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I. INTRODUCTION

It is appropriate in this bicentennial year that this conference is reexamining the mechanisms which the Founding Fathers built into the Constitution to deal with interstate water problems. They obviously anticipated that a variety of regional disputes might arise within the newly-created federal system which would be beyond the power of a single state to deal with and yet not within what were then thought to be the relatively narrow powers which the states had delegated to the National Congress. Hence the Constitution provided for the continued use of interstate agreements or "compacts" (a device which had been liberally used in Colonial America to resolve boundary disputes and had received acceptance in the Articles of Confederation), subject only to the requirement of Congressional consent to such agreements. Thus, article I, section 10, clause 3 provides that: "No state shall, without the consent of Congress . . . enter into any agreement or compact with another state or with a foreign power."[1]

The second mechanism provided for the settlement of interstate disputes was original action in the Supreme Court of the United States.[2] Both techniques have been frequently em-

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1. Although the compact clause seems to mandate Congressional consent for all interstate agreements, the Supreme Court has stated that such consent is required only where the compact threatens to impinge on national interests. Virginia v. Tennessee, 148 U.S. 503, 518-19 (1893); New Hampshire v. Maine, 96 S.Ct. 2113 (1976). Similarly, consent is not required prior to formal agreement, as the clause suggests, but may be evidenced either before or after agreement is reached. Virginia v. Tennessee, 148 U.S. 503, 521 (1893). The critical question is whether "Congress, by some positive act in relation to such agreement, [has] signified the consent of that body to its validity." Green v. Biddle, 21 U.S. (8 Wheat.) 1, 86 (1823).

2. U.S. CONST., art. 3, §2.

ployed over the years, primarily in connection with interstate water resources matters. Some 35 compacts have been approved by Congress relating to water resources management, and a large number of Supreme Court decisions have been rendered on disputes over the consumptive use or pollution of the waters of 14 interstate river basins.[3]

It was not until its 1963 decision in *Arizona v. California,*[4] an interstate dispute over the allocation of the waters of the Lower Colorado River Basin, that the Supreme Court discovered that a third possibility for the solution of interstate water disputes existed, namely through Congressional exercise of some of its powers, particularly the power to regulate interstate commerce, the scope of which had gradually been expanded by the Supreme Court since the 1930s. I refer to the Court's "discovery" of such Congressional power advisedly, since in a 1907 interstate water decision, *Kansas v. Colorado,* the Court had explained that "[a]s Congress cannot make compacts between the States, as it cannot, in respect to certain matters, by legislation compel their separate action, disputes between them must be settled either by force or else by appeal to tribunals empowered to determine the right and wrong thereof."[5] However, half a century later in *Arizona v. California,* the Court concluded that Congress had in fact imposed a compact on several of the states of the Lower Colorado River Basin through the Boulder Canyon Project Act of 1928.[6] It held that Congress had effected a "statutary apportionment" of the waters of the mainstream of the Colorado River at Hoover Dam and below among the states of California, Arizona, and Nevada by conferring upon the Secretary of the Interior, as part of his

3. Compacts currently in effect are set out in Appendix A to this paper. For a scholarly compilation of most of the compacts as of 1968 dealing with consumptive use, pollution control, and flood control with respect to interstate waters as well as related legislation and the principal Supreme Court decisions in interstate water disputes, see Witmer, *Documents on the Use and Control of the Waters of Interstate and International Streams,* H.R. Doc. No. 319, 90th Cong., 2d Sess. (1968).

The Court's interstate water decisions as of April 1959 are also collected in a useful indexed compilation prepared by Professor Charles E. Corker and filed by the California defendants with the Special Master in Arizona v. California, 373 U.S. 546 (1963), as a supplement to their proposed findings of fact and conclusions of law.

4. 373 U.S. 546 (1963).

5. 206 U.S. 46, 97 (1907).

6. 373 U.S. 546 (1963); *see also* Boulder Canyon Project Act of 1928, 43 U.S.C. §§ 617-617t (1970).

authority to manage Hoover Dam and the other water conservation works authorized under that Act, the power to make a "contractual allocation" of those waters in the event that the three states were unable to agree to the terms of a tristate compact to which consent was given in the Act.[7]

Of these three means for allocating interstate waters, I have been asked to focus on interstate compacts. But before dealing with that subject, I want to review briefly Supreme Court litigation and Congressional allocation as a means of resolving interstate water disputes.

The guiding principle which the Supreme Court has applied in interstate water disputes is the doctrine of "equitable apportionment." In *Nebraska v. Wyoming,*[8] the Court enunciated the basic factors involved in determining the "equitable shares" of an interstate stream to which competing states are entitled:

> [I]n determining whether one State is "using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one State or the other must be weighed as of the date when the controversy is mooted." 320 US p. 394. That case did not involve a controversy between two appropriation States. But if an allocation between appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible. For example, the economy of a region may have been established on the basis of junior appropriations. So far as possible those established uses should be protected though strict application of the priority rule might jeopardize them. Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas, if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made.[9]

7. 373 U.S. 546 (1963).
8. 325 U.S. 589 (1945).
9. *Id.* at 618.

With respect to "statutory apportionment" of interstate waters, there is no real guidance beyond the Supreme Court's analysis of the legislative history of the Boulder Canyon Project Act in *Arizona v. California.* One can only speculate whether some of the multitude of Congressional authorizations for multiple purpose projects under the federal reclamation and flood control programs may someday receive a similar interpretation. For example, did the Secretary of the Interior's recent execution of a contract with Montana for delivery of 300,000 acre-feet of water from the Fort Peck Reservoir to users in that state, referred to by Assistant Secretary Horton this morning,[10] accomplish a *pro tanto* "contractual allocation" of the waters of the Missouri Basin? Whether Congress will be inclined to legislatively direct the allocation of interstate waters among competing states in particular controversies in the future is also highly speculative. It would seem preferable for the affected states to determine their own water destiny by agreement, rather than to have it decided by a Congressional majority which may have little interest in the problems peculiar to a region, or whose votes may be influenced by political considerations wholly unrelated to the merits of a particular basin's water problems.

It is apparent that the determination of a state's equitable share in the waters of an interstate river basin is fraught with complex factual, legal, policy, and political considerations, and the Supreme Court has pointedly commented on several occasions that the difficulty of the task makes it one peculiarly appropriate for resolution by interstate agreement if at all possible. In *Nebraska v. Wyoming,* the Court characterized the problem as follows:

> There is some suggestion that if we undertake an apportionment of the waters of this interstate river, we embark upon an enterprise involving administrative functions beyond our province. . . . [T]hese controversies between States over the waters of interstate streams "involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotia-

10. *See* Horton, *Water Issues in Perspective, infra,* at 405.

> tion and agreement, pursuant to the compact clause of the Federal Constitution. We say of this case, as the court has said of interstate differences of like nature, that such mutual accomodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power." But the efforts at settlement in this case have failed. A genuine controversy exists. The gravity and importance of the case are apparent. The difficulties of drafting and enforcing a decree are no justification for us to refuse to perform the important function entrusted to us by the Constitution.[11]

Similarly, in the New York Harbor pollution litigation, the Court admonished the party states as follows:

> We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of the representatives of the States so vitally interested in it than by proceedings in any court, however constituted.[12]

The Court has always exercised its discretionary original jurisdiction cautiously, and there are some signals that it may apply even more rigorous standards in the future.[13]

II. COMPACTS

With respect to the use of interstate compacts for the resolution of interstate water disputes, I have dealt with that subject at length in a study for the National Water Commission in 1971[14] and in a briefer article in 1973[15] and do not intend to duplicate that detailed analysis here. Rather, I propose to survey briefly the use of interstate compacts in the water resources field, review the conclusions and recommendations contained in my study for the National Water Commission, and then amplify on my view that the federal-interstate compact offers the optimal permanent institutional arrangement for regional water resources management, particularly in the Western United States.

Water compacts (other than those relating to navigation

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11. 325 U.S. 589, 616 (1945).

12. New York v. New Jersey, 256 U.S. 296, 313 (1921).

13. *See, e.g.*, Ohio v. Wyandotte Chemical Corp., 401 U.S. 493 (1971).

14. J. MUYS, INTERSTATE WATER COMPACTS (1971) (NTIS PB202 998).

15. Muys, *Interstate Compacts and Regional Water Resources Planning and Management*, 6 NAT. RES. LAW. 153 (1973).

and fishing) may be grouped into four categories relating generally to (1) water allocation, (2) pollution control, (3) flood control and planning, and (4) comprehensive water regulation and project development programs, *i.e.*, principally the federal-interstate compact.

The basic purpose of all 18 existing water allocation compacts is to accomplish an equitable apportionment of the waters of the affected interstate streams. They reflect a number of different approaches to allocating water rights to the signatory states, but whatever the allocation formula, existing uses and rights are usually protected. About half of them provide that the allocations are to include all federal uses, which can be significant in the western states because of the predominance of federally-owned land and federal water projects constructed by the Bureau of Reclamation under the Reclamation Act or by the Corps of Engineers under various Congressional authorizations.

The earliest compacts generally charged the chief water officials of the compacting states with obtaining and correlating necessary hydrologic data on supply and uses, and authorizing them to agree to such regulations as were necessary to implement the compact apportionment. More recent compacts, however, provide for the establishment of a permanent administrative entity to carry out the functions essential for achieving the compact's objectives.

Some 10 compacts deal with interstate water pollution control in a variety of ways. The older compacts are single purpose agreements concerned only with pollution, but the more recent compacts encompass a more comprehensive approach to water quality problems. All provide for an administrative agency to implement the compact purposes. The powers conferred on these commissions range from the Potomac River Basin Commission's rather limited authority to study and recommend remedial actions on pollution problems to the broader water quality standard-setting and enforcement powers of the Delaware and Susquehanna commissions.

A handful of flood control and planning compacts, created generally in response to the federal flood control program of the 1930s in order to promote cooperative state action in that effort, now largely appear to be dead letters.

The federal-interstate compacts on the Delaware and Susquehanna Rivers are what I have characterized as comprehensive regulatory and project development compacts. Under a general directive in the Delaware River Basin Compact to "adopt and promote uniform and coordinated policies for water conservation, control, use, and management in the basin [and to] encourage the planning, development, and financing of water resources projects according to such plans and policies." The Delaware River Basin Commission is charged with formulating a "comprehensive plan" for the development and use of the basin's waters, and is endowed with very broad planning, licensing, regulatory, and project construction powers to aid in implementing the basin plan. The Susquehanna River Basin Compact follows a similar format.

In my study for the National Water Commission I evaluated the effectiveness of existing water compacts and compared the compact mechanism to other institutional approaches to river basin management. With respect to compact commissions established to monitor or administer water allocations or to carry out limited functions associated with joint planning or certain aspects of the states' role in federal flood control programs, I concluded that the performance of most of them was generally adequate given their relatively modest objectives.

In the water quality area, efforts through interstate compact mechanisms to deal with water pollution problems generally appeared to have been no better or worse than the overall national effort, and I could draw no general conclusions as to the impact of the compact approach on particular rivers, although I was impressed with the efforts of ORSANCO on the Ohio River.[16]

As to the federal-interstate compact approach, it was, and is, my enthusiastic conclusion that the Delaware River Basin Commission (DRBC) has compiled an impressive record of accomplishment, much of which I am convinced would not have resulted but for the existence and efforts of DRBC.

16. For an analysis of operative and proposed compacts dealing primarily with water pollution control see Chambers, *Water Pollution Control Through Interstate Agreement*, 1 U. CAL. DAVIS L. REV. 43 (1969) and Curlin, *The Interstate Water Pollution Compact—Paper Tiger or Effective Regulatory Device*, 2 ECOL. L.Q. 333 (1972).

In addition to the evaluation of the record of various compacts, I also examined the potential of the compact as an institutional mechanism for future water resources management against six legal and political criteria:

> 1. The availability and adequacy of legal and administrative authority that may be exercised by compact to deal with problems deemed important by the compacting parties;
>
> 2. The degree of difficulty in creating, implementing, and altering a compact program, including the ability to match function and area and to respond expeditiously to changing needs and conditions;
>
> 3. The degree to which the compact affords meaningful public participation in planning and the formulation of decisions;
>
> 4. The ability to facilitate and achieve productive cooperation and coordination among federal, state, local, and private interests;
>
> 5. Political accountability and responsiveness; and
>
> 6. The ability to establish regional visibility and to attract adequate executive leadership and staff.

In addition I considered a number of traditional arguments sometimes advanced against interstate compacts and found them either to be unpersuasive or generally inapplicable to water compacts. In light of my study, I concluded that the compact mechanism, specifically the federal-interstate variety, affords the optimum permanent institutional approach to regional water problems.

Perhaps the chief advantage of the compact approach to river basin management is its adaptability to the particular needs of a basin. It is axiomatic that each river basin has its distinctive physical and political characteristics; such peculiarities demand specific legal approaches. Since a compact must be the product of agreement among the states, it can be shaped as the states desire, in accordance with their particular regional philosophy of appropriate intergovernmental relations. It can be targeted on a single problem, such as water quality management, or may seek comprehensive, multipurpose goals. Similarly, it may create a permanent administrative entity and endow that entity with such powers as the states consider appropriate to accomplish their regional objectives, provided they are consistent with broad national water resource goals.

Although the states generally possess ample authority to confer adequate powers on compact commissions, it is difficult to disagree with one characterization of most traditional water compacts as creatures of "states jealous of their prerogatives and niggardly in their grants of authority."[17] With the exception of the Delaware and Susquehanna compacts, and a few others, the authority granted to compact commissions has been extremely limited and their funding, accordingly, as anemic.

What this historic pattern unfortunately seems to reflect is a lack of commitment on the part of the states to any cooperative regional effort that would require a significant delegation of power to an interstate entity they may not be able to wholly control. The irony of this approach is that the more successful the states have been in hobbling compact agencies in order to protect their sovereign prerogatives, the more likely it has become that regional water problems will be dealt with by federal programs wholly superseding state or local authority. If the states, and particularly the western states, are truly determined to have a stronger role in regional water development, it seems clear to me that they must recognize and utilize the potential of the compact as a mechanism for positive action on regional water problems and confer adequate powers on compact agencies to deal with such problems effectively.

I find little substance to the argument sometimes advanced that the endowment of compact commissions with broad powers will simply add an unnecessary or undesirable layer of government between existing state and federal water agencies. Both state and federal water officials often appear apprehensive that some of their responsibilities might be usurped by a regional agency, a reaction which might be termed the bureaucratic version of the "territorial imperative." Federal agencies also contend that such regional entities should not be allowed to preempt federal agency responsibilities for national water programs allegedly requiring uniform, functional implementation throughout the Nation. This latter argument assumes that because the Congress has previously filled the gap left by the states, a point of no return has been reached. But the Bureau of Reclamation, the Corps of Engi-

17. H. ODUM & H. MOORE, AMERICAN REGIONALISM 206 (1938).

neers, and the other federal executive agencies and independent regulatory commissions involved in water matters were established by Congress to meet specific national needs at particular times. There is nothing to preclude Congress from now deciding that changed conditions or national sentiment—and I think that there is ample current evidence of both—dictate that other institutional arrangements, such as regional compact commissions, may be a more appropriate way to implement national water policies than is continued wholesale reliance on federal agencies.

To the extent that there may be a need for overall national policies on certain water resource matters, there arises a distinctly different issue from the question of the institutional means by which such policies should be carried out. It is clear that Congress may utilize any agent it chooses to implement national programs. Hence, if Congress should elect to have the national flood control program, or the reclamation program, or the licensing of nonfederal dams carried out by joint federal-state regional entities of some kind, there is no constitutional reason why that could not be done. The national policies would still be articulated in federal legislation binding on the regional entities, so there would be no subversion of the paramount national interest. However, if compacts are to be used in attacking regional water quality and other water resource management problems, it will be essential that Congress scrutinize each compact to determine whether it implements the national programs provided for in federal law or may serve only to impede them. For example, with regard to regional water quality control efforts, the Environmental Protection Agency has aptly recognized that although "compacts have already demonstrated their usefulness, and . . . have the potential for playing a more important role," nevertheless, "a compact which established dilatory procedures, or which provided an inadequate commitment of resources from the signatory states, could have the effect of delaying the establishment of enforceable standards or plans."[18]

18. *Hearings on S.907 Before the Senate Committee on the Judiciary*, 92d Cong., 1st Sess. 87, 91 (1971), in which the Senate Public Works Committee expressed similar concern in connection with the proposed Interstate Environment Compact Act. *See also* S. REP. No. 92-643, 92d Cong., 2d Sess. (1972).

A major criticism of compacts is that they require an inordinately long time to negotiate and effectuate by state ratification and Congressional consent. Although the track record of the various kinds of water compacts is uneven on this score, there is substantial evidence to support a conclusion that the compact is not inherently more cumbersome and time-consuming in its creation and change than other institutional approaches to comparable water resource problems. Most delays appear to have been caused by specific policy controversies which are not unique to the use of the compact mechanism, but also plague efforts at problem solving through interagency committees, river basin planning commissions, and Congressional legislation. The fact that it took the Corps of Engineers and the Bureau of Reclamation 16 months to consummate a one-page power marketing agreement on the Missouri River is illustrative. I should also note that 12 years elapsed between the filing of Arizona's complaint in the Supreme Court in 1951 in *Arizona v. California* until the Court's decision in 1963,[19] and the post-decree proceedings to resolve the question of "present perfected rights" are still pending.

The recent experiences with the Delaware and Susquehanna compacts demonstrate that even relatively complex interstate agreements can be negotiated and approved with impressive swiftness, given proper incentive on the part of the states. An obvious problem, however, is that a compact must find acceptance in the legislatures of all the compacting states and Congress, thus affording multiple opportunities for delay or frustration of the compact plan. Similarly, the rigid constraints which have been placed on compact agencies by their creators in some cases have necessitated a return to the legislatures for additional authority with the concomitant delays associated with that process. Nevertheless, given the implementation of recommendations made to the National Water Commission for (1) a more explicit statement of Congressional policy on water compacts, (2) more constructive federal participation in compact negotiations, and (3) some liberalization of the state ratification and Congressional consent process, the potential for significantly expediting the compact negotiation and approval process appears excellent.

19. 373 U.S. 546, 550-51 (1963).

Finally, I want to emphasize why I recommended to the National Water Commission that the federal-interstate compact should be endorsed as the preferred permanent institutional arrangement for regional water resources planning and management.

The great goal of river basin planning and management over the last half-century has been to achieve meaningful coordination of federal and nonfederal water resources plans and actions. With respect to interstate waters, the search has also been for a mechanism to provide a regional perspective to the development and implementation of a comprehensive plan. The interstate compact always has provided a theoretical means for achieving those two objectives and, starting about 30 years ago, began to be used to provide the permanent administrative mechanism lacking in more informal approaches, such as interagency committees. However, the compact approach has traditionally evidenced important shortcomings. A major one relates to the role of the federal government. The broad constitutional powers of the federal government over the development, use, and management of the nation's water resources inevitably make it the controlling force in the success or failure of cooperative state efforts to deal with regional water problems. It is ever present, either as the provider of essential hydrologic data, as a de facto river master through its construction and control of reclamation and flood control projects or the Federal Power Commission's licensing of nonfederal hydroelectic projects, or as the ultimate regulator of activities affecting a river's quality through the Environmental Protection Agency's administration of the federal water pollution control program. Where its land ownership is significant, as in the West, its claims to water for consumptive use on its lands or for minimum streamflows to maintain important in-stream environmental values is a significant aspect of the regional water picture. Similarly, the activities carried out on federal lands by the land management agencies or their private licensees, lessees, and permittees have an important impact on water quality. Yet the federal government has neither been a party to the traditional compacts nor been formally committed in any way to support the compact programs.

Most of the water allocation compacts and several of the

older pollution control compacts merely invite the President to appoint a federal representative to sit as a neutral, nonvoting chairman of these commissions, occasionally granting him the right to cast decisive votes when the states cannot agree. But the federal government in those situations appears to be little more than an honored observer, without obligation to see that federal plans or programs in the region are coordinated to the maximum extent feasible with those of the states. Obviously, a compact plan for an interstate river basin cannot be "comprehensive" if it does not encompass federal water planning as an integral part of the effort, nor can it serve any meaningful function unless all interests in a basin, and particularly the federal government, are committed to carry out their respective programs in accordance with it.

A second major shortcoming is that the member states of the traditional interstate compacts do not appear to have been really committed to a regional approach to river basin problems. Their participation has been cautious and hesitant, concerned primarily with preservation or promotion of their individual interests. Thus, one commentator has concluded that "the interstate compact approach to river basin development therefore tends to accentuate state and local parochialism at the expense of regional and national goals in water use policy."[20] In short, the traditional interstate compact approach has been "regional" in name only.

It was against this generally discouraging backdrop of interstate compact performance that the federal-interstate compact on the Delaware emerged in 1961 to provide both (1) the long-sought linkage between federal and state planning and program implementation,[21] and (2) the regional emphasis lacking in earlier compact approaches. The Delaware River Basin Compact embodied two significant innovations in the compact approach to interstate river basin problems. First, it estab-

20. W. BARTON, INTERSTATE COMPACTS IN THE POLITICAL PROCESS 177 (1965).

21. The Compact preamble states that its foundation rationale was that unified regional development and control were essential because of "the duplicating, overlapping, and uncoordinated administration of some forty-three State agencies, fourteen interstate agencies, and nineteen Federal agencies which exercise a multiplicity of powers and duties resulting in a splintering of authorities and responsibilities." Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688 (1961) [hereinafter cited as DRBC].

lished a structure for meaningful comprehensive planning by including the United States as a signatory party and imposing significant coordinating constraints on both the states and the federal government. Second, it assured a more regionally-oriented approach through a generous grant of powers to the Delaware River Basin Commission (DRBC) and by providing for the injection of a broader perspective of basin problems through the federal government's active participation in the compact program.

To assure that development projects in the basin are in general conformity with the comprehensive plan developed by the DRBC, section 3.8 of the Compact confers a "licensing" power on the DRBC by providing that "no project having a substantial effect on the water resources of the basin shall hereafter be undertaken by any person, corporation or governmental authority unless it shall have been first submitted to and approved by the Commission."[22] The Commission must approve any project which it finds "would not substantially impair or conflict with the comprehensive plan," and a project not meeting that standard may be either disapproved or approved subject to modification to make it consistent with the plan.

In addition to its comprehensive licensing authority, the DRBC is granted broad regulatory and financing powers (other than the power to tax) and is even authorized to construct, develop, operate, and maintain "all projects, facilities, properties, activities and services, determined by the commission to be necessary, convenient or useful for the purposes of [the] compact."[23]

The DRBC's powers have been exercised in consonance with "the purpose of the signatory parties to preserve and utilize the functions, powers and duties of existing offices and agencies of government to the extent not inconsistent with the compact," and the Commission is "authorized and directed to utilize and employ such offices and agencies for the purpose of this compact to the fullest extent it finds feasible and advantageous."[24] Thus each state's authority is preserved to

22. *Id.*
23. DRBC at §3.6(a).
24. DRBC at §1.5.

the maximum extent compatible with the Compact's objectives.

One of the unique features of the Compact is the DRBC's power to allocate the waters of the basin among the signatory states in accordance with the doctrine of equitable apportionment,[25] a provision designed as an alternative to (1) what was considered to be the relatively inflexible apportionments made by the traditional water allocation compacts and (2) litigation in the United States Supreme Court. This allocation power, as well as all other DRBC authority, may not be used to adversely affect the rights and obligations of the states under a 1954 Supreme Court decree,[26] other than by unanimous agreement.[27] The DRBC's power to make interstate allocations of water is supplemented by its authority to regulate withdrawals and diversions of surface and groundwaters in certain situations.

The Compact mandates interstate and federal-state cooperation through the constraints which DRBC approval of the comprehensive plan places on the water resource programs of the signatory parties. All water projects in the basin are required to conform to the DRBC's comprehensive plan. Specifically, with respect to federal projects, a reservation of the consent legislation provides that "whenever a comprehensive plan, or any part or revision thereof, has been adopted with the concurrence of the member appointed by the President, the exercise of any powers conferred by law on any officer, agency, or instrumentality of the United States with regard to water and related land resources in the Delaware River Basin shall not substantially conflict with any such portion of such comprehensive plan."[28] Since the content of the comprehensive plan is determined by majority vote of the DRBC, on which the federal government has a single vote with each of the state representatives, Congress has provided an escape valve in its consent legislation which provides that the federal government

25. DRBC at §3.3.

26. New Jersey v. New York, 347 U.S. 995 (1954).

27. DRBC at § §3.3(a), 3.4, 3.5.

28. DRBC at §15.1(S)(2). "Concurrence" of the federal member is presumed unless he files a notice of nonconcurrence with the Commission within 60 days after notice of action with respect to the comprehensive plan.

need not shape its projects to a plan with which it is not in agreement, authorizing the President to "suspend, modify or delete" any provision of the comprehensive plan affecting federal interests when he "shall find . . . that the national interest so requires."

The Compact's procedural requirements are designed to afford maximum opportunity for the expression of public opinion on significant matters prior to DRBC decisions. Thus public hearings are required as a precondition to almost all important DRBC actions, and all meetings are required to be open to the public.[29] In addition, the Commission is authorized, but not directed, to establish advisory committees representing a broad spectrum of water resource interest groups.[30]

The DRBC has compiled an impressive record of accomplishments over the past 15 years[31] which are particularly noteworthy when viewed against the obstacles it has faced, particularly its role in breaking much new ground as the first federal-interstate compact, the broad responsibilities it has been delegated under the Compact in areas which all merit serious attention, its relatively modest financing, and the distraction of the 1965-1966 Northeast drought emergency which commanded much of its time and resources in those formative years. Nevertheless, it has moved forward in many areas. It played an important role in alleviating the 1965-1966 Northeast drought crisis. It has developed a comprehensive plan for the basin and has reviewed some 2500 proposed projects for their compatibility with that plan. A basin-wide water quality control program has been established, including regional sewage collection and treatment works. The DRBC has assumed responsibility for the cost of nonfederal water supply features in federal reservoirs in the basin, thus serving as a middleman between the Corps of Engineers and state and local ultimate users. As a corollary to that program it has instituted charges for basin-wide water withdrawals for consumptive use in excess

29. DRBC at § § 13.1, 14.2, 14.4(b).

30. DRBC at §3.10.

31. For a general review of DRBC operations, see MUYS, *supra* note 14, at 157-92; *see also* U.S. ADVISORY COMM. ON INTERGOVERNMENTAL RELATIONS, MULTI-STATE REGIONALISM 95-96, 99-108, 111-20 (1972). The DRBC publishes an excellent annual report detailing the highlights of its operations.

of 1971 levels. It has made studies of water supply and demand in the basin, a major component of which is a Commission-mandated master power plant siting study prepared by electric utilities in the basin. The DRBC has laid the groundwork for comprehensive flood plain regulation. In recent years, it has placed increasing emphasis on environmental values, and in 1975 it took the almost unprecedented step of recommending Congressional deauthorization of the major proposed reservoir project in the basin, the controversial Tocks Island Dam. It has been a useful mechanism for facilitating public participation in the planning of projects in the basin and is providing a basin-wide point of view for balancing diverse values and exploring various alternatives to proposed projects.

Both in theory and practice the Delaware River Basin Compact has shown that disparate federal, state, and local elements in water resources development can be forged into a comprehensive, cooperative, and consciously directed regional program. While it is too early to tell whether the similar compact on the Susquehanna will be as successful, at this point the framework for regional coordination under the federal-interstate compact mechanism appears unrivalled by any existing or proposed institutional arrangement.

Although some jurisdictional problems in the federal-interstate compact approach are still in the process of being resolved, this compact approach justifies serious and thoughtful consideration by other regions. It merits particular consideration in the western public land states where the federal government's dominant role as landowner and water master makes the goals of the federal-interstate compact particularly relevant. It is meaningless to talk of comprehensive planning and management of water and land resources in the West if the federal government is not to be an integral part of the effort. Effective water and land use planning requires a fully cooperative, coordinated effort among the federal government, the states and, perhaps most important, the Indian tribes who are probably holding the biggest and most secure water rights in the West. Almost all of the water allocation compacts were agreed to before the full impact of the so-called "reservation doctrine" of federal and Indian water rights was announced by

the Supreme Court in *Arizona v. California* in 1963.[32] Consequently, I think it safe to assume that the estimated water requirements which undoubtedly formed the basis of the allocations to the compacting states were grossly understated for those states with substantial areas of reserved federal and Indian land. I know from my National Water Commission study that this was the case with respect to the Upper Colorado River Compact. Whether the conflicting equities in those situations can be fairly balanced remains to be seen. What is clear is that federal and Indian claims should be fully reflected in, and bound by, any future efforts at compact allocations or renegotiation of present allocations.

Similarly, future compact allocations or reallocations must reflect not only federal rights and obligations as landowner and trustee of Indian rights, but should be made with careful consideration, to the extent possible, of the impact of the national water pollution control program on consumptive use water rights. It would be idle to allocate quantities of water to a particular state or states if physical and geographic factors or use patterns, coupled with the limitation of water quality control standards under the Federal Water Pollution Control Act, would never permit those waters to be put to maximum beneficial use.

If the federal government were a signatory party to a compact and therefore bound by it the same as each of the states, to the extent constitutionally permissible, the federal representative would serve as the focal point for all federal interests, whether consumptive use rights, in-stream and other environmental values, water quality control, flood control, project construction and licensing, and the like. That kind of arrangement would compel coordination and sanity in comprehensive river basin development, and I would hope it would be embraced by both the states and the federal government.

However, in conversations with state water officials about the prospects of such an approach in the West I have sensed an attitude of mixed despair and hostility toward the concept, apparently a residual legacy of antipathy toward the federal dominance of land and water use policy in the West.

32. 373 U.S. 546 (1963).

While I can understand this attitude, I believe that it is shortsighted. The fact is that old "States' Rights" arguments are futile, since the federal government, both as a legal and practical matter, wields paramount power in the West in land and water (and now air)[33] resources. Although periodic gestures of comity and cooperation are made by various federal officials, they are only as substantial as the tenure of those officials. What is needed is a Congressionally approved regional institutional arrangement which will mandate cooperative, coordinated action by federal agencies in conformity with the views of the affected basin states, while necessarily reserving the federal government's right to assert the paramount national prerogative in appropriate situations. That vehicle, in my view, is the federal-interstate compact now operating so successfully on the Delaware.

III. CONCLUSION

Over 50 years ago Harvard law professor (later Supreme Court Justice) Felix Frankfurter collaborated with Harvard Dean James M. Landis in a classic article advocating the "imaginative adaptation of the compact idea" to regional problems. Their conclusion is appropriate to our times:

> The overwhelming difficulties confronting modern society must not be at the mercy of the false antithesis embodied in the shibboleths "States-Rights" and "National Supremacy." We must not deny ourselves new or unfamiliar modes in realizing national ideals. Our regions are realities. Political thinkers must respond to these realities. Instead of leading to parochialism, it will bring a fresh ferment of political thought whereby national aims may be achieved through various forms of political adjustments.[34]

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33. Under the EPA's nondeterioration regulations promulgated under the Clean Air Act, as well as even more stringent statutory amendments which have been proposed, constraints on future development in the public land states are dependent in many cases on the impact of various activities on certain classes of federal lands. *See* 40 C.F.R. §52.21 (1976); H.R. 10498, §108 & S. 3219, §6, 94th Cong., 2d Sess. (1976) (House and Senate versions of the Clean Air Act Amendments of 1976). Although each body passed its version of the bill, the Conference Committee Report was not acted on before adjournment. H. REP. No. 94-1242, 94th Cong., 2d Sess. (1976).

34. Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 729 (1925).

Appendix:
Compacts Relating to the Planning and Management of Interstate Water Resources

I. WATER ALLOCATION COMPACTS

Arkansas River Compact, Pub. L. No. 81-82, 63 Stat. 145 (1949) (signed by the States 14 Dec. 1948).

Arkansas River Basin Compact, Pub. L. No. 89-789, §107(a), 80 Stat. 1409 (1966) (signed by the States 31 Mar. 1965).

Arkansas River Basin Compact, Pub. L. No. 93-152, 87 Stat. 569 (1973) (signed by the States 16 Mar. 1970).

Bear River Compact, Pub. L. No. 85-348, 72 Stat. 38 (1958) (signed by the States 4 Feb. 1955).

Belle Fourche River Compact, Pub. L. No. 78-236, 58 Stat. 94 (1944) (signed by the States 18 Feb. 1943).

Canadian River Compact, Pub. L. No. 82-345, 66 Stat. 74 (1952) (signed by the States 6 Dec. 1950).

Colorado River Compact, COLO. REV. STAT. ANN. § §37-61-101 *et seq.* (1973), approved by Congress, Pub. L. No. 70-642, §13, 45 Stat. 1057, 1059 (1928) (signed by the States 24 Nov. 1922). Text may be found at 70 Cong. Rec. 324 (1928).

Costilla Creek Compact, *as amended,* Pub. L. No. 88-198, 77 Stat. 350 (1963) (signed by the States 30 Sept. 1944).

Kansas-Nebraska Big Blue River Compact, Pub. L. No. 92-308, 86 Stat. 193 (1972) (signed by the States 25 Jan. 1971).

Klamath River Basin Compact, Pub. L. No. 85-222, 71 Stat. 497 (1957).

La Plata River Compact, Pub. L. No. 68-346, 43 Stat. 796 (1925) (signed by the States 27 Nov. 1922).

Pecos River Compact, Pub. L. No. 81-91, 63 Stat. 159 (1949) (signed by the States 3 Dec. 1948).

Republican River Compact, Pub. L. No. 78-60, 57 Stat. 86 (1943) (signed by the States 31 Dec. 1942).

Rio Grande Compact, Pub. L. No. 76-96, 53 Stat. 785 (1939) (signed by the States 18 Mar. 1938).

Sabine River Compact, Pub. L. No. 83-578, 68 Stat. 690 (1954) (signed by the States 26 Jan. 1953), *as amended,* Pub. L. No. 87-418, 76 Stat. 34 (1962).

Snake River Compact, Pub. L. No. 81-464, 64 Stat. 29 (1950) (signed by the States 10 Oct. 1949).

South Platte River Compact, Pub. L. No. 69-37, 44 Stat. 195 (1926) (signed by the States 3 May 1923).

Upper Colorado River Basin Compact, Pub. L. No. 81-37, 63 Stat. 31 (1949).

Upper Niobara Basin Compact, Pub. L. No. 91-52, 83 Stat. 86 (1969).

Yellowstone River Compact, Pub. L. No. 82-231, 65 Stat. 663 (1951) (signed by the States 8 Dec. 1950).

II. SINGLE PURPOSE POLLUTION CONTROL COMPACTS

New England Interstate Water Pollution Control Compact, Pub. L. No. 80-292, 61 Stat. 682 (1947).

New York Harbor (Tri-State) Interstate Sanitation Compact, Pub. L. No. 74-62, 49 Stat. 932 (1935).

Ohio River Valley Water Sanitation Compact, Pub. L. No. 76-739, 54 Stat. 752 (1940).

Potomac River Basin Compact, Pub. L. No. 76-93, 54 Stat. 748 (1940) (signed by the States 16 Apr. 1940), *as amended*, Pub. L. No. 91-407, 84 Stat. 856 (1970).

Tennessee River Basin Water Pollution Control Compact, Pub. L. No. 85-734, 72 Stat. 823 (1958).

III. PLANNING AND FLOOD CONTROL COMPACTS

Connecticut River Flood Control Compact, Pub. L. No. 83-52, 67 Stat. 45 (1953).

Great Lakes Basin Compact, Pub. L. No. 90-419, 82 Stat. 414 (1968).

Merrimack River Flood Control Compact, Pub. L. No. 85-23, 71 Stat. 18 (1957).

Red River of the North Compact, Pub. L. No. 75-456, 52 Stat. 151 (1938) (signed by the States 23 June 1937).

Thames River Flood Control Compact, Pub. L. No. 85-526, 72 Stat. 364 (1958).

Wabash Valley Compact, Pub. L. No. 86-375, 73 Stat. 695 (1959) (approved by Indiana on 26 Feb. 1959 and by Illinois on 20 Mar. 1959).

Wheeling Creek Watershed Protection and Flood Prevention District Compact, Pub. L. No. 90-181, 81 Stat. 553 (1967) (approved by Pennsylvania on 2 Aug. 1967 and by West Virginia on 1 Mar. 1967).

IV. MULTIPURPOSE REGULATORY COMPACTS

Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 689 (1961).

Missouri-Illinois Bi-State Compact, Pub. L. No. 81-743, 64 Stat. 569 (1950), *as amended,* Pub. L. No. 86-303, 73 Stat. 583 (1959).

Susquehanna River Basin Compact, Pub. L. No. 91-575, 84 Stat. 1509 (1970).