

Interstate Water Compacts: Partnerships for Transboundary Water Resource Management

Cindy G. Roper

AUTHOR: Doctoral Student, Strom Thurmond Institute, Clemson University, Clemson, SC, 29634, USA.

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ABSTRACT. While there are both successes and challenges related to the use of interstate water compacts, in their most effective forms, they allow states to take a comprehensive, holistic approach to water management. Successful compacts tend to encompass the natural hydrologic boundaries of the water basin. They are more likely to utilize a commission type governance structure with sufficient authority to carry out the mission and goals of the compacting agreement. Successful compacts are flexible and allow for future developments (including climate change) while being cognizant of the need to protect and enhance the environment. They are also sensitive to the needs and desires of various stakeholders, including federal, state, and local governments as well as non-governmental organizations.

Water compacts also face a variety of challenges. They must answer to a wide and diverse constituent base, often with conflicting interests. Stronger states can and do attempt to “bully” other states, severely limiting or eliminating altogether the usefulness of the compact. Governance structures that fail to integrate the interests of both states into a single body simply make the compact into an arena where small scale water wars can be fought.

INTRODUCTION

Of the fifty states that comprise the United States of America, only two – Alaska and Hawaii—do not share a ground or surface water resource with another state. Accordingly...the forty-eight contiguous states fall into one of two categories: those states that are (or have been) involved in an interstate water conflict or those states that are going to be involved in an interstate water conflict (Sherk, 2005, p.765).

That statement was made nearly ten years ago. Since then, increasing population, climate change and new technologies are putting even more pressure on water resources. States are having to re-evaluate how they

manage these assets, both intrastate and those that are shared with neighboring states. As part of this process, state officials need to develop a clear picture of what future needs and conflicts may emerge and how these might be mitigated. They also need to prepare flexible mechanisms for dealing with the uncertainty that accompanies almost any planning effort. Without the means to successfully address transboundary water issues, options are limited and too often result in undesirable outcomes.

The purpose of this paper is to examine federal-interstate compacts as a possible solution to both existing and emerging issues related to shared water resources. It provides an overview of the advantages and challenges of utilizing interstate compacts as well as giving examples of compacts that have experienced various rates of success. The paper concludes with the possibility of a future compact for the Savannah River Basin.

The information in this paper is especially relevant for those who are charged with providing solutions to problems emerging from shared water resources. It provides an alternative to piecemeal administration that is not equipped to deal with problems that require the broad participation of other parties to solve. Overall, this paper illustrates a mechanism that allows for extensive stakeholder participation within a comprehensive, flexible framework that has been shown to work in complex transboundary water resource situations.

INTERSTATE WATER COMPACTS

Interstate compacts are authorized under Article 1, §10, Clause 3 of the U.S. Constitution as a means for states to enter into agreements that might affect federal prerogatives. This clause benefits the federal government, relieving it of responsibility for problems better left to the province of states. At the same time, it allows states to exercise authority over issues within their purview while still providing a method for states and the federal government to “solve mutual problems in a

collective fashion” (Kearney & Stucker, 1985, p. 210).

There are compacts to address any number of issues (Florestano, 1994; Frankfurter & Landis, 1925) but, as discussed here, compacts are cooperative agreements for sharing transboundary water resources. Compacts are negotiated by member states, ratified by state legislatures, sent to Congress for ratification, and signed into law by the President. After Congressional approval, a compact cannot be unilaterally amended or appealed by any of the signatory parties. Compacts are binding on all citizens of the participating states and if the terms of the compact are not honored, the injured party can bring suit in state or federal court (Florestano, 1994; Frankfurter & Landis, 1925).

Compacts can be relatively simple or they can be comprehensive documents that can consist of nearly unlimited combinations of goals, purposes, and organizational structures (Frankfurter & Landis, 1925). Compacts provide a principle means by which states can allocate water from common river systems, they help provide for efficient use and equitable apportionment of shared resources and they serve to administer rules and develop strategies to insure compliance (Schlager & Heikkila, 2009).

There are two types of interstate compacts. The first is a compact between states, ratified by the states’ legislatures and by Congress but without the federal government as an active participant. In the second type, the federal-interstate compact, the federal government is an active member of the compact. There are currently seven federal-interstate compacts; four of which deal with transboundary water resource issues (Zimmerman, 2012).

SUCCESSFUL INTERSTATE COMPACTS

Successful interstate water compacts share certain characteristics. For example, viable compacts must be able to meet and negotiate changing conditions; therefore, they must be designed with flexibility in mind. Successful compacts are often those specifically created for individual circumstances. Successful compacts are those that can be implemented with few external constraints. Another plus for successful compacts is that they routinely involve water resource management experts who have a better understanding of technical data, long-term outcomes, and different available options (Tarlock, cited in Stephenson, 2000).

Many successful compacts utilize commissions as a major element of their governance structure (Mandarano, Featherstone, & Paulsen, 2008). These commissions are, as Stephenson (2000) says, “...how interstate water compacts make their greatest contribution to water resource management” (p.99). These permanent

commissions provide authority and structure for the agreements (Stephenson, 2000), gather information, meet and discuss water problems, develop regulations to administer compacts, monitor water use, and mediate conflict (Schlager & Heikkila, 2009). Compact commissions also allow for the participation of stakeholders in decision making and for transparency in processes and outcomes (See the Delaware River Basin Compact, 1961). Compacts are also useful in promoting and maintaining relations between states themselves and between states and the federal government. Comity, or as Professor Dan Taylor of Colorado State University describes it, “the need for courtesy and respect when negotiating among equals” (McClurg, 1997, p. 6) is an essential element in building collaborative water partnerships.

Adequate boundaries are also essential for the success of water compacts. No matter what the measure, excellent management in one state can be nullified by poor management in adjacent states sharing the same river basin (Dellapenna, 2006). Therefore, interstate management within the hydrological boundaries of a river basin is substantially more likely to succeed than management utilizing political boundaries.

The Delaware River Basin Compact

The Delaware River Basin Compact (DRBC), the first federal-interstate compact developed, has emerged as a model compact (Dellapenna, 2006; Zimmerman, 2012). In this compact, participating states acknowledge not only the realities of future population growth and development but the interrelatedness of water resources and the need to work together to resolve the issues that affect them all. The DRBC also recognizes the overarching importance of allocating water equitably, without regard for artificially imposed borders; “...to apply the principle of equal and uniform treatment to all water users who are similarly situated and to all users of related facilities, without regard to established political boundaries” (emphasis added) (Delaware River Basin Compact, 2009, Article 1, § 1.3, ¶ (e)).

One of the major strengths of this compact is that it is administered by a commission with broad powers to carry out its responsibilities. These powers include the critical ability to borrow money and issue bonds, giving the commission the wherewithal to maintain a necessary amount of independence. Other successful aspects of the DRBC include the ability to aid in the coordination and integration of federal, state, municipal, and private agencies and the development of a comprehensive plan addressing both immediate and long range water resource needs (Delaware River Basin Compact, 2009). The success of the DRBC was such that, in 1970, it became the template for the Susquehanna River Basin Compact (SRBC) (Dellapenna, 2006).

COMPACTING CHALLENGES

Compacts can and do fail. There are a variety of barriers to developing and implementing successful interstate water compacts. There are often diverse cultural, political, historic and economic priorities that each group brings to the negotiations. Parties to these types of agreements must often cooperate and collaborate with others of widely divergent interests (Mulroy, 2008).

Developing and implementing an interstate compact can be a complicated, expensive, and time consuming project (Meyers cited in Stephenson, 2000). Because of often substantial federal interests in the areas covered by these compacts, these agreements must also account for the participation of these and other stakeholders (Mandarano et al., 2008; Sherk, 2005). In addition, lack of accurate data and faulty or no planning for future development can threaten to derail elements of a compact years down the road (McClurg, 1997).

The ACT and ACF Compacts

The Alabama-Coosa-Tallapoosa (ACT) and the Apalachicola-Chattahoochee-Flint (ACF) compacts are examples of failed efforts to find a solution to a growing water crisis. Although deadlines were extended several times, the states were unable to reach a compromise and no effective compact has emerged (Dellapenna, 2006). This failure can be attributed to several problems associated with water compacts. Primarily, the states relentlessly protected their own interests and failed to negotiate in good faith (Mandarano et al., 2008; Stephenson, 2000). In addition, these compacts (ACT & ACF) lacked many of the attributes that made the DRBC and the SRBC so effective (Dellapenna, 2006). For example, while the DRBC Commission has the power to allocate waters to and among the compact states and to impose conditions, the ACT/ACF Commission was limited to planning, coordinating, monitoring, and making recommendations concerning the water resources of the basin (Alabama-Coosa-Tallapoosa River Basin Compact, 1997; Apalachicola-Chattahoochee-Flint River Basin Compact, 1997; Delaware River Basin Compact, 2009). Another problem with the ACF compact centers on the treatment of federal agencies (Dellapenna, 2006). Given the huge federal expenditures in the basin, in excess of \$1.5 billion just for the Army Corps of Engineers, the proposed compact called only for minimal federal participation, an unacceptable situation for the U.S. Department of Justice (Reno cited in Sherk, 2005).

The Colorado River Compact

Not the stunning success of the Delaware River Basin Compact nor the abysmal failure of the ACT/ACF, the 1922 Colorado River Compact continues to be a source of controversy. However, the number and scope of

“agreements, contracts, treaties, laws, and court decisions” (McClurg, 1997, p.7) that make up “the law of the river” governing the Colorado today, indicate that there was a great deal of ground not covered in the original compact. These topics include environmental issues, increasing development, growing water shortages, water transfers, the rights of Native Americans to water, and a possible dispute with Mexico over water promised by treaty in 1944.

Other Challenges

Other problem spots for water resource management include the Great Lakes and the Catawba River between North and South Carolina. Although the Great Lakes Basin Compact has been revised to reflect fears of predatory interbasin transfers, it still lacks a strong commission with adequate authority. On the Catawba, it appears that neither state is willing to compact and disputes have already erupted, lessening the chance of a viable compact in the near future (Dyckman, 2008).

A SAVANNAH RIVER COMPACT?

The Savannah River begins in North Carolina, forms the boundary between Georgia and South Carolina and empties into the Atlantic at the port of Savannah. The river basin has a number of important issues that will either require cooperative efforts between the states or may escalate into litigation. Among these are water quality issues, drought issues, economic development and population growth, fish and wildlife issues, regulatory issues and the Savannah Harbor Expansion Project (Georgia Environmental Protection Division & South Carolina Department of Health and Environmental Control, n.d.; Savannah River Basin Advisory Council, n.d.).

South Carolina’s Approach to the Savannah River Basin

In a 2004 report, the Governor’s Water Law Review Committee (GWLRC) supported a compact with Georgia as a viable method to apportion the resources of the Savannah River Basin. However, while recognizing that both states have an interest in the entire river and that there is a need for consistency between the states in areas such as water quality standards and FERC relicensing (Governor's Water Law Review Committee, 2004), it does not appear that there are any recommendations for a strong, resilient, basin-wide governing body similar to those found in more successful water compacts. In fact, the GWLRC specifically suggests that the compact utilize various protocols that would “obligate each state to manage its basin resources in a consistent manner” (Governor's Water Law Review Committee, 2004, p.24) but carefully avoids any commitment to common

governance. That being said, the GWLRC has highlighted a number of elements that may contribute to the development and ratification of a successful Savannah River Compact.

When discussing the allocation of the usable water, the Committee acknowledges the many stakeholders involved, including the significant role of the Army Corps of Engineers (USACE or CoE) and other federal agencies. In case of drought, cooperation and coordination with the CoE will be essential since they control significant resources on the river. Another positive element from the GWLRC report is the recognition of the importance of accurate data. Unlike the Colorado River Compact, where the river was over-allocated from the beginning, having a realistic estimate of the available water supply can only enhance the working of any compact that may emerge.

The GWLRC proposal also advocates addressing the looming issue of interbasin transfers. It specifically notes that while Greenville and Beaufort-Jasper together are permitted to access 210 million gallons per day from the basin, Georgia also has the potential for a very large transfer from the Savannah. Again, inclusion of the CoE, who also oversees a major supplier of water to Atlanta, Lake Lanier, can, at the very least increase the scope, accuracy and reliability of the knowledge available and significantly improve any compacting efforts.

Although the GWLRC acknowledges that various state and federal agencies with interests in the environment conduct activities within the Savannah River Basin, there is no evidence of real concern about the environment itself. The only mention of the Clean Water Act is related to FERC relicensing and there is one mention of endangered species. In reality, the Clean Water Act and the Endangered Species Act will impact the way states will manage the Savannah River resources. The possible consequences of these laws must be incorporated into any viable compact.

The 2004 *South Carolina Water Plan* (Badr, Wachob, & Gellici) supports the development of a compact between the state and others that share water resources. "Compacts", the authors point out, "will promote interstate coordination, reduce potential disputes between the states, enhance the flow regime of many of South Carolina's rivers and extend the availability of water during severe droughts (p. vi).

Georgia's Approach to the Savannah River Basin

Like its South Carolina counterpart, the *Georgia Comprehensive State-wide Water Management Plan* (Georgia Environmental Protection Division, 2008) recognizes the need for flexibility, the importance of including various stakeholders, and the need for relevant and accurate data. However, unlike the South Carolina plan, there is no mention of the possibility of a compact

or any coordinated effort with South Carolina regarding the Savannah River.

A Bi-state Approach

A recent development, the Savannah River Basin Water Caucus is composed of legislators from counties on both sides of the river. A major purpose of the Caucus is to avoid lengthy and costly litigation between the states as South Carolina threatens action against Georgia over water allocation. While there has been mention of an interstate water compact for the Savannah Basin (Cary, 2013), it is too early in the process to determine if this option will actually reach the Caucus' agenda

CONCLUSIONS AND RECOMMENDATIONS

Water compacts can be an optimal method for dealing with impending "water wars." Compacts allow states to avoid the time and expense of litigation, the possibly capricious nature of legislative apportionment, and most importantly, compacts allow states to have input into the process that is not present in litigation or legislative apportionment (Kerwin, 2005). In federal-interstate water compacts, the combined resources of the federal and state governments provide nearly unlimited possibilities for action (Frankfurter & Landis, 1925). In addition, compacts are versatile and can be configured to address almost any number of current and future situations.

Developing a compact can be a long and complex process. The time to start is now. The Savannah River Basin Water Caucus can initiate a substantive dialogue between Georgia and South Carolina officials that can lead to a workable and sustainable federal-interstate water compact for the Savannah River.

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