs a and b of article three.

DELPH E. CARPENTER.

POSTAL TELEGRAM.

Washington, D. C., February 12, 1923.

Delph E. Carpenter,
State Capitol,
Denver, Colo.

I concur with you, and shall so advise Congress in my report, that the intent of the Commission in framing the Colorado River Compact was as follows:

First, that Paragraph B of Article Three means that Lower Basin may acquire rights under the compact to annual, beneficial consumptive use of water in excess of the apportionment in Paragraph A of that article by one million acre-feet and no more.

There is nothing in the compact to prevent the States of either Basin using more water than the amount apportioned under Paragraphs A and B of Article Three, but such use would be subject to the further apportionment provided for in Paragraph F of Article Three and would vest no rights under the present Compact.

Second, that Article Eight is not intended to authorize, constitute or result in any apportionment of water to the Lower Basin beyond that made in Paragraphs A and B of Article Three.

HERBERT HOOVER.

WESTERN UNION TELEGRAM

Denver, Colorado, February 13, 1923.

R. H. McKisick,
Deputy Attorney General,
Sacramento, California.

Do you concur with me that intent of Commission in framing Colorado River Compact was as follows:

That Paragraph B of Article Three means that the Lower Basin may increase its annual beneficial consumptive use of water one million acre feet and no more.

That Article Eight is not intended to authorize, constitute or result in any apportionment of water to the Lower Basin beyond that made in Paragraphs A and B of Article Three.

DELPH E. CARPENTER,

WESTERN UNION TELEGRAM.

Sacramento, Calif., February 13, 1923.

Hon. Delph E. Carpenter,
State Capitol,
Denver, Colo.

Am of opinion that Paragraph B of Article Three permits increase of annual beneficial consumption use of water by Lower Basin to eight million five hundred thousand acre-feet total or one million in excess quantity apportioned each basin in perpetuity by Paragraph A, Article Three, and no more. When both paragraphs are read together no other construction tenable. "Per annum" not synonymous with "annually."

Article Eight is not intended to authorize, constitute or result in any apportionment of water to the Lower Basin beyond that made in Paragraphs A and B of Article Three, but means that if and when the water passing Lees Ferry as provided in Paragraphs D and E, Article Three, is impounded within specified storage, claims of Lower Basin appropriators or users adverse to those of Upper Basin appropriators or users shall be transferred to and satisfied from the water so stored.

R. T. McKISICK.

WESTERN UNION TELEGRAM.

Sacramento, Calif., February 15, 1923.

Delph E. Carpenter,

Denver, Colo.

My interpretation of Articles Three and Eight well expressed in McKisick's wire of the thirteenth.

W. F. McCLURE,

(The following is from letter of February 16th, 1923, of Arthur P. Davis, Director U. S. Reclamation Service, addressed to Clarence C. Stetson, Executive Secretary, Colorado River Commission, interpreting Par. (b), Art. III and Art. VIII, Colorado River Compact.)

"Article VIII provides that all of the rights of the Lower Basin shall be satisfied from the water apportioned to that basin. There is no indication that any portion of its needs shall be taken from the allotment to the Upper Basin. The assumption that the Lower Basin could claim priority for the appropriation of water in a reservoir is an assumption that the compact is invalid, for this is just the contingency which it was designed to meet. The proviso that a storage reservoir of 5,000,000 acre-feet or more shall take care of the perfected rights in the Lower Basin is designed to lift the ban upon the diversion of the low water flow from the upper tributaries after the construction of such a reservoir, which will be filled from the flood waters, but which is to be charged against the allotment of the lower division as specifically provided in Paragraph (a), Article III. This provides conclusively against the supposition that the stored waters are not to come out of the allotment to the Lower Basin.

The assumption that Paragraph (b) of Article III has no limit is its own refutation on account of the absurdity of that assumption. It would in a few years, if so construed, absorb more than the entire flow of the river, which reduces the assumption to an absurdity. Furthermore, the language is specific as the apportionment is for the consumptive use of 1,000,000 acre-feet per annum and cannot be construed to mean 2,000,000 acre-feet per annum or any other amount."

(NOTE.—The Colorado Legislature also had before it, during the debates in re approval of Colorado River Compact, the report of Herbert Hoover, Representative for the United States, the same being Doc. 605, 67th Cong., 4th Sess., House of Representatives; also extension of remarks of Cong. Carl Hayden, of Ariz. See Cong. Record, Jan. 30, 1923, 67th Cong., 4th Sess.)