

FEATURE ARTICLE

THE EVOLUTION OF INTERSTATE WATER DISPUTES INTO
REGIONAL COOPERATIVE MANAGEMENT REGIMES: LAUNCHING
A NEW MODEL COMPACT FOR INTERSTATE WATER ISSUES

By Karen M. Hansen

Interstate water disputes have a long history of being addressed in one of three Constitutionally recognized ways: (1) litigation in the United States Supreme Court, (2) entry into negotiated interstate water compacts, and (3) to a far lesser extent, direct congressional allocation via legislation. Each of these options represents an unattractive, unavoidable, and significant commitment of time and money to pursue a highly uncertain outcome. This reflects the nature of traditional interstate water use conflicts, which, along with the inexorable legal process of determining and allocating the water rights of respective states, are rife with political agendas and parochialism. Layer onto these well-known elements of interstate water disputes more modern notions of—and legal requirements for—protecting water quality, species/habitat, and recreational and cultural uses, and the never simple question of how to determine, allocate and manage respective shares of shared waters becomes increasingly complex.

Of the three mechanisms for resolving interstate water disputes, the U.S. Supreme Court long ago began encouraging states to cooperate and compromise with one another rather than subject their claims and complaints to the federal judiciary. Although states have entered into numerous water compacts, many of these compacts are decades old and, by virtue of this fact alone, simply do not include provisions that can effectively address contemporary issues, such as mandatory water quality improvements, endangered species requirements, population growth patterns, and the like.

Water practitioners and policy makers have long recognized these shortcomings. In direct response to the growing frustration with, and seeming inef-

fectiveness of, existing water compacts to address such modern water challenges, there have been recent efforts to catalogue and find solutions to the perceived shortcomings of existing water compacts. These efforts have led to the development of a model interstate water compact that will be published in final form later this year. While this first step focuses on state-to-state issues, the initial interstate model compact is expected to be followed by a separate model compact to address directly the related but equally thorny federal issues that have arisen over the years with existing water compacts. This article explores the problems with existing compacts and what the new model interstate compact is designed to accomplish.

Background

About two dozen interstate water disputes have been reviewed in some fashion by the Supreme Court over the last century or so. Through these cases, the Court has crafted a doctrine of “interstate federal common law” around the legal principle known as “equitable apportionment.” Equitable apportionment involves allocating states’ respective quantitative rights to shared water resources by application of a series of factors that have developed through decades of case law, primarily though not exclusively involving disputes among Western states. Important factors in apportionment cases have evolved over time, and include considerations such as the adjacency of land and the dependency of its use on the disputed water resource, the extent and amount of water available in or from the water resource, whether the water resource includes only surface water or also subterranean waters that serve as sources to or flows from

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the surface water, what constitutes a reasonable use in particular circumstances, when actions by a state may be deemed a use or threatened use of more than an equitable share, and so on. In more recent years, explicit consideration of effects on wildlife and habitat, and of other environmental impacts such as water quality, have been added to the Court's equitable apportionment analysis. These interstate disputes are usually long-standing, fact-dependent, politically charged, and complex.

Not surprisingly, then, while these cases when litigated inevitably lead to largely principled results, the disputes and issues can take decades to resolve. Arizona's suit against California for an equitable apportionment of the Lower Colorado River began in 1952, yet the final consent order resolving the last disputed issue was scheduled to be entered by the court just a few weeks ago. The interstate compact negotiations for two major river systems involving Florida, Alabama and Georgia famously imploded a few years ago, after decades of study, the hands-on involvement of three governors and then-Rep. Newt Gingrich, and numerous trips to several federal courts, in the wake of eleventh-hour media reports of secret negotiations among only a subset of affected parties. (These reports, by most accounts, were largely true).

Nevertheless, as arduous as this litigation process can be, reliance upon Congress to make a direct statutory allocation has not been a popular mechanism. As a result, most interstate water disputes are ultimately resolved through interstate compacts, which typically are negotiated in the context of pending and/or threatened litigation. Although interstate water compacts entered into decades ago are fraught with shortcomings, they are, in comparison with the other choices, increasingly seen as the best way for affected interests to effectively and cooperatively manage increasingly complex water systems on a regional basis.

It is against this backdrop of rising expectations for the interstate water compact process that the Utton Transboundary Resources Center at the University of New Mexico School of Law embarked two years ago on a congressionally-funded project to craft a Model Interstate Water Compact (Model Compact). The idea was to pull together the best of the existing interstate water compacts, along with the valuable lessons learned from protracted litigation and difficult

compact negotiations, and then, from this base of experience, build a model compact designed to guide states toward effective water management systems that reasonably address water quantity and quality issues. Although the federal government plays a significant role in the regional water management issues addressed by interstate compacts, there was enough ground to cover with state-to-state issues to leave the state-federal issues for a separate model compact effort that will be the next step of the Utton Center project.

The Utton Center project (Project) developed the draft Model Compact by looking in depth at existing interstate water allocation compacts, Congressional consent legislation, literature and other scholarly treatments of water dispute issues, case studies involving negotiated compacts as well as failed compact negotiations, litigation processes and outcomes, and federal and state environmental requirements imposed in the last thirty years that have significantly redefined the scope of inquiry and interests in traditional water rights disputes. The Project was led by two renowned and distinguished water practitioners, Jerome C. Muys of Washington, D.C., and Dr. George William Sherk of Denver, Colorado, with the participation of a blue-ribbon caliber advisory panel and under the direction of the Utton Center Director Marilyn O'Leary. The Model Compact Project produced a draft document, which was highlighted at the recent American Bar Association's Annual Water Law Conference. The Model is intended to serve as a prototype mechanism by which states may organize, deliberate, and decide their cooperative approach to the range of difficult issues that arise in disputes over shared water resources.

Analysis

As the title to this article suggests, the Model Compact is designed to reflect the evolution of early, narrowly drawn water allocation compacts to more sophisticated, holistic forms that can be understood and used as regional, cooperative management regimes. The Model Compact is intended to serve affected interests in two fundamental ways. First, affected states will be encouraged to use the Model Compact to begin updating existing compacts that are considered outdated. Second, states with disputes over regionally shared water bodies for which no compact exists will be encouraged to use the

Model Compact as a starting point for (or to rekindle stalled) good faith negotiations. As noted above, a follow-on model compact to address more directly the state and federal issues is expected in the future and would supplement the state-to-state efforts.

The concept of a model compact was borne out of dissatisfaction with numerous aspects of how historic interstate water disputes have been resolved, and, once resolved in a compact, how these agreements are actually implemented. However, there were several key shortcomings to existing compacts that the Model Compact effort in particular set out to address. These key issues may be summarized as follows:

Water allocations tend to be based on old, often invalid assumptions about water supply and demand. Often, these allocations not only are based on inaccurate estimates of available water, but also were determined decades ago, before current growth patterns and environmental requirements emerged. The failed ACT/ACF river basin compact negotiations began and continue to this day to focus on the explosive growth of the Atlanta area as the catalyst for hardening positions on how to allocate the limited shared water resources in the affected tri-state area. The water quantity issues that understandably dominate the older compacts need to be supplemented with provisions that address contemporary water quality requirements and needs.

Compacts entered into decades ago have built-in rigidity and parochialism, often with no mechanism for revisiting past decisions or modifying dated agreements to reflect new information. As such, these compacts are essentially ineffective tools for addressing contemporary water management challenges. In the Missouri River Basin disputes, for example, unanticipated developments included the emergence and increase of hydropower and recreational uses coupled with the decline of historic levels of commercial navigation activity on the river system. The authority to acknowledge and manage this change belonged to no single state or federal agency, and the means to try to develop consensus on what the facts proved to be insufficient to avoid federal litigation.

Older compacts also tend to focus solely on surface water, without a recognition of or provision for the interconnectivity between surface and ground waters and associated basin-wide management needs and practices. In the Great Lakes region, the most visible recent disputes have involved the propriety of using

this vast resource for bottled water and other uses outside of the watershed, presenting both significant water use as well as governance issues.

Governance of compacts, which is usually by commissions, tends to be an odd mix of granted but unexercised state powers coupled with (and perceived as hobbled by) often ambiguous federal roles and mixed participation in a compacts' processes by federal agencies that are viewed as critical to the success of the compact's purposes. The Delaware River Basin Compact has long included the federal government as a voluntary but instrumental party, and this feature is widely recognized as a key factor in the relative success of the management of that water resource by the affected communities.

Ten Primary Aspects of an Interstate Water Compact

To address these key concerns, the Model Compact drafters highlighted ten primary concepts that should be accounted for in interstate water compacts. These ten concepts are: (1) inclusion of a broad and robust enunciation of the purposes of the compact, (2) use of adaptive management for decision-making, (3) development of meaningful water monitoring programs and use of good science, (4) adoption of a regional focus, or, put another way, an emphasis on basin-wide systems and management, (5) inclusion of a strong statement of State and joint compact powers, subject to political conditions where warranted, (6) emphasis on an organizational structure that supports decision-making by top-level policymakers with meaningful technical support, (7) inclusion of a dispute resolution mechanism to promote consensus where needed, (8) evidence of meaningful compact buy-in via visible and reliable funding and participation by members, (9) duration of a reasonable length that can be prolonged or sun-setted as warranted by the parties, and (10) inclusion of a means for federal agencies to (among other things) align federal water management programs with compact programs that are "not in conflict with non-discretionary mandates of federal statutes."

Certain of these themes, such as adaptive management, good science, and a basin-wide perspective on water supply and use issues, resonate with similar approaches that have been promoted extensively in recent years to better address old and emerging water quality problems associated with complex, multi-juris-

dictional water systems. Thus, one can see a parallel between encouraging, through the Model Compact, a more holistic perspective toward the water supply, use and quality issues that a compact should address throughout a particular regional water basin, and growing efforts to evolve to watershed-based management and regulatory schemes in the water quality arena, or similarly, to ecosystem-based and integrated management principles for U.S. oceans policy. The ten principles articulated for the Model Compact are conceptually well understood by water practitioners and policy makers, whose experience, advice and recommendations were sought and relied upon. Beyond the recognizable common sense of the ten principles, however, it is also fair to conclude that the ten principles represent a patently responsible means upon which to base increasingly complex interstate water agreements that must provide both certainty and flexibility.

Other Issues to Address

Within these laudable ten concepts lie some very difficult issues, however. For example, the Model Compact calls for additional water monitoring and data evaluation, and use of adaptive management and good science, to make the best possible water management decisions. Similar principles are called for in various federal, state and regional water quality programs that have developed largely under the framework of the Clean Water Act. In both arenas, however, issues arise not over whether additional data would benefit management decisions (the answer, invariably, is yes), but rather, over how such efforts will be funded and, assuming the data is obtained, regarding what the data mean. Likewise, while adaptive management is included in the Model Compact, in a bow to reality and the prowess of federal agency programs, its use is made subject to vested water rights and environmental protection mandates. As in many environmental contexts, good science is often in the eye of the beholder.

The litigation over the revision of the Corps of Engineers' Master Manual for the Missouri River system illustrates some of these difficulties. The 1944 Flood Control Act and Pick-Sloan Plan developed for this river system by definition did not anticipate or include a host of environmental values, most notably the Endangered Species Act (ESA). Although a series of conflict resolution efforts using various mecha-

nisms began in the 1980s, in an attempt to balance increasingly competing uses of the river (*e.g.*, barge traffic, habitat, recreation, hydropower, *etc.*), it was the ESA review conducted for the Master Manual revisions that served as the catalyst for the multiple federal court cases that followed. In a nutshell, the data showed both that protected species of plover needed shallow water habitat at certain times of the year, which happened to coincide with when high river levels were needed to allow licensed commercial barge traffic. There was data that could be used to support both points of view, and the Corps' attempts in the proposed Master Manual revision to adjust seasonal water levels (*e.g.*, a form of adaptive management) was viewed by one affected interest group as abrogating vested rights and by another as a failure to comply with federal legal mandates. One of the recommendations stemming from the Missouri River Basin litigation was for interstate compacts to agree on the use of neutral third party scientific review, such as by the National Academy of Sciences, to depoliticize the data in order to make recommendations as to what constitutes "good science" and appropriate adaptations to prior management decisions.

Also of interest are some more legalistic issues raised by the draft Model Compact. One example is found in the apparent premise of the Model that the compact commission—by definition an unelected group of representatives from a number of states—can establish and enforce water quality standards under the Clean Water Act. It is unclear how the Model Compact's assertion of such authority fits within current EPA regulations under which federal Clean Water Act authorities for establishing and enforcing water quality standards and NPDES permit limits are delegated to individual states. Will a future interstate compact that has adopted this provision from the Model be a proper plaintiff in a challenge to a new water quality standard or permit limit, and does it matter if the challenge is to a limit or permit established by a state environmental agency whose state, via its governor, is a party to the complaining interstate compact?

Another interesting provision suggests that the compact commission could order member entities to suspend water resource construction priorities based on the compact commissions' collective judgment that water supply and use requirements within the basin are out of balance. It is difficult to imagine a

political scenario, for example, in which a favored reservoir project in one state, that is deemed vital to and in the public interest of that particular state, would lie fallow because an unelected multi-state water compact commission deemed the timing of the project to be in conflict with overall basin needs. Perhaps by aspiring to such ends, the Model Compact will, at a minimum, force serious discussion of such difficult but perhaps necessary propositions.

Conclusion and Implications

The Utton Center's Model Interstate Compact is an ambitious and laudable effort to develop a structured and effective approach to harmonize the many complex laws and policies that apply when disputes arise among States over water supply, use and qual-

ity. The Model Compact's value lies not only in the wealth of experience, knowledge and wisdom upon which its provisions and recommendations are based, but also in its bold outlook of what may be possible if cooperation and compromise on a holistic, regional basis prevail over provincialism in addressing the increasingly complex world of shared water resources. In this regard, it is worth noting that the Utton Center has ambitions for its Model Compact efforts not only as the framework upon which state/federal water disputes in the United States will be negotiated and resolved, but also as a template for addressing international water resource disputes. Affected interests looking to solve existing water management problems may use the Model Compact as a starting point to renegotiate current compacts, and others may look to its terms in the future as new disputes arise.

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