

December 2019

## The Compact Clause of the Constitution

W. J. Wehrli

Follow this and additional works at: <https://scholarship.law.uwyo.edu/wlj>

---

### Recommended Citation

W. J. Wehrli, *The Compact Clause of the Constitution*, 3 Wyo. L.J. 3 (1948)  
Available at: <https://scholarship.law.uwyo.edu/wlj/vol3/iss1/1>

This Article is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Wyoming Law Journal by an authorized editor of Law Archive of Wyoming Scholarship.

# THE COMPACT' CLAUSE OF THE CONSTITUTION

W. J. WEHRLI\*

Frequent reference is made to the compact clause of the constitution, giving rise to the implication that there is a positive grant of power. On the contrary, the language is permissive only and in negative terminology, being that contained in paragraph 3 of section 10 of Article I, which provides:

“No state shall, without the consent of Congress, \* \* \*  
enter into any agreement or compact with another state.  
\* \* \*”

The compact power has been used somewhat sparingly, although early recognized and frequently commended. From an appendix to an article written by Felix Frankfurter, now justice of the United States Supreme Court, and James M. Landis, appearing in Volume 34 of the Yale Law Journal of May, 1925, we find that nine compacts between colonies were made during the colonial period, and four between states under the Articles of Confederation. Compacts made with the consent of Congress since 1789 are listed as 39 in number, the first having been consummated between Virginia and Kentucky in 1789. In a report of the National Resources Committee of December, 1935, only 34 are listed as having become effective through state ratification, although 57 were authorized by Congress. Undoubtedly several have been consummated since the writing of Justice Frankfurter's and Mr. Landis' article in 1925 and also since the National Resources Committee report of 1935.

These interstate agreements have covered such subjects as the following:

1. Boundaries and cessions of territory.
2. Control and improvement of navigation.
3. Penal jurisdiction.
4. Uniformity of legislation.
5. Interstate accounting.
6. Conservation of natural resources.
7. Utility regulations.
8. Taxation.
9. Apportionment of the use of water of interstate streams.

While it is only in the field of interstate water disputes that Wyoming has become interested in the compact process, this is a

---

\* Retiring President of the Wyoming State Bar. Address delivered at the Annual Meeting, September 3 and 4, 1948. Mr. Wehrli acted as Special Counsel to the Wyoming Interstate Streams Commissioner in negotiations of the Upper Colorado River Basin Compact.

rather late development, particularly in the western states. However, it has become a much favored method of settlement of interstate controversy relating to appropriation and use of water.

Although frequently obtained in recent years, precedent authorization of Congress is not essential to the making of a compact. The states may proceed, each state appointing a commissioner, and these commissioners arriving at an agreement which must then be submitted to the Legislature of each state. If ratification by the legislatures follows, the compact may then be presented to Congress for approval without any prior authorization by congressional enactment or any participation by any representative of the United States. In compacts relating to apportionment of the use of water of interstate streams, however, it has become accepted practice for the interested states to invite the President of the United States to appoint a representative of the federal government. This procedure has been and is followed because the federal government, in all cases, has some interest which should be conserved, and as a practical consideration it is felt that approval by Congress will more readily follow if the government is represented. The first example of this procedure is that of the Colorado River Compact, which was concluded November 24, 1922, after negotiations participated in by Herbert Hoover as representative of the United States. Mr. Hoover was chairman of the compact commission. A similar procedure is being followed in the making of the compact for the Upper Basin of the Colorado River, negotiations for which are now under way, with Harry W. Bashore, former Commissioner of the Bureau of Reclamation, as representative of the President and chairman of the commission.

Aside from acts of Congress giving specific authorization for particular compacts, we find one general enactment commonly known as the Weeks Act of March 1, 1911, Section 552 of Title 16, U. S. C. A., which is as follows:

*"Sec. 552. Consent to agreement by States for conservation of forests and water supply*

*"Consent of the Congress of the United States is given to each of the several States of the Union to enter into any agreement or compact, not in conflict with any law of the United States, with any other State or States for the purpose of conserving the forests and the water supply of the States entering into such agreement or compact, March 1, 1911, c. 186, Sec. 1, 36 Stat. 961."*

It is not my understanding that this act is sufficient to constitute the approval of a compact but that each must be approved by Congress after its consummation by the states.

Lay writers, lawyers and the Supreme Court have commended the use of the compact procedure. In the above mentioned Yale Law Journal, article of Justice Frankfurter and James M. Landis, we find the following:

“The attempt to make an equitable apportionment of water among States within a given region has been sought through litigation as though it involved the riparian rights of neighboring individuals. The most informed professional opinion registers the failure of this attempt and the present movement towards solutions by interstate treaties is a decisive recognition that the instrument of state-craft in this field is not court but compact. While assuming jurisdiction over these complicated and pervasive interstate difficulties the Supreme Court has recognized its own inadequacy to give relief. Continuous and creative administration is needed; not litigation, necessarily a sporadic process, securing at best merely episodic and mutilated settlements, which leave the central problems for adjustment unsolved.”

The Supreme Court has repeatedly adverted with commendatory language to the use of the compact power, as shown by the following quotations from its opinions:

*Washington vs. Oregon*, 214 U. S. 205, 29 Sup. Ct. 631, 53 L. Ed. 969, Page 972:

“We submit to the states of Washington and Oregon whether it will not be wise for them to pursue the same course, and, with the consent of Congress, through the aid of commissioners, adjust, as far as possible, the present appropriate boundaries between the two states, and their respective jurisdiction.”

*Minnesota vs. Wisconsin*, 252 U. S. 273, 40 Sup. Ct. 313, 64 L. Ed. 558, Page 564:

“It seems appropriate to repeat the suggestion made in *Washington v. Oregon*, 214 U. S. 217, 218, 29 Sup. Ct. 631, 55 L. Ed. 971, 972, that the parties endeavor, with consent of Congress, to adjust their boundaries.”

*New York vs. New Jersey*, 256 U. S. 296, 41 Sup. Ct. 492, 65 L. Ed. 937, Page 945:

“We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York bay is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the states so vitally interested in it than by proceedings in any court, however constituted.”

*Hinderlider vs. LaPlata*, 304 U. S. 92, 58 Sup. Ct. 803, 82 L. Ed. 1202, is a case involving the validity of the LaPlata River Compact made between Colorado and New Mexico, November 27, 1922, and providing for an apportionment of the use of the water of the LaPlata River. In the *Hinderlider case*, suit was brought by LaPlata River and Cherry Creek Ditch Company in the State of Colorado, the company contending that the water administration officials of the State of Colorado, in enforcing the division of water made by the compact, were depriving plaintiff of water to which it was entitled under the

laws of Colorado. The Supreme Court of Colorado held the compact was void, because the compact did not represent a decision upon the question of the amount of water to which each state was entitled and was a mere compromise of conflicting claims, and that thereby water users of Colorado had their appropriate rights impaired without notice or hearing. This decision was reversed by the Supreme Court of the United States, the Court holding that since Colorado possessed only the right to an equitable share of the water in the stream the plaintiff ditch company could not have any right greater than Colorado's equitable share. It is clear from this decision that impingement upon private rights cannot be urged as cause of invalidity of an interstate compact. The Court in its opinion said:

"The Supreme Court of Colorado held the Compact unconstitutional because, for aught that appears, it embodies not a judicial, or quasi-judicial decision of controverted rights, but a trading compromise of conflicting claims. The assumption that a judicial or quasi-judicial decision of the controverted claims is essential to the validity of a compact adjusting them, rests upon misconception. It ignores the history and order of development of the two means provided by the Constitution for adjusting interstate controversies. The compact—the legislative means—adapts to our Union of sovereign States the age-old treaty making power of independent sovereign nations. Adjustment by compact without a judicial or quasi-judicial determination of existing rights had been practiced in the Colonies, was practiced by the States before the adoption of the Constitution, and had been extensively practiced in the United States for nearly half a century before this Court first applied the judicial means in settling the boundary dispute in *Rhode Island v. Massachusetts*, 12 Pet. 657, 723-725, 9 L. Ed. 1233, 1260, 1261."

Wyoming concluded with South Dakota the Belle Fourche River Compact, which was approved by our Legislature March 3, 1943, and appears as Chapter 117 of the 1943 Session Laws. This agreement has been approved by the State of South Dakota and the Congress of the United States, and is in full force and effect.

At the present time, Wyoming is engaged in negotiations for the consummation of compacts upon the Bear River, the Yellowstone River and its tributaries, and upon the tributaries of the Colorado River. As to the latter, the Upper Colorado River Basin Compact Commission has had a series of meetings which commenced in July, 1946, at the instigation of Wyoming's governor and State engineer, and which have continued to the present time, the last having been held at Vernal, Utah, July 7 to 21, inclusive. Such progress has been made that it is anticipated the compact will be signed at the next meeting to be held at Santa Fe, New Mexico, October 4.

Historical significance will attach to the consummation of the Upper Basin Colorado River Compact at Santa Fe, since it was there, on November 24, 1922, that the Colorado River Compact was signed. This compact was made by the States of Arizona, California and Nevada, known as the Lower Division, and Colorado, New Mexico, Utah and Wyoming, known as the Upper Division. At the inception of proceedings, it was intended to make a compact apportioning to each state such use of the water of the Colorado River system as it might be entitled to receive. This was found to be impossible and the commissioners, under the guidance of Herbert Hoover, were able to conclude only a division of water between the upper and lower basins. The upper basin is that portion of the Colorado River system above Lee Ferry, Arizona, which is a point in northern Arizona about 350 miles above Hoover Dam. The lower basin is that portion of the drainage area below Lee Ferry.

In the compact, apportionment was made to the upper basin in perpetuity of the exclusive, beneficial consumptive use of 7,500,000 acre feet of water per annum, and to the lower basin a like amount. In addition, the lower basin is to be permitted to increase its beneficial consumptive use 1,000,000 acre feet per annum.

While the upper basin was awarded in perpetuity 7,500,000 acre feet of consumptive use, the compact placed an obligation upon the upper basin not to deplete the flow of the river at Lee Ferry below an aggregate of 75,000,000 acre feet for any period of ten consecutive years, reckoned in continuing, progressive series. The compact also contains a provision that if the United States recognizes any right of the United States of Mexico to receive any of the water of the Colorado River system, same shall be supplied first from the waters which are surplus, over and above the total quantity of 7,500,000 acre feet awarded in perpetuity to the upper and lower basins and the 1,000,000 additional acre feet of consumptive use allowed for the lower basin, and if the surplus is insufficient, then the deficiency shall be equally borne by the upper and lower basins.

When the compact was made in 1922, it was believed the supply was abundant to furnish all water allocated and, in fact, provisions were inserted for the apportionment of a surplus after October 1, 1963. However, up to that time there had been no experience with such a drouth period as 1931 to 1940. In this ten year period, the average annual flow of the Colorado River at Lee Ferry declined from the long time mean of 14,000,000 to 10,000,000 acre feet. Since existing consumptive use in the upper basin approximates only 2,500,000 acre feet annually, it can readily be seen that if the full beneficial consumptive use of 7,500,000 acre feet is made, as contemplated by the Colorado River Compact, and if another period such as 1931 to 1940 occurs, there will not be sufficient water for such use and the

delivery required by the compact of 75,000,000 acre feet in each consecutive ten year period at Lee Ferry. If the upper basin had consumed 7,500,000 acre feet annually during this drouth period, the flow at Lee Ferry would have been only 5,000,000 acre feet annually for the ten years and the upper states would have failed to comply with the delivery requirements of the compact by an average of 2,500,000 acre feet annually. The solution for this problem is the construction of large, main stem reservoirs which will hold over the surplus of years of abundant run-off for delivery in years of law supply. The Bureau of Reclamation has determined that by the construction of these reservoirs, there can be made available to the upper basin the full consumptive use of 7,500,000 acre feet.

Since there was no division between the states in the Colorado River Compact, and because of the experience of the drouth period, 1931 to 1940, the Bureau of Reclamation has taken the position that additional projects for the use of water cannot be constructed in the upper basin until there is an apportionment of the supply between the interested states. Development by private capital in the upper basin is no longer feasible, as the cost of such projects as may be built is beyond private financing. They can only be constructed by the government through the Bureau of Reclamation. Consequently, the states of the upper basin, in order to utilize the water supply apportioned to them, must make a compact apportioning between them the water to which they are collectively entitled.

While Arizona is not an upper division state, she has a small area in the upper basin, and consequently has participated with the upper division states of Colorado, New Mexico, Utah and Wyoming in the negotiations for the Upper Colorado River Basin Compact.

At the recent meeting at Vernal, Utah, agreement was reached on a percentage allocation of the water. It was early decided that division could be made only upon a percentage basis, since no determination can be made of the exact amount of water which will be available for use in the upper basin, due to the delivery obligation to the lower basin heretofore mentioned of 75,000,000 acre feet in each consecutive ten year period; also due to the possible demand for water for the United States of Mexico, a treaty having been made in 1945, awarding to Mexico 1,500,000 acre feet annually, and because of uncertainty of the supply in the light of the history of the drouth period, 1931 to 1940, and due to the necessity of construction of main stem reservoirs, all of which may not be built. Arizona, being entitled to only a small amount of water or a small percentage in any event, agreed to accept 50,000 acre feet annually as her allocation, and the remainder of the supply was apportioned percentage-wise as follows:

Colorado .....	51.75%
New Mexico .....	11.25%

Utah .....	23	%
Wyoming .....	14	%

On the assumption there will be available for use the 7,500,000 acre feet awarded in perpetuity to the upper basin by the Colorado River Compact, the states will participate in such use as follows:

Arizona .....	50,000	acre feet
Colorado .....	3,855,375	" "
New Mexico .....	838,125	" "
Utah .....	1,713,500	" "
Wyoming .....	1,043,000	" "
<hr/>		
Total .....	7,500,000	" "

The apportionment to the states was based largely upon the possibilities of use in each state and does not bear any direct relation to quantities produced. For illustration, Wyoming will be permitted to use about 65% of the water produced in Wyoming, Utah about 64% of her production, Colorado 36% of hers, and New Mexico, in excess of the water produced in that state, as the major portion of her supply will come from Colorado.

The division agreed upon bears a close relation to the use potentialities of the different states and could not be changed to any substantial degree without the award of supplies in excess of potential use.

The Bureau of Reclamation lists potential new projects which can be constructed for the irrigation of land in the upper basin states totaling 1,230,000 acres, and which will provide supplemental supply to an additional 504,000 acres. Present irrigated acreage is 1,350,000. Therefore, it appears possible that the amount of land irrigated can be doubted. In Wyoming we have a present irrigated area of 247,000 acres, and this can be increased to the extent of 290,000 acres of new land and supplemental supply for 95,000 acres. These Wyoming figures are based upon the report of the Bureau of Reclamation. The compact commissioners had a committee of engineers, and according to this committee the consumptive use in Wyoming is much less than was estimated by the Bureau. If this committee's figures are correct, we can irrigate in Wyoming much more than 300,000 acres of new land. The apportionment is of consumptive use and this term has received no exact definition but is generally understood to be the amount of water consumed through the activities of man. It includes water lost by evaporation and water consumed in plant transpiration. Of course it is said that water is indestructible and all that we mean by consumptive use is that through the activities of man a certain amount of water taken from a stream does not return thereto because of evaporation losses and the growth of plants. The water itself has been transformed to vapor and vegetable growth.



The Colorado River Basin in Wyoming covers about 17,000 square miles, which is approximately 18% of the area of the state. The Colorado River Basin in its entirety covers 242,000 square miles, or approximately one-twelfth of the land area of the United States. If the Upper Colorado River Basin Compact is concluded, vast development will be permitted in the upper basin which will take 50, 75 or 100 years for its completion, and which will develop tremendous new resources of agriculture, power and industry, and which will support many thousands of people in addition to the present inhabitants of the area.

Those of us who are engaged in the negotiation of the Upper Colorado River Basin Compact believe that we are making good use of the so-called compact clause of the Constitution, and one which will result in a vast agricultural and industrial development in the upper basin of the Colorado.

## THE TIDELANDS QUESTION

E. J. SULLIVAN\*

On June 23, 1947, the Supreme Court of the United States decided the case of *U. S. v. California*<sup>1</sup>—the “Tidelands Case” in favor of the Federal Government. In doing so, the Court raised a startlingly new and alarming concept of property rights—the concept of the “paramount right” of the Federal Government to take natural resources based on the Government’s need for those resources, even though it could not establish its title to these resources or the soil from whence they come.

In its suit, the United States asserted that it is “the owner in fee simple of, or possessed of paramount rights in and powers over, the lands, minerals and other things of value underlying the Pacific Ocean, lying seaward of the ordinary low water mark on the coast of California and outside of the inland waters of the State, extending seaward three nautical miles and bounded on the north and south, respectively, by the northern and southern boundaries of the State of California.”<sup>2</sup> In its prayer to the Court, the United States asked for “a decree declaring the rights of the United States in the area as against California and enjoining California and all persons . . . in violation of the rights of the United States.”

In deciding against California, the Supreme Court found ownership in neither the State nor in the United States, but gave dominion and control over the lands to the federal government. This decision, as read by Mr. Justice Black, was based on an entirely new and un-

---

\* of Casper, Wyoming, member of the Wyoming State Bar.