

# [***ARTICLE: DELPH CARPENTER'S INTERSTATE WATER TRIALS AND TRIBULATIONS LED TO THE WATER COMPACT ERA***](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:60V9-XDG1-F81W-20TK-00000-00&context=1516831)

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**Highlight**

"To Delph Carpenter - the Father of Interstate ***River*** Treaties - we offer a salute. Whenever water users have settled their differences over ***river*** flows without expensive and protracted litigation, they owe a debt of gratitude to the man whose efforts, more than those of any other individual, have pointed the way." - ***Colorado*** *Governor Ralph L. Carr 10/29/1943, Address to the National Reclamation Association*

Abstract

*Delph Carpenter's bruising battle with Wyoming over Laramie* ***River*** *water led to the era of interstate water compacts. Astride the Great Divide,* ***Colorado*** *provides source water for five major watersheds, the Platte, the Republican, the Arkansas, the Rio Grande and the* ***Colorado******River****.* ***Colorado*** *is a party to two U.S. Supreme Court equitable apportionment decrees and nine interstate compacts. Eighteen downstream states and the Republic of Mexico depend upon water that originates within the state. On the average, due to these legal instruments,* ***Colorado*** *can consume only one-third of the water that arises within its borders. Though it took decades to unfold,* ***Colorado****'s 1876 constitution foretold the state's water-sharing future. The constitutional framers well-knew of* ***Colorado****'s birth right in the public domain. They consciously invoked the public domain's water heritage when they provided in Article XVI, Section 5, that the "water of every natural stream" is the "property of the public." The term "natural stream" includes tributary ground water as well as surface water. Who constitutes this "public" entitled to use water allocated to* ***Colorado*** *turns out to be every person and entity who can establish a right under* ***Colorado*** *or federal law to use the public's water.* ***Colorado****'s water allocation amounts, in turn, depend upon the terms of the applicable U.S. Supreme Court equitable apportionment decree or interstate compact approved by Congress. Starting as a champion of prior appropriation, Delph Carpenter became an ardent water compact convert when he realized that downstream states could win an interstate prior appropriation race.* [[2]](#footnote-3)2

**Text**

**[\*2]**

Waging Water War in The U.S. Supreme Court, the Laramie ***River*** Case

As a young water lawyer in Greeley, Delph Carpenter's professional employment included the Greeley-Poudre Irrigation District, formed in 1909 to import water through a tunnel from the Laramie ***River*** into the Poudre ***River*** for use in Weld County, ***Colorado***. The district planned to irrigate 125,000 acres of land north of Greeley in the vicinity of Nunn. [[3]](#footnote-4)3After the district had issued five million dollars in bonds and almost completed the Laramie-Poudre Tunnel, Wyoming sued ***Colorado*** and the Greeley-Poudre District in the U.S. Supreme Court to stop the diversion. [[4]](#footnote-5)4The lawsuit lasted eleven years, from its inception in 1911 to the Court's 1922 decision. [[5]](#footnote-6)5A first generation descendent of 1870 Union Colony settlers, Carpenter served one term in the ***Colorado*** Senate from 1909 to 1912. He lost his Senate re-election bid in the fall of 1912. [[6]](#footnote-7)6Universally trusted for his dedication to ***Colorado*** and its water law, he became ***Colorado***'s interstate stream commissioner. [[7]](#footnote-8)7In quick succession, his defense of ***Colorado*** in the United States Supreme Court included lawsuits involving Wyoming's claim for Laramie ***River*** water, Nebraska's claim for South Platte ***River*** water, and Nebraska's claim for Republican ***River*** water. [[8]](#footnote-9)8This incomparable exposure to interstate and federal water conflicts placed him squarely in the eye of an intense water law and policy maelstrom. [[9]](#footnote-10)9Presiding at the top of the great Atlantic/Pacific Continental Divide, ***Colorado*** had much to learn about its privileges and responsibilities as the source water state to eighteen downstream states and to the United States, the predominate western landowner. [[10]](#footnote-11)10

***Colorado***'s assumption that it owned, controlled, and could use all of the water within its boundaries, exclusive of any other state or federal interest, began to erode in the first decade of the twentieth century; at the same time, Carpenter took on the duties of public office. In 1909, his first legislative year, while preparing to defend ***Colorado*** against federal and interstate claims, Carpenter sponsored Senate Resolution No. 16, which set up a special committee to investigate (1) the conditions of ***Colorado***'s streams and watersheds and the diversion, storage and uses of water dependent on them; (2) the development, use, and application of return or seepage waters; (3) the relation of public and State **[\*3]**lands to the water supply of the streams; and (4) the administration for the betterment of those lands and for the protection of the streams. [[11]](#footnote-12)11***Colorado***'s northern neighbor, Wyoming, pulled the first big string out of the ball when it sued the State of ***Colorado*** and the Greeley-Poudre District. [[12]](#footnote-13)12On May 29, 1911, just as the diversion tunnel was being completed into the Poudre basin, Wyoming filed a bill of complaint in equity before the U.S. Supreme Court. [[13]](#footnote-14)13On January 8, 1913, Carpenter entered his appearance as counsel to the Greeley-Poudre District and filed an answer he prepared on behalf of ***Colorado***, the Greeley-Poudre District, and the Laramie Poudre Reservoirs and Irrigation Company, which the government contracted to build the tunnel. [[14]](#footnote-15)14In his briefs, Carpenter contended that ***Colorado*** possessed "inherent sovereign power to divert from the section of the Laramie ***River*** within ***Colorado*** the entire run-off of said section for use within the State of ***Colorado***." [[15]](#footnote-16)15All waters within ***Colorado*** "are owned by it," subject to "the right of appropriations thereof under her laws," and use of them is "to no extent affected by, or subject to, the laws of any other sovereignty than the state of ***Colorado***." [[16]](#footnote-17)16He asserted an August 25, 1902, prior appropriation right for the Laramie ***River*** Greeley-Poudre District diversions in the amount of 70,000 acre-feet of water, senior to the bulk of Wyoming's Laramie ***River*** uses. [[17]](#footnote-18)17

Carpenter had little room under the ***Colorado*** Supreme Court's 1912 *Stockman v. Leddy* decision to contend otherwise. [[18]](#footnote-19)18That decision addressed the purposes the Legislature sought to protect when it established the "interference inquiry committee," which Carpenter chaired. [[19]](#footnote-20)19In February of 1911, the committee had reported that the federal government and other states were seeking "to impair the vested rights and titles of the appropriators of water within the state of ***Colorado***." [[20]](#footnote-21)20The committee recommended funding actions to resist "attacks by the federal government and by other states or citizens thereof, which tend to impair the vested rights and titles of the appropriators of water within the State of ***Colorado*** or to hamper the further acquisition of such titles and the further development of our natural resources." [[21]](#footnote-22)21This report resulted in the ***Colorado*** General Assembly's May 11, 1911, law establishing a joint Senate-House legislative committee to investigate the actions and claims of the Interior Department, the Reclamation Service, and the Forest Service to "control the distribution" of ***Colorado*** water. [[22]](#footnote-23)22In adopting this legislation, said the court in its *Leddy* decision, the General Assembly had both the power and the duty to **[\*4]**"protect the state's interest in the natural streams of this state." [[23]](#footnote-24)23***Colorado*** "has never relinquished its right of ownership" to the waters and "has granted to its citizens ... the right to the use of such waters for beneficial purposes within its own boundaries." [[24]](#footnote-25)24When Congress admitted ***Colorado*** into the Union, the federal government knew that all "the natural streams of this state are, in fact, non-navigable" and that the state owned them "in its sovereign capacity ... free from any interference by any other sovereignty." [[25]](#footnote-26)25

Carpenter was naturally inclined to insist on ***Colorado***'s sovereign ownership and use of the water. He had devoted his Senate career to this cause. He had studied the law of nations whereby the upstream nation has a predominant right to ***river*** water, subject to whatever treaty arrangements it might agree to with downstream nations. When first confronted with the fact it was not an independent nation under the law of nations, but a state within a union of other states, ***Colorado*** prevailed over Kansas. The U.S. Supreme Court's 1907 *Kansas v.* ***Colorado*** decision vindicated ***Colorado***'s earlier reliance on Arkansas ***River*** water. [[26]](#footnote-27)26Nonetheless, the U.S. Supreme Court left open the possibility that Kansas might prevail in future litigation. [[27]](#footnote-28)27When the interests of two or more sovereign states came into conflict, the Court said, it would weigh equitable principles, including benefits to the upstream state versus damages to the downstream state. [[28]](#footnote-29)28***Colorado*** won this first round when the court ruled, "when we compare the amount of this detriment with the great benefit which has obviously resulted to the counties in ***Colorado***, it would seem that equality of right and equity between the two states forbids any interference with the present withdrawal of water in ***Colorado*** for purposes of irrigation." [[29]](#footnote-30)29

The court in *Leddy* said it was not questioning the interstate dispute jurisdiction the U.S. Supreme Court exercised in its 1907 *Kansas v.* ***Colorado*** decision. [[30]](#footnote-31)30Yet, the ***Colorado*** justices seemed to assume ***Colorado*** would prevail in future conflicts against downstream states, as it had against Kansas. [[31]](#footnote-32)31According to the ***Colorado*** Supreme Court, the allocation determination "in a controversy between two or more sovereign states over the waters of an interstate stream," came down to "whether they are reasonably exercising their inherent powers of sovereignty." [[32]](#footnote-33)32Moreover, ***Colorado*** had nature on its side: irrigation return flows from its upstream uses within the state would sufficiently benefit downstream states. [[33]](#footnote-34)33

Perceiving danger from all surrounding states, the ***Colorado*** General Assembly in February of 1913 rallied to its former colleague. It adopted an act cataloguing threats to the state: a suit in the U.S. Supreme Court instituted by **[\*5]**the State of Wyoming "to restrain the diversion of water of the Laramie ***River***"; a similar suit "threatened by the State of Nebraska" on the South Platte ***River***; a federal district court Kansas irrigators' suit over the "right to the use of the waters of the Arkansas ***River***"; the U.S. Interior Department's refusal "to grant rights of way across public lands for canals and reservoir systems" in the San Luis Valley; and the Bureau of Indian Affairs' construction of ditches on the Pine and Animas ***Rivers*** and other streams in ***Colorado*** "for the irrigation of Indian lands, with the avowed purpose of disregarding the law of the State of ***Colorado*** pertaining to appropriations of water." [[34]](#footnote-35)34The legislature authorized expenditures "for the protection of the right to use the water of the natural streams of ***Colorado*** for domestic, irrigation, or power purposes wherever threatened." [[35]](#footnote-36)35

On June 10, 1913, the U.S. Supreme Court appointed Clyde M. Watts to take testimony in the case as a Special Master in the Wyoming case. [[36]](#footnote-37)36Wyoming and ***Colorado*** submitted testimony and exhibits to the Court on May 22, 1916. [[37]](#footnote-38)37Oral argument occurred in December of 1916. [[38]](#footnote-39)38Carpenter presented meticulous and lengthy briefs on behalf of ***Colorado***, the Greeley-Poudre District and the Reservoirs and Irrigation Company. ***Colorado***'s factual argument relied primarily on the testimony of Louis G. ("L.G.") Carpenter (no relation to Delph Carpenter) and John Field. Both men had distinguished themselves in the study of Poudre Valley irrigation and both had served for a time as ***Colorado***'s State Engineer. [[39]](#footnote-40)39The gist of Delph Carpenter's argument went as follows. The Poudre Valley irrigators excelled in the techniques of irrigation and the bounty of crops produced. [[40]](#footnote-41)40Wyoming's use of Laramie ***River*** water would be "greatly inferior in productiveness" and yield "less returns" than ***Colorado*** could make by diverting 70,000 acre-feet of additional water into the Poudre ***River*** through the tunnel it had constructed. [[41]](#footnote-42)41The extensive diversion and storage system of the Greeley-Poudre District would enable use for "growing alfalfa, fruits, potatoes, sugar beets, and various kinds of grain." [[42]](#footnote-43)42***Colorado*** had justifiably relied on its "inalienable and inherent sovereign rights" to make these diversions from a "section of [] stream" within its boundaries. [[43]](#footnote-44)43Carpenter also emphasized the Greeley Poudre district's due diligence. [[44]](#footnote-45)44The state had issued $ 5,000,000 in bonds to finance "an adequate system of irrigation for [125,000 acres]" of land within the district. [[45]](#footnote-46)45It had completed the tunnel, relying on ***Colorado***'s prior appropriation law and water right decrees adjudicated in ***Colorado***'s courts. [[46]](#footnote-47)46Its **[\*6]**citizens had properly obtained lands under the homestead and desert land laws of the United States and by purchase. [[47]](#footnote-48)47The "sufficiency of said water supply" needed to serve these lands, Carpenter argued, would be "materially impaired" should the Court allow Wyoming to apply this water to lands "of an inferior quality for all character of crops" producing "comparatively small results." [[48]](#footnote-49)48

On behalf of ***Colorado***, Professor L.G. Carpenter of the ***Colorado*** Agricultural College had conducted "a very extended and thorough examination" of the entire project supporting purchase of the district bonds. [[49]](#footnote-50)49He had served as ***Colorado***'s state engineer in 1903 when *Kansas v.* ***Colorado***, a case involving the Arkansas ***River***, was pending before the U.S. Supreme Court. [[50]](#footnote-51)50Addressing Poudre Valley irrigation, he observed that "cooperative or company ditches" ... and reservoirs were changing "the character of the agriculture from grain to crops like potatoes, sugar beets and others that require water later in the season and are more profitable." [[51]](#footnote-52)51John Field testified that "the valley of the Cache la Poudre is recognized as the most advanced agricultural district in the inter-mountain region. It has reached a higher stage in the growing of crops and in the utilization and conservation of its water supply." [[52]](#footnote-53)52Invidiously comparing the Laramie Plains to the Poudre Valley, he proclaimed that Wyoming's use of the water would spoil "good ranch country to make a poor farming country, which is destined ultimately to failure." [[53]](#footnote-54)53Field continued, "the traveler further observes that many of the ranch houses have been deserted, that there is apparently on the part of those living there at present, other than with the elder stock ranchers, no effort to make a comfortable, pleasant and permanent home." [[54]](#footnote-55)54Ignoring ***Colorado***'s heritage in virtually the same range of this hardy frontier, he conjured up "pleasant homes for the women folks." [[55]](#footnote-56)55"The absence of trees, of lawns, of yards, of those things which go to make a pleasant home for the women folks, lead the observer to believe that even those people who reside there at present are there only temporarily and are living only with the hope of leaving. When he observes the new irrigation projects, he wonders whether the projects have been competently advised, and whether it is not spoiling a good ranch country to make a poor farming country, which is destined ultimately to failure." [[56]](#footnote-57)56Field also trumpeted sugar production in northern ***Colorado***. [[57]](#footnote-58)57"The manufacture of sugar, of course, is carried on in most of these towns ... these main manufacturies (sic) are directly associated with the farming element in the vicinity. [[58]](#footnote-59)58Sugar factories are located in Ft. Collins, Greeley, **[\*7]**Eaton and Windsor." [[59]](#footnote-60)59

Wyoming countered effectively with engineer Ralph I. Meeker's testimony. [[60]](#footnote-61)60He described canals and reservoirs in Wyoming designed to irrigate pasture lands, and to produce alfalfa, potatoes, barley, wheat and truck garden crops. [[61]](#footnote-62)61Wyoming's argument centered on the assertion that its prior appropriation rights pre-dated the 1909 formation of the Greeley-Poudre Irrigation District. [[62]](#footnote-63)62Shockingly to ***Colorado*** interests, the U.S. Supreme Court ordered a second round of briefing after the December 1916 oral argument. By this time, confidence in the Greeley-Poudre District bonds was virtually bankrupt. While the lawsuit languished before the Court, Carpenter fretted about southern California's Imperial Irrigation District. In 1911, the year Wyoming sued ***Colorado***, the Imperial Irrigation District had issued bonds under California law and, by 1915, had acquired the existing water distribution system in the valley, which dated back to 1901. [[63]](#footnote-64)63It was also pressing the U.S. Department of Interior's Reclamation Service for construction of an All-American canal and massive flood control reservoir upstream using ***Colorado*** ***River*** water. [[64]](#footnote-65)64A newly organized water agency, the predecessor to today's Metropolitan Water District of Southern California, planned an aqueduct to transport ***Colorado*** ***River*** water across the length and breadth of the southern California water basin. [[65]](#footnote-66)65

The U.S. Supreme Court's order in 1917 restoring the Laramie ***River*** case to the docket for re-argument centered on the role prior appropriation might play in its decision and the federal government's interest in the outcome. [[66]](#footnote-67)66It directed the two states to brief (1) whether prior appropriation principles should apply "without regard to state boundaries" or "limited in this case by state lines," (2) establish "the extent of appropriation made or authorized in either or both states," and (3) the "possible consequences" of the federal reclamation laws and program. [[67]](#footnote-68)67It invited the U.S. Attorney General to appear in the case. [[68]](#footnote-69)68How might this affect the federal Reclamation program? What rule of law should govern interstate water disputes? The General Assembly dug in. On March 30, 1917, it passed a law prohibiting diversion of water from within ***Colorado*** for delivery outside of the state; it directed the State Engineer to prevent any such diversion in order "to see that the waters of the state are preserved for the use and benefit of the citizens and inhabitants of the state for its growth, prosperity and general welfare." [[69]](#footnote-70)69On the same date, it passed another law providing for irrigation districts to refinance their bond debt. [[70]](#footnote-71)70Its Act of April 17, 1917 **[\*8]**authorized irrigation districts to contract with the United States under the federal reclamation laws "for the assumption as principal or guarantor of indebtedness to the United States on account of district lands." [[71]](#footnote-72)71And its Act of April 21, 1917 established a "Water Defense Fund" for "the protection of the right to use the water of the natural streams of ***Colorado*** for domestic, irrigation or power purposes whenever threatened." [[72]](#footnote-73)72The Greeley-Poudre District's struggle for survival had alarmed communities throughout the state.

In his second round of briefing in the Wyoming case, Carpenter repeated ***Colorado***'s contention that (1) it owned all water within its boundaries, (2) it had a sovereign right to develop all the water it needed, and (3) the Greeley-Poudre District had a 1902 priority that was superior to the vast majority of Wyoming's water claims. [[73]](#footnote-74)73Carpenter was relying on a February 20, 1914, ***Colorado*** decree that Judge Neil F. Graham of the Larimer County District Court had entered for the Greeley-Poudre reservoirs, ditches, and trans-basin tunnel, with an appropriation date of August 25, 1902. [[74]](#footnote-75)74The ***Colorado*** court ordered the state's water commissioners to enforce the 1902 priority for "regulation of the flow of the water through said system" from the Laramie to the Cache la Poudre ***rivers***. [[75]](#footnote-76)75***Colorado*** State Engineer John Field's signature appears on the decree filed in his office on May 5, 1914. [[76]](#footnote-77)76

Wyoming stuck to its downstream prior appropriation argument - the Greeley-Poudre District had not come into existence until 1909, and any pre-existing notion of importing Laramie ***River*** water into the Poudre basin was speculative. [[77]](#footnote-78)77The federal government's brief confirmed all of Carpenter's suspicions about its intent to control water development in ***Colorado*** and throughout the West. Invoking Indian and Forest Reservations and the Reclamation Program, the U.S. asserted ownership over all the remaining unappropriated water. [[78]](#footnote-79)78"The question of original ownership of the in-navigable waters on the public lands is fundamental," the Justice Department argued; "the Government's contention that such ownership is in the United States is the basis of its position that private vested rights in the use of such waters are obtained by grants from the Federal Government." [[79]](#footnote-80)79This being so, "water rights not so granted are its property; and ... the remaining waters" are the Government's "for use in the reclamation of its lands or otherwise." [[80]](#footnote-81)80***Colorado*** and Wyoming "own only such water rights as have been granted by the United States to them or to others for use on lands within their borders." [[81]](#footnote-82)81Thus, the Court should give effect in the Laramie ***River*** **[\*9]**case only to "prior grants by the federal government." [[82]](#footnote-83)82

It appeared that the United States was siding with Wyoming's prior appropriation claims based upon the 1866 Mining Act recognizing prior appropriation rights in public domain waters. [[83]](#footnote-84)83Ironically, this federal legislation had paved the way for the essentials of the 1876 ***Colorado*** Doctrine of Prior Appropriation, that water within the state is "the property of the public" and the right to make beneficial use of it "shall never be denied." [[84]](#footnote-85)84Just who is "the public" served by water arising in ***Colorado*** is the enduring riddle Carpenter found himself struggling with. Considering the prior appropriation threat rearing up from downstream states, Carpenter began to characterize a state's prior appropriation law as an intra-state matter. [[85]](#footnote-86)85"The doctrine of prior appropriation," he contended, "is one of private usufructuary property law *intra-state* in its character." [[86]](#footnote-87)86A different rule of law should apply to inter-state water allocations between states. Prior appropriation is inequitable and inapplicable either as a rule of law or administration for *interstate*regulation of streams. "The general principles of appropriation cannot apply in the settlement of controversies involving the rights of sovereign states." [[87]](#footnote-88)87The preferred means for resolving interstate disputes resides in the Compact Clause of the U.S. Constitution. [[88]](#footnote-89)88If the parties cannot agree upon a compact, said Carpenter, the Supreme Court should "not intervene unless, under all the facts and circumstances of the case, it shall appear that the one State is unreasonably injuring the other or interfering with the sovereign rights thereof." [[89]](#footnote-90)89The Court should not disturb the exercise of a state's sovereign rights "unless the case be of serious magnitude, clearly and fully proved." [[90]](#footnote-91)90The dispute should be "settled in such a way as will recognize the equal sovereign rights of both States and at the same time establish justice between them." [[91]](#footnote-92)91In other words, the Court should recognize a presumption that the headwaters state is reasonably using the water resources within its boundaries absent a clear and convincing showing of great injury to the downstream state.

But, the Court in the *Wyoming* case could not shake the notion that it was equitable for two prior appropriation states to abide by that doctrine on a shared ***river*** system. The Justices heard re-argument on January 9 and 10, 1922, just as the ***Colorado*** ***River*** Compact Commission was about to convene. [[92]](#footnote-93)92When the Court issued its decision on May 5, 1922, Carpenter lost on a basic principle of prior appropriation water law: that the appropriator must establish the date of its firm intent and means to beneficially use the water in a specified location. [[93]](#footnote-94)93 **[\*10]**The Court ruled that the Greeley-Poudre District formed such intent only when it came into existence in 1909. [[94]](#footnote-95)94"In April, 1909, the Greeley-Poudre Irrigation District, within which the water is intended to be used, was organized." [[95]](#footnote-96)95In September of that year the irrigation company and the irrigation district "entered into a tentative contract to consummate the project in its current form." [[96]](#footnote-97)96The district ratified the contract in October, issued bonds, and began boring the tunnel and "up to that time the whole subject was at large. There was no fixed and definite plan." [[97]](#footnote-98)97"It had not reached a point where there was a fixed and definite purpose to take it up and carry it through." [[98]](#footnote-99)98The Supreme Court thereupon accorded the Greeley-Poudre project an October 1909 priority date, junior to what the Court found to be Wyoming's senior prior appropriation rights. [[99]](#footnote-100)99

Justice Van Devanter's opinion contains an extensive discussion of the Laramie ***River***'s hydrology and the relative amounts of water the two states should enjoy based on prior appropriation rights the Court deemed valid. [[100]](#footnote-101)100"As the available supply is 288,000 acre-feet, and the amount covered by senior appropriations in Wyoming is 272,000 acre-feet, there remain 15,500 acre-feet which are subject to this junior appropriation in ***Colorado***." [[101]](#footnote-102)101The Court put aside, for the time being, the U.S. Government's water claims for the federal public lands, choosing instead to focus on statutes Congress had adopted, which ratified state prior appropriation water rights: "nor is the United States seeking to impose a policy of its choosing on either state. All that it has done has been to recognize and give its sanction to the policy which each has adopted. Whether its public land holdings would enable it to go further we need not consider." [[102]](#footnote-103)102

Perhaps the Court thought it need not spell out the implications of its decision in the 1908 *Winters* case. There, it explicitly rejected Montana's argument that a state's admission to the Union repealed any federal reservation of water for Indian tribes within the boundaries of the state. [[103]](#footnote-104)103Writing for the court, Justice McKenna clearly stated that the federal government had authority to reserve water for Tribes when they had ceded a larger amount of their lands in return for a smaller reservation in need of water for their present and future purposes. [[104]](#footnote-105)104"The power of the government to reserve waters and exempt them from appropriation under state laws is not denied and could not be." [[105]](#footnote-106)105The **[\*11]**Court recognized that there was an established, reserved water right with a priority date of May 1, 1888. [[106]](#footnote-107)106It then rejected Montana's argument that Congress intended, when it admitted Montana to the Union, to leave the Tribe "a barren waste - [taking] from them the means of continuing their old habits, yet [] not [leaving] them the power to change to new ones." [[107]](#footnote-108)107An astute constitutional lawyer and student of ***Colorado*** history, especially Union Colony history, Carpenter could not have missed the implications the *Winters* case had for ***Colorado*** and its prior appropriation doctrine. After the Civil War, pre-dating ***Colorado***'s 1876 admission to the Union, Congress created the 1868 Ute Indian Reservation comprising a major portion of western ***Colorado***. [[108]](#footnote-109)108If Montana's admission to the Union did not extinguish Indian reserved water rights in favor of that state's water ownership, how could ***Colorado*** make that same argument?

In the *Wyoming* case, without taking the Justice Department's invitation to expound on federal reserved water rights, the Court summarily disposed of ***Colorado***'s water ownership sovereignty argument. "The contention of ***Colorado*** that she as a state rightfully may divert and use, as she may choose, the waters flowing within her boundaries in this interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary, cannot be maintained." [[109]](#footnote-110)109The Court also rejected ***Colorado***'s argument that it would use the Laramie ***River*** water better than Wyoming. [[110]](#footnote-111)110Here, the Court stung ***Colorado*** with that state's own recognition of hay ranching and stock growing as a valued beneficial use. "It is true that irrigation in the Poudre valley has been carried to a higher state of development than elsewhere in the Rocky Mountain region, and that the lands of the valley lie at a lower altitude than do those in the Laramie Plains, and generally are better adapted to agriculture." [[111]](#footnote-112)111Nevertheless, "for combined farming and stock raising those of the Laramie Plains offer opportunities and advantages which are well recognized... . The same industry is carried on in the same way in sections of ***Colorado***." [[112]](#footnote-113)112

The underdog won. The Court prohibited ***Colorado*** from "diverting or taking more than 15,500 acre-feet per year from the Laramie ***River*** by means of or through the so-called Laramie-Poudre project." [[113]](#footnote-114)113That same day the U.S. Supreme Court applied prior appropriation law as the primary basis for deciding Nebraska's Republican ***River*** inter-state allocation claims against ***Colorado***. This suit began in the federal district court for ***Colorado*** in 1913, and Carpenter became ***Colorado***'s lead lawyer in the U.S. Supreme Court. [[114]](#footnote-115)114A Nebraska canal company argued it had the right to divert Republican ***river*** water from within ***Colorado*** boundaries and carry it through the ditch for use in Nebraska under **[\*12]**an 1890 priority. [[115]](#footnote-116)115This one-upped the Wyoming case, which did not involve any Wyoming diverter seeking to operate a point of diversion within ***Colorado***. [[116]](#footnote-117)116Agreeing with two lower federal court decisions, the Court ruled that state officials should ignore state boundaries in applying prior appropriation law to resolve an interstate water conflict: "The presence of the state line did not affect the superiority of right ... in the distribution of water otherwise than it would be treated in the canal were wholly within the state of ***Colorado*** and all the lands irrigated therefrom were in that state." [[117]](#footnote-118)117

The Wyoming litigation festered on for three more decades. In 1956, the United States Supreme Court approved an agreement Wyoming and ***Colorado*** negotiated putting in place a revised equitable apportionment decree. It allowed diversion of no more than 19,875 acre-feet of water per calendar year from the Laramie ***River*** basin for use elsewhere in ***Colorado***. [[118]](#footnote-119)118

Carpenter's Bitter Greeley-Poudre Experience Helped Forge the Compact Era

Carpenter's defense of ***Colorado***'s right to use its source water helped forge state and federal water law and policy and continues to do so to this day. His greatest success, interstate water compacts, stemmed directly from his Greeley-Poudre defeat; his resolute study of hydrology and the law matched up with his resilient tenacity. Carpenter learned on the job that the ultimate expression of a state's sovereignty within the federal Union resides in joining with one or more other states to share, with Congressional assent, the waters of an interstate stream system. [[119]](#footnote-120)119Carpenter had been considering the possibility of compact negotiations for a decade before the ***Colorado*** ***River*** Compact of 1922. [[120]](#footnote-121)120In 1912, while still a member of ***Colorado***'s legislature, he wrote Senator Carl Hayden of Arizona suggesting invocation of the U.S. Constitution's Compact Clause to resolve interstate water disputes. [[121]](#footnote-122)121In a 1925 report, ***Colorado*** State Engineer Hinderlider and R.I. Meeker, who had served Wyoming so well in the Laramie ***River*** litigation, credited Carpenter for the interstate treaty idea as early as 1911 when, as counsel for the Greeley-Poudre District, he was beginning work on the *Wyoming* case. [[122]](#footnote-123)122

The looming threat of massive prior appropriation water use in the Imperial Valley spurred Carpenter's commitment to ***Colorado*** ***River*** compact negotiations. In May of 1920, Congress authorized the Secretary of Interior to prepare a plan for Imperial's irrigation development on public and private lands **[\*13]**using ***Colorado*** ***River*** water. [[123]](#footnote-124)123It required the Secretary to recommend "to what extent the United States should control, operate and supervise the carrying out of the plan proposed." [[124]](#footnote-125)124The League of the Southwest convened a series of meetings promoting a Boulder Canyon Reservoir and an All-American Canal. At the League's June 1920 Denver meeting, upper ***river*** spokespersons expressed their fears about go-it-alone California water development. [[125]](#footnote-126)125Former ***Colorado*** State Engineer John Field called for the "telescope to be reversed" and up ***river*** "problems and ... conditions ... studied close-up." [[126]](#footnote-127)126He singled out the Grand ***River*** Ditch as one example of a trans-basin diversion needed for the fast-growing Front Range. [[127]](#footnote-128)127***Colorado*** State Engineer A. J. McCune joined his concern. [[128]](#footnote-129)128In an earlier League meeting, McCune had witnessed the Los Angeles Chamber of Commerce urging a halt to all development in the upper basin until a Boulder Canyon Project reached completion. [[129]](#footnote-130)129Wyoming State Engineer Frank C. Emerson supported ***Colorado***'s concerns. He pointed to the federal government's refusal to grant homesteads and irrigation rights-of-way for water projects in Wyoming, claiming Pathfinder Reservoir (located in southwestern Wyoming) needed the North Platte ***River*** water to serve agricultural uses downstream in Nebraska. [[130]](#footnote-131)130

Carpenter took all of this in, even as Wyoming's Laramie ***River*** case was still pending against his state. He had a statewide responsibility as interstate stream commissioner and U.S. Supreme Court litigator to act on behalf of ***Colorado***. Should he fail to gain the Laramie ***River*** diversions he sought for northern ***Colorado***, he knew that the 1915 legislation creating Rocky Mountain National Park contained a savings provision for a ***Colorado*** ***River*** trans-mountain diversion through the park. The ***Colorado*** Big-Thompson Project, completed in the 1950s, accomplished this goal. The savings clause stated the following: "the United States Reclamation Service may enter upon and utilize for flowage or other purposes any area within said park which may be necessary for the development and maintenance of a Government reclamation project." [[131]](#footnote-132)131Distrusting federal efforts to control water development in the West, Carpenter's compact goals nevertheless included the eventuality of harnessing Reclamation's expertise in service of state sovereignty interests. In a remarkable 1921 speech before the ***Colorado*** Bar Association, he announced ***Colorado***'s commitment to forging as many interstate compacts as possible. [[132]](#footnote-133)132The states, said Carpenter, have a duty "to reasonably exercise this power," and the U.S. Supreme Court should require this before directing "the issuance of process **[\*14]**against a State or States upon the complaint of another State". [[133]](#footnote-134)133

Again, the General Assembly rallied to Carpenter's leadership. On April 2, 1921, it passed a number of bills authorizing ***Colorado***'s participation in multiple joint interstate stream commissions to negotiate compacts: ***Colorado*** and Kansas for the Arkansas ***River***; [[134]](#footnote-135)134***Colorado*** and Nebraska for the South Platte ***River***; [[135]](#footnote-136)135***Colorado*** and New Mexico for the La Plata ***River***; [[136]](#footnote-137)136***Colorado*** and Wyoming for the Laramie ***River***; [[137]](#footnote-138)137and ***Colorado***, Arizona, California, Nevada, New Mexico, Utah and Wyoming for the ***Colorado*** ***River***, with a duly authorized representative of the United States. [[138]](#footnote-139)138Each of these laws provided for one and the same person to represent ***Colorado*** on each of these commissions and to receive such "legal, engineering and other assistance as the Governor and Attorney General may deem advisable and necessary." [[139]](#footnote-140)139The State Engineer, Division Engineers, and local water commissioners had a duty to assist ***Colorado***'s commissioner "to bring about a speedy and satisfactory adjustment of any disagreement" among the states. [[140]](#footnote-141)140In addition, the commissioner had "full authority to make all and any investigations" necessary to determine the physical conditions of the stream as well as the present and future needs of ***Colorado*** and its citizens. [[141]](#footnote-142)141By its Act of April 7, 1921, the Assembly authorized water user petitions to the State Engineer for comprehensive and detailed studies of water flows, diversions, and return flows whenever "present or prospective litigation or adjustment" of interstate stream disputes rendered such studies "advisable or necessary." [[142]](#footnote-143)142

Carpenter became ***Colorado***'s designated representative on the seven-state ***Colorado*** ***River*** Compact Commission in 1921. That same year, ***Colorado***'s Governor named him to commissions for the South Platte, Arkansas, La Plata, and Laramie ***Rivers***. Subsequently, he participated in discussions looking to compacts for the North Platte, Little Snake, Rio Grande, and Upper ***Colorado*** ***rivers***. The compacts he successfully negotiated were the ***Colorado*** ***River*** and La Plata ***River*** Compacts of 1922 and the South Platte ***River*** Compact of 1923. Governor Ed Johnson terminated his assignment as Interstate Stream Commissioner in 1933 and assigned Carpenter's duties to State Engineer Hinderlider. [[143]](#footnote-144)143The six additional compacts to which ***Colorado*** is a party include the 1938 Rio Grande ***River*** Compact, 1942 Republican ***River*** Compact, 1944 Costilla Creek Compact (Amended 1963), 1948 Arkansas ***River*** Compact, 1948 Upper ***Colorado*** ***River*** Basin Compact, and the 1968 Animas-La Plata Project Compact. The Animas-La Plata Project Compact helps to provide water for the Ute **[\*15]**Mountain Ute and Southern Ute Tribes, as owed under their 1868 federal reserved water right. [[144]](#footnote-145)144All these successor compacts drew from Carpenter's turn to interstate diplomacy as far preferable to lawsuits in the U.S. Supreme Court. In June of 1921, Carpenter appeared before Congress urging creation of a ***Colorado*** ***River*** Compact Commission with members from the seven ***Colorado*** ***River*** Basin states, plus a federal representative. [[145]](#footnote-146)145He submitted to the House Judiciary Committee an extensive brief about the Compact Clause and its historical invocation to settle boundary disputes among eastern states. [[146]](#footnote-147)146He advocated applying the clause to the apportionment of ***Colorado*** ***River*** water "to determine the respective rights of the states prior to any further large construction or extensive utilization of these waters." [[147]](#footnote-148)147Carpenter contrasted the two ways officials could apportion interstate ***river*** waters between states: by interstate compacts under Article I, section 10, paragraph 3 of the U.S. Constitution or by a lawsuit between states before the U.S. Supreme Court. [[148]](#footnote-149)148"A suit between the States is but a substitute for war," Carpenter proclaimed. It should be "the last resort." [[149]](#footnote-150)149

Shared Authority Among Interdependent Sovereigns for Water Law and Water Rights

Eventually, the ***Colorado*** Supreme Court overruled its 1912 *Stockman v. Leddy* decision that held ***Colorado*** had obtained ownership of all water within its boundaries when it became a state in 1876. [[150]](#footnote-151)150In the face of lawyers continuing to raise the ownership contention argument, the court came around to ***Colorado***'s essential truth: it was born out of the public domain. [[151]](#footnote-152)151The United States and the states, as inter-related sovereigns, share authority over the public's waters. [[152]](#footnote-153)152

The McCarran Amendment of 1952 provides for state courts to adjudicate federal reserved water rights claims, allowing states to integrate state and federal rights into comprehensive systems of water administration. [[153]](#footnote-154)153A state's compact or equitably apportioned share of interstate waters include the amount of federally reserved water rights operating within a state's boundaries. [[154]](#footnote-155)154

**[\*16]**In 1983, exercising its jurisdiction under the McCarran amendment to adjudicate federal and state water right claims, the ***Colorado*** Supreme Court recognized that "the power of the United States to legislate a federal system for the use and disposition of unappropriated non-navigable waters on federal lands generally, and on reserved lands specifically, is derived from the Property Clause of the United States Constitution" and for navigable waters from the Commerce Clause. [[155]](#footnote-156)155Exercising its authority, Congress has legislated in favor of "comprehensive state control over the appropriation of water, including water on federal lands, at least with respect to rights that could be asserted by private appropriators." [[156]](#footnote-157)156Accordingly, national water policy includes "Congressional recognition of the primacy of the western states' interests in regulating and administering water rights." [[157]](#footnote-158)157For example, the United States possesses implied federal reserved water rights, but only up to the amount of water essential to the primary purposes of the federal reservation. [[158]](#footnote-159)158Federal statutes "(1) effectuated a severance of water from the land patents issuing out of the public domain; (2) confirmed the right of the states and territories to recognize rights to water established prior to the federal acts; and (3) granted the right to states and territories to legislate in regard to water and water use rights." [[159]](#footnote-160)159***Colorado***'s authority to adopt its own system for the use of all waters within the state in accordance with the needs of its citizens is "subject to the prohibitions against interference with federal reserved rights, with interstate commerce, and with the navigability of any navigable waters." [[160]](#footnote-161)160

Conclusion

***Colorado***, the quintessential headwaters state, turned to compacts as the preferred method of resolving interstate water conflicts, due to hard lessons its foremost spokesman of the age, Delph Carpenter, learned in the trenches of U.S. Supreme Court litigation. He discovered the hard way that prior appropriation applied interstate would erode instead of forward sovereignty among sister-states. ***Colorado***'s choice to found its water law upon the public's ownership of the water resource resulted in profound implications for ***Colorado***, the West, and the United States as a whole.

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**End of Document**

1. 1

   Senior Water Judge, ***Colorado*** Courts; ***Colorado*** Supreme Court Justice (Ret.); ***Co***-Director Environmental and Natural Resources Law Program, University of Denver Sturm College of Law. The original source material for this article is part of the ***Colorado*** Supreme Court Library's collection. The author thanks the library staff, especially Chris Hudson, for invaluable help in researching this article.

   [↑](#footnote-ref-2)
2. 2

   Permission to publish this article in Volume 23, Issue 1 of the University of Denver *Water Law Review,* is granted by the City of Greeley, ***Colorado***. It is part of a manuscript on the City's water history being prepared by the author and Professor Michael Welsh of the University of Northern ***Colorado***. It was first presented at the American Bar Association's Water Law Conference in Denver, March 2019.

   [↑](#footnote-ref-3)
3. 3

   Daniel Tyler, Silver Fox of the Rockies, Delphus E. Carpenter and Western Water Compacts 77 (Univ. of Oklahoma Press, 2003); *see also* ***Colo.*** State Engineer, Fifteenth Biennial Report of the State Engineer 87-91 (1910).

   [↑](#footnote-ref-4)
4. 4

   [*Wyoming v.* ***Colorado****, 259 U.S. 419, 495 (1922)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-45S0-003B-H2C4-00000-00&context=1516831); *see also* ***Colo.*** State Engineer, *supra* note 3, at 87-91.

   [↑](#footnote-ref-5)
5. 5

   [*Wyoming, 259 U.S. at 456*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-45S0-003B-H2C4-00000-00&context=1516831).

   [↑](#footnote-ref-6)
6. 6

   Tyler, *supra*note 3, at 86.

   [↑](#footnote-ref-7)
7. 7

   *Id.*at 266.

   [↑](#footnote-ref-8)
8. 8

   *Id.*at 78, 107-08.

   [↑](#footnote-ref-9)
9. 9

   *See*  *id.*at 76.

   [↑](#footnote-ref-10)
10. 10

    *Id.*at 169.

    [↑](#footnote-ref-11)
11. 11

    ***Colo.*** S. Journal, 17th Gen. Assemb., Reg. Sess. 1092 (1909).

    [↑](#footnote-ref-12)
12. 12

    [*Wyoming, 259 U.S. at 455*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-45S0-003B-H2C4-00000-00&context=1516831).

    [↑](#footnote-ref-13)
13. 13

    Transcript of Record at 1, [*Wyoming v.* ***Colorado****, 259 U.S. 419, 495 (1922)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-45S0-003B-H2C4-00000-00&context=1516831) [hereinafter Transcript].

    [↑](#footnote-ref-14)
14. 14

    *Id.* at 26.

    [↑](#footnote-ref-15)
15. 15

    *Id.*at 28.

    [↑](#footnote-ref-16)
16. 16

    *Id.*

    [↑](#footnote-ref-17)
17. 17

    *Id.*at 33.

    [↑](#footnote-ref-18)
18. 18

    ***Stockman v. Leddy, 129 P. 220, 220 (Colo. 1912)***.

    [↑](#footnote-ref-19)
19. 19

    *Id.*

    [↑](#footnote-ref-20)
20. 20

    ***Colo.*** S. Journal, 18th Gen. Assemb., Reg. Sess. 223 (1911).

    [↑](#footnote-ref-21)
21. 21

    *Id.*

    [↑](#footnote-ref-22)
22. 22

    1911 ***Colo.*** Sess. Laws 671-73.

    [↑](#footnote-ref-23)
23. 23

    ***Stockman, 129 P. at 222***.

    [↑](#footnote-ref-24)
24. 24

    *Id.*

    [↑](#footnote-ref-25)
25. 25

    *Id.*

    [↑](#footnote-ref-26)
26. 26

    [*Kansas v.* ***Colorado****, 206 U.S. 46, 117 (1907)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B060-003B-H2B5-00000-00&context=1516831).

    [↑](#footnote-ref-27)
27. 27

    [*Id. at 117-18*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B060-003B-H2B5-00000-00&context=1516831).

    [↑](#footnote-ref-28)
28. 28

    [*Id. at 99-100*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B060-003B-H2B5-00000-00&context=1516831).

    [↑](#footnote-ref-29)
29. 29

    [*Id. at 114*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B060-003B-H2B5-00000-00&context=1516831).

    [↑](#footnote-ref-30)
30. 30

    ***Stockman, 129 P. at 222***.

    [↑](#footnote-ref-31)
31. 31

    *Id.*

    [↑](#footnote-ref-32)
32. 32

    *Id.*

    [↑](#footnote-ref-33)
33. 33

    [*Kansas, 206 U.S. at 113-14*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B060-003B-H2B5-00000-00&context=1516831).

    [↑](#footnote-ref-34)
34. 34

    1913 ***Colo.*** Sess. Laws 381-82.

    [↑](#footnote-ref-35)
35. 35

    *Id.* at 382-83.

    [↑](#footnote-ref-36)
36. 36

    Transcript, *supra* note 13, at 53.

    [↑](#footnote-ref-37)
37. 37

    [*Id. at 55*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B060-003B-H2B5-00000-00&context=1516831).

    [↑](#footnote-ref-38)
38. 38

    [*Wyoming, 259 U.S. at 419*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-45S0-003B-H2C4-00000-00&context=1516831).

    [↑](#footnote-ref-39)
39. 39

    Transcript, *supra* note 13, at 361, 388.

    [↑](#footnote-ref-40)
40. 40

    *Id*. at 31-45.

    [↑](#footnote-ref-41)
41. 41

    *Id*. at 34.

    [↑](#footnote-ref-42)
42. 42

    *Id*. at 42-43.

    [↑](#footnote-ref-43)
43. 43

    *Id.* at 41-42.

    [↑](#footnote-ref-44)
44. 44

    *Id*. at 43-44.

    [↑](#footnote-ref-45)
45. 45

    Transcript, *supra* note 13, at 43.

    [↑](#footnote-ref-46)
46. 46

    *Id*. at 44-45.

    [↑](#footnote-ref-47)
47. 47

    *Id*. at 43.

    [↑](#footnote-ref-48)
48. 48

    *Id*.

    [↑](#footnote-ref-49)
49. 49

    *Id.*

    [↑](#footnote-ref-50)
50. 50

    *Id.*at 388.

    [↑](#footnote-ref-51)
51. 51

    Transcript, *supra* note 13, at 391.

    [↑](#footnote-ref-52)
52. 52

    *Id.* at 381.

    [↑](#footnote-ref-53)
53. 53

    *Id.* at 380.

    [↑](#footnote-ref-54)
54. 54

    *Id.*

    [↑](#footnote-ref-55)
55. 55

    Transcript, *supra* note 13, at 380.

    [↑](#footnote-ref-56)
56. 56

    *Id.*

    [↑](#footnote-ref-57)
57. 57

    *See* *id.* at 382-83.

    [↑](#footnote-ref-58)
58. 58

    *Id.*

    [↑](#footnote-ref-59)
59. 59

    *Id.*at 383.

    [↑](#footnote-ref-60)
60. 60

    ***Id.at 230***.

    [↑](#footnote-ref-61)
61. 61

    *See*Transcript,  *supra*note 13, at 230.

    [↑](#footnote-ref-62)
62. 62

    Brief for Defendant, *supra* note 56 at 239.

    [↑](#footnote-ref-63)
63. 63

    Otis B. Tout, The First Thirty Years, Being an Account of the Principal Events 114 (Imperial Cty. Historical Soc'y, 1990).

    [↑](#footnote-ref-64)
64. 64

    [*Id.at 126*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B060-003B-H2B5-00000-00&context=1516831).

    [↑](#footnote-ref-65)
65. 65

    [*Id.at 114*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B060-003B-H2B5-00000-00&context=1516831).

    [↑](#footnote-ref-66)
66. 66

    Brief for Defendant at 9, [*Wyoming v.* ***Colorado****, 243 U.S. 622 (1917)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6DK0-003B-H1NN-00000-00&context=1516831).

    [↑](#footnote-ref-67)
67. 67

    *Id.*at 9-10.

    [↑](#footnote-ref-68)
68. 68

    *Id.*

    [↑](#footnote-ref-69)
69. 69

    1917 ***Colo.*** Sess. Laws 539-40.

    [↑](#footnote-ref-70)
70. 70

    *See* ***id. at 318***.

    [↑](#footnote-ref-71)
71. 71

    ***Id. at 290, 291***.

    [↑](#footnote-ref-72)
72. 72

    [*Id. at 108*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B060-003B-H2B5-00000-00&context=1516831).

    [↑](#footnote-ref-73)
73. 73

    Original Motion for Leave to File Bill of Complaint in Equity at 1-2, [*Wyoming v.* ***Colorado****, 243 U.S. 622 (1917)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6DK0-003B-H1NN-00000-00&context=1516831).

    [↑](#footnote-ref-74)
74. 74

    Transcript, *supra* note 13, at 328.

    [↑](#footnote-ref-75)
75. 75

    *Id.*at 218.

    [↑](#footnote-ref-76)
76. 76

    ***Id.at 220***.

    [↑](#footnote-ref-77)
77. 77

    Brief for Plaintiff at 23-25, [*Wyoming v.* ***Colorado****, 243 U.S. 622 (1911)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6DK0-003B-H1NN-00000-00&context=1516831).

    [↑](#footnote-ref-78)
78. 78

    Brief for the United States at 4-13, [*Wyoming v.* ***Colorado****, 243 U.S. 622 (1911)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6DK0-003B-H1NN-00000-00&context=1516831).

    [↑](#footnote-ref-79)
79. 79

    *Id.*at 15.

    [↑](#footnote-ref-80)
80. 80

    *Id.*

    [↑](#footnote-ref-81)
81. 81

    *Id.* at 173.

    [↑](#footnote-ref-82)
82. 82

    *Id.* at 174.

    [↑](#footnote-ref-83)
83. 83

    Act of July 26, § 9 (1866).

    [↑](#footnote-ref-84)
84. 84

    [***Colo.*** *Const. Art. XVI,§§5*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61VF-9YF1-DYDC-J030-00000-00&context=1516831)-[*6*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61VF-9YF1-DYDC-J032-00000-00&context=1516831).

    [↑](#footnote-ref-85)
85. 85

    Brief for Defendant, *supra* note 56, at 319.

    [↑](#footnote-ref-86)
86. 86

    *Id.*

    [↑](#footnote-ref-87)
87. 87

    *Id.*

    [↑](#footnote-ref-88)
88. 88

    *See* *id.* at 328-29.

    [↑](#footnote-ref-89)
89. 89

    *Id.* at 365.

    [↑](#footnote-ref-90)
90. 90

    *Id.* at 366.

    [↑](#footnote-ref-91)
91. 91

    Brief for Defendant, supra note 56, at 366.

    [↑](#footnote-ref-92)
92. 92

    [*Wyoming, 259 U.S. at 419*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-45S0-003B-H2C4-00000-00&context=1516831).

    [↑](#footnote-ref-93)
93. 93

    [*Id. at 495*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-45S0-003B-H2C4-00000-00&context=1516831).

    [↑](#footnote-ref-94)
94. 94

    [*Id. at 494*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-45S0-003B-H2C4-00000-00&context=1516831).

    [↑](#footnote-ref-95)
95. 95

    *Id.*

    [↑](#footnote-ref-96)
96. 96

    *Id.*

    [↑](#footnote-ref-97)
97. 97

    [*Id at 494*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-45S0-003B-H2C4-00000-00&context=1516831).

    [↑](#footnote-ref-98)
98. 98

    [*Wyoming, 259 U.S. 495*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-45S0-003B-H2C4-00000-00&context=1516831).

    [↑](#footnote-ref-99)
99. 99

    [*Id. at 495-96*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-45S0-003B-H2C4-00000-00&context=1516831).

    [↑](#footnote-ref-100)
100. 100

     [*Id. at 493-96*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-45S0-003B-H2C4-00000-00&context=1516831).

     [↑](#footnote-ref-101)
101. 101

     [*Id. at 496*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-45S0-003B-H2C4-00000-00&context=1516831).

     [↑](#footnote-ref-102)
102. 102

     [*Id. at 465*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-45S0-003B-H2C4-00000-00&context=1516831).

     [↑](#footnote-ref-103)
103. 103

     [*Winters v. United States, 207 U.S. 564, 577 (1908)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9WV0-003B-H241-00000-00&context=1516831).

     [↑](#footnote-ref-104)
104. 104

     *See* [*id.at 576*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9WV0-003B-H241-00000-00&context=1516831) *.*

     [↑](#footnote-ref-105)
105. 105

     [*Id. at 577*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9WV0-003B-H241-00000-00&context=1516831).

     [↑](#footnote-ref-106)
106. 106

     *Id.*

     [↑](#footnote-ref-107)
107. 107

     *Id.*

     [↑](#footnote-ref-108)
108. 108

     *Southern Ute Indian Tribe History*, S. Ute Indian Tribe, [*https://www.southernute-nsn.gov/history/*](https://www.southernute-nsn.gov/history/) (last visited Dec. 22, 2019).

     [↑](#footnote-ref-109)
109. 109

     [*Wyoming, 259 U.S. at 466*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-45S0-003B-H2C4-00000-00&context=1516831).

     [↑](#footnote-ref-110)
110. 110

     [*Id. at 469*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-45S0-003B-H2C4-00000-00&context=1516831).

     [↑](#footnote-ref-111)
111. 111

     *Id.*

     [↑](#footnote-ref-112)
112. 112

     *Id.*

     [↑](#footnote-ref-113)
113. 113

     [*Id. at 496*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-45S0-003B-H2C4-00000-00&context=1516831).

     [↑](#footnote-ref-114)
114. 114

     Weiland v. Pioneer Irrigation ***Co*** [*., 259 U.S. 499, 499 (1922)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-45S0-003B-H2C6-00000-00&context=1516831).

     [↑](#footnote-ref-115)
115. 115

     [*Id. at 500*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-45S0-003B-H2C6-00000-00&context=1516831).

     [↑](#footnote-ref-116)
116. 116

     *See* [*id. at 466*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-45S0-003B-H2C4-00000-00&context=1516831).

     [↑](#footnote-ref-117)
117. 117

     [*Id. at 502*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-45S0-003B-H2C4-00000-00&context=1516831).

     [↑](#footnote-ref-118)
118. 118

     ***Wyoming v. Colorado, 353 U.S. 953, 953 (1957)***.

     [↑](#footnote-ref-119)
119. 119

     Daniel Tyler, *Delphus Emory Carpenter and the* ***Colorado******River*** *Compact of 1922*, 1 U. Denv. Water L. Rev. 228, 232 (1998).

     [↑](#footnote-ref-120)
120. 120

     ***Id. at 232, 233***.

     [↑](#footnote-ref-121)
121. 121

     ***Id. at 230***.

     [↑](#footnote-ref-122)
122. 122

     M.C. Hinderlider & R.I. Meeker, Interstate Water Problems and Their Solution, Final Discussion 6 (1925) (unpublished Manuscript), [*https://mountainscholar.org/bitstream/handle/*](https://mountainscholar.org/bitstream/handle/) 10217/30023/WDEC06102.pdf?sequence=1&isAllowed=y.

     [↑](#footnote-ref-123)
123. 123

     H.R. Res. 12537, 66th Cong. (1920) (enacted) ("Kinkaid Act").

     [↑](#footnote-ref-124)
124. 124

     *Id.*

     [↑](#footnote-ref-125)
125. 125

     Norris Hundley, Jr., Water and The West, The ***Colorado*** ***River*** Compact and the Politics of Water in the American West 96 (Univ. of California Press, 1st ed. 1981).

     [↑](#footnote-ref-126)
126. 126

     *Id.*

     [↑](#footnote-ref-127)
127. 127

     [*Id. at 97*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B060-003B-H2B5-00000-00&context=1516831).

     [↑](#footnote-ref-128)
128. 128

     [*Id. at 98*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B060-003B-H2B5-00000-00&context=1516831).

     [↑](#footnote-ref-129)
129. 129

     *Id.*

     [↑](#footnote-ref-130)
130. 130

     [*Id. at 99*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B060-003B-H2B5-00000-00&context=1516831).

     [↑](#footnote-ref-131)
131. 131

     [*16 U.S.C. § 191*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8S7X-DBD2-D6RV-H4X6-00000-00&context=1516831) (1915).

     [↑](#footnote-ref-132)
132. 132

     Delph Carpenter, Address to the ***Colorado*** Bar Association (July 29, 1921)(***Colorado*** Bar Association, Volume 24, 24th Annual Meeting, July 29 and 30, 1921) at 44-101, 89.

     [↑](#footnote-ref-133)
133. 133

     *Id.*

     [↑](#footnote-ref-134)
134. 134

     1921 ***Colo.*** Sess. Laws 795.

     [↑](#footnote-ref-135)
135. 135

     *Id.* at 799.

     [↑](#footnote-ref-136)
136. 136

     *Id.* at 803.

     [↑](#footnote-ref-137)
137. 137

     *Id.* at 807.

     [↑](#footnote-ref-138)
138. 138

     *Id.* at 811.

     [↑](#footnote-ref-139)
139. 139

     *Id.*at 795, 799, 803, 807, 811.

     [↑](#footnote-ref-140)
140. 140

     1921 ***Colo.*** Sess. Laws 796, 800 *,* 804, 808, 812.

     [↑](#footnote-ref-141)
141. 141

     *Id.*

     [↑](#footnote-ref-142)
142. 142

     H.B. 580, 23rd Gen Assemb., Reg. Sess. (***Colo.*** 1921).

     [↑](#footnote-ref-143)
143. 143

     Daniel Tyler, Tribute, *Delphus Emory Carpenter "The Silver Fox of the Rockies"*, 5 U. Denv. Water L. Rev., xii, xv (2001).

     [↑](#footnote-ref-144)
144. 144

     *See* [***Colo.*** *Rev. Stat.§§37-62-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J33Y-00000-00&context=1516831), -64-101, -66-101, -67-101, -68-101, -69-101 (2019).

     [↑](#footnote-ref-145)
145. 145

     Ray Lyman Wilbur & Northcutt Ely, The Hoover Dam Power and Water Contracts and Related Data 17-19 (2d ed. 1948).

     [↑](#footnote-ref-146)
146. 146

     *Historical Memorandum in re* ***Colorado******River*** *and Brief of Law of Interstate Compacts: Hearing on H.R. 6821 Before the H. Comm. on the Judiciary*, 67th Cong. 1 (1921) (memorandum submitted by Delph E. Carpenter) (reprinted in Ray Lyman Wilbur, supra note 145, at app. 210, A84-105).

     [↑](#footnote-ref-147)
147. 147

     Wilbur, *supra* note 145, at app. 210, A84.

     [↑](#footnote-ref-148)
148. 148

     *Id.* at A88-90.

     [↑](#footnote-ref-149)
149. 149

     *Id.* at A90.

     [↑](#footnote-ref-150)
150. 150

     [*United States v. City and Cty. of Denver, 656 P.2d 1, 17 (****Colo.*** *1983)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-17K0-003D-912C-00000-00&context=1516831).

     [↑](#footnote-ref-151)
151. 151

     *Id.*

     [↑](#footnote-ref-152)
152. 152

     [*Id. at 5-4*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-17K0-003D-912C-00000-00&context=1516831).

     [↑](#footnote-ref-153)
153. 153

     [*43 U.S.C. § 666*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SDD-0HD2-8T6X-73VR-00000-00&context=1516831) (2018).

     [↑](#footnote-ref-154)
154. 154

     *See* [*Arizona v. California, 373 U.S. 546, 601 (1963)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H3B0-003B-S2D7-00000-00&context=1516831); Hinderlider v. La Plata ***River*** & Cherry Creek Ditch ***Co*** [*., 304 U.S. 92, 106 (1938)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8RW0-003B-709P-00000-00&context=1516831).

     [↑](#footnote-ref-155)
155. 155

     [*City and Cty. of Denver, 656 P.2d at 17*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-17K0-003D-912C-00000-00&context=1516831).

     [↑](#footnote-ref-156)
156. 156

     [*Id. at 8*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-17K0-003D-912C-00000-00&context=1516831).

     [↑](#footnote-ref-157)
157. 157

     [*Id. at 9*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-17K0-003D-912C-00000-00&context=1516831).

     [↑](#footnote-ref-158)
158. 158

     [*Id. at 20*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-17K0-003D-912C-00000-00&context=1516831).

     [↑](#footnote-ref-159)
159. 159

     [*Bd. of Cty. Comm'rs v. Park Cty. Sportsmen's Ranch, 45 P.3d 693, 708 (****Colo.*** *2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45J9-VSF0-0039-427X-00000-00&context=1516831).

     [↑](#footnote-ref-160)
160. 160

     *Id.*

     [↑](#footnote-ref-161)