

Multi-State Compacts and Regional Water Management

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Introduction

On some levels water is extremely easy to understand. Chemically, it is two atoms of hydrogen combined with one of oxygen. Everyone knows its basic properties and that without it most earthly life could not exist, but water in the eyes of the law is something else altogether. The legal nature of water matters greatly to how we use it, to how we manage it, and to our ability to be better stewards of it.

The law tends to view water as either a state resource or as a federal resource. As either surface water or ground water. And as either water in its banks or diffuse storm or flood water. These views have some value and a lot of history behind them, but they miss some of the fundamental functions, values, and challenges of water. This is particularly true of waters that flow through (or under) more than one state.

Traditionally--and for the most part currently--interstate waters are like a baton in a relay race with ownership of the water itself changing hands from one state to another as it flows. But unlike the runners in a relay, the federal government and the states sharing an interstate waterbody usually share no common purpose that binds them together to reach some defined water management goal. The result is a patchwork quilt of private and public legal rights and duties that almost guarantee conflict between and among states and the federal government. Nowhere is this truer than in the watershed of the Mississippi River where no fewer than 31 separate state legal regimes combine with a variety of federal laws and programs and tribal rights hold sway over the waters that become that great river. This virtually guarantees

conflict as the states and those acting under state law contend for the increasingly valuable waters of the Mississippi Basin, especially as no state can impose its will or priorities on another. If that were not enough of a problem, the United States Constitution limits the ability of states to decide between themselves how interstate resources should be divided up and managed. A multistate compact with the force of federal law may be the best alternative to intractable conflict or federally or judicially imposed solutions.

Multistate Compacts

A multistate compact is nothing more than an agreement between states to do something. More precisely, it is one that is entered into in compliance with the Compact Clause of the United States Constitution (Article I, Section 10, Clause 3). The Compact Clause says:

“No State shall, without the consent of Congress ...enter into any Agreement or Compact with another State....”

Taken literally, this language would be extremely burdensome and frustrate all sorts of innocuous beneficial interstate cooperation and action. In practice, congressional approval has only been required when the multistate agreement would increase the political power of the states or interfere with the federal government’s supreme powers, such as those dealing with the regulation of interstate commerce.¹

There are literally hundreds of multistate compacts covering topics as diverse as taxation to the management of the interstate waters... Many of these deal with matters of administrative convenience (e.g. the licensing of nurses) that do not require congressional approval. There are also compacts that deal with such things as arteries of commerce—The Colorado River, the Great Lakes, the Delaware River for example--that do require congressional involvement. Any

¹ See, *Virginia v. Tennessee*, 148 U.S. 503 (1893), *United States Steel Corp. v Multistate Tax Commission*, 434 U.S. 452 (1978) and *Milk Industry Foundation v Glickman*, 132 F3d 1467, 1478 (Rogers, Concurring) (1998).

meaningful compact covering the Mississippi would almost certainly fall in that category.

There are four basic types of compacts that deal with waterways:

- Compacts that facilitate consultation and discussion among the states.
- Compacts that provide for the management of water resources both in terms of quality and quantity.
- Compacts that apportion the ownership of water resources.
- Compacts that involve some combination of the previous three purposes.

No one type of compact is best, and each has its strengths and its weaknesses depending on what their purpose is. Fundamentally they depend on the need and on the thought, energy and political capital that are invested in them. As with any contract or law it is very possible to give legal effect to bad ideas and to retard flexibility and creativity if one is not careful².

Who Can Be In a Compact?

² A cautionary tale is offered by the Pecos River Compact of 1948 (ratified by Congress in 1949 (63 Stat. 159)) between Texas and New Mexico. This compact was intended to protect the flows of Pecos from depletion “from man’s activities” in such a way as to ensure a base level of flow to Texas. The procedure set out in the Compact for measuring flows was so complicated and vague that it turned out to be extremely inaccurate (to the disadvantage of Texas). The Pecos River Commission required that the Texas and New Mexico members agree on any changes which effectively gave New Mexico a veto over any changes. The resulting litigation produced two arcane trips to the United States Supreme Court before producing a \$14 million settlement in favor of Texas (a sum that hardly serves the same purposes as water). See, *Texas v New Mexico*, 462 U.S. 554 (1983) and 482 U.S. 124 (1987). The case has hardly ended the states’ travails under the Compact. See also, G. Emlen Hall, “The Mismeasure of the Pecos River: Royce Tipton and the 1948 Pecos River Compact”, 9 *Western Legal History* 55 (1996).

Compacts are a special breed of agreement that can only be entered into between states or between states and the federal government. Private parties and even federally recognized Indian tribes cannot be parties to a compact.³

What is the Effect of a Congressionally Approved Compact?

Congressional approval of a compact makes it a matter of federal law which allows the participating states to create rights and remedies that they would not have under their own laws, but it also can expand the range of state power in ways that would otherwise not be allowed under the Compact Clause or the Commerce Clause of the U.S. Constitution.

Why Choose a Compact?

The object of a compact is not the same as the reason for entering into it. As noted above, water compacts tend to fall into one (or more) of four categories. That does not however explain why states would go to the trouble to craft and enter into a compact. Administrative convenience may be a sufficient reason for compacts such as those involving interstate professional licensing, but it rarely, if ever, is the impetus for compacts covering water resources. Where water is concerned, some shared strategic interest or intractable conflict is more commonly the spark. Even then, in order to get more than one state interested in pursuing a compact, the potential compact normally has to offer at least one of the following benefits.

1. To be able to do something that would otherwise conflict with federal law. An example of this is the power of a state to keep water for itself in ways that would otherwise violate the Commerce Clause.⁴

³ *Arizona v California*, 373 U.S. 546 (1963).

⁴ E.g. *Tarrant Regional Water District v Herrmann*, 656 Fed 3d 1222 (10th Cir 2011). In this case, the State of Oklahoma was allowed to restrict water exports to Texas under the terms of the Red River Compact even though such restrictions would likely have violated the Commerce Clause had Oklahoma tried to justify the restriction under state law.

2. To gain advantages from acting under federal law. An example of this would be using the terms of the compact to trump or reconcile contrary provisions of state law by virtue of the Supremacy Clause of the U.S. Constitution.
3. To incentivize the federal government to provide some benefit. The Colorado River Compact is an excellent example of this. The federal government's willingness to construct Hoover Dam was conditioned on the seven Colorado River state's agreeing on how the Colorado would be apportioned among the upper and lower basin states.
4. To provide a framework for regional water planning and for resolving interstate disputes (and avoiding remedies such as judicial apportionment).
5. To avoid the uncertainty of leaving the framing and resolution of interstate conflicts to Congress or the Supreme Court.

Getting Congressional Approval

There are several paths to getting Congressional approval of a compact including:

1. Approval in advance
2. Approval by ratification
3. Delegated approval

Congressional approval in advance or by ratification are just what their names suggest. In the former, Congress indicates its approval of a form of agreement on certain terms and conditions and it is then up to the states to frame and execute a conforming agreement. In the latter, the states enter into an agreement that is contingent upon Congress subsequently approving it.

Complicated issues or those implicating the expertise of certain federal agencies often lend themselves to the delegated approval route. Under this approach Congress approves a compact (in advance or after the fact) but conditions that approval on some further approval by a federal administrative

agency provided that it has been given intelligible principles to guide it⁵. This delegated authority can extend even beyond the approval of the compact itself to elements of relationship between the states under the compact. An example of this can be found in the case of the Colorado River Compact of 1922 that was ratified by Congress in the Boulder Canyon Project Act of 1928⁶ (BCPA). The BCPA not only ratified the Colorado River Compact but delegated to the Secretary of the Interior the authority to make contracts with the lower Colorado River Basin states that would effectively distribute (or apportion) the river among them provided it those contracts stayed within the gross water limitations set forth in the BCPA.⁷

Compacts In Action/Compact Inaction

In the abstract, multistate water compacts are not hard to understand. Making them work in practice is another matter. The history of water compacts is littered with compacts that have worked well, compacts that have not worked well at all, compacts that made little or no difference, and for some it is too early to pass judgment. The following examples may help illuminate some of the ups and downs of multi-state compacts.

1. The Colorado River Compact of 1922. This compact, described briefly above, is the grand-daddy of compacts. The CRC apportions the water between the upper Colorado River Basin states and the lower. It also apportions the river among the 4 upper basin states. The impetus for the CRC was the fear that fast-growing California would effectively usurp the flow of the river by application of the doctrine of prior appropriation which dominates in the west. California's entry into the compact was conditioned on the federal government committing to the construction of Hoover Dam and the All American Canal. The CRC is the cornerstone of what has come to be called "the law of the River". Arizona only entered the compact in 1944. The implementation of the

⁵ See, e.g. *Milk Industry Foundation v. Glickman*, 132 F3d 1467 (US App. D.C. 1998).

⁶ 45 Stat. 1057, 43 U.S.C. Section 617.

⁷ *Arizona v California*, 373 U.S. 546 (1963).

CRC has been complicated by disputes that produced four Supreme Court cases, the largely-unplanned-for rights of tribes and Mexico, and an overly generous estimate of the river's expected flows. Even with those problems, the CRC is largely considered a success.

2. The Great Lakes-St. Lawrence River Basin Water Resources Compact of 2008 (the Great Lakes Compact). The Great Lakes are shared by two nations, eight states, and their waters are coveted by many others. The use and management of the Lakes has been a bone of contention for years between the eight states and the Canadian provinces of Ontario and Quebec. One of prime areas of conflict has been the issue of transferring water out of the Great Lakes Basin, an issue that came to a raucous head in 1998 when Ontario proposed to sell 600 million liters of water to a company with a fleet of tankers for sale in Asia⁸. Out of basin transfers on the U.S. side have been prohibited by federal law since 1986 unless the governors of the eight states all agree to the transfer⁹.

The GLC's history dates back to 1968 when Congress authorized (subject to conditions) the eight states to enter into the Great Lakes Basin Compact and to create the Great Lakes Commission¹⁰. The aim of that compact and commission was to be solely of a "consultive and recommendatory nature"¹¹.

⁸ See, Canadian Environmental Law Association, "Intervenor", Vol 23, No. 3, July-September 1998.

⁹ Water Resources Development Act of 1986, 42 U.S.C. 162d-20. Concerns over whether this ban was structured in such a way as to inoculate it from successful legal challenges under the Dormant Commerce Clause, the nondelegation doctrine, the Compact Clause, and/or the General Agreement on Tariffs and Trade as supplemented by World Trade Organization Agreements were among the reasons for the states seeking a more explicit compact. See, Lochhead, Asarh et al, *Governing the Withdrawal of Water from the Great Lakes—Report to the Council of the Great Lake Governors*, May 18, 1999.

¹⁰ Public Law 90-419

¹¹ Id., Section 2.

The progression from that consultive type of compact to the more managerial style of compact ratified by Congress in 2008 was not done in a single lift. There were intermediate steps such as the Council of Great Lake Governors (1983)¹², the Great Lakes Charter (1985)¹³, the Water Resources Development Act of 1986¹⁴, the Great Lakes Charter Annex (2001), and finally the Great Lakes Compact and Great Lakes Agreement¹⁵ of 2005 which were made law in 2008.

The Compact requires the states to protect the water resources of the Lakes from diversions and excess withdrawal and requires them to implement the Compact over a five period ending on December 8, 2013. Because that date has not passed, it is too early to judge the Compact though some disputes have already arisen and all of the states have missed one or more of the interim deadlines.¹⁶ At this point those problems reveal more about the realities of how difficult it can be to put bold visions into action than they suggest fundamental problems with the Compact.

3. The Red River Compact. The Red River is a tributary of the Mississippi River that rises in eastern New Mexico and flows eastward through Texas, Oklahoma, Arkansas and Louisiana. In 1955 Congress gave four of those states-- Texas, Oklahoma, Arkansas and Louisiana—the authority to enter into a compact to apportion the waters of the river

¹² The Council describes itself as a nonpartisan partnership of the Governors of the eight Great Lakes States that was created to tackle the severe environmental and economic challenges facing their states. See Council of Great Lakes Governors, Overview, <http://www.cglg.org/Overview>.

¹³ An agreement entered into February 11, 1985 by the Governors of the eight Great Lake States and the Premiers of Quebec and Ontario to conserve the levels and flows of the lakes, tributaries and connecting waters to encourage cooperative management.

¹⁴ See, Footnote 9, *supra*.

¹⁵ This Compact binds the eight states while the Agreement commits Canada's Great Lakes provinces implement policies that parallel those required under the Compact.

¹⁶ See, e.g., The National Wildlife Federation, *The Good, The Bad, and The Ugly: Implementation of the Great Lakes Compact*, page 2, July 201

and its tributaries among them¹⁷. The compact was signed by the states in 1978 and ratified by Congress in 1980¹⁸. The contract also allows disputes over the compact to be litigated in the lower federal courts, not just the U.S. Supreme Court.

This longstanding compact has become notable in recent years for how differently some of its signatories interpret it. Texas's growing need for water and its own diminishing supplies have prompted some Texas communities to look to Oklahoma for water—water that Oklahoma has decided to keep for itself claiming that the compact allows it to do that. A federal court of appeals has sided with Oklahoma based in part on an in depth reading of the compact and the negotiations surrounding it¹⁹. If nothing else, this reinforces the importance of compact language that is clear and of documenting the discussions that led to its adoption and approval.

4. The Apalachicola/Chattahoochee/Flint Compact. Few water disputes have proven to be as divisive and intractable as those between Georgia, Alabama, and Florida over the Apalachicola, Chattahoochee, Flint (ACF) River system. At the heart of this dispute are the burgeoning water needs of Atlanta versus those of everyone else. The history of this struggle dates back into a least the 1970's and it has been the subject of ongoing litigation since 1990²⁰. It has also been the subject of a multistate compact between the three states the Army Corps of Engineers that was authorized by Congress in 1997 for the purpose of "interstate comity, removing causes of present and future controversies, and equitably apportioning the surface waters of the ACF".

¹⁷ Public Law 84-346.

¹⁸ Public Law 96-564. Between the time that Compact negotiations began and it was executed the Clean Water Act had become law so the Compact was allowed to expand its scope to address water quality as well as water quantity.

¹⁹ *Tarrant v Herrmann*, FN 4, *Supra*.

²⁰ The most recent ruling in what is called the Tri-State Water Rights Litigation was handed down by the United States Eleventh Circuit Court of Appeals in June of 2011.

The Compact was clearly envisioned as a means of reaching a consensus solution that would avoid the need for and expense of litigation. It did not work, and the ACF Compact was allowed to expire in August 2003 while the litigation and rhetoric ramped up.

The lessons from the ACF Compact are that sometimes compacts fail and that without a sufficient common interest and desire among the participants to make them work they almost certainly will fail.

A Compact for the Mississippi River Watershed

The Mississippi River system is the largest river system on the North American continent, encompassing 41% of the area of the 48 contiguous states and draining part or all of 31 states and two Canadian provinces. The River and its tributaries and distributaries have sculpted America's physical, environmental, economic and cultural landscapes at a profound and prodigious scale. They also contribute to the vitality of the Gulf Mexico and important migratory flyways.

The sheer scale and political complexity of this great watershed defy simplistic efforts to manage its waters comprehensively. By the same token, the growing importance of and demand for those waters will likely fuel a competition for them that leads to greater conflict or cooperation (more likely both) that could be the basis for a compact covering all or parts of the Mississippi system. Indeed, at least fourteen compacts are already in place covering parts and aspects of that system, though none of them are on the main stem of the River²¹. But wanting a compact is different from crafting and implementing one, as the examples discussed above make clear. There are

²¹ These include the Yellowstone River Compact, the Belle Fourche River Compact, the Upper Niobrara River Compact, the South Platte River Compact, the Republican River Compact, the Big Blue River Compact, the Arkansas River Compact of 1949, the Arkansas River Compact of 1965, the Arkansas River Basin Compact of 1970, the Ohio River Valley Sanitation Compact, the Canadian River Compact, the Red River Compact, the Bi-State Metropolitan Development District Compact (between Missouri and Illinois), and the Tennessee River Water Pollution Control Compact

many entrenched and powerful players, and each state has a duty to look after their own; so shared visions and consensus will not come easily. While compacts are hard work and each one is unique, experience teaches that the chances for success go up if they keep the following basic points in mind.

Water has value where it is and doing what it naturally does.

Water may be an article of commerce as some level, but it also is a fundamental part of the places where it naturally is. It is woven into the geology, ecology, cultures and economies of those places, often in ways that are not fully or well understood. It is a dangerous conceit to view water that is not fully in the service of human kind as wasted or without value.

Hydrology matters.

One of the earliest things taught in natural science is the “water cycle”. The notion that water operates in a cycle involving ground water, surface water, flow, precipitation, and evaporation is about as fundamental as it gets. But the way water works in nature is not necessarily the way it works in the hands of the law. Indeed, modern water law is often based upon the elevation of public policy over hydrology. In the eyes of the law, subterranean water and surface water are traditionally treated as being unconnected. Ground water has been described by some courts as being too “occult and unknowable” to manage²². Rivers are managed in pieces based on the names we have given them, episodic project authorizations, and the geo-political boundaries they span. Droughts and floods are managed as crises rather than expected, even necessary, parts of the hydro-ecologic cycle.

The take away here is not that water should not be used or even exploited, but rather that there can be profound risks, particularly from a sustainability standpoint, from managing water in ways that ignore or disrupt the actual hydrology of that resources. One need look no further than the

²² See e.g., *Sipriano v. Great Spring Waters of America*, 1 S.W. 3^d 75 (Texas 1999).

vanishing wetlands of coastal Louisiana and the over-taxed aquifers and rivers of the West to see how real and costly getting the hydrology wrong can be.

Understand current uses and users.

Water management and water conflicts are rarely just about water. In practical terms they are almost always about how water is used, by whom, and for whom. Virtually all fresh water in the United States is spoken for to some extent. Someone has the right or authority to take it, use it, regulate it, navigate on it, or dole it out. Unfortunately, there is no central register of those users or the uses to which water is put, although some rights and authorizations have clearer legal footprints than others.

Water rights and duties can be public or private.

Some water rights are created formally by legislative acts or recorded claims. Those are the easy ones. Others are created by actual use or just by the ownership of land abutting a waterway or above an aquifer. Some are creatures of common law or back ground legal principles—such as the public trust doctrine. Some rights and uses are clearly prioritized, while many others are not. Whatever the nature or source of a water right or duty is, one can be assured that they will be asserted and defended if they are threatened. That makes them something of paramount importance to any effort to develop a comprehensive water management vehicle under a compact.

Understand and anticipate new uses and users.

Just as existing water users and uses have to be taken into consideration, so must the inevitability of new uses in the future. Not so long ago, hydraulic fracturing to extract oil and gas was an insignificant user of water. The shale gas and oil revolution which can require 3-5 million gallons of water for each

well has changed that. The need for significant river flows to conserve and restore coastal wetlands like those in Louisiana are creating demands that few anticipated a decade ago²³. Compacts need to anticipate changing conditions and build in the flexibility to accommodate new demands, new information, and changing priorities.

A water budget and clear public interest priorities are the keys to sustainability.

This is related to the previous points but is different in one critical respect. It is one thing to understand the hydrology, uses and users of a waterway, but figuring out how much river there is to go around, and for what reasons, is quite another. A management-focused compact needs to go that extra mile if it is really expected to yield positive and sustainable results. Certainly, there are limits to how specific this can get, but the more forthright and honest the compact is about these, the clearer the guidelines for implementing it will be. If certain amounts are required for such things as navigation, local water drinking water supply, irrigation, and environmental sustainability, and those things are to trump other uses or out of basin transfers, it is best to build that into the compact rather than to ignore them and hope for the best.

Conclusion

Compacts are potentially powerful tools for managing interstate water resources, but they require states and constituencies with sufficient willingness and desire to make them work. It is highly likely that the demands on the waters of the Mississippi watershed will force the consideration of a compact. It is also highly likely that, as was true with the Great Lakes and the Delaware and Colorado Rivers, it will take time and perhaps several intermediate steps before anything akin to a comprehensive compact is ripe. Any compact of that sort will be orders of magnitude more challenging than

²³ See, e.g. Louisiana's Comprehensive Master Plan for a Sustainable Coast, adopted May 23, 2012 Louisiana Senate Concurrent Resolution 46, 2012 General Legislative Session.

any ever attempted in the United States and will demand a commensurate level of vision and commitment from the basin states, Congress, and key constituencies.