A DRAFT BILL TO AMEND CONGRESSIONAL CONSENT LEGISLATION FOR
EXISTING INTERSTATE WATER COMPACTS

A bill to amend Congressional consent legislation for existing interstate water compacts to promote comprehensive interstate watershed management, protection and restoration programs, to improve federal participation and provide for Native American participation in such programs, to clarify and strengthen the authority of interstate water compact administrative agencies, and to consent to the joinder of the United States in certain interstate water litigation before the United States Supreme Court.

WHEREAS Congress and the states have enacted various laws for the management, protection, and restoration of the land and water resources of the Nation's watersheds;

WHEREAS Congress finds that the implementation of those laws needs improved coordination within interstate watersheds;

WHEREAS Congress has granted consent to a number of interstate water resources allocation compacts which provide for the establishment of interstate administrative agencies for the administration of those compacts, many of which provide for a non-voting federal member, but none of which provide for a Native American member even though tribal reservations with significant water rights may exist within such watersheds; and

WHEREAS such interstate administrative entities can be an appropriate institutional arrangement for the coordination of existing state, federal, and Native American watershed
programs if made more representative, the participation of federal agencies is improved, and the authority of such agencies is clarified and enhanced.

THEREFORE, BE IT ENACTED

TITLE I - Amendment of Existing Interstate Water Compact Consent Legislation

Sec. 101. All existing statutes granting the consent of Congress to interstate water resources allocation and/or management compacts are hereby amended as follows:

A. Additional Obligations and Authority

(1) In addition to the rights and obligations of the compacting states set forth in each compact, the signatory states, within two years, shall undertake a cooperative program for the management, protection, and restoration of the water and related land resources of the watershed covered by the compact, which may include provisions for maintenance of minimum stream flows and protection of riparian areas; provided, that this obligation shall (1) only operate prospectively, (2) shall be subject to valid existing water rights, and (3) shall not provide the basis for any claim for damages or other relief against any state or compact entity for failure to take such action prior to the date of enactment of this act.

(2) Each state (a) shall exercise its compact rights and responsibilities in good faith and shall take no action or fail to take action with the intent to and which does in fact frustrate the compact purposes and (b) shall make reasonable beneficial use of its water allocation under the compact with due regard to the interests of the other compact states in the common resource and, on international rivers, the interests of Canada and Mexico under existing treaties and accepted principles of international law.

(3) In addition to the express powers conferred upon any interstate administrative agency, such agency may, by unanimous consent of the member states: (a) adjust
any allocations or delivery obligations made by the compact to such extent, for such duration, and upon such conditions, including payment of equitable compensation to states whose allocations or delivery entitlements are reduced, as they may deem appropriate; provided that such adjustments shall not impair any vested water rights or environmental protection obligations; and (b) interpret ambiguous compact provisions, take action on matters not expressly addressed by the compact or the federal consent legislation, and exercise incidental authority as necessary or appropriate to carry out the basic compact purposes that does not conflict with such purposes or any express compact provision or other federal law.

B. Federal and Native American Representatives on Interstate Administrative Agencies

(1) Any interstate administrative agency provided for in a compact shall include a non-voting federal representative, who shall be appointed by the Secretary of the Interior after consultation with the Administrator of the Environmental Protection Agency and the Chief of the Army Corps of Engineers. In addition, where the watershed subject to a compact includes Native American reservations, a non-voting Native American representative shall be appointed to represent all tribes in the watershed. Such representative shall be selected by a majority of the tribal councils in the watershed or, by agreement of a majority of such tribal councils, the Native American Rights Fund located in Boulder, Colorado.

(2) The federal representative on any interstate administrative agency shall actively participate in the deliberations of such agency and shall coordinate the views of all federal agencies in the watershed with land and/or water development or management responsibilities or water regulatory responsibilities, including, but not limited to the Bureau of Land Management, the Forest Service, the Fish and Wildlife Service, the National Marine Fisheries Service, the Bureau of Reclamation, the Corps of Engineers, the Environmental
Protection Agency, and the Federal Energy Regulatory Commission and present a single,
coordinated federal position, including non-binding suggestions, comments and
recommendations, during the agency's deliberations.

C. **Effect of Approved Watershed Plans or Programs on Federal Agency Programs**

   (1) A watershed plan or program adopted by an interstate administrative
agency shall be binding on the federal agencies in the watershed, which shall carry out their
programs in conformity with such plan or program unless the federal representative shall make a
formal written, documented finding that such plan or program would violate an express provision
of a federal statute or valid regulation. Such finding shall be presented to the members of the
interstate administrative agency within 60 days of the agency's adoption of such plan or program.

D. **Establishment of Interstate Administrative Agencies Under Existing Compacts**

   (1) The signatory states to an interstate water allocation compact to which
Congress has granted its consent but which does not provide for an interstate administrative
agency to carry out the compact purposes may create such an agency, which shall be subject to
the provisions of this Act.

**TITLE II - Review of interstate compact water allocations**

Sec. 201. The signatory states to existing water allocation compacts shall review (1)
the water supply assumptions on which the compact allocations were based, (2) the extent of
adjudicated or claimed express or implied water rights for federal and Indian reservations in the
compact watershed, and (3) federal regulatory programs under the Clean Water Act and the
Endangered Species Act in the compact watershed and determine whether (a) the possible impact
of such federal water rights and regulatory programs were considered in making the original
compact water allocations and, (b) if not, whether such allocations are inequitable in light of
current future water supply data and federal law. The results of such consideration shall be
reported by the states to Congress along with any proposed amendments to the compact, if any, unanimously agreed to by the states. The federal and Native American representatives of any interstate administrative agency shall submit comments on the states' report to Congress.

TITLE III - Sunset Provision

Sec. 301. The Congressional consent granted each existing interstate water allocation compact shall terminate at midnight on December 31, 2015, unless all signatory states shall file a joint statement by June 30, 2014 requesting that the Congressional consent be extended for such period as they choose, not to exceed 25 years. Any such compact termination shall not adversely affect valid existing water rights and environmental protection obligations.

TITLE IV - Waiver of Sovereign Immunity for Interstate Litigation

Sec. 401. The consent of Congress is hereby given for the joinder of the United States as a party in any action by a state in the United States Supreme Court for (1) an equitable apportionment of the waters of an interstate water body or the enforcement of the provisions of an interstate water compact and (2) the enforcement or amendment of a final decree in any such action.
Section 101(A)(1) contains the only federal “mandate,” i.e., to prepare a watershed protection and restoration plan, which I view as urgently needed. The states are left free to figure out how to do it and what they put in it. It is not a “one size fits all” directive. Section 101(A)(2) makes express what I believe are already implied obligations under existing compacts. Section 101(A)(3) is an “empowering” section which permits “adaptive management” in a basin, subject to vested water rights and environmental protection obligations. It in essence permits modification of compact allocations or delivery obligations by unanimous vote of the states, which shouldn’t be objectionable. Although it might permit state legislatures and governors to be bypassed, the mechanics and delays involved in amending compacts have always been a problem. Moreover, I believe state officials ought to be able to keep appropriately tight rein on their compact representatives.

Section 101(B) tries to force a coordinated single federal position on basin issues in response to the complaints we heard from the Missouri River Basin Association and others. Section 101(B)(1) finally brings Native Americans to the table in a non-voting capacity, which is long overdue.

Section 101(C) would apply the approach to binding federal agencies to a basin plan or program now in effect on the Delaware and Susquehanna rivers and proposed on the Chattahoochee and related rivers in Georgia, Alabama and Florida. This is “regional federalism” which gives the states maximum authority with necessary recognition of the federal government’s reserved responsibility to preserve and assert express non-discretionary federal law where necessary.
Section 101(D) permits, but does not mandate states that are parties to compacts which have no compact agency (such as the Colorado River Compact) to create one.

Section 201 is designed to require states to at least take a look at where they are under their compacts, most of which are over 40 years old.

Section 301 forces Congress, which has never been very good at oversight of anything it legislates, to periodically review compacts it has approved.

Section 401 is a sovereign immunity waiver for all interstate litigation that seems long overdue to me, particularly since such a waiver has been in effect in the Colorado River Basin for almost 50 years.