

THE REPUBLICAN RIVER COMPACT

A. Background and Negotiations

In response to an extended drought during the 1930s, interrupted by a devastating flood in 1935, and the need to agree to an apportionment before federal development in the basin could be undertaken, Colorado, Kansas, and Nebraska began negotiations for a compact in 1940 to allocate the waters of the Republican River Basin above the junction of the Republican and Smoky Hill Rivers in Kansas. Commissioners were appointed by the Governors of the three States. After eight meetings, the commissioners signed a proposed compact in March 1941. The proposed compact was ratified by the legislatures of the three States and consented to by Congress, but President Roosevelt vetoed the bill approving the compact in 1942 because of objections by federal agencies. Congress then passed, and President Roosevelt approved, a bill authorizing further compact negotiations with a federal representative to be involved.

A federal representative was appointed to participate in the negotiations, and, with limited changes to satisfy the federal government that did not change the allocations of water to the three States, a second Republican River Compact was signed by the commissioners on December 31, 1942, ratified by the state legislatures and approved by Congress and the President in 1943.

B. Summary of the Compact Provisions

The Compact is divided into eleven Articles.

Article I

Article I begins by setting out six major purposes of the Compact: (1) to provide for the most efficient use of the waters of the Republican River Basin for multiple purposes; (2) to provide for an equitable division of such waters; (3) to remove all causes, present, and future, which might lead to controversies; (4) to promote interstate comity; (5) to recognize that the most efficient utilization of the waters within the Basin is for beneficial consumptive use; and (6) to promote joint action by the States and the United States in the efficient use of water and control of destructive floods.

Article II

Article II defines the Basin for the purposes of the Compact as “all the area in Colorado, Kansas, and Nebraska, which is naturally drained by the Republican River, and its tributaries, to its junction with the Smoky Hill River in Kansas,” and defines terms used in the Compact, including “virgin water supply” and “beneficial consumptive use.” It also states that beneficial consumptive use is the basis and principle upon which the allocations made in the Compact are predicated.

Article III

Article III sets forth the computed average annual virgin water supply (defined as the water supply within the basin “undepleted by the activities of man”) originating in designated drainage basins, or parts thereof. The Compact quantified the average virgin water supply originating in the main stem of the Republican River and each of the sub-basins within the basin upstream from the lowest crossing of the river at the Nebraska-Kansas state line. Based on records for an eleven year period, the average annual virgin water supply in the basin at the lowest crossing point was quantified as 478,900 acre-feet per year.

Article IV

Article IV makes allocations for beneficial consumptive use in each State, annually, in acre feet. The Compact allocates for beneficial consumptive use in Colorado, annually, a total of 54,100 acre-feet of water. This total is to be derived from the following sources and in the amounts specified and is subject to the quantities being physically available from those sources:

North Fork of the Republican River drainage basin – 10,000 acre-feet;

Arikaree River drainage basin – 15,400 acre-feet;

South Fork of the Republican River drainage basin – 25,400 acre-feet;

Beaver Creek drainage basin – 3,300 acre-feet.

In addition, for beneficial consumptive use in Colorado, Colorado is allocated the entire water supply of the Frenchman Creek (River) drainage basin in Colorado and the Red Willow Creek drainage basin in Colorado.

The Compact allocates for beneficial consumptive use in Kansas, annually, a total of 190,300 acre-feet of water, and for beneficial consumptive use in Nebraska, annually, a total of 234,500 acre-feet of water, to be derived from the sources and in the amounts specified in the Compact. In addition, Kansas is allocated the entire water supply originating in the basin downstream from the lowest crossing of the river at the Nebraska-Kansas state line.

Article III provides that the allocations made to each State from each source are subject to proportional increase or decrease if the computed virgin water supply of the source varies more than ten percent from the average annual virgin water supply set forth in the Compact. Under Accounting Procedures adopted by the Republican River Compact Administration (RRCA), Colorado’s allocation derived from each of the four sources or sub-basins is a percentage of the annual computed water supply for each sub-basin. Under the RRCA Accounting Procedures, Colorado’s sub-basin allocations are as follows:

22.4% of the computed water supply of the North Fork drainage basin;

78.5% of the computed water supply of the Arikaree River drainage basin;

44.4% of the computed water supply of the South Fork drainage basin; and
20% of the computed water supply of the Beaver Creek drainage basin.

The RRCA Accounting Procedures also contain formulas to calculate the computed water supply for each sub-basin and the main stem of the Republican River between the junction of the Arikaree River and the Republican River near Hardy, Nebraska (i.e., the lowest crossing of the river at the Nebraska-Kansas state line). The RRCA Accounting Procedures also specify how computed beneficial use of groundwater and surface water shall be determined.

The final sentence of Article IV of the Compact states that the use of the waters allocated to the State shall be subject to the laws of the State.

Article V

Article V recognizes the judgment in the case of *Weiland v. Pioneer Irr. Co.*, a 1922 decision of the U.S. Supreme Court affecting the Pioneer irrigation ditch or canal, as binding on the States, and provides that Colorado, through its officials, shall have the exclusive right to control and regulate diversions by the canal in conformity with that judgment. Article V also states that the water adjudicated to the Pioneer Canal by the district court of Colorado is included in and is a part of the total amounts of water allocated for beneficial consumptive use in Colorado and Nebraska.

Articles VI, VII, and VIII

Articles VI, VII, and VIII address the right to construct reservoirs or diversion works in an upper state for use in a lower state. The geography of the basin is such that Colorado is an upper state, but Kansas is both upstream and downstream of Nebraska.

Article IX

Article IX provides for the administration of the Compact through the officials who administer the public water supplies in the three States. Although the Compact does not expressly provide for a Compact Administration, the three officials, pursuant to Article IX, organized themselves into the RRCA in 1959.

Articles X and XI

Article X addresses the effect of the Compact on the rights of the United States. Finally, Article XI specifies when the Compact would become operative, requiring, among other things, that the congressional legislation consenting to the Compact provide that any beneficial consumptive uses by the United States, or those acting by or under its authority, within a State of waters allocated by the Compact, be included within that State's allocations.

C. U.S. Supreme Court Litigation

After the Compact became effective in 1943, it operated without controversy for many years. In the 1980s, however, Kansas began to express a concern that ground water in the basin should be regulated. In May 1998, after unsuccessful efforts to reach a solution, Kansas filed a motion with the U.S. Supreme Court for leave to file a bill of complaint alleging that Nebraska had injured Kansas through overuse of ground water in the basin. Colorado, as one of the compacting States, was named as a defendant, but Kansas sought no relief against Colorado. In June, 1999, the U.S. Supreme Court granted Kansas' motion for leave to file a bill of complaint and granted Nebraska leave to file a motion to dismiss the complaint, limited to the question whether the Compact restricts a State's consumption of ground water. In November 1999, the Supreme Court appointed a Special Master in the case and referred Nebraska's motion to dismiss to the Special Master.

In January 2000, the Special Master issued his First Report in which he recommended that the Supreme Court deny Nebraska's motion to dismiss on the ground that the Compact "restricts a compacting State's consumption of ground water to the extent the consumption depletes stream flow in the Republican River Basin." Nebraska and Colorado filed exceptions to the First Report. In June 2000, the Supreme Court denied Nebraska's motion to dismiss and recommitted the case to the Special Master for further proceedings. In November 2000, Nebraska filed an amended answer, counterclaims against Kansas, and a cross-claim against Colorado alleging that if all groundwater that is hydraulic connected to the Republican River is subject to the allocations contained in the Compact, Colorado had consumed amounts of water in excess of its annual allocations.

D. Final Settlement Stipulation

Beginning in October 2000 the Special Master urged the States to consider a negotiated settlement of the case. Settlement efforts between the three States began in October 2001, and the States entered into a Final Settlement Stipulation as of December 15, 2002, to resolve the pending Supreme Court litigation. In the Stipulation, which was approved by the Special Master and the Supreme Court, the States agreed that all claims against each other with respect to activities or conditions occurring before December 15, 2002, would be waived, forever barred and dismissed with prejudice, including all claims for damages. With certain exceptions, the States agreed to a moratorium on the construction of new wells in Nebraska upstream from Guide Rock, Nebraska, to match an existing de facto moratorium in Colorado and Kansas. One of the exceptions is for wells acquired or constructed by a State for the sole purpose of offsetting stream depletions in order to comply with its Compact allocations, although an augmentation plan and related accounting procedures for such wells must be approved by the RRCA prior to implementation.

The States also agreed to new and more specific Accounting Procedures to determine virgin water supply, computed water supply, allocations, imported water supply credit, and computed beneficial consumptive use. And, the Stipulation provides that water in excess of a State's specific sub-basin allocations is available for use by each of the States, subject to certain conditions. One of those conditions is that use of such water does not

impair the ability of another State to use its sub-basin allocation within the same sub-basin.

The States further agreed that stream flow depletions caused by well pumping would be determined using a ground water model that would be jointly-developed by a modeling committee and that Compact accounting would be done on a five-year running average in accordance with the Accounting Procedures, except for certain restrictions when water-short year administration is in effect. A schedule was established to complete the groundwater model, and the States agreed to undertake the obligations set forth in the Stipulation, including a study, in cooperation with the United States, of non-federal reservoirs and land terracing on the virgin water supply.

With respect to activities or conditions occurring after December 15, 2002, the dismissal of the pending claims with prejudice does not bar a State from seeking enforcement of the Compact, the Stipulation, or the consent decree entered by the U.S. Supreme Court. However, the States agreed in the Stipulation to a dispute resolution procedure for submitting any matter relating to Compact administration, including administration and enforcement of the Stipulation, to the RRCA for resolution. If the dispute cannot be resolved by the RRCA, the dispute may be submitted to non-binding arbitration or, if the affected States agree, to binding arbitration.

E. Creation of the Republican River Water Conservation District

In 2004, Governor Bill Owens signed into law Senate Bill 04-235, establishing the Republican River Water Conservation District, which includes the area in Colorado in Phillips and Yuma counties, and those portions of Kit Carson, Lincoln, Logan, Sedgwick, and Washington counties within the Republican River Basin. The District was established for the purpose of cooperating with and assisting the State of Colorado to carry out the state's duty to comply with the Compact and was given powers to carry out this purpose. The general powers of the District are set forth in section 37-50-107 of the Colorado Revised Statutes.