

South Platte River Compact and U.S. Supreme Court Decree for North Platte River

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Introduction

The geographic distribution of most water supply sources does not end at boundary lines. Landowners often share the shorelines of lakes, reservoirs and streams. Individual properties frequently overlie common ground water sources. Many cities, states and countries are similarly situated. Periodic drought and growing water demands prompts many to view increased demand by others as a threat to their own well-being. Competition to acquire needed water supplies has lead to legislative initiatives and to litigation in the courts.

In much of the western U.S., water resources litigation among states, municipalities and the federal government is common and has been for nearly a century. Disputes over rights to consume flows in the Colorado, Pecos, North Platte, and Arkansas rivers, for example, have been resolved through litigation brought before the U.S. Supreme Court.

Elsewhere, interstate agreements (compacts) have been negotiated to avoid litigation and to allocate waters of streams which flow from one state to another. The Delaware River Compact among Delaware, New York, Pennsylvania and New Jersey; Rio Grande River Compact among Colorado, New Mexico and Texas; the Yellowstone River Compact between Wyoming and Montana; and the Big Blue River Compact between Nebraska and Kansas are examples.

In the Platte River watershed the State of Nebraska has experience allocating water resources under provisions of an interstate compact and under directives of a U.S. Supreme Court decree.

South Platte River

The South Platte River and its principal tributaries (EX's: Cache la Poudre & Big Thompson rivers, St. Vrain Creek) originate in the Front Range of the Rocky Mountains (Figure 1). The South Platte passes through Denver and flows generally toward the northeast where it enters Nebraska near Big Springs. Statistically, its flow is greatest when the mountain snow pack melts during April through June. A complex system of inter-mountain tunnels, canals, reservoirs and pumping facilities supplies irrigation water to more than half a million acres in northeast Colorado and to Denver and other municipalities. Downstream, river flows irrigate less than 15,000 acres within the Western (Canal) Irrigation District in Nebraska's portion of the South Platte valley.

Under authority granted to the states by Article I, Section 10, *Constitution of the United States*, Nebraska and Colorado negotiated one of the Nation's first interstate agreements intended to allocate stream flows for diversion and consumption among users in each state. Following several years' negotiation, the South Platte River Compact (R.R.S., 1943, as amended - see Appendix; Sec. 1-105) was approved in 1923. In ratifying the Compact, the states formally acknowledged one another's consumption requirements and the corresponding water rights necessary to assure their continuance.

By calling for restriction of upstream diversions in Colorado, the Compact created a regulatory mechanism intended to assure river flows reach Nebraska and the Western Canal diversion works located immediately downstream from the Colorado-Nebraska boundary. Data collected at the stream flow

monitoring station near Julesburg, Colorado is used to determine when upstream diversions from the river are curtailed.

Specifically, during the April 1 to October 15 time period when river flows near Julesburg drop below 120 cubic feet per second (cfs), the Colorado State Engineer is required to limit diversions by those holding permits having diversion priority dates newer than June 14, 1897 (Western Canal priority date). The geographical extent of Colorado's obligation lies roughly between Fr. Morgan, Colorado and the Colorado-Nebraska boundary; approximately 150 river miles.

Under all other circumstances and at all other times of the year, residents of Colorado are entitled to "... the full and uninterrupted use and benefit of the waters of the (South Platte) river . . ."

The Compact also provides for operation of the (as yet un-constructed) Perkins County Canal. Presumably that canal would be used for supplying irrigation water to users in Nebraska not already served by the Western Canal. In conjunction with constructing the canal, terms of the Compact empower the State of Nebraska or its citizens to acquire necessary rights-of-way through "purchase, prescription, or the exercise of eminent domain . . ." To assure river flows arrive at the diversion works, Colorado agreed a) to recognize a December 17, 1921 priority date for diversions by the Perkins County Canal and b) during the October 15 to April 1 time period, to authorize the diversion of 500 cfs into it.

Because provisions of the Compact are customarily self-executing, formal meetings among officials from each state are infrequent and not routine. Expenses for operating and maintaining the Julesburg measuring station traditionally have been shared by the states and the U.S. Geological Survey.

North Platte River

Headwaters of the North Platte River lie in the Rocky Mountains of northern Colorado. From there the river flows north into Wyoming where, in a large arc, it turns toward the southeast and flows toward Nebraska. Principle tributaries entering the North Platte in Wyoming include the Sweetwater and Medicine Bow rivers which originate in Wyoming and the Laramie river which originates in Colorado. Flows of the North Platte are normally greatest during April through June when the mountain snow pack melts.

North Platte flows are impounded in a series of large reservoirs constructed by the U.S. Bureau of Reclamation. Seminoe, Pathfinder, Alcova, Glendo & Guernsey reservoirs were built on the main channel of the river in Wyoming. The off-channel Inland Lakes (Minatare, Alice, Little Alice & Winters Creek) are located near Scottsbluff. Each is filled with water flows diverted from the river in Wyoming and carried to them through the Interstate Canal.

Natural flows diverted from the river and additional quantities released from the federal reservoirs in Wyoming are used to produce electric energy and to irrigate crops in eastern Wyoming and in western portions of the panhandle. The Inland Lakes supply supplements irrigation water only to lands in Nebraska. Excluding ground water sources, some 250,000 acres are irrigated from river flows and the federal reservoir system in Nebraska. Not counting some 24,000 irrigated acres near Casper, the number of acres irrigated from the river and federal reservoir system in eastern Wyoming is approximately one-fourth the Nebraska total.

Efforts begun in the 1920s to create a compact for sharing water of the North Platte River among users in Colorado, Wyoming and Nebraska were ultimately unsuccessful. In 1934 after being left with no

other means to obtain a) relief from alleged abuses and b) formal interstate recognition of water rights served from flows in the river, Nebraska initiated litigation against Wyoming under authority of Article III, Section 2, *Constitution of the United States*.

Precedent established in previous litigation (*Kan v Colo*, 206 U.S. 46; *Mo v Ill*, 180 U.S. 208; and *Wyo v Colo*, 259 U.S. 419 and other specific references) was cited by the U.S. Supreme Court in a) rejecting Wyoming's motion for dismissal, b) allowing for the impleaded defense by Colorado, c) allowing intervention by the United States and d) ultimately crafting an equitable apportionment. Time spent by the parties in discovery, preparations, trial and written and oral arguments was extensive. The proceedings ended in October 1945 when the U.S. Supreme Court entered a decree (*Neb v Wyo*, 325 U.S. 589, 665).

To later accommodate construction and operation of the Glendo reservoir, in 1953 the parties agreed to modification of the decree (*Neb v Wyo*, 345 U.S. 981). Changed conditions in Wyoming prompted Nebraska's re-opening of the suit in 1986. The Court subsequently made several clarifications and revisions to the 1945 decree [*Neb v Wyo*, 507 U.S. 584 (1993) and 515 U.S. 1 (1995)], and in 2001 the parties agreed to settlement of all remaining issues (*Neb v Wyo*, 534 U.S. 40 (2001)).

Comprehensive regulatory provisions relating to diversions, impoundment and use of water in the North Platte River basin are the subject of some 365 pages of text containing technical procedures, mathematical formulae and reporting requirements (*Neb v Wyo*, *supra*). Some provisions also are subject to decisions made by the North Platte Decree Committee.

In recognition of long-established demands for substantial irrigation diversions from the river in the Whalen Diversion Dam to Tri-State Diversion Dam section (the latter lies in Nebraska, approximately one mile below the Neb-Wyo boundary), a series of injunctions limit the jurisdiction of Wyoming and Colorado officials. With the exception of certain *de minimis* water uses, the complex regulatory scheme is intended to curtail upstream consumption so that remaining water supplies are available for diversion in the 26-mile Whalen to Tri-State section of the river. The upstream restrictions apply to a) diversions from the river and its tributaries; b) impoundment of flows in upstream reservoirs on tributaries and the main stem; and c) pumping of ground water from aquifer systems in hydraulic connection with streams in the watershed. Other provisions of the decree require snow melt and rainfall runoff to be impounded in the federally-constructed reservoirs only during times when natural flow is not needed for diversion by the state line canals (partially identified below). The sequence of impoundment in the various reservoirs corresponds to the chronological order in which they were constructed.

Natural flow accruing in the Wyoming portion of the watershed is apportioned to the so-called state line canals diverting from the North Platte in the Whalen to Tri-State reach. As a group, Nebraska's state line canals (Tri-State, Interstate, Ft. Laramie, Northport, Mitchell and Gering) are apportioned 75% of the natural flows in the river each day; the remaining 25% is apportioned to Wyoming for diversion by canals which divert from the river in the Whalen to Tri-State reach. Accordingly, no natural flow is to pass downstream, below the Tri-State diversion dam. Nebraska's 75% portion of natural flow is distributed to the state line canals according to the respective priority dates assigned to each. Distribution of additional, supplemental reservoir water supplies is governed by terms of contracts negotiated between individual irrigation districts/corporate users and the U.S. Bureau of Reclamation.

In conformance with requirements contained in "The Agreement of Settlement and Compromise *In the Cases of Neb v REA and Neb v Ray*," certain operational provisions govern activities at the Grayrocks

Reservoir (used to supply water for condenser cooling at the coal-fired Laramie River Station) located on the Laramie River in Wyoming. Wyoming officials are obligated to prevent diversions from the Laramie River when, to supplement flows in the Whalen Dam to Tri-State reach of the North Platte River, Basin Electric Cooperative staff members release water from that reservoir.

In contrast to the meager and seasonal administrative execution of provisions contained in the South Platte Compact, administrative actions in the North Platte River watershed are extensive and occur year-round. Staff members from Nebraska, Wyoming, Colorado, Basin Electric and the Bureau of Reclamation collect and exchange hydrologic data. Communication and coordination of consequent administrative actions often occurs several times per day. Periodic and formal meetings of the four-member North Platte Decree Committee are an additional activity.

In conformance with a requirement of the decree in *Neb v Wyo*, each state and the Bureau are required to share expenses for operation of various stream flow measuring stations. The same entities also share expenses for collection of Rocky Mountain snow pack data and corresponding snow melt runoff analyses.

Lake McConaughy, the largest reservoir in the watershed, is located near Ogallala. It is owned by the Central Nebraska Public Power & Irrigation District. Water impounded in the reservoir and in others owned by Central and the Nebraska Public Power District (Sutherland, Maloney, Jeffrey & Johnson) is used for generation of electric energy and, as a supplement to diversion of natural river flows, for crop irrigation in the lower North Platte and central Platte valleys. An additional quantity of water stored in Lake McConaughy is available to the U.S. Fish & Wildlife Service for management of threatened and endangered species habitat in the central Platte valley.

Kingsley Dam operations do not fall under requirements of the decree in *Neb v Wyo*. Instead, provisions specified in the NPPD and Central water appropriations (granted to it by the Department of Natural Resources) and additional provisions specified in federal power generation licenses (granted by the Federal Energy Regulatory Commission) provide a comprehensive framework which directs operational decisions. The expense of necessary data collection is shared by the Department, Central, NPPD, the U.S. Geological Survey and other entities.