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The Model Interstate Surface and Groundwater Compacts Project

Background

Disputes among states sharing interstate rivers have increased significantly over the past two decades. These disputes involve the states' respective quantitative shares of such rivers, water quality concerns and how to comply with a variety of federal environmental laws enacted since the early 1970s.

There are three Constitutional mechanisms to resolve interstate water disputes: (1) interstate agreements or compacts, (2) litigation in the United States Supreme Court and (3) Congressional legislation. The Supreme Court has made its position abundantly clear: States should resolve their conflicts among themselves pursuant to the compact clause of the Constitution. Such disputes are "more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted." *New York v. New Jersey*, 256 U.S. 296, 313 (1921). This position was reaffirmed in *Vermont v. New York*, 417 U.S. 270 (1974), *Texas v. New Mexico*, 462 U.S. 554 (1983), and *Oklahoma and Texas v. New Mexico*, 501 U.S. 221 (1991). In response, the states have entered into some 26 interstate water allocation compacts, primarily in the western United States, most of them over 50 years ago.

The Model Compacts Project

As interstate water conflicts have increased, so has the realization that most of the existing interstate compacts appear to be inadequate to resolve such conflicts. Consequently, the Utton Transboundary Resources Center at the University of New Mexico School of Law has initiated a comprehensive project to develop two model compacts, an interstate water compact (state parties only) and a federal-interstate water compact (states and the United States as parties). This project has been undertaken by Mr. Jerome C. Muys and Dr. George William Sherk.¹

¹ Additional information regarding the essential strengths and weaknesses of interstate compacts is contained in the attached paper, "Lessons From The West: The Western States' Experience With Interstate Water Issues," which was presented by Mr. Muys at an American Bar Association conference in May of 2004.

The methodology for the project consists of a number of discrete though closely interrelated steps:

- The initial step has been a thorough literature review to identify and evaluate the asserted strengths and weaknesses of the use of compacts to resolve interstate water conflicts in both theory and practice.
- The next step has been to review the language of all existing interstate water compacts and required Congressional consent legislation to ascertain how critical issues have been addressed historically. This has been supplemented with information obtained in response to a questionnaire sent to each of the interstate compact commissions on the practical administration of those compacts.
- While these tasks were ongoing, an Advisory Committee was selected comprised of some two dozen individuals representing a wide range of professional areas of expertise and stakeholder interests in interstate water issues.
- The results of the earlier reviews will be complemented by several case studies, including the current efforts to negotiate (or renegotiate) compacts on the Apalachicola-Chattahoochee-Flint River Basin and the Alabama-Coosa-Tallapoosa River Basin in the Southeast and the Great Lakes to identify problem areas and opportunities in the interstate compact approach.
- Additional project activities that will supplement the identification of issues by the earlier reviews include an analysis of the impact of federal environmental legislation affecting existing interstate water compacts and a review of compact litigation in the Supreme Court.
- In March of 2005, the Advisory Committee will be assembled at Bishops Lodge near Santa Fe, New Mexico, where the first interstate compact (the Colorado River Compact) was negotiated in 1922. The purpose of this meeting will be to evaluate and supplement the principal issues identified by the project study and to receive recommendations regarding specific approaches or methodologies to be included in the model compacts.
- Following the meeting of the Advisory Committee, Mr. Muys and Dr. Sherk will prepare working drafts of the two model compacts which will be sent to the Advisory Committee for review. The model compacts will not be “one size fits all” proposals, but will be annotated extensively with suggestions for alternative approaches to critical issues such as compact commission membership and voting procedures, allocation methodologies, dispute resolution and adjustments to changing hydrologic data or legal requirements. Once this review has been completed, the model compacts will be modified as appropriate and distributed with commentary for public comment.

A primary goal of the Project is to provide a mechanism by which interstate water conflicts may be resolved in an amicable, efficient, equitable and effective manner. In addition to their applicability to interstate water conflicts within the United States, the Utton Center hopes that the model compacts may also assist in the peaceful resolution of international water conflicts.