

Model Compact Completed, Offers Alternative for Resolving Water Conflicts

Disputes among states sharing interstate waters have increased significantly during the past two decades. These proliferating disputes involve water quantity, water quality and the effects of a variety of federal environmental laws enacted since the early 1970s. Drought has exacerbated these tensions.

As interstate water conflicts have increased, so has the realization that most of the existing compacts appear to be inadequate to resolve such conflicts. Consequently, in 2002 the Utton Center initiated a comprehensive project to develop a model interstate water compact that could be adapted either along the lines of a traditional interstate compact, with only states as signatory parties, or a federal/interstate compact with the United States also a signatory party, which is the approach the four most recent compacts approved by Congress have taken. Either approach would include Native American representation. This project was undertaken with funding the center received from the Department of Energy with the help of Sen. Pete Domenici.

First, a national conference titled, "Interstate Waters: Crossing Boundaries for Sustainable Solutions, a Multidisciplinary Approach," addressed the approaches of a variety of disciplines that are key in managing interstate water resources. Seventy lawyers and scientists from across the U.S. with extensive expertise in interstate water issues gathered to share what they believed to be the strengths and the limitations of their particular discipline when it came to addressing complex water issues. The

program was designed to identify ways they could better work together to support the management goals of stakeholders.

A second national conference, "Crossing Cultural Boundaries for Sustainable Solutions," brought together a variety of experts who had been successful in crafting Indian water rights settlements. Representatives of major water user groups shared perspectives on the values related to water.

Crafting the Compact



Jerome C. Muys, Jr.

In 2004, the Utton Center began work on the model compact. Jerome C. Muys, Jr., a lawyer with considerable experience with interstate compacts was contracted to oversee the project. He was assisted by George W. Sherk, a lawyer with an engineering background who also has extensive experience and knowledge with interstate water compacts. UNM law students assisted in the research. Together with Marilyn O'Leary, director of the Utton Center, Muys and Sherk developed a methodology for carrying out the project in the following order:

- ◆ 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;

Ombudsman Program to Assist in Adjudications

The Utton Center is developing an ombudsman program in an effort to help streamline New Mexico's complex water rights adjudication process.

The first phase of the program focuses on a state lawsuit stemming from the Lower Rio Grande adjudication. This case involves a judicial determination of the quantity and priority date of the individual water rights claims of more than 16,000 parties who use water along the Rio Grande below Elephant Butte Lake. Many of the parties are *pro se* claimants who can be intimidated by the litigation process. Third Judicial District Court Judge Jerald Valentine believes that some of the *pro se* parties are not participating in the adjudication case due to fear and confusion about the process and that they need to be involved to protect their water rights.

In this developing program, the ombudsman will have many roles. As a neutral third-party expert, this person will answer questions about the process, but will not provide legal advice. The ombudsman will help *pro se* parties to understand the process and determine what options are available in order to respond to pleadings and offers of judgment from the State Engineer.

The Utton Center and ombudsman Lisa Brown ('98) already have enlisted the expertise of the New Mexico State University Media Department to develop a video that illustrates the status of the case and possible actions a claimant/defendant could take.

"By providing water rights holders with information about why the adjudication is happening and how the process works, hopefully they will feel more comfortable with the process," says Brown. "Through this educational effort they will learn that by participating they are protecting their water rights."

She will promote the video throughout southern New Mexico, at community meetings, special-interest gatherings and to other interested groups.

As part of the program's second phase, Brown has begun researching all ongoing stream adjudication cases in New Mexico to determine the most effective role an ombudsman could play. She will prepare a report with her conclusions.

A hotline is planned to handle questions about the Lower Rio Grande adjudication.

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Lisa Brown ('98) at the Corrales Growers' Market

- ◆ Review and catalog the language of all existing interstate water allocation compacts and required Congressional consent legislation by topic to identify how critical issues have been addressed historically. This research was supplemented with information obtained in response to a questionnaire sent to each of the interstate water compact commissions on the practical administration of those compacts;
- ◆ Selection of an advisory committee comprised of 30 individuals representing a wide range of professional areas of expertise and stakeholder interests in interstate water issues;
- ◆ Additional research included an analysis of the impact of federal environmental legislation affecting existing interstate water compacts and a review of compact litigation in the U.S. Supreme Court;
- ◆ Research efforts were complemented by looking at several case studies, including the Great Lakes Compact and in the Southeast, the Apalachicola-Chattahoochee-Flint River Basin and the Alabama-Coosa-Talapoosa River Basin Compacts. Problem areas and opportunities in the interstate compact approach were identified.
- ◆ In March 2005, the advisory committee assembled at Bishop's Lodge near Santa Fe. It was no coincidence that Bishop's Lodge was the site of the 1922 negotiations for the Colorado River Compact, the first interstate water allocation compact. During the three-day workshop, the principal issues identified by the project study were evaluated and supplemented. Recommendations were offered regarding specific approaches, methodologies and topics to be included in the model compact. The committee prepared a summary of the workshop's principal conclusions and recommendations.
- ◆ Muys, Sherk and O'Leary prepared a working draft of the model compact, which was sent to

the advisory committee for review and comment. Many of the comments were incorporated in the draft model compact.

- ◆ Each compact article was accompanied by a commentary to explain why particular approaches were taken, along with suggestions for alternative approaches to critical issues, such as compact commission membership and voting procedures, interstate allocation methodologies, dispute resolution and adjustments to changing hydrologic data or legal requirements. These commentaries were drawn from the comments received from the advisory committee and illustrated how the model compact, which is not intended as a "one-size-fits-all" proposal, can be adapted to different situations in various river basins.

Blueprint for Peaceful Resolution

The primary goal of the model compact is to provide a mechanism by which interstate water conflicts may be resolved in an amicable, efficient, equitable and effective manner. The intention is to empower states to take interstate water management into their hands in a collaborative way and avoid the uncertainties and costs of litigation and vagaries of Congressional legislation. It is hoped that this compact will provide a blueprint not only for states and sovereign entities to collaborate for sustainable management of shared water resources, but can also serve as the basis for peaceful resolution of international conflicts over shared resources.

The compact with commentaries is available on the Utton Center website at <http://uttoncenter.unm.edu>, and will be published in the winter 2007 issue of the Natural Resources Journal.

The compact is dedicated to the memory of Al Utton, whose practice of 'preventive diplomacy' and authorship of *Transboundary Groundwaters: The Bellagio Draft Treaty* brought to reality his values of inclusiveness and mutual respect in the sustainable management of transboundary natural resources.



George W. Sherk

Water/Energy Link Focus of Annual Workshop

The Utton Center's Third Annual Water Policy CLE, "Water for Energy in the Southwest: Where Will It Be Found?" addressed the nexus between water and energy production. The May workshop was co-sponsored by the State Bar Association's Natural Resources, Energy and Environmental Section.

Water and energy are two critical resources that are inexorably and reciprocally linked – the production of energy requires large volumes of water, while the treatment and distribution of water is equally dependent upon readily available, low-cost energy.

Among the subjects discussed by speakers from New Mexico, Colorado and Washington, D.C. were, competing needs for water, alternative and non-traditional supplies of water, energy production that might require less water and state and federal priorities.

Erik Webb from Sen. Pete Domenici's office addressed congressional concerns related to the energy/water nexus, while Mike Connor, Sen. Jeff Bingaman's counsel to the Senate Energy and Natural Resources Committee, spoke about energy and water issues in the context of cli-

mate change. Gene Whitney from the National Science and Technology Council focused on federal priorities.

A panel of New Mexico speakers, moderated by Bill Hume, water policy adviser to Gov. Bill Richardson, discussed water-energy planning in the state. A second panel provided an opportunity to hear about the issue from tribal perspectives, both in a general sense and particularly with regard to how the Navajo Nation is proceeding. A third panel dealt with regulatory issues that impact water availability. John Shomaker, an Albuquerque hydrologist, talked about hydrologic issues relating to the administration of brackish water supplies.

The program ended with a discussion during which suggestions were offered for how to address the energy/water issue throughout New Mexico and the Southwest.

A reception sponsored by the Rodey Law Firm provided a relaxed opportunity for the speakers to visit with participants at the conclusion of the program.