
Kansas v. Colorado
A Case Study

David W. Robbins
Hill & Robbins, P.C.

With appreciation to Dennis Montgomery and Jennifer Hunt

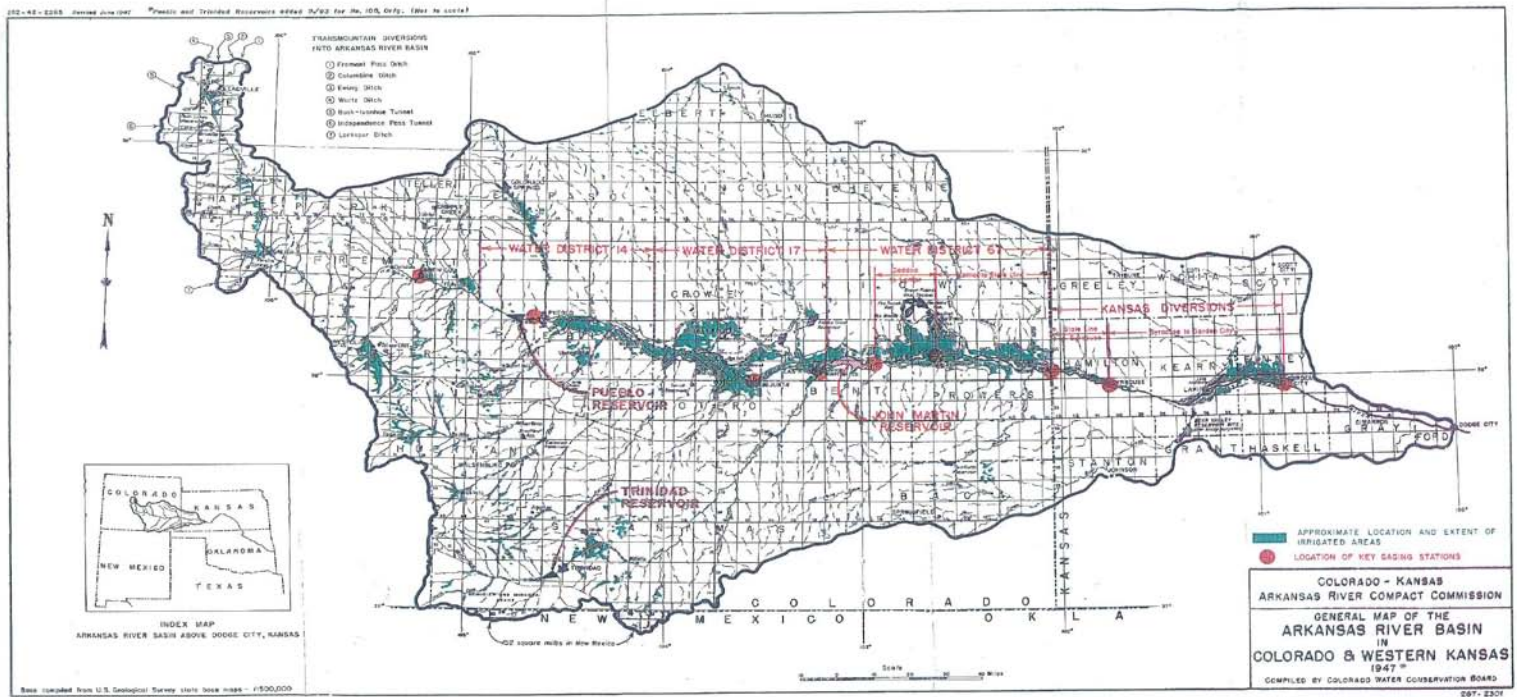
Interstate Compacts

- An interstate compact is both a contract and a law of the United States
- One consequence of the fact that a compact is a law of the United States is that, unless the compact is somehow unconstitutional, no court may order relief inconsistent with its express terms. *Texas v. New Mexico*, 462 U.S. at 464.
- The U.S. Supreme Court has jurisdiction to resolve controversies between two or more States, including a dispute over a compact. U.S. Const., Art. III, § 2, cl. 1.
- Contract remedies are generally available to remedy a breach of a compact, including damages. Equitable remedies, such as specific performance may also be available. *Texas v. New Mexico*, 482 U.S. 124, 134 (1987).
- Article I, §10, clause 3 of the U.S. Constitution: “No State shall, without the Consent of Congress, ...enter into any Agreement or Compact with another State.

The Arkansas River Compact

- Congress authorized the negotiation of a compact between Colorado and Kansas for an equitable apportionment of the waters of the Arkansas River in 1945. Act of April 19, 1945, 59 Stat. 53 (1945).
- Commissioners for Colorado and Kansas signed the Arkansas River Compact on December 14, 1948
- Ratified by the Legislature of each State in 1949
- Consented to by Congress and became effective in 1949.
- Once given, “Congressional consent transforms an interstate compact within this Clause into a law of the United States.” *Texas v. New Mexico*, 462 U.S. 554, 564 (1983) (quoting *Cayler v. Adams*, 449 U.S. 433, 438 (1981)).

Map of the Arkansas River Basin



The Arkansas River Compact

- The best of Colorado's compacts
- The worst of Colorado's compacts

Article IV-D – Future Beneficial Development

- Article IV.D addresses future beneficial development of the Arkansas River basin in Colorado and Kansas by federal or state agencies, by private enterprise, or by combinations thereof.
- Article IV.D – the Compact is not intended to impede or prevent future beneficial development of the Arkansas River basin in Colorado and Kansas, as well as the improved or prolonged functioning of existing works: Provided, that the waters of the Arkansas River shall not be materially depleted in usable quantity or availability for use to the water users in Colorado and Kansas under the Compact by such future development.
- Article IV.D recognizes that even with the John Martin Reservoir project, there would be some flood flows and winter flows that would be unused and could be developed in the future, so long as the rights of existing water users under the Compact were protected.

Article IV.D Proviso

- “waters of the Arkansas River”
- “materially depleted”
- “usable quantity or availability”
- “for use to the water users in Colorado and Kansas under this Compact”
- “by such future development or construction”

Overview

25 Years of *Kansas v. Colorado*, No. 105, Original

- 1985 Kansas requests investigation
- December 1985 Kansas files its Complaint in the Supreme Court
- Early 1986, the Court accepts Kansas' Complaint
- March 2009 – Final Decree Entered
- August 2009 – Remaining Retained Jurisdiction is Relinquished
- From 1985 to 2009 – Litigation
 - Discovery
 - Five Reports of the Special Master
 - Four Arguments before the Supreme Court
 - Over 270 Days of Actual Trial

General Truths

- All water compacts limit and allocate consumption.
- History tells us that it is hard to live with limits on consumption.
- Under most conceivable circumstances, when a compact controversy arises Colorado will be on the defense.
- Other States are not as impressed with Colorado and its growing need for water as we ourselves are.
- For better or worse, a deal is a deal.
- For every Compact there is a lot of folklore and coffee shop wisdom about how it went down and how it's supposed to work that is frequently well off the mark.

The Process #1

- Learn the applicable law.
 - Remember, Colorado's internal law may be relevant and can work against us.
- Learn the History
 - Hire a historian.
 - Study the State's own records of the negotiations and subsequent interaction.
 - Review the public records in the other State(s).
 - Review the public records of federal agencies and those in the National Archives and the Library of Congress.
- Learn the Facts
 - Study what has occurred in our State that has raised the ire of our neighbor.
 - Assemble all of the available information
 - Climate Data
 - Stream flows
 - Diversion records
 - Water rights decrees

The Process #2

- Well Records
- Pumping Data
- Land use Data
 - Irrigated v. dryland acres
 - Cropping patterns and crop types
 - Yield data
 - Irrigation techniques
 - Non-agricultural uses
- Determine the Tools
 - To model or not to model
 - Techniques for filling missing data
 - Appropriate equations to estimate the unmeasured or unknown

The Process #3

- Discovery
- Pre-trial Maneuvers
- Trial to the Master
- Exceptions to the Supreme Court
- Repeat if Necessary

Trial Phases

1. Liability
 - Did Colorado do anything wrong: Parts 1 & 2?
2. Liability
 - How much wrong did we do?
3. Remedy
 - Should it be water or dollars?
 - What was Colorado doing to come into compliance?
 - How much should a dollar remedy be?
4. Future Compliance
 - H-I Model to be used on what basis
 - Offset Account
5. Costs

Why Is It So Complicated?

- Inevitably a basin scale problem
 - Data gaps and uncertainty
 - Multiple interests within the State
- Expectations/Political Requirements
 - On the defense – to admit you're wrong means some citizens must give up water they rely on – not popular.
 - On the other side – once the sense of outrage arises, it's hard to turn back and accept less than what you've convinced your water users and politicians is fair.
- First trial phases were about Colorado and the question of liability
- Remainder were about resolving the Kansas expectations
- There is a lot of money at stake:

Damages claimed by Kansas:
\$300+ million in 1998 dollars
\$68 million in 1998 dollars
dollars

Award
\$21 million in 1998 dollars
> or \$34 million in 2005

Costs claimed by Kansas:
About \$11 million -

About \$1 million

Questions?
