The Law and Use of Interstate Compacts

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THE COUNCIL OF STATE GOVERNMENTS
Lexington, Kentucky
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PREFACE

We have been gratified by the continuing use of this publication, The Law and Use of Interstate Compacts. In the 15 years since it first appeared, there have been many new developments. The interstate agencies in existence at that time have an additional decade and a half of experience. Some compacts and interstate agencies, not then conceived, have been negotiated and placed in effect during recent years.

The Council of State Governments has proposed that in the light of continuing demand, a reprinting of the original text, supplemented by a number of recent articles which have appeared under our authorship, would be desirable. These articles do not take the place of a revision of the book. However, they do constitute a periodic commentary on and review of major developments in the field as seen at relatively brief intervals since the publication of this book. Accordingly, we are pleased to see the reprinting in this expanded form.

Frederick L. Zimmermann
Mitchell Wendell
INTRODUCTION

The interstate compact is the most binding legal instrument to provide formal cooperation between States. In recent decades, the compact has emerged as one of the better known and more widely employed mechanisms for intergovernmental cooperation. Until 1920, only 36 compacts were entered into by States. Between 1921 and 1940, about 20 more compacts were adopted. However, between 1941 and 1975, over 100 additional compacts were negotiated.

Compacts have expanded their scope of coverage with their increasing use. From typically bi-state agreements prior to the 1920s, many compacts have been written for areawide or even nationwide adherence by States. In addition, the Delaware River Basin Compact of 1961 introduced the newest intergovernmental aspect of compacts—the national government, by an act of Congress, was made a full member of the compact body.

The problems addressed by compacts have also expanded. Having been initially used primarily to settle boundary disputes, compacts are now being used in an ever-expanding number and variety of fields: energy conservation, civil defense and disaster, workmen's compensation, mass transit, fisheries management, education, juvenile delinquency, pollution control, planning and development, law enforcement and corrections, taxation, mental health, nuclear energy, forest fire protection, land and water resources, placement of children, the environment, and a myriad of other applications.

Because the positive and progressive nature of interstate compacts has great potential for the good of the Nation and its people, and because the original edition of 1961 has been well received and is now out of print, it has been decided that a reprint of the original text is essential. Supplementing the original text is a series of articles by the authors which has appeared since 1970 in two Council of State Governments' publications: The Book of the States, a biennial reference work, and State Government, a quarterly journal of state affairs.

Messrs. Zimmermann and Wendell have written this manual and accompanying articles from the vantage point of extensive experience and understanding. They are recognized authorities in the field and they have participated in the drafting and implementation of many compacts. Mr. Zimmermann is Political Science Professor Emeritus of Hunter College, City University of New York. Dr. Wendell, formerly a member of the faculty of American International College, is a consultant on government affairs.

The Council of State Governments hopes that this reprint and the new material contained herein will be of practical assistance to the States as further use is made of interstate compacts.

Lexington, Kentucky
January 1976

Brevard Crihfield
Executive Director
The Council of State Governments
Chapter I

COMPACT LAW

A. Sources of the Law

INTERSTATE compacts are legal instruments. Consequently, those who draft, administer, interpret or assert rights and incur obligations under them inevitably face the need to know which corners of the law are to be consulted for guidance as to their meaning, operation, characteristics and relation to other laws. This chapter is intended as an exposition of compact law, but its brevity does not allow exhaustive treatment of the subject. It is hoped that what the reader finds here will serve to answer the day-by-day questions which may arise in working with compacts. Fortunately for their understanding, compacts are basically combinations of other quite familiar forms of legal instruments. With the materials here provided, the remaining question then will be where to turn when these pages do not contain a complete answer to the problem confronting the reader. It is appropriate to begin with an exploration of the sources of compact law rather than to end with it, because such an inquiry affords an introduction to the characteristics of the device.

1. Statutory Construction

An interstate compact is almost always a statute in each of the jurisdictions which is party to it and, even in those cases where this may not be strictly true, the instrument has the force of statutory law. As a result, the entire body of legal principles applicable to the interpretation of statutes is also applicable to the interpretation of compacts. For example, when the power of the Missouri-Illinois Bi-State Agency to purchase a bridge was contested, it was argued that the compact creating the agency and describing its powers gave it authority to construct, operate and maintain facilities, but that the word purchase was absent from the grant of power contained in the compact. In further support of this position, it was contended that four years after the adoption of the compact, this omission was sought to be remedied by an additional enactment in the form of an amendment. Illinois enacted the amendment but the legislation did not pass in Missouri. Consequently, it was asserted that this later attempt to secure legislative action was evidence that at the time of original enactment, the legislative intent did not extend to acquisition of a bridge by purchase. On the other hand, it could be argued that the failure of the Missouri bill showed a belief that the compact...
pact in its original form already included the power of purchase, thereby making the additional enactment unnecessary.\(^1\)

Once controversy over the construction of a compact provision goes beyond the plain meaning of the words themselves, the legislative history assumes its accustomed role as an aid to statutory construction. However, the assembling of such a legislative history for most of the compacts which have so far come into effect is beset with some limitations. State legislative debates normally are not recorded in publications like the *Congressional Record*, nor are committee reports on state bills as detailed or as systematically preserved as they are for Congress. Some assistance may be obtained from the annual or biennial reports of Commissions on Interstate Cooperation in the several states and from the annual reports of the New York Joint Legislative Committee on Interstate Cooperation. For many years, the latter agency has made it a practice to print accounts of the development of interstate compacts, especially for those compacts to which New York is a party and to include the texts of such documents. In a number of instances, summaries of meetings at which new compacts have been formulated or explained are also in existence. However, almost invariably these are in mimeographed form and are not generally available, except in the files of organizations such as the Council of State Governments, or in state repository libraries to which copies have been sent.

Another source of legislative history is to be found in proceedings in Congress. Most, but not all, compacts have received the consent of Congress. Hearings often are held on such consent measures and they are sometimes debated on the floor. Explanations of the meaning and intent of compact provisions often are made during the course of these proceedings. It should be noted that the degree of their relevance as evidence of legislative intent depends on the identity of the witness who testifies or the member of Congress who makes the remarks. This is true because the compacts themselves are state law rather than federal law. This means that the statements in Congress concerning the intent of state legislatures are second-hand material.

### 2. Applicability of Contract Law Enforcement

Interstate compacts are not only statutes; they also are contracts. This means that the substantive law of contracts is applicable to them. This is certainly true of the vast body of case law and of the general characteristics of contracts which are recognized throughout the common law world. The extent to which statutory provisions of contract law which differ from generally accepted case law principles may be employed in their interpretation is somewhat more open to doubt, unless all of the party jurisdictions adhere to the same statutory divergence from a

\(^1\)Most of the information on which this account is based has been secured from the attorneys in the litigation. In the higher Illinois courts, the cases were ultimately decided on other grounds. *City of Venice v. Bi-State Development Agency*, 8 Ill. Rep. 2d 121 (1956).
particular common law doctrine. In any event, it should be noted that the compact itself has the force of statute and, in case of conflict, its provisions would supersede any general statutes relating to contracts.

Since contracts are such familiar legal instruments, there is no need to consider the application of this body of law to interstate compacts. On the whole, contract law affects compacts no differently than other instruments of agreement which are classifiable as contracts. The only thing that must be especially borne in mind is that the parties to a compact have special characteristics which may have a bearing on the context within which the law of contract functions. The respects in which this factor must be taken into consideration are set forth in the section of this chapter dealing with the substantive law of compacts.

3. Case Law

Case law must be used with considerable caution. Even before the United States had become a nation, judges and legal philosophers in the common law world and elsewhere had come to use the word compact as a loose synonym for virtually any kind of solemn agreement. Hence it became impossible to tell, except by strict attention to the context, whether the term was being employed as a way of referring to an international treaty, a philosophically presumed social or political contract between a king and his subject, a prenuptial undertaking or some other mutual arrangement. This inexactness of usage may have decreased somewhat in modern times, but its effects are still with us. Especially to be guarded against is the frequent tendency to mistake uniform laws, reciprocal laws and administrative agreements for compacts.

Despite the fact that interstate compacts have been used to some extent throughout our history under the federal Constitution, there are only a small number of cases that actually deal with them. In part this paucity of decisional law is due to the fact that for almost a century and a half compacts dealt with little aside from the determination of boundary lines. Once the transfers of territory were accomplished, the compacts were completely executed. In only a few instances did litigation subsequently arise. Many of the more recent compacts provide for cooperative administration and are likely to involve only governmental units as parties upon whom litigable duties are imposed. Consequently, it is not surprising that the largest single body of decided cases has developed from litigation under the Interstate Compact for the Supervision of Parolees and Probationers. This agreement provides for the out-of-state supervision of persons on conditional release from correctional institutions. Given a fairly large group of convicts whose liberties are still partially restrained, it is inevitable that attempts to escape these restrictions should be made and that litigation should result. As the Interstate Compact on Juveniles and compactual arrangements for the cooperative institution-

2 For a convenient compendium of cases in this field see Handbook on Interstate Crime Control (1955), Council of State Governments.
alization of prisoners and mental patients come more widely into use, it is likely that the body of litigation will materially increase—not so much because of the characteristics of the compact device as because of the nature of the subject matter and the resistance of private persons to coercion.

To date there are only three cases which are indisputably classified as fundamental in compact law. These are *Virginia v. Tennessee*, *Virginia v. West Virginia*, and *State ex rel. Dyer v. Sims*. Petty v. Tennessee-Missouri Bridge Commission also is notable because of its interpretation of a significant provision appearing frequently in Congressional consent statutes. It may be appropriate to set forth the principal points of law for which each of them is known.

*Virginia v. Tennessee* is important for its holding that Congressional consent to a compact may be validly given by implication as well as by express action. Specifically, it was held that because Congress had set up judicial districts and had done a number of other things in recognition of the Virginia-Tennessee boundary established by compact, Congress had in fact consented even though it had never taken direct action for that purpose. Of equal significance is the rule, first stated in this case and followed ever since, that only certain types of compact need Congressional consent: i.e., those which affect a power delegated to the national government or which affect the "political balance" of the federal system. This rule in *Virginia v. Tennessee* is discussed further in the second chapter of this handbook under the heading "The Consent of Congress."

*Virginia v. West Virginia* is probably the longest litigation directly involving obligations assumed under a compact that has ever taken place. It resulted from the unwillingness of West Virginia to pay the portion of the Virginia debt which it had assumed by compact as part of the final settlement after its separation from the Commonwealth of Virginia. Its importance lies in the flat statement by the United States Supreme Court that it would enforce a compact although the precise means that it would employ were not described.

*State ex rel. Dyer v. Sims* is significant because of its clear recognition that a compact is a contract. This principle had been established as early as *Green v. Biddle* but its repetition in a case decided under modern conditions has strengthened the principle and contributed to a wider understanding of it. In fact, the United States Supreme Court went so far as to overturn a construction of the West Virginia Constitution by the highest decision of the state court, *opinion in the state court*, 412 Ill. 204 (1952); Dixie Wholesale Grocery Inc. v. Morton, 278 Ky. 705 (1939) cert. den. 308 U.S. 609; Roberts Tobacco v Michigan Department of Revenue, 322 Mich. 519 (1948); Russell v. American Association, 189 Tenn. 124 (1918).

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1 148 U.S. 503 (1893).
2 246 U.S. 565 (1918).
3 341 U.S. 22 (1951).
6 8 Wheat. 1 (1823).
court of that state in order to sustain West Virginia's participation in the Ohio River Valley Water Sanitation Compact.

**Petty v. Tennessee-Missouri Bridge Commission** is of a somewhat different order than the three cases just noted. Nevertheless, it should be borne in mind, especially by draftsmen of interstate compacts. With three justices dissenting, the Court held that the interpretation of compact language should be in accordance with rules of federal substantive law. A provision of the consent act by which the compact secured Congressional approval was relied upon to produce this result. Among other things, the dissent questioned whether the provision of the consent act actually did make federal law applicable. However, should the Petty case be followed in the future, parties to compacts will have to draw their instruments with an eye to possible construction under both federal and state law. Under certain circumstances, this case appears to make a qualified exception to the proposition that compact provisions are to be construed by rules applicable to the interpretation of other statutes of the jurisdictions party to them.9

4. Administrative Interpretations

The relatively small body of case law makes other sources of even greater importance than they otherwise would be. In the administration of compacts, as with other statutes, the administering officers and agencies must constantly apply the law by which they are authorized to act. In some instances—and their number seems likely to grow—compacts give administrators the power to make rules and regulations of an implementing nature. The Parole and Probation Compact Administrators Association has developed a detailed set of rules, regulations and forms which appear as part of an administrators' manual.10 The much newer Juvenile Compact Administrators Association has also adopted rules, regulations and forms, and a manual.11

Actions taken at the annual meetings of administrators are sometimes of an interpretative character. A recent instance is to be found in the 1957 action of the Juvenile Compact Administrators with respect to custody proceedings. Among other things, the Interstate Compact on Juve-

9 Congressional consent act proviso:
"That nothing herein contained shall be construed to affect, impair, or diminish any right, power, or jurisdiction of the United States or of any court, department, board, bureau, officer, or official of the United States, over or in regard to any navigable waters or any commerce between the states or with foreign countries, or any bridge, railroad, highway, pier, wharf, or other facility or improvement, or any other person, matter, or thing, forming the subject matter of the aforesaid compact or agreement or otherwise affected by the terms thereof" [65 Stat. 930]. This provision of the consent statute was construed to make federal law applicable to the interpretation of the compact's provisions.

10 Some of this material also appears in the several editions of the Handbook on Interstate Crime Control published by the Council of State Governments.

11 In 1960, the compact administrators for the agreement on detainers adopted rules, regulations and forms. The administrators of the Interstate Compact on Mental Health meet periodically and minutes of their meetings are kept but they have not yet formalized their proceedings to the same extent as the administrators of the several compacts just mentioned.
niles provides methods for the return of children to their parents when interstate movement is involved. While the compact was intended to deal with runaway and escapee situations, it is also true that one of the ways in which a child may become separated from a parent is to be removed as the result of friction between spouses. When a California-Washington instance of this type was brought to their attention, the administrators, by official action— at their annual meeting, gave it as their opinion that the Interstate Compact on Juveniles was not intended to be used in determining the disputed custodial rights arising out of a marital dispute if other civil remedies were available for the purpose. While this construction of the compact could not survive in the face of court decisions to the contrary, it is probably to be regarded as the law and is available as evidence of proper construction of the compact in any judicial proceeding which may arise.

5. The Federal Constitution and Other Federal Law

Compacts are instruments to be understood within the context of the federal system. Consequently, it is sometimes assumed that federal law is of great importance in this field. This assumption is correct, but only in a very limited way. The United States Constitution provides that "No State shall, without the consent of Congress ... enter into agreement or compact with another State or with a foreign power ...". A reading of these words makes it clear that interstate compacts are legally possible. But with this clause of the Constitution as with all others, an accurate exposition of the law must go beyond the phraseology itself. The fact that the Constitutional provision recites the necessity for Congressional consent, apparently as a condition of operability, has led many people to the mistaken conclusion that all compacts require such consent. The opinion in Virginia v. Tennessee, and the rule which has developed from it, makes it clear that only certain types of compacts must have Congressional consent. (This matter is discussed on page 21, infra.)

Another provision of the Constitution important to compact law is the contract clause—"No State shall ... pass any law impairing the obligation of contracts...". This is true because, as already indicated, interstate compacts are contracts.

Acts of Congress are important as to the question of consent. Where Congress is silent, the rule of Virginia v. Tennessee prevails. However, any federal statute giving, withholding or prescribing conditions for consent to a compact must be considered on this one point. For example, the Crime Control Act of 1934 makes it clear that, even if consent to a compact in the field of crime control would otherwise be necessary, such consent already exists and covers any such compacts which may hereafter be adopted by the states. On the other hand, the Federal Water Pollution

12 See minutes of 1957 annual meeting (mimeographed).
13 U.S. Const., Art. 1, Sec. 10, Cl. 3.
14 U.S. Const., Art. 1, Sec. 10.
Compact Act of 1956\textsuperscript{16} provides that compacts in that field must be submitted for specific consent. Other aspects of compacts, however, are not especially affected by federal law.\textsuperscript{17} While a dispute over the interpretation of an interstate compact raises a federal question such as may be determined in the federal courts, a compact itself is not federal law even where an act of Congress consenting thereto sets forth the text of the compact being approved.\textsuperscript{18} This means that the sources of compact law are predominantly state sources.

6. Treaty Law

Compact literature is replete with references to international treaty practice. It seems clear that the founding fathers were thinking of interstate agreements in a treaty context. The fact that the compact clause is found in close juxtaposition with a provision denying the states any power to make treaties or alliances testifies to this connection in the minds of the framers. Late eighteenth-century American history makes it clear that they sought to prevent combinations of states which might disrupt the nation. But the very fact that the federal Constitution forbids the states to make treaties while permitting them to enter into compacts should demonstrate that there is a vital difference between them. The persistence of the treaty analogy appears to stem from the fact that the states are regarded as sovereigns within the federal system and that agreements among sovereigns are often in the form of treaties. The ceremonial methods of negotiating compacts (now much less used than formerly) also have nourished the belief that compacts are treaties. However, the only real points of identity are that the parties to both types of instrument enjoy certain attributes of sovereignty and that the agreement is embodied in a document. But in view of the much closer affinity of compacts with contracts and statutes, treaty law is a poor source of compact law.

B. Substantive Law

The substantive law of compacts is principally contract law. As such it has few peculiarities and, to set it forth at great length would duplicate material familiar to all lawyers which, to the extent that more detailed information is necessary, can be found in the standard treatises on contracts. Nevertheless, it is desirable to set forth the respects in which the character of the parties to an interstate compact and the requirements of their governmental organization and procedures affect the application of this body of law.

\textsuperscript{16} 70 Stat. 498 (1956). The relevant provisions were unaltered by the amendments of 1961, Public Law 87-88, July 20, 1961.
1. Offer

As with any other contract, the inception of a compact must be in the form of an offer to make a binding agreement. But since a compact is also an instrument which is normally a statute, and always has the force of statutory law, the offer must be made in a way that produces such law in the offering jurisdiction. Until now, the almost universal method for accomplishing this result has been the enactment of the verbatim compact text as the body of a statute, declaring the state's adherence to it. The compact itself almost always names or clearly describes the parties eligible for joinder, but if it does not do so, or to the extent consistent with the compact provisions themselves, the statute which enacts the compact on behalf of the state can specify the jurisdictions to which the enacting jurisdiction offers to bind itself. In several recent instances, however, motor vehicle administrators of the western states have been authorized by the statutes of their respective states to enter into tax proration agreements in terms sufficiently spelled out in the statutes themselves so that the agreements are actually compacts even though their precise texts do not appear in the statute books. The test of validity for an offer made by an administrator under these circumstances is whether he has been empowered to bind his jurisdiction and whether the specific terms of his offer of an agreement are those which he had been directed or authorized to make by the empowering statute.

2. Acceptance

The compact must also have the force of statutory law in an accepting jurisdiction. Consequently, the acts which constitute an acceptance are precisely the same as those which constitute the offer—enactment of a statute entering into the compact and embodying its text, or execution of an agreement binding on the jurisdiction pursuant to specific authorization by statute.

It is fundamental that no act constitutes an acceptance unless it is an acceptance of the offer which has been made. Consequently, the same problems raised by variance in the terms of offer and acceptance which sometimes becloud the existence of a binding contract also can produce problems in the compact field. To date such difficulties have been rare. The statutory character of compacts makes it impossible to enter into them orally or by simple exchange of letters, and it is these methods of making agreements which give rise to most of the offer and acceptance controversies in private law. If care is taken to enact identical texts in the laws of all compacting jurisdictions or to see that administrators execute the same or identical documents, there is assurance that the agreement accepted is the same as that offered.

Where the compacts purportedly entered into by party states have not

19 Besides the multiparty Western States Vehicle Registration Proration and Reciprocity Agreement there are several similar bilateral arrangements such as those between Kansas-Oklahoma and North Dakota-Montana.
been identical, the problem raised has been the customary one in contract law. Are the variant versions sufficiently similar to permit a reasonable conclusion that an agreement has been reached?

New Hampshire's first attempt to become a party to the Interstate Compact on Juveniles was abortive. Inadvertently, that state enacted one of the early drafts of the compact in the mistaken belief that it was the final version. Since no other state made a similar error, the New Hampshire compact was not identical with that adopted by other states. When the compact was before the Governor for execution, he declined on the advice of the state Attorney General to take such action.\textsuperscript{20} The New Hampshire version was similar to the final product in most respects. However, there was a difference in the prescribed method of effecting the return of a runaway or escapee. The New Hampshire compact specified gubernatorial participation in the requisitioning process required for the return of such juveniles; the versions enacted by other states made this unnecessary and permitted a direct court-to-court approach. A subsequent New Hampshire enactment embodied the juvenile compact precisely as adopted by other states. As a result, that state is now a party.

A somewhat different result was produced by a Vermont enactment of a civil defense compact which varied from that adopted by the states generally. In that instance, the variant compacts were identical in almost all respects. However, there was a substantial difference in the immunities given to civil defense workers from another state sent in to render aid. This was obviously a material divergence, but the Governors of the New England states executed a formal memorandum of understanding declaring that their states were bound to one another to the extent of the similarity in the respective versions of the compact.\textsuperscript{21}

3. Consideration

The principle of consideration is probably applicable to compacts, but it has far less practical meaning than in the field of private contracts. While it is quite possible to have a compact which places entirely different sets of obligations on each of the parties, such cases so far have been rare, or perhaps even nonexistent. Almost invariably the compact represents either the settlement of a dispute or an undertaking to be associated in a joint or common activity. In the former instance, the acceptance of the agreed solution and the attendant abandonment by each of the parties of its inconsistent claims constitutes the consideration. The situation is analogous to an agreement to submit to arbitration and to be bound by the award, or to a settlement out of court. In such an instance the consideration is the settlement of the dispute. Where the compact provides for a joint or common undertaking or for cooperation in a reciprocal fashion, the existence of consideration would be difficult to

\textsuperscript{20} Letter to Governor Dwinell, Oct. 25, 1955.
avoid. Even if no other element is present, it is to be found in the reciprocal obligation to perform or in the contribution to the enterprise.

4. Termination and Amendment

Once a compact comes into force, it continues so in accordance with its terms. Many compacts, especially those drafted in recent years, have specific provisions setting forth procedures for termination, amendment or withdrawal of a party. Of course, the actual provisions of the compact itself govern in all such matters. Only if such specific provisions are incomplete or nonexistent is there need to inquire further.

Obviously, termination or amendment can be accomplished by concurrence of all the parties, evidenced by whatever action would be appropriate in each of the states concerned for the repeal or alteration of statute or of law having the force of statute. However, it is important that, in the absence of specifically applicable provisions of the compact itself, the action taken be effective to deal with the particular type of law in which the compact is embodied. If it has been enacted by statute, legislative alteration or repeal is necessary. If the compact text is an administrative product entered into by officers of the executive branch pursuant to authority conferred by statute, it may be that administrative action would suffice. Should compacts among local governmental units in different states come into prominence, it would be important to recognize that, in the absence of governing law to the contrary, termination or amendment of such instruments might be effected by the action of the city councils, county boards of supervisors or similar local lawmakers.

If the contemplated amendment is merely an addition, it may be achieved by less than the total number of compacting jurisdictions, provided that the amendment in question does not conflict with the basic compact or impair the obligations of any party under it. In such a case the amendment is binding only on the jurisdictions adopting it. The basic compact continues in force among all the party jurisdictions.

In many instances, the withdrawal of a party or the termination of the entire agreement would present no problems connected with the disposition of assets. For example, the Interstate Compact for the Supervision of Parolees and Probationers, the Interstate Compact on Juveniles and the Interstate Compact on Mental Health provide for the rendering of services by regularly constituted agencies of the state government of each of the parties. No property is involved and withdrawal or termination would simply involve a discontinuance of the service.

On the other hand, compacts establishing separate interstate agencies for their administration might present such problems if a time for withdrawal or termination ever came. Where the assets consist only of office supplies and equipment, the problem is not likely to be of large proportion.

22 See infra, Chapter IV, p. 52.
Compact Law

Interstate Agencies: Status, Audit, Personnel

Interstate agencies established by compact are organs of the party governments no less than internal parts of the governmental structure. They perform on an interjurisdictional basis functions which may be undertaken by ordinary departments, commissions, boards and other types of administrative units for purely internal purposes within the state. Consequently, they are public bodies with characteristics similar to those of other governmental organs. They may receive and exercise delegations of power, secure and expend appropriations of public funds and enjoy tax exemption and the benefit of the doctrine of intergovernmental immunities, as first laid down for units within our federal system in McCulloch v. Maryland and much elaborated and refined since.

Nevertheless, some problems must be solved in gearing interstate agencies into the pattern of governmental administration. The questions which do exist stem from the fact that state statutes and constitutions relating to administrative matters have generally been framed on the assumption that any state or local agency would be an organic part of only one jurisdiction. If interjurisdictional agencies ever become a really substantial part of the governmental apparatus, it may be necessary to make more specific provision for them in general provisions of law. In almost all instances, however, pragmatic accommodations can be made which do not strain the letter or the intent of existing statutory or constitutional requirements.

The surveillance of expenditures is one area in which such arrangements may have to be made. A common practice is to provide in the compact itself that all auditing requirements for the interstate agency

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24 McCulloch v. Maryland, 4 Wheat. 316 (1819).
shall be met by a yearly independent audit made by a qualified public accountant, and that the duly constituted fiscal agents of the party jurisdictions shall have a right of inspection to be used at their discretion. An alternative arrangement which has been developed in some instances where the compact makes no special provision for audit is to have the audit performed on a rotating basis by the appropriate fiscal officers of the party states with acceptance of the result by the others. For example, this is the procedure employed for the Interstate Sanitation Commission (New York-New Jersey-Connecticut). Under either method, only one audit is required for any given time period but the information necessary to insure financial regularity is available to all interested parties.

Problems relating to personnel can be illustrated by two situations: civil service status and eligibility for employee benefits. With respect to the former, it sometimes has been desirable to permit the interstate agency to employ its personnel without regard to the civil service laws of the party jurisdictions. Such a solution does not spring from any desire to dispense with employment by the processes of a merit system but rather results from the difficulty of attempting to apply the disparate civil service laws of two or more states to the personnel needs of the same agency.25

On the other hand, it seems inappropriate to exclude interstate personnel from eligibility for social security or other pension coverage. While the question has been raised in at least several instances, the appropriate legal officers seem to have little difficulty in ruling that participation in retirement systems is possible.26 However, since the question in the past has had to be submitted for such determinations, it would seem appropriate that in the future negotiators of compacts proposing to create interjurisdictional agencies should determine whether they wish to make specific provision for this matter in the compact itself.

**D. Procedural Law**

1. **Entry into Force**

Each compact comes into force in accordance with its own provisions for this purpose. There have been two methods: enactment and execution. The first of these is the simpler. It requires only that the compact be enacted into law by the legislatures of participating jurisdictions. Since such enactments are in the form of statutes, they include gubernatorial action to the same extent as in the case of ordinary bills. The execution

25 The Port of New York Authority unlike most compact agencies has a large number of employees. It has established its own merit system.

26 The proceedings to which reference is made have generally been informal. The two instances known to the writers involved the Atlantic States Marine Fisheries Commission and the Northeastern Interstate Forest Fire Protection Compact.
method requires all of the steps necessary for adoption by the enactment method but, in addition, it requires formal execution by the Governor or other official agent of the state as a separate and subsequent action. This additional procedure involving more mechanics to accomplish the same result undoubtedly is derived from earlier notions that an interstate compact is analogous to a treaty. Its use can be justified only if there are special circumstances in a particular instance.

2. Enforcement

One of the great virtues inherent in written legal instruments is that they reduce the necessity for enforcement proceedings. Reducing the likelihood of later controversy over the actual terms of the agreement and of the obligations assumed under it improves the chances that satisfactory performance will follow as a matter of course. Moreover, the responsible behavior which generally characterizes governmental units supplies a high degree of assurance that they will discharge their compactual obligations. To date the tradition of performance and the seriousness with which states have regarded compacts have made enforcement proceedings unnecessary in almost every case. Nevertheless, four situations require specific mention here because, so far as the writers know, they constitute the only enforcement problems which have arisen.

1. The Virginia-West Virginia debt dispute has already been summarized. Ultimately the defendant state did perform, but only after protracted litigation. Since the obligation to perform was a financial one, it required a willingness on the part of the West Virginia legislature to appropriate funds in order to meet the legal liability affirmed by judicial decision. The problem of financial responsibility is one which faces all parties wishing to enter agreements and, whenever monetary obligations are involved, naturally should be considered by prospective parties to compacts.

2. In the past, there has been some question as to whether the fishing laws of Washington and Oregon have in fact been concurrent as required by the terms of the compact between them. Some years ago, there was litigation on this point from which it seems clear that the difficulty was principally caused by the brevity and vagueness of the compact text.27

3. Dyer v. Sims was a suit to compel support of the Ohio River Valley Sanitation Commission in accordance with obligations assumed under the compact establishing that interstate agency. However, it should be noted that the case did not involve an attempt on the part of one state to compel performance by another. The West Virginia legislature had recognized its obligation and discharged it. In effect the suit was by the

state against its own auditor to compel him to release the funds. The action succeeded.

4. In 1957 Maryland enacted a statute purporting to withdraw from the Virginia-Maryland Compact of 1785 relating to the Potomac River fisheries. Since Virginia contended that such withdrawal, under the facts in the case, was not possible, she commenced suit to settle the issue. Rather than rule on the question immediately, the United States Supreme Court continued the case in order to permit negotiations between the two states.

October 6, 1958, was fixed as the date on which the parties would have to report to the Court concerning their progress. At that time negotiating bodies which had been appointed by the Virginia and Maryland Governors were able to inform the Court that they had reached agreement on the text of a new regulatory compact for the disputed fisheries. Consequently, the court proceeding went no further. The two states have enacted the new compact, thereby solving the problem.

The basic point is not that enforcement problems may not arise; although it is important to remember that they have been very rare. Of more importance is the fact that an interstate compact is a legal instrument that can be enforced, if the need arises, more effectively than other known arrangements for the undertaking of cooperative programs on an interstate basis.

3. Jurisdiction over Suits

Since compacts are agreements among states, suits between the parties over their interpretation or enforcement or to vindicate rights arising under them usually have been suits in the United States Supreme Court. This is true because the federal Constitution gives original jurisdiction over suits between the states to that tribunal. The procedural rules applicable to such suits are those applicable to suits between states generally.

Where the suit is by an interstate agency against a private party, the governing jurisdictional requirements are those provided in the compact itself. If no such provision has been made, the applicable procedural law is the same as for suits involving other agencies of the state government.

4. Private Rights

For the most part, interstate compacts have not created any privately assertable rights. Customarily, their subject matter has been cooperative governmental administration or the rights of governmental units as such rather than the specific rights of private persons. However, this is not

28 It is possible for litigation involving the rights of private parties to involve compact questions. In such instances, the suit may be commenced in a state court or a lower federal court. For a notable example, see Hinderlider v. La Plata River and Cherry Creek Ditch Co., 304 U.S. 92 (1938).
invariably the case. For example, water allocation compacts, while they apportion water among states, may affect the rights of individual water users in such a way as to make them proper parties to suits. In such situations, the governing fact is that compacts are statutory law. Consequently, the assertion of private rights created or otherwise affected by a compact is procedurally similar to the assertion of such rights conferred by other statutes of the jurisdiction dealing with similar subject matter.29

29 However, the fact that interpretation of a compact raises a federal question makes proceedings in federal courts as well as in state courts possible.
Chapter II

COMPACT NEGOTIATION, ENACTMENT AND CONSENT

A. FORMULATION AND STATE ENACTMENT

The enactment of compacts always requires some degree of formality. This is occasioned by the nature of the instrument and the involvement of more than one jurisdiction. Since the compact is a contract between jurisdictions, it usually is set forth in a specific document and enacted in substantially uniform language by each of the party states. This practice is reinforced by the need for Congress to be informed of the precise terms. When Congressional consent is a condition precedent to the effectiveness of the compact, an exact and identifiable text is obviously desirable. In those compacts where, under the rule of Virginia v. Tennessee, consent is not necessary, the embodiment of an exact text in state statutes (readily available public records) affords Congress an opportunity to inform itself concerning the nature of the agreement.

The compacting process includes enactment of the specific document by the legislatures of the participating states and signatures by their Governors. Where necessary and desirable it also requires Congressional legislation consenting to the compact. As with other legislation, at either the state or national level, the executive can veto the compact or the consent thereto and the legislature can override the veto. Neither the national nor state constitutions contain any procedural requirements for compact making. Practice has developed from usage.

1. Negotiation

Colonial practice established a procedure of state negotiation. Agreement subject to approval of the Crown was one of the ways of settling the intercolonial disputes which arose over boundaries—a principal problem of the time for bordering colonies. Negotiations to that end usually were carried on through joint commissions. Following this precedent, interstate compacts traditionally were negotiated by joint compact commissions composed of representatives of each state appointed by the Governor. Beginning with some of the compacts of the 1930's, there

1 See Chapter I, supra, p. 4.
2 See p. 24, infra, with respect to the veto of an interstate compact by the President.
Compact Negotiation, Enactment and Consent

has been a widespread departure from the use of negotiating joint commissions except for two types of compact—boundary and water allocation.4

The joint compact commission has some definite advantages and it is significant that use of this negotiating mechanism continues for subjects where the parties undertake to bargain over the terms and where there is a presumption of permanence approaching perpetuity. In such cases, the task of negotiation is very exacting and may warrant the creation of joint negotiating commissions by state enactment since this action constitutes an official declaration of intention to negotiate for a specific purpose. Such statutes authorize and direct negotiators to act on behalf of the state so that the individuals who are appointed for that purpose have an official mandate to carry out this task. This method can provide the continuity of effort and negotiating personnel which may be desirable over a protracted period of negotiation such as frequently occurs in compacting for water allocation. It also makes it possible materially to aid the negotiating effort by providing a staff for the joint body. It is noteworthy that the joint commission procedure can provide the official direction and prestige necessary to negotiations which arise from controversy between states. The water allocation and boundary compacts provide cases in point. The recent negotiations with respect to a new compact for the Potomac fisheries, following a long period of bitter altercation between the two states involved, were conducted in this fashion.

With respect to other areas of compact activity and particularly in the eastern third of the country, the use of negotiating joint commissions has been rare since the 1930's. This has been due in part to the general lack of need for water allocation compacts in the East5 and the infrequency of boundary questions in that region. Moreover, in many cases the subject matter of the compacts initiated in the eastern part of the country could be expressed in broader language and usually arose more out of efforts to undertake or coordinate programs than out of controversy. The recent tendency to devise compacts which are open to participation by all states regardless of geographic location also militates against the use of formal negotiating commissions.

Many agencies have served as forums of initiation and formulation. The Southern Regional Education Compact was largely a product of the southern Governors. Many compacts, both national and regional in scope, have been initiated by the New York Joint Legislative Committee on Interstate Cooperation and formulated in regional conferences sponsored by that organization and the Eastern Office of the Council of

5 The Delaware River Basin Compact (enacted by the four states of New York, New Jersey, Delaware and Pennsylvania, and by the United States in 1961), involved a complex water allocation problem, as well as many other aspects of comprehensive water and related resource development. Negotiation of it was by the Delaware Basin Advisory Committee consisting of the Governors of the four states and the Mayors of New York City and Philadelphia.
State Governments. The other regional units of the Council have been active in the development of regional compacts for their areas. The success of these less formal initiating procedures in some fields is evidenced by the resultant enactment of a number of compacts. Although the joint negotiating commission has many elements of strength, less formal methods in many cases can speed and simplify the compacting process. In fact, it might be said that in modern practice compact negotiation has been replaced in many fields by compact formulation. A proposed compact is formulated by an interested group of state officials without any prior authorization and ordinarily it then is reviewed, revised and recommended by ad hoc conferences called for the purpose. The resulting compact is enacted by a state as a statute, the enactment constituting in effect an offer by one state. An acceptance is evidenced by enactment of the same statute by one or more other states. Thus, states today often enact compacts which are open to their prospective membership without any formal negotiation and even, in some cases, with little or no direct participation in the original formulation.

It is customary for the federal government to be represented in the negotiation of compacts affecting the development, control and use of interstate streams. This practice is undoubtedly a result of the peculiar interest of the federal government in "navigable waters." So widespread has been this practice that it is likely that many kinds of water compacts negotiated without benefit of federal representation may have difficulty in the national capitol. When Congress enacts a statute which grants consent to particular states to negotiate a compact in a designated field subject to subsequent referral to Congress, it normally provides for such federal representation. Such consent to negotiate is not constitutionally necessary. Federal representation could be provided for a particular negotiation without the inclusion of this unneeded language "consenting" to negotiation by the states. The federal government always can refuse consent; there is no reason to infer limitation of state initiative in negotiation.

There are some real advantages in making formal provision for federal representation at the negotiating stage. As the use of the interstate compact has grown, federal pressure for influence in negotiation of interstate compacts or for representation on resultant interstate agencies has increased. Except for the authorized representation in the negotiation of water allocation compacts, however, such federal participation as has occurred, lacking specific statutory direction, has been neither responsible nor consistent. On some occasions when the states specifically have invited representation there has been none. On others, it has been merely token representation of federal agencies by field officials or by observers with no authority to speak for the federal government. Only in the case of the water compacts has federal representation been specifically mandated, with an especially appointed officer who acts as the President's representative and reports to him through the Director of the Bureau of the Budget. In fact, there is a distinct advantage to the states in
such an arrangement. This may provide them with a friend at court at a
high level who understands their situation and can present their case.
The federal representative in water allocation negotiations is the single
example in our federal-state relations of a direct, legally established
channel on a specific subject from the interested states to a place close
to the nerve center of our governmental leviathan. In other fields, inter-
state compact negotiation may well be increasingly handicapped by the
difficulty of establishing effective relations with the multitude of
many-tiered federal agencies. Accordingly, in the case of important interstate
agreements which affect federal interests or agencies it might be well to
consider federal representation by such statutory mandate. Care should
be taken, however, to avoid unnecessary strictures in the provisions of
such legislation. If formal participation is not provided, it would seem
desirable in many cases to seek such federal attendance as can be obtained.

In general, the type of consent in advance which requires subsequent
referral seemingly has only one justification—the encouragement of state
compactual action. Actually, it may be more likely to discourage or com-
plicate state action because its listing of states permitted to negoti-
ate may not accord with the actual situation or because its requirement
of referral may compel such action for all compacts in the described
category even though the final form of such agreements may be such
as to make Congressional consent unnecessary.

2. State Enabling Legislation

The usual practice in state ratification of compacts is to embody the
interstate agreement in an enabling statute. Ratification of the compact
by that state is complete when this measure has been passed by the legis-
lature and signed by the Governor.

Since the 1930's, a two-step process of state ratification, sometimes
denominated the "execution method," has been used on occasion, notably
in the East. First the empowering legislation is passed by the legislature
with the approval of the Governor in the usual fashion. Second, the
Governor may or may not execute the compact, just as the President
may or may not complete the ratification of a treaty even though the
Senate has consented. The execution method was first used for the
adoption of the Interstate Compact for the Supervision of Parolees and
Probationers. That agreement was formulated in the 1930's by an extra-
legal organization—the Interstate Commission on Crime. Although com-
posed of Attorneys General and other state officials, its membership
had not been empowered by the states to negotiate a compact and the
Governors had not participated in the project. In these circumstances,
there was some apprehension that the proposed compact might encounter
trouble because it had not been negotiated in the traditional way.
Accordingly, enabling legislation which authorized the Governor to
"execute" the compact with other states was used. Subsequently, a
number of other compacts followed this pattern, including the Atlantic
and Gulf fisheries, the New England Interstate Water Pollution Control Compact and the Northeastern Forest Fire Protection Compact.

The extra step involved in execution by the Governor is not necessary. In the light of recent practice, the courts would not hold that a compact ratified by the usual legislative process was enacted invalidly simply because it had not been negotiated through agents expressly authorized by the Governor. Nor is there any reason why the Governor should have a double veto over interstate compacts. Although the enabling legislation for the parole compact was adopted in New York in 1936, that state did not become a party to the instrument until 1944, because of the refusal of the Governor to "execute." The execution process also has led to some procedural difficulties in the exchange of such executions. As new states joined the parole compact they were not supplied with the executing signatures of the Governors of the earlier member states, some of whom were no longer in office. This situation was ultimately rectified by the use of photostats. In the case of other compacts, the difficulty was avoided by securing a supply of additional signed instruments at the outset. While these procedural troubles are not likely in the case of a closed compact limited to the original signatories, the execution method seems to have a number of disadvantages without any discernible advantages.

The role of the Governor in interstate affairs is not analogous to that of the President in foreign relations. Without legislative authorization, the Governor cannot enter into an interstate compact binding upon the state in the way that a President can make executive agreements with foreign nations. The entire history of compact making indicates a general understanding that adoption of the interstate compact is achieved through the legislative process, although, to be sure, there are no authoritative court cases.

State enabling legislation provides a flexible tool for integrating the compact—a precise and relatively rigid instrument—into the legal and administrative system of an acting state. Unlike the compact, the enabling legislation does not have to be uniform in all party states and can be utilized to fit variations into the compactual pattern. To some degree, provisions in the enabling legislation can be used to condition the impact of a compact in a state. It may be easier to handle some last-minute development through provisions in the enabling legislation rather than to go through the process of amending the compact. Of course, a state cannot make reservations in the enabling legislation which would materially change a compact unless the other states specifically consent. Consent to such a reservation could be consent to the acceptance of a lesser or different agreement on the part of all the states concerned, or it could be an affirmation of the full agreement with a proviso that relations with the reserving state be limited by the reservation. This, in effect, was the case in connection with Vermont ratification of the civil

defense compact. There is no reason why a state cannot participate in a compact arrangement for certain of its purposes but not for others if the other member states subscribe to such limited participation. The state enabling legislation is another tool for adjustment of the compactual pattern

B. The Consent of Congress

1. The Rationale of Consent

In any consideration of Congressional consent there are two basic Constitutional landmarks. One is the compact clause of the Constitution with its specific mention of the consent of Congress. The other is the rule in Virginia v. Tennessee that only those agreements which affect the political balance within the federal system or affect a power delegated to the national government must be approved by Congress. An element of the consent of Congress must necessarily be the ability of Congress to determine how its consent shall be expressed. In addition to the Supreme Court’s determination that where there is no specific consent legislation, consent can be inferred from other acts of Congress, practice evidences other ways by which compacts can operate without specific Congressional consent. Clearly, when a compact is brought before it for its consideration, Congress can indicate by a variety of means its legislative intent that consent is not necessary. It has pursued this course on at least two occasions.

The Southern Regional Education Compact has been in operation for a number of years without specific consent of Congress. In this case, legislative intent may be inferred from the action of the Senate in sending a House-passed joint resolution back to committee, from which it never emerged, to determine whether it needed Congressional consent. This followed debate on the floor in which it was widely contended that the agreement was not of such character as to require Congressional consent since the states are constitutionally in possession of power over education and the agreement would not affect the balance of power within the federal system.8

More recently, committee reports in both houses indicated in slightly varying degree that the Great Lakes Basin Compact9 did not require Congressional consent. The states in presenting the legislation had asserted that Congressional consent was not necessary but, for various reasons, was desirable. State representatives took a similar position in requesting Congressional consent for the juvenile compact. They stated that Congressional consent was not needed in view of the character and provisions of the compact but that it was desirable in order to facilitate participation

7Zimmermann and Wendell, op. cit. supra, note 4, p. 87.
by the Territory of Hawai'i.\textsuperscript{10} When the House of Representatives subsequently passed a consent bill which was viewed as undesirable, state officials opposed\textsuperscript{11} and the Senate permitted the bill to die. The juvenile compact, which deals with interstate aspects of state law and administration, has been in operation for several years following enactment by well over half the states.

The basic purpose of the constitutional requirement of Congressional consent is to make certain that no such agreement can stand against the will of Congress. This was vitally necessary with respect to the interstate boundary agreements which were the principal concern of the founding fathers. Such compacts conceivably could affect the balance of the federal system. There is no doubt that the power of consent is absolute. Congress can, and in some cases has limited its consent to a period of years, thus requiring further Congressional action for continuance. This has been the case with the oil and gas compact. But to achieve its purpose, it does not have to require every compact to come before it even though it has the power to do so. In reality, no interstate compact of any significance can exist without the knowledge of federal agencies or officials. Interstate compacts which are not known to the appropriate federal agencies are unlikely to be threats to either the federal system or the interest of the federal government. The fact that Congress, in the face of the existence of interstate compacts which do not have specific consent, has neither passed negating legislation nor indicated any opinion that specific consent is required, is indicative of Congressional consent to the interstate action. The "political balance" doctrine is in harmony with the political purposes underlying the supplanting of the Articles of Confederation. In the present day of widening use of the compact device and increasing burdens upon the Congress and the national government, it is an exceedingly useful rule because it permits the maximum degree of flexibility compatible with safeguarding the national interest.

2. Compacts Requiring Consent

The Committee on Interstate Compacts of the National Association of Attorneys General in 1957 urged the need of simplifying and expediting Congressional consent to compacts.\textsuperscript{12} Among other things, the report adopted by the Association recommended that states should not request that Congress consent to a compact unless the compact is such as to require Congressional consent or unless it is decided to seek such consent for policy reasons.

What then are the criteria for determining what type of compacts will affect the political balance of the federal system and, accordingly, should

\textsuperscript{10}If any problem existed with respect to Hawaii, it has been solved by its admission as a state.

\textsuperscript{11}Resolution of Association of Juvenile Compact Administrators adopted at Chicago, August 16, 1957 (mimeographed).

\textsuperscript{12}National Association of Attorneys General, Conference Proceedings (1957), pp. 167-174.
be submitted to Congress for specific consent? Boundary settlements, by interstate agreement, with their connotations of effect upon the territorial extent of particular states and accordingly of their potential strength in the federal system, provide the clearest examples of arrangements affecting the political balance of our federalism. Agreements among states relative to jurisdiction over boundary waters present a variant of that situation since they fix the legislative and judicial jurisdiction of the states concerned. Conceivably, compacts which might be said to have a discriminatory effect upon nonparty states could be described as affecting the political balance of the federal system. In actuality, there have been no compacts adopted or proposed in our history which have really affected that political balance.13

The real test of the need for Congressional consent in the present day is the degree to which an interstate agreement may conflict with federal law or federal interests. If it runs any danger of conflict with federal law or the doctrine of pre-emption, then the need for Congressional consent is clearly indicated. If it provides for state action in close proximity to areas of traditional federal power or wide federal activity, then the need for such specific consent should be considered. For example, compact-established agencies like the port authorities, with their close connection with interstate and foreign commerce, might have difficulty in operation, as well as in bond flotation, without Congressional consent. Such consent is obviously indispensable for the Waterfront Commission Compact14 with its regulation of labor employed in connection with interstate and foreign shipping. The eastern states Military Aid Compact15 also falls in this category in view of the constitutional position of the states in military affairs. Federal law requires specific Congressional consent for interstate pollution compacts.16 This provision, like others of its kind, was originally intended to encourage interstate compacts for pollution abatement by granting consent in advance, but its requirement of subsequent submission complicates the adoption of such agreements. However, federal statutory requirements for submission of compacts for Congressional consent, while common for particular compacts where a federal negotiator has been statutorily provided, are otherwise rare. In short, consideration should be given to seeking specific federal consent in the instances of any compact which brings state action into a field of federal-state sensitivity—either legal or administrative.

3. Compacts Not Requiring Consent

There is a wide area where consent by federal legislation is not necessary. Clearly, if widespread use should be made of interlocal com-
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pacts, their subject matter almost without exception would be of such a local service character that Congressional consent would not be necessary. Similarly, interstate compacts which integrate state services, state administration or state law in areas where state action is usual or predominant do not require Congressional consent. The mental health, higher education and juvenile compacts are clear examples, even though consent has been sought for some of them for other reasons. Interstate compacts establishing joint institutions for correctional, health, educational or other state purposes also fall into this category. Compacts to establish channels of interstate relationships or recommendatory commissions are designed only to improve interstate relations or provide a joint study and advisory mechanism. Such legal arrangements for communication and consultation among the states do not require Congressional consent. Similarly, if the states can seek uniformity of law by statute without consent of the federal government, there is no reason why the same words in an interstate compact require consent. The national legislature need not be concerned with interstate arrangements for juveniles or uniformity of commercial law, nor is it equipped or competent for the task. A busy Congress, in a world of crisis, is hard-pressed even to perform its duties as a national legislature. Consent bills for interstate compacts dealing with issues in the realm of state activity, law and administration, with interstate jurisdictional problems and with the settlement of interstate equities, normally serve only to clutter Congressional calendars and complicate and obstruct interstate cooperation.

4. Federal Consent Legislation

Formal Congressional consent is manifested by act of Congress or by joint resolution, which, as in the case of state enabling legislation, usually embodies the compact document. Usage has brought the President into the compact process. On a very few occasions, the veto has been used or threatened to prevent the passage of an interstate compact. But instances where consent to a compact has been finally refused because of either Congressional or Presidential reluctance have been extremely rare. The only clear case was the failure in the thirties of the Connecticut and Merrimack rivers flood control compacts in the face of a threat of Presidential veto. Until recently, there has been comparatively little difficulty in obtaining consent. As the states have turned to greater use of the interstate compact and the number and type of interstate agreements have increased, some federal administrative agencies have developed a less friendly attitude. This fact, combined with the pressure of growing national and international problems, has resulted in some delays and

17See Chapter IV.
18The Atlantic States Marine Fisheries Compact is an exception since it imposes an obligation on a federal agency.
19The President originally vetoed the Republican River Compact, but signed a later version. See Zimmermann and Wendell, op. cit. supra, note 4, p. 38.
20Ibid.
snarls in the granting of consent, although in no case has an interstate compact specifically been denied consent.

The National Association of Attorneys General in their annual meeting of 1957 urged that Congress seek to simplify the process of Congressional consent. In general, for those compacts which do require consent, they recommended the establishment of a procedure designed to assure expeditious consideration by Congress. They urged consideration of a procedure like that now used for civil defense compacts as an alternative which states might select in certain cases to the normal method of consideration. Under the procedure specifically recommended, the consent of Congress would be deemed to have been granted to any compact filed with the President, the Speaker of the House of Representatives and the President of the Senate, upon the expiration of the first period of ninety calendar days of continuous session of the Congress following the date on which the agreement is transmitted, "if within such ninety day period there has not been passed by the Congress or either House thereof a resolution stating in substance that said consent is not granted."

Consent of Congress may either be specific, i.e., consent to a particular compact between particular states, or it may be general, in the sense that authorization is given in advance to all compacts which subsequently may be made in a certain designated field. The usual procedure is specific consent to particular arrangements. The state Attorneys General, in the report referred to above, stressed greater use of general consent. They suggest that when a regional compact consent act is introduced, a section might be added to the consent act enabling other groups of states to enter into similar compacts on the basis of either of the following arrangements: (1) consent would be effective for a new compact of the same character unless, within a stated period of time, Congress passed a resolution disapproving it; or (2) consent would be given in advance to any two or more states to enter into compacts of certain types or in certain categories. This consent in advance would be actual consent without the limiting requirement of subsequent referral previously mentioned. There are a limited number of examples of genuine consent-in-advance acts of which the most recent are the consents to highway safety and airport compacts. The most famous is the provision in the Crime Control Act of 1934, as amended, by which Congress consented to interstate compacts dealing with problems of interstate crime control, even though no such compacts then existed. The interstate parole and probation compact enacted by fifty states, Puerto Rico and the Virgin Islands derives its consent from this Congressional action, even though the text of the specific compact was never submitted to Congress. In actuality, as indicated previously, this compact does not really need consent.

It is settled that the inclusion of the compact in the federal enabling statute does not make it federal law even though the provisions of the enabling act itself are federal law.\textsuperscript{24} It is clear also that subsequent federal legislation can modify both the consent to the compact and the provisions of the enabling legislation. The Supreme Court in \textit{Pennsylvania v. Wheeling and Belmont Bridge Company} pointed out that if the Congress were subsequently to be barred from regulation because of its prior consent to a compact, "the Congress and two states would possess the power to modify and alter the constitution itself."\textsuperscript{25} Nevertheless, Congress in consenting to compacts has sometimes expressly reserved the right "to alter, amend or repeal its act of consent."\textsuperscript{26}

The federal enabling legislation containing the text of the compact provides flexibility at the national level in the integration of interstate and national action. Among other things, it can provide for federal supplementary or cooperative action, make parallel arrangements in federal law or administration, direct federal administrative aid, or even give the compact the character of federal as well as state law. It also can be used to incorporate conditioning language to control the impact of the compact on areas of federal sensitivity or quiet the apprehensions of federal agencies. The one important example of federal failure to grant consent, in the case of the Connecticut and Merrimack compacts of 1936, was easily avoidable. The President threatened to veto the acts consenting to these compacts because of fears of the Federal Power Commission that Congressional approval to the compacts might disturb its jurisdiction on the streams in question.\textsuperscript{27} Even if such were the case, the commission's jurisdiction could have been completely safeguarded by a provision in the enabling legislation. Of course, Congress cannot substantially change the language of the compact itself without danger of negating the agreement. Certainly, as a matter of policy it should never do so. On one occasion it did modify the language of a compact.\textsuperscript{28} While the agreement survived, Congress can always achieve its purpose through conditioning provisions in the enabling legislation without intruding into the language of an agreement to which it is not party.

\textsuperscript{24}\textit{Supra} note 18, Chapter I.
\textsuperscript{25}18 How. 421, 433 (1855).
\textsuperscript{26}See Section 4 of the consent to the Wabash Valley Compact, 73 Stat. 694 (1959).
\textsuperscript{27}See Zimmermann and Wendell, \textit{op. cit. supra}, note 4, pp. 122-124.
\textsuperscript{28}The Gulf States Marine Fisheries Compact. See Zimmermann and Wendell, \textit{op. cit. supra}, note 4, p. 41.
Chapter III
DRAFTING COMPACTS

A. GENERAL CONSIDERATIONS

The foregoing pages have emphasized the statutory and contractual nature of compacts. They are legal instruments and their drafting must be considered in this light. To a marked degree, the drafting of all such documents—contracts, wills, deeds, mortgages, statutes and even constitutional provisions—presents similar problems and requires the use of similar skills. At all times the rules of construction applicable to legal instruments must be borne in mind. When operating in the compact field, draftsmen must constantly realize that they are dealing with the law and practice of all jurisdictions whose participation in the agreement is contemplated. Consequently, ways must be found to harmonize the terms and actual language of the compact with the legal and administrative structure and characteristics of the prospective party jurisdictions.

This task is made considerably easier by the fact that a compact is superior in force to both prior and subsequent statutory law. Consequently, the existence of conflicting or divergent statutes in different party states presents no fatal obstacle. Upon enactment, the compact provisions will govern wherever necessary. But when a problem arising out of disparate bodies of internal law in the party jurisdictions is anticipated, the compact itself should contain provisions specifically setting forth the desired governing law. The customary effect of such special provisions is not to disturb existing internal law but to make an exception for compact purposes. Of course, the fact of compact supremacy to ordinary statute does not obviate the need for policy decisions as to whether and to what extent it may be desirable to proceed differently in intergovernmental matters than in purely internal matters.

As in the case of Chapter I which dealt with compact law, this chapter concentrates on the features of compact draftsmanship which set it apart from draftsmanship in general. It is to be understood in the context of the reader's knowledge of the general field obtained from practical experience and from the standard treatises on subjects such as statutory construction. In general, the various subdivisions of this chapter deal with

aspects of compact documents and include some sample provisions which may be adapted for use in new compacts. Additional sample provisions are to be found in the appendix to this manual.

**B. Style and Format**

As with most legal instruments, matters of drafting style and format are partly determined by tradition and partly by convenience. To the extent that tradition may be important, there probably is no substitute for familiarity with a large number of compacts. The element of convenience will be dealt with to some extent in several of the subdivisions which follow.

At the outset, however, it should be noted that the customary characterization of individual compact provisions as "articles" rather than as "sections" is useful as a means of preventing confusion. A compact is usually contained within an enabling act by which it is made part of the law of the adopting jurisdiction and which sometimes contains other sections of an implementing nature. Consequently, the use of the word "article" for a compact provision makes it possible readily to distinguish between citations to numbered provisions of the compact itself and numbered provisions of the enabling statute which will appear as "sections."

More elaborate compacts may have separate articles on each of the following: purpose, definition of terms, establishment of a commission or other joint agency, internal management of such an agency, powers, finance, entry into force and eligibility for participation, termination or withdrawal, and severability of provisions. In any given instance, this list may be lengthened, shortened or altered, depending on the subject matter and the substance of the compact.

**C. "Purpose" Provisions**

The reasons for including "purpose" provisions in compacts are much the same as those which often suggest their use in statutes. Legislative findings, declarations of policy, and descriptions of purpose may be used by courts and administrative bodies in construing the law. On occasion, they also are helpful as explanations of the circumstances which make adoption of the compact advisable.

Older compacts containing "purpose" provisions generally utilize the "whereas" form, i.e., the document begins with a series of "whereas" clauses much in the style of resolutions passed by associations or conference meetings. These recitals conclude with a phrase such as: "Now therefore, the compacting states solemnly agree as follows: . . . ." This is followed by the body of the compact. Recently the "whereas" form has been less in evidence. Increasingly its place is being taken by an initial article of the compact, which in format is much the same as the subsequent articles.

While the choice between these two approaches is partly a matter of stylistic preference, one substantive difference in the resulting product
should be noted. The "whereas" form presents the "purpose" clauses as recitals which may lend background color to the compact and can be useful in promoting its adoption, but strictly speaking such clauses are not part of the compact. This means that they do not have the full force of law. On the other hand, the setting forth of purposes, findings and declarations of policy as an initial article of the compact gives such provisions the same standing as the rest of the agreement.

D. Administrative Structure

1. Administration by Existing Agencies

Whether a given compact should establish a special administrative structure depends on the subject matter and scope of the agreement. In many instances, no new administrative machinery is created. For example, some of the simpler water allocation compacts merely provide for the allocation to each of the party states of fixed quantities of water from an interstate stream. Since jurisdictions entering into such agreements usually have state engineers or water boards whose duties include the administration of water rights, it often has proved appropriate to entrust implementation of the compact to these officials who administer it along with other laws for the apportionment of water within the state.

Some of the boundary compacts present other cases in point. They give certain types of law enforcement jurisdiction in areas adjacent to the boundary but outside the territory of the state acquiring the rights and duties of such enforcement. In these instances the functions performed under the compact are the same as those already administered by courts and police within each of the party states and a simple extension of the judicial or police jurisdiction of adjacent county or municipal units may be all that is necessary.

2. Compact Administrators and Associations

Only one step beyond the compact which provides for no special administrative machinery is the compact which contemplates the appointment of a "compact administrator" who may act individually or in concert with his counterparts in other party states. Article XI of the Interstate Compact on Juveniles provides for such a system. It reads:

That the governor of each state party to this compact shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this compact.

To date "compact administrators" under each of the several compacts calling for their appointment always have been existing state officers with responsibilities in the subject matter field to which the compact relates. They are useful where more than one state or local agency is affected by

2 An example is the Colorado River Compact. For text see 45 Stat. 1057-1066 (1928).
the compact provisions or by responsibilities assumed under the agreement. The administrator can then act as coordinator for his state.

Where interstate movement of persons under the compact is envisaged, the administrators' association which can come into existence pursuant to provisions such as that quoted above is often useful. It provides a forum for the discussion and study of problems encountered in operations under the compact and for the promulgation of uniform rules and regulations under which such interstate movement and the continuing relationships often resulting therefrom can be more smoothly accomplished. The Interstate Compact for the Supervision of Parolees and Probationers is the oldest example of a compact functioning with the assistance of a compact administrators' association and affords an excellent illustration of the circumstances in which the device may be useful. The purpose of the compact is to provide for the supervision of parolees and probationers on an out-of-state basis. A parolee or probationer may receive such supervision in a state other than the one where he was originally incarcerated or convicted if he meets certain conditions set forth in the compact, but in any event, the state to which he goes acts only as an agent for the so-called "sending state." The implementation of arrangements for such out-of-state supervision, some of the rules and regulations governing the conduct of "receiving states" toward parolees and probationers being supervised under the compact, and the forms to be used in handling the administrative detail of interstate supervision have all been standardized by the administrators' association.

3. Establishment of Intergovernmental Agencies by Compact

The process for the creation of administrative agencies by statute is a familiar one. The language employed must describe in sufficient detail the composition, character, internal management and powers of the agency. Other matters appropriate for coverage vary with the field in which the new unit is to work. In creating an intergovernmental agency by compact, what has just been said is also applicable. However, the compact draftsman must recognize that some of the general provisions of his jurisdiction's law which normally would be a relevant part of the context of the new enactment in the case of a purely internal statute are not properly applicable, or should not be applicable in quite the same way, in the case of a compact creation.

Every administrative agency must be governed by laws relating to direction and responsibility, personnel, finance, judicial review of its acts and other matters. Usually, some or all of these subjects are dealt with in general provisions of state law and so need not be set forth in each of the enactments creating a new administrative unit. While it may be expected that the statutes of any two or more compacting jurisdictions will contain law on these subjects, it would be remarkable if relevant provisions were identical in all significant respects. Even if no other differences appear, internal statutes are bound to refer to the Governor, legislature,
court structure, civil service, laws, retirement systems and other institutions or procedures of their own state. This means that unless special provision is made for resolution of these matters in the compact itself, the question must inevitably arise to which laws are to be applied to the intergovernmental agency. Subjection to the substance and procedural requirements of the laws of each of the two or more jurisdictions involved is not desirable from the practical operational point of view. Moreover, in the case of statutory provisions of the several jurisdictions which diverge significantly or even conflict with one another, such multiple compliance is likely to be impossible. The usual remedy is to write enough administrative law into the compact to cover essential points. Upon enactment, these compact provisions become law for the intergovernmental agency in each of the party jurisdictions and substitute for the general statutes which might otherwise be applicable. On occasion it is possible to simplify this process somewhat by making the laws of each party jurisdiction applicable to transactions or matters having a peculiar significance for one of the parties. For example, the securing of commission members to represent a state on an intergovernmental commission is customarily handled somewhat as follows:

The Commission, hereinafter called the Commission, is hereby **created** and shall consist of three commissioners from each party state. Each commissioner shall be appointed, suspended or removed and shall serve subject to and in accordance with, the laws of the state which he represents.

The foregoing language would make it possible for each party jurisdiction to provide separately for its commissioners in whatever manner suited it best. Such a provision, either standing alone or in conjunction with other appropriate clauses of the compact, could make it possible to apply the laws of each jurisdiction relating to travel expenses, liability for disability incurred while on official business and similar matters to its own representatives on the interstate body.

4. **Finance**

The two aspects of finance which need special attention in the case of an intergovernmental agency are the provision of funds and the audit of expenditures. The regular appropriations process normally satisfies the former for internal units of the state or local government, while the latter is accomplished as a matter of course by applying the general internal laws of financial responsibility. In a less numerous but important set of instances an agency's need for revenue is met by entrusting it with the management and proceeds of income-producing properties and with the power to borrow against such receipts. It is possible to handle the income requirements of intergovernmental agencies in either or both of these ways and the considerations involved in the choice are much the same as in the case of purely internal agencies.

A customary compact provision dealing with the income aspect of...
compact agency finance is as follows:

A. The members of the Commission shall serve without compensation, but the expenses of each commissioner shall be met by the state which he represents in accordance with the law of that state. All other expenses incurred by the Commission in the course of exercising the powers conferred upon it by this compact, unless met in some other manner specifically provided by this compact, shall be paid by the Commission out of its own funds.

B. The Commission shall submit to the executive head or designated officer of each party state a budget of its estimated expenditures for such period as may be required by the laws of that state for presentation to the legislature thereof.

C. Each of the Commission's budgets of estimated expenditures shall contain specific recommendations of the amount or amounts to be appropriated by each of the party states. Detailed Commission budgets shall be recommended by a majority of the votes cast, and the costs shall be allocated equitably among the party states in accordance with their respective interests.

D. The Commission shall not pledge the credit of any party state. The Commission may meet any of its obligations in whole or in part with funds available to it under Article IV (H) of this compact, provided that the Commission takes specific action setting aside such funds prior to the incurring of any obligations to be met in whole or part in this manner. Except where the Commission makes use of funds available to it under Article IV (H) hereof, the Commission shall not incur any obligations prior to the allotment of funds by the party states adequate to meet the same.

Article IV (H) referred to in Subdivision D above reads:

The Executive Director, on behalf of, as trustee for, and with the approval of the Commission, may borrow, accept, or contract for the services of personnel from any state or government or any subdivision or agency thereof, from any intergovernmental agency, or from any institution, person, firm or corporation; and may accept for any of the Commission's purposes and functions under this compact any and all donations, gifts, and grants of money, equipment, supplies, materials, and services from any state or government or any subdivision or agency thereof or intergovernmental agency or from any institution, person, firm or corporation and may receive and utilize the same.

It does not appear of particular value to reproduce the text of a compact provision authorizing an intergovernmental agency to issue bonds and detailing the procedures for doing so. To date few agencies established by compact have been financed in this manner. Moreover, arrangements for bond issuance are likely to be so individualized for each intergovernmental agency that, at least in the absence of a more widespread past experience, it might be imprudent to offer a model.

In a slightly different category from provisions dealing with the se-

These provisions are taken from the Great Lakes Basin Compact. The language of Article IV (H) making the executive director a trustee of Commission properties should be employed only if there are special reasons for it. Normally, it is simpler to empower the Commission to hold and deal in property directly.
curing of funds are compact clauses recognizing the possible impact of compact obligations on the internal financial responsibilities of agencies and subdivisions within the individual party states. For example, the Interstate Compact on Juveniles provides for the return of runaway children and for certain other services to juveniles. When these functions are performed wholly within a single state, they may be the responsibility of local governmental units in more or less degree. In recognition of this fact, the compact provides:

**Article VIII**
Responsibility for Costs

(a) That the provisions of the compact shall not be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs, or responsibilities therefor.

(b) That nothing in this compact shall be construed to prevent any party, state or subdivision thereof from asserting any right against any person, agency or other entity in regard to costs for which such party state or subdivision thereof may be responsible pursuant to the compact.

The problem of audit also must be specially considered. In respect of some compact agencies, satisfactory arrangements have been worked out even in the absence of compact provisions dealing with amenability to audit. It has sometimes been decided that the regularly constituted auditing agency of one of the party states should make the audit and that each of the other party jurisdictions will accept the result. This avoids the need for compliance by the intergovernmental agency with several different sets of requirements and also forestalls the disruption of office routine which might reach burdensome proportions if the auditors from each jurisdiction were to examine the books separately.

Another way of approaching the same problem is presented by the following:

E. The Commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the Commission shall be subject to the audit and accounting procedures established under the bylaws. However, all receipts and disbursements of funds handled by the Commission shall be audited yearly by a qualified public accountant and the report of the audit shall be included in and become a part of the annual report of the Commission.

F. The accounts of the Commission shall be open at any reasonable time for inspection by such agency, representative or representatives of the party states as may be duly constituted for that purpose and by others who may be authorized by the Commission.

5. **Personnel**

A compact which is to be administered by the regular departments and employees of the party jurisdictions along with their purely internal activities raises no special personnel problems. Obviously, all personnel

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4 This has been the practice under the Tri-State Sanitation Compact (N.Y.-N.J.-Conn.).

5 Great Lakes Basin Compact.
engaged in compact administration in such cases are to be treated in the same manner as other employees of the governmental unit. However, the employment of separate personnel by intergovernmental agencies raises problems of governing law similar to those already noted in the field of finance. As a matter of policy, it seems unlikely that parties to compacts wish either to discriminate in favor of or against the employees of intergovernmental agencies. But in the absence of specific recognition in the compact itself, questions have arisen. In recent years, Attorneys General and legal officers of the federal government have had to rule on the eligibility of compact agency personnel for social security coverage and other welfare benefits. While such rulings have been favorable, the mere fact that the question has arisen seems to indicate the advisability of considering specific provision for this subject in the compact. The following is offered as a possible suggestion:

Employees of the Commission shall be eligible for social security coverage in respect of old age and survivors insurance provided that the Commission takes such steps as may be necessary pursuant to federal law to participate in such program of insurance as a governmental agency or unit. The Commission may establish and maintain or participate in such additional programs of employee benefits as may be appropriate to afford employees of the Commission terms and conditions of employment similar to those enjoyed by employees of the party states generally.

For retirement purposes it may be possible to work out arrangements for proportionate membership of employees in the systems of the individual party states. However, the limited experience to date with such solutions has shown them to be complicated.

Civil service status is yet another personnel problem to be considered. Merit systems generally are geared to agencies wholly attached to one governmental unit, or at most to units within a single jurisdiction. For this reason, some recent compacts specifically have provided that employment of compact agency personnel shall be without regard for the civil service laws of any party jurisdiction. This does not appear to indicate any hostility to the principle of employment on a basis of merit, but merely a desire to avoid the confusion which would attend any attempt to apply the divergent civil service laws of several jurisdictions to a single agency.

E. Entry into Force and Withdrawal

Since compacts are both contractual and statutory in nature, it is only to be expected that some attention should be given to the manner of entry into force. The legislation enacting a compact in a given jurisdiction

6 See supra, note 26, Chapter I.
7 This is the practice on the Interstate Palisades Park Commission. According to a recent commentary these arrangements have proved cumbersome. See Richard H. Leach and Redding S. Sugg, The Administration of Interstate Compacts (1959), pp. 141-143.
8 The Wabash Valley Compact and the Southern Interstate Nuclear Compact use this procedure.
can be handled in respect of its effective date in the same manner as an ordinary statute of the state. However, the text of the compact should also contain a provision setting forth the events which will bring it into force. These events are usually conceived as enactment of the compact by a predetermined minimum number of jurisdictions. It also should be decided whether the "enactment" or "executory" form is to be used.9

Although some compacts contain no withdrawal provisions at all, the inclusion of withdrawal or termination clauses should always be considered and a conscious decision made as to their desirability in each case. In the drafting of such clauses, the principal elements to be considered are (1) adequate notice to the parties of a withdrawal, and (2) the fixing of a time period which will not unreasonably jeopardize the work under the compact by the remaining parties to it. It should be noted that to date only two compacts have ceased to function via the withdrawal or termination route. The minimum wage compact enacted during the 1930's by New Hampshire, Massachusetts and Rhode Island was terminated when it became apparent that other remedial measures in the wages and hours field had largely accomplished the purpose for which the compact had originally been intended. The original Rio Grande Compact lapsed in accordance with its terms.

F. CONSTRUCTION AND SEVERABILITY

Construction and severability provisions serve the same purpose in compacts as in ordinary statutes. The only unique feature of their character in interstate agreements is that they must be drafted to take account of the necessity to recognize that their saving effect is directed at the constitutions and court decisions of several jurisdictions instead of those of a single state. A provision which covers the peculiarities of the compact situation and which is to be found in a number of recent compacts such as mental health and the Interstate Compact on the Placement of Children is as follows:

It is intended that the provisions of this compact shall be reasonably and liberally construed to effectuate the purposes thereof. The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

G. ENABLING AND CONSENT LEGISLATION

As already indicated, a compact is generally adopted by a jurisdiction

9 For a discussion of this matter see Chapter I, supra p. 12.
as part of a statute for that purpose. Such a statute will set forth the full text of the compact immediately following a phrase such as:

The (title of compact) is hereby enacted into law and entered into by this state with all other jurisdictions legally joining therein in the form substantially as follows:

The words "in the form substantially as follows" are especially significant. It will be remembered that in Chapter I the necessity for identical enactment of the text of the compact in each party jurisdiction was discussed. On the other hand, it was also pointed out that minor differences in such enactments do not necessarily destroy the validity of joinder. The use in the enabling act of the last quoted phrase makes this result clearer than it might otherwise be if left completely to judicial or administrative interpretation.

In some instances, the simple declaration of adoption followed by the compact text is sufficient. Often, however, it is desirable to add sections to the enabling act of an interpretive or implementing nature. For example, a compact may provide for the submission of estimated budgets to "the designated official of each party state." Such general language in the compact is desirable because the administrative organization of party jurisdictions is likely to vary. In an enabling act, however, it may become necessary to indicate who the appropriate official in that state shall be. By way of further illustration, it can be noted that there are now several compacts contemplating the cooperative institutionalization of prisoners. The provisions of such compacts may or may not be comprehensive enough to give judges in each party state power to commit persons to such cooperative institutions. For reasons of either necessity or clarity, it is sometimes desirable to include such powers of commitment as a separate section of an enabling act.

Since the purpose of many enabling act provisions is to permit a state more fully to discharge its obligations or receive the benefits of the compact, it follows that such provisions need not be uniform in the several party jurisdictions. They may and should be adapted so as most effectively to fit the compact into the pattern of law and government in each party jurisdiction.

In those instances where a compact needs Congressional consent to become effective, federal legislation for the purpose is essential. It is possible for Congress to give its consent to compacts in a specified field. Such acts may be passed in advance of the conclusion of any interstate agreements dealing with the subject matter. Since such consent-in-advance acts are likely to vary in their phraseology depending on the fields to which they are intended to apply, little of a general nature can be said of them. It should be pointed out, however, that on a number of occasions, Congress has enacted statutes or joint resolutions which are erroneously called "consent-in-advance acts." These authorize the negotiation

10 Virtually all of the western water compacts have been in this category. In such instances the "consent to negotiate" legislation has generally included provision for a federal representative to participate in the negotiations. An interesting development which is not consent in advance but which should be mentioned at this point is found
of a compact and require that its completed text be brought back to Congress for specific approval. Since state and local officials are in any event free to confer with one another and formulate plans—whether in draft language or not—to cooperate with one another, the desirability of such Congressional enactments is a matter of policy rather than of law.

The statute or joint resolution consenting to a specific compact is usually a simple piece of legislation. It may do nothing more than state that Congress hereby gives its consent to a compact which is as follows... The declaration may be followed only by the text of the compact which, however, does not become federal law merely by its reproduction in the consent act. Its presence normally is only for the purpose of specifically identifying the compact to which consent is being given.

In some instances, however, some implementation, or even membership as a party, may be appropriate on the part of the federal government. In such cases, a consent or federal enactment statute may contain provisions of an implementing character.

Where they occur, these additional provisions of consent acts can have purposes somewhat similar to those in enabling statutes. The elaboration of the Congressional statute is usually for one or both of two reasons: (1) to accept proposals or recognize conditions that the compacting states regard as essential to the effective operation of their agreement, and (2) to provide for some degree of federal participation in the activities envisaged by the compact.

To date, provisions of the first-mentioned type have not been frequent. They seem to have been limited to a few western water compacts. Because the United States owns extensive public lands in the Klamath Basin, California and Oregon thought it of the highest importance that Congress specifically recognize certain of the water allocation features of the interstate agreement in affirmative statute. This was done in an added provision of the consent act. An earlier instance applying the same principle was the consent legislation for the Republican River Compact.

Where some measure of direct federal participation is to be undertaken, the consent statute should make specific provision for it. For example, the Northeastern Water and Related Land Resources Compact would establish an intergovernmental planning agency consisting of one member from each of the party states and seven federal representatives. Accordingly, the consent legislation authorizes the President to appoint seven such representatives

in the 1960 legislation setting up a temporary transit agency for the District of Columbia and environs. That act provides for the negotiation of a compact among the District of Columbia and the states of Maryland and Virginia. If such a compact is negotiated and put into effect, the statute declares a Congressional purpose that the compact should supersede the statute as now in force. National Capitol Transportation Act of 1960, P.L. 86-669, 1960.

11 The language "substantially as follows" often has been used in the past and is preferable. However, there has been indication of preference by federal officials for the more restrictive version.

12Sec. 3, H.R. 30, 87th Cong. (1961). See similar provision with respect to the Ohio River Pollution Compact, Sec. 3, 54 Stat. 751 (1940).
At the present time, federal policy with respect to such representation does not appear entirely clear. Specific demand for federal representation in an instance where the states had not expressly contemplated it seems first to have appeared when the Great Lakes Basin Compact was placed before Congress for consent. On the other hand, the Hearings on Consent to the Northeastern Water and Related Land Resources Compact in 1960 contain evidence of federal agency reluctance for full participation in the work of the agency to be established by that agreement. It would seem, then, that especially in the water resources field, consideration should be given to the problem of federal participation and, if it is provided for in the compact, the consent legislation should cover the subject.

Still a third type of consent statute provision is of considerable importance. This is the clause containing a limitation rather than implementing language. Obviously, the precise subject of such limitations can vary depending on the federal view of its possible interest. A rather extensive set of such limitations may be found in the 1959 consent act for the New York-New Jersey Transportation Agency Compact.

From the state point of view, these provisions of limitation may assume an importance that they were formerly thought not to have. In the past, they have been regarded as ceremonial phrases—statements of the obvious included to assure cautious persons. However, the decision in Petty v. Tennessee-Missouri Bridge Commission (discussed in Chapter I, supra) raises the possibility that states may wish to examine consent legislation carefully and make appropriate representations with respect to provisions that may derogate, however inadvertently, from the original intention of the party jurisdictions.

Recently the Congressional power of consent to compacts has been used as a further potentially limiting factor. Asserting its power to recommend legislation specifically with respect to the statute consenting to the Port of New York Compact, and generally in the entire field of compacts, the Committee on the Judiciary of the House of Representatives undertook to conduct a complete investigation of the Port of New York Authority. The committee subpoenaed all Port Authority records for the years 1946-1960, including daily worksheets, staff memoranda and all other records relating to the internal management of the agency. The Authority refused to produce these documents relating to its internal administration, although it made large quantities of other documents available.

For this refusal the Judiciary Committee cited the Chairman, the Executive Director and the Secretary of the Port Authority for contempt, and the House voted the citations, although only in the face of an unusual degree of opposition to such action.

At the present writing, Executive Director Austin Tobin of the Authority has been prosecuted for contempt of Congress and a decision

13 H.R. 9999 and H.R. 10922.
convicting him has been handed down by the United States District Court for the District of Columbia. The case is now on appeal. When ultimately determined it is virtually certain to have great importance, either for the practical administration of agencies established by compact, for compact law, or for both such practice and law.

Mr. Tobin has argued that the Port Authority is a state agency and that its internal records are therefore immune from the compulsory process of Congress. He has further argued that the interest of Congress under the compact clause is limited to a determination as to whether a particular compact is likely to affect or does affect the political balance of the federal system or a power of the national government.

On the other hand the prosecution has contended that Congress can investigate in any field of national importance as an aid to its legislative processes. It has also argued that the compact clause itself is an affirmative grant of power to Congress and that accordingly all matters pertaining to any phase of compacts are subject to Congressional investigation, backed by compulsory process if the committee is so authorized by its parent house.

The District Court's opinion deals with several issues, some of which are not relevant to compact law or practice. With respect to the compact issues, the Court places its holding on two grounds:

1. The Port Authority can be investigated fully by a Congressional committee because its activities involve matters of national interest, such as interstate commerce and national defense, and
2. The compact character of the Port Authority makes it a "hybrid," subject to Congressional surveillance under the compact clause.

From the opinion it is not clear whether these are independent grounds for the decision, or whether the two standing in combination are necessary to support the holding. The opinion speaks of the need to balance federal and state interests but supplies no test by which this balancing is to be done. Consequently, it is possible that the opinion places all agencies of state government engaged in matters of national interest (highway departments, water supply or regulatory agencies using or regulating navigable waters, etc.) in equally vulnerable positions. It is also possible that the Court views compacts as something special for investigatory purposes.

Naturally, the extent of the federal supervisory power over compact agencies, and whether it is any different from a possible power over the state agencies generally, is an important question to be weighed in drafting compacts and accompanying consent statutes. Until this case is finally decided, an authoritative statement of the law cannot be presented. The policy issues cut deep into the very fabric of our federal system.

Chapter IV

USE OF THE COMPACT

A. PURPOSE OF COMPACTS

1. Permanent Arrangements

SINCE a state is forbidden by the Constitution to impair the obligation of contracts, it cannot unilaterally renounce an interstate compact except as agreed by the parties. Consequently, the interstate compact is the instrument best suited for the establishment of permanent arrangements among the states. Its original role was of this character—the determination of state boundaries or of jurisdiction along them through self-executing agreements to continue in perpetuity except as the parties might agree to their modifications. Now, as then, the compact, because of its assurance of permanence, is the vehicle for establishing boundaries or territorial jurisdiction in boundary areas. Instances of the use of compacts for these boundary-jurisdictional purposes have been less numerous in modern times. The interstate compact is equally effective in the formulation of other arrangements where a high degree of stability is desired. Since the famous Colorado River compact of the 1920's,1 and despite the somewhat chequered career of that agreement as illustrated by the long controversy between California and Arizona, the interstate compact has established itself as the preferred and most widely utilized method for effecting the allocation of waters of interstate streams.2 Interstate park compacts3 also are motivated in part by the desire to employ a mechanism that will prevent the alienation of lands from the park purpose to which they are dedicated. The flood control compacts of the East—the Connecticut, Merrimack and Thames,4 seek to establish interstate arrangements to reimburse upstream communities for a portion of the tax loss occasioned by

2 See Howard R. Stinson, "Western Interstate Water Compacts," California Law Review, 45: 655-664 (1957). The author, who served as federal legal advisor on the Republican and Snake River Compacts and as federal representative on the Belle Fourche River Compact states that in spite of problems, especially with regard to dealing with the federal government, it would seem that compacts present a better means of settling differences as to equitable apportionment of water than judicial determination.
3 For example, see text of the Palisades Interstate Park Agreement, 50 Stat. 719 (1937); Breaks Interstate Park Compact, 68 Stat. 571 (1954).
4 For texts, see Connecticut River Flood Control Compact, 67 Stat. 45 (1953); Merrimack River Flood Control Compact, 71 Stat. 18 (1957); Thames River Flood Control Compact, 72 Stat. 364 (1958).
the construction of flood control reservoirs. Permanence is necessary in such arrangements so that the affected communities may be assured of continued funds from the downstream beneficiary states.

2. Jurisdictional Questions

As suggested above compacts have been used to establish certain types of jurisdiction for one state within the territory of another. The interstate compact is the best legal vehicle for the bridging of jurisdictional barriers. Such agreement to extraterritorial jurisdiction is essential, of course, to arrangements for joint use or joint establishment of institutions, including those for correctional purposes. Arrangements through interstate compacts for the sharing of correctional institutions or of educational or other facilities and programs can be of great value to the states, whether or not they involve an exercise of extraterritorial jurisdiction in the strict sense. On the one hand, they can reduce duplication of facilities; on the other, cooperative use can provide the broader base which will make possible the maintenance of better facilities and higher program standards. The compact could be used in even more extensive arrangements of this type to provide extraterritorial state jurisdiction to correspond with a problem area. Such use was illustrated early by the New York-New Jersey Compact of 1834 which extended the criminal jurisdiction of each party state over particular water areas beyond the actual boundary line. There are other uses of interstate compacts to meet jurisdictional questions. One of the values of the several forest fire compacts and of the civil defense compact is their establishment of the basic legal pattern and procedures essential to the functioning of mutual aid among the states. The forest fire compacts, for example, meet a fundamental need in implementing such mutual aid by prescribing the rights, privileges and immunities of forces rendering aid in another state and establishing rules as to liability, responsibility for compensation and reimbursement arrangements as between aiding and aided states.

The possibility of other jurisdictional uses is indicated by the recent Interpleader Compact. Until recently, comparatively little thought was given to possible compacts dealing with any phase of private law, despite the fact that there are many jurisdictional problems in this field which might be handled through formal interstate agreements. The enactment by several states of an interpleader agreement may mark the beginning of the use of the compact for private law. The basic purpose of the agreement is to permit the holder of a debt or property claimed by two or

7 For text of Interstate Civil Defense Compact, see N.Y. Laws C. 16 (1951).
8 For text of the Interpleader Compact, see N.Y. Laws C. 775 (1957).
more persons to obtain jurisdiction over all such parties so that complete and final settlement of the dispute may be had in a single proceeding. This remedy of interpleader, of course, long has been available in individual jurisdictions and, subject to certain limitations, in the federal courts, but not on an interjurisdictional basis.

3. Uniformity

There are some types of interstate activity in which the achievement and maintenance of uniformity are especially necessary. For example, the interjurisdictional movement of parolees and probationers, their supervision in states other than the state of conviction, and the retention of jurisdiction over them probably would be impossible unless each of the states participating in the arrangement operated under substantially identical and unified laws. The necessity for the common adherence to a single legal pattern is even greater where, as in the case of cooperative institutionalization or the interstate clearance of detainers, patients under legal commitment or convicts are to be moved across state lines either temporarily or in order to alter their ultimate custodial situation.

There appears to be only one instance in which an attempt has been made to handle a somewhat analogous jurisdictional problem by reciprocal laws rather than by compact. All of the states now have reciprocal enforcement of support laws which are widely used to assure the honoring of familial support obligations by persons in one jurisdiction who owe them to dependents in another. These laws specifying the amount of support and designating those liable to support duties vary considerably from jurisdiction to jurisdiction. They are similar primarily in that each of them affords a procedure for cooperating with other states in the conduct of interstate enforcement of support proceedings. However, the limited objective of the interstate support proceeding does not require— and indeed is useful because it largely avoids—the movement of parties across state lines. Consequently, the actions in each participating jurisdiction may be viewed as complementary or auxiliary rather than as parts of an indissoluble transaction. The closer the coordination between the various elements of the cooperative undertaking, the more necessary is the use of the compact approach.

The concept of uniformity is most familiar in connection with the work of the National Conference of Commissioners on Uniform State Laws. That organization has accomplished much by preparing uniform laws and offering them for consideration by the states. A number of these laws, especially in the commercial field, have achieved wide adoption over a period of years. However, uniformity attained in this way is subject to dissipation from two directions: First, uniformity can be impaired by the unilateral action of particular state legislatures in amending a uniform statute so that it is no longer uniform or in introducing nonuniform

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provisions when the act is being initially considered by the legislature. Second, differing interpretations of provisions of uniform acts can impair the degree of uniformity actually achieved. The ordinary law, for all its identity in language with the laws of other states, is only a simple statute organically unconnected with the statutes of other jurisdictions. Accordingly, the courts in different states can and sometimes do interpret identical provisions differently. Since the highest court of each state is the final authority on the meaning of the statutes of its own state, there is no satisfactory way to achieve a reconciliation of divergent interpretations. Of course, it is true that to some extent clear and careful draftsmanship may reduce the dangers of nonuniformity resulting from judicial decisions, but in so large and complex a field as the commercial law it seems too much to hope that this will solve the problem.

As the Court has noted, an interstate compact is a contract between the states and enjoys the protection of the contract clause of the United States Constitution. If uniform provisions are embodied in a compact, no state could subsequently destroy this uniformity by unilateral amendment of its own statute except to the extent that such variation might be permitted by specific provision of the compact. To some degree, this limitation of a state's freedom to alter its law unilaterally may raise questions. However, if the virtue of a uniform measure is to be found in the identity of the law from state to state, the superior stability produced by a compact should be considered.

4. Determination of Rights and Duties

The interstate compact as noted above has been widely used for the allocation of the waters of interstate streams in the West. In large part, the water allocation compacts represent the balancing of rights, benefits and duties among the states by formal agreement. This use of the device for the equitable allocation of scarce water has now been paralleled by its use among eastern states to obtain an equitable distribution of financial burdens incident to flood control. The Connecticut, Merrimack and Thames agreements previously mentioned are for this purpose.

Compacts have been employed in a somewhat analogous fashion to meet interstate problems in motor truck taxation. The states party to these agreements apportion annual registration and weight fees for motor trucks on the basis of vehicle miles travelled within each jurisdiction.

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10 See Braucher, "Commercial Code in Massachusetts," 18 Harvard Law School Record No. 3 (Feb. 18, 1954) p. 1, 4. "Conflicting judicial interpretations are reported with respect to at least seventy-five sections of the Negotiable Instruments Law," p. 4.


12 The report of the special master in Arizona v. California (Draft Report in No. 9, Original October Term, 1959) indicates very strongly the advantages for solving water allocation problems by compact. Judge Rifkind construes the lack of a compact for the lower basin of the Colorado River to require him to apportion water in accordance with federal statute even though he points out that the act of Congress is faulty.

tion. A fleet operator pays each participating state in which his vehicles travel a pro rata share of the total amount of annual registration and weight fees that would be required to register his entire fleet in that state. The share is in accordance with the ratio of fleet mileage in that state to total fleet mileage. These agreements on the part of a substantial number of states to allocate taxes among several jurisdictions on an equitable basis indicate the possibility of even wider use of the interstate compact for balancing rights, benefits and duties among states.14

5. Cooperative Services

Among the outstanding recent developments in the use of interstate compacts has been their application to the field of state services. Instead of maintaining entirely separate correctional institutions, some states are now beginning to provide for the use of certain types of facilities and institutions on a cooperative basis. Under these arrangements institutional facilities located in one of the participating states may serve at least some of the needs for two or more jurisdictions.15 The higher education compacts—the Southern, Western, and New England—proceed on a similar principle in that they provide for the cooperative use of college and university programs.16 All of the correctional and educational agreements formulated to date contemplate the use of contracts for the purchase of the desired service. In the case of corrections the use of contracts alone without basic compactual underpinning would not suffice because of the need to construct a firm foundation in the laws of all participating states for the safeguarding of constitutional rights and the conduct of legal proceedings, incident to the administration of criminal law. In the educational arrangements the making of contracts within the framework of an interstate compact has been thought desirable in order to promote the continuing character of the undertakings on a stable basis. In each instance such a compact makes possible the provision of a more effective program than any one state might otherwise be able to afford for itself.

The compact is being used increasingly in the welfare field notably to meet interstate problems with respect to juveniles and mental health. The Interstate Compact on Mental Health is an agreement to provide state services to all in need within their boundaries regardless of the state of the person's residence. State laws generally set up obligations in this matter with reference to the residence of the person in need of care. In some cases they provide for reciprocal arrangements with other states calling

14 Probably the only instance of this general type of compact was between Virginia and West Virginia, entered into for the purpose of apportioning responsibility for the Virginia state debt shortly after the separation of West Virginia from Virginia. Because of the peculiar circumstances, this compact produced very lengthy litigation.

15 South Central Corrections Compact; for text, see Tennessee Public Act C. 165 (1955), Arkansas joined 1957; Western Interstate Corrections Compact; for text, see pamphlet under this title of Council of State Governments (1958).

for the return and acceptance of mentally ill patients so that each state would take care of its own residents. The mental health compact provides for the handling of mental patients on the basis of clinical determination of patient welfare rather than through the automatic application of principles of residence or settlement.

6. Channels of Intergovernmental Relations

The compact has been widely used to establish permanent channels of interstate relations and consultation, notably by creating a number of interstate commissions of a study or recommendatory type. The marine fisheries commissions—Atlantic, Gulf, and Pacific—are basically advisory in character as is the Great Lakes Basin Commission. In a few cases, commissions of this type may have, in addition to their advisory functions, some aspects, even though not explicit, of a promotional or "regional voice" character. This is true to some extent of the Great Lakes Basin Commission. Certainly it is true of the Tombigbee compact among Alabama, Mississippi and Tennessee to promote development of an interstate water route. Generally speaking, the advisory bodies have been surprisingly successful. The Pacific Marine Fisheries Commission, the Interstate Commission on the Potomac River Basin and the Interstate Oil Compact Commission are outstanding examples. The latter is one of the most controversial of all interstate agreements. Yet a recent evaluation says of it, "Other compacts provide for commissions to study and recommend, and many do an effective job. But none is listened to as is the Interstate Oil Compact Commission. It has a unique position among compact agencies in this country. Legally, it has no power; actually, it is the most powerful and respected agency in the oil and gas industry."22

Such advisory and recommendatory groups of state officials could operate without the formal framework of an interstate compact. In fact, less formal organizations, such as the various associations of state officials, have functioned for years. Nevertheless, the value of compacts in this role is that they provide a formal, comparatively more binding and more permanent legal base for the establishment of continuing study and advisory groups.

17 For texts, see Atlantic States Marine Fisheries Compact, 56 Stat. 267 (1942); Pacific Marine Fisheries Compact, 61 Stat. 419 (1947); Gulf States Marine Fisheries Compact, 63 Stat. 70 (1949).
18 The Gulf States Compact contains a clause permitting states to establish joint administration of common areas. A number of the Atlantic states have enacted an amendment to their compact to the same effect. No use has yet been made of these provisions.
19 For text of the Great Lakes Basin Compact, see Laws of Minn. C. 691 pp. 1048-56 (1925).
20 For text, see 72 Stat. 609 (1958).
21 For text of the Interstate Compact to Conserve Oil and Gas, see 65 Stat. 199 (1951).
Compacts also can be used to provide a basic framework for the development of supplementary or implementing patterns of cooperative relationship. The three educational compacts—the Southern, Western, and New England—establish regional education boards which are largely recommendatory in character, but in operation the agreements provide the essential channels for contracts-for-services through which educational facilities can be regionally shared. The Western Interstate Corrections Compact provides a constitutional basis for contracts under which the correctional institutions of one state can be utilized by another. But unlike the South Central Corrections Agreement this arrangement does not create any interstate agency even of an advisory character. The particular contracts for institutional use made under its aegis will be formulated and carried out by existing agencies of the states party to the compact.

7. Joint Agencies

The interstate compact is the most effective medium for the establishment of joint agencies of two or more states. This is particularly so in the creation of administrative agencies. Its original use for this purpose in the Port of New York Authority23 has been followed by several similar broad-purpose interstate authorities, the Delaware River Port Authority24 and the Missouri-Illinois Bi-State Agency.25 Another body of this type is proposed for the Kansas City area.26 All these agencies of the authority type have similar basic purposes—to provide and administer joint public works and facilities. To this end, they were given financial, operational and construction powers. Because of its legal character, the compact provides interstate arrangements with the freedom from disruption necessary for administrative stability. It acts as a joint charter for the creation of a joint agency and establishes a single basic delegation of powers by all the states party to that joint agency. A single law provides a single administrative structure and hierarchy with one apex of administrative command below the policy level. As parties to the joint charter the states accept a common responsibility, a common administration and an agreed allocation of costs.

This is equally true when the joint body is an interstate regulatory commission. The Ohio River valley27 and New York harbor28 pollution abatement commissions were the first interstate agencies to be granted regulatory powers. Possibly, the leading example of an interstate regulatory agreement is the Waterfront Commission Compact of New York and New Jersey29 designed to meet some of the problems raised by un-

23 For text of the Port of New York Authority Compact, see 42 Stat. 822 (1921).
24 For text of the Delaware River Port Authority Compact, see 66 Stat. 747 (1925).
25 For text of the Missouri-Illinois Bi-State Development Compact, see 64 Stat. 568 (1950).
26 For text, see Kan. Laws C. 198 (1957). It would appear that by the time the agreement is consummated there may be alterations.
27 For text of the Ohio River Valley Water Sanitation Compact, see 54 Stat. 752 (1940).
28 For text of the Interstate Sanitation Compact, see 49 Stat. 952 (1935).
29 For text of the Waterfront Commission Compact, see 67 Stat. 541 (1953).
Use of the Compact

desirable labor-management practices, racketeering and extensive violence along the New York waterfront. The agreement outlaws the "shape up" hiring system and other practices deemed undesirable and excludes criminal and subversive elements from port operation. The commission licenses and regulates longshoremen in the two-state port area and operates a system of licensing and information centers. Under the waterfront agreement comprehensive and stringent regulation of important phases of a major industry are entrusted to an agency established by interstate compact. The use of an interstate compact makes possible a single delegation of powers and fixing of standards in connection therewith by the two states, effected by a single law rather than by the difficult, if not impracticable method of parallel laws.

The waterfront compact broke new ground for interstate compactual agencies in another area. For the first time an interstate agency has been given the power to tax. Within defined limits, the commission may finance its operations by a tax on employers in the regulated industry. This method of financing is to continue until and unless the legislatures of the two states provide other means of meeting the commission's budget.

Both states in this case provided in their enacting legislation that in the event of delay in Congressional consent, separate but closely cooperating commissions were to function in the two states, using substantially the text of the compact as though it were two ordinary statutes, one operative in New York and one in New Jersey. While rapid Congressional action made the use of this alternative unnecessary it is questionable, indeed, if such an arrangement could have survived in the face of the political storms that challenged the waterfront agency in both states.

It would seem that for most purposes, the use of the interstate compact is essential in important delegations of power. Two compacts recently enacted by Maryland and Virginia would provide further examples of interstate agencies delegated regulatory powers. One delegates to an interstate commission financed by a tax on oysters broad regulatory powers over the long-disputed fisheries of the Potomac River.30 The other, with the District of Columbia as the basic partner, establishes a joint agency for the regulation of transport utilities in the Washington metropolitan area.31 Obviously, the latter compact involves a substantial and complex delegation of powers.

Recently, there have been some criticisms of the use of authorities and independent commissions for administrative purposes. Whatever may be said of the operation of these agencies as part of internal administrative structure within a jurisdiction, they do have a special justification in intergovernmental affairs in that they can provide an administrative bridge of jurisdictional lines. Obviously, many compacts are self-executing or can be administered by the normal state governmental machinery without the need of any interstate agency. Others, such as the parole and pro-

31 For text of Washington Metropolitan Area Transit Regulation Compact, see P.L. 86-794 (1960).
bation agreement, provide simply for the designation of specific state compact administrators. In some cases these officials have formed associations to coordinate their efforts in implementing the compact. Subject to possible limitations in some state constitutions, the compact, if legislatures so desire, can be used to establish interstate machinery of a wide degree of authority. It can also be used to formulate the simplest machinery for consultation.

One of the chief criticisms sometimes made of the authority type of agency is that it escapes effective control. This apprehension has included compactually established interstate agencies particularly in view of their intergovernmental character. Fears of lack of effective control should not discourage the use of interstate bodies. Controls can be fashioned to meet the needs of the situation either in the compact itself or in the state enabling legislation. In fact, the multijurisdictional nature of the agency makes it subject to the surveillance of all of the party states and, under some circumstances, even of Congress. For example, Congress has required periodic resubmission to it of the interstate oil compact and has instructed the Attorney General of the United States to report concerning the possible relations of activities under this compact to monopoly.32

The Port of New York Authority operates under provisions that require the submission of the minutes of its board of directors to both Governors and these minutes may be disapproved within ten days.33 This veto of the minutes is potentially a powerful control, even though it does not by itself promote a general review and evaluation of activities of the agency. In practice, there has been no detailed supervision and the veto power rarely has been exercised.34 However, a procedure could be established which would encourage an over-all evaluation of authority programs. Certainly the need to return to the legislatures for authorization to construct new projects, as has occurred in the case of the New York Port Authority, is an important control.35 Interstate commissions which do not have the fiscal characteristics of the authorities are more readily controlled. In the case of many interstate agencies the required filing of annual reports and submission of appropriation requests bring them under the scrutiny of Governor and legislature and the budget processes of the states.

From another direction, there is criticism of the interstate compact commission as characteristically indecisive. A 1954 analysis of twenty-seven compact administrative agencies concludes that in general, they operate in practice under variations of the unanimity rule or with one exception, provide for simple majority rule only where the commissions

33 Article XVI of the Compact provides "Each state reserves the right hereafter to provide by law for the exercise of a veto power by the Governor thereof over any action of any Commissioner appointed therefrom."
Use of the Compact

are purely recommendatory. The exception is the Yellowstone River Compact Commission which supervises the allocation of the water of that river and can, therefore, directly affect important substantive matters. This commission is chaired by a Federal representative who serves as tie-breaker in case the two states deadlock. The author of the article just quoted grants that too much cannot be proved from this analysis. He says, "It is obvious that going Organizations such as the Port of New York Authority act with a good deal of administrative vigor, although it is worth noting that the power of the Port of New York Authority to use its toll revenues for new projects, frees it to a certain extent from reliance on State appropriations. But if one assumes that effective Organizations should be designed to meet serious conflicts and administrative crises rather than the daily run of non-controversial business, then the voting arrangements by which decisions may be taken are a significant indication of administrative strength.

Several observations can be made. Where there is a bistate agency unanimity is frequently quite feasible and many of the twenty-seven compacts under reference were bilateral. A number of others did not ordinarily require speedy decision making. It can be stated that there has been no indication of wide dissatisfaction in practice with compact agencies on these grounds. The Waterfront Commission operating in a controversial and politically explosive field does not seem to have suffered from inherent weakness in its decision making process. The recent Klamath River Compact illustrates one way to prevent prolonged disagreement by providing arbitration machinery for the resolution of deadlocks. Compact agencies can be shaped to make speedy decisions if expeditious action is the principal desideratum. A 1959 study of the administrative experience of compact agencies, the first systematic study of this aspect of compact use, presents conclusions very favorable to the interstate agencies.

Students of government generally do not approve of the commission for administrative purposes, whatever its merits for quasi-legislative and quasi-judicial functions. However, the compact commission may in its ability to provide representation of different jurisdictions have special qualities for intergovernmental administration. It is significant that although not a single compact until the twenties established a joint interstate agency, many of the non-self-executing compacts since then have created formal interstate commissions.

8. Multilevel Integration

In addition to its assets in interstate relations, the compact is potential...
ally the most pervasive of all our tools of American intergovernmental relations. It is available for coordination on all levels—federal, state, local and international—and for the building of vertical as well as horizontal relationships. No other device known to our federal experience can provide the single legal pattern effective on all levels and for all types of government that is possible under the interstate compact. Nor can any other device provide a balance quite so effectively between intergovernmental integration and variation.

A significant feature of the compact is its availability for federal participation—for the establishment of vertical federal-state arrangements along with interstate agreement as part of a single legal pattern. There are two avenues to an arrangement of this type. First, the federal government can become a party to the compact itself. Second, the statute by which Congress consents to the compact can contain integrating language and directions providing a more or less complete marriage of the federal statute and the interstate compact.

There is nothing in the federal constitution which forbids the federal government to engage in contractual relations with the states. An interpretation so limiting national power would embody an undesirable rigidity in federal-state relations. In fact, the federal government uses contractual arrangements in federal-state relations and the validity of such agreements has received judicial recognition. Moreover, on several occasions the District of Columbia and federal territories and possessions have either become parties to compacts or have been authorized by Congress to do so. Of course, the federal government cannot be legally bound by a federal-state agreement even though the states are. However, the binding of the federal government is not important to the values of federal participation in such an agreement as a party thereto. First, this procedure would effect a more complete federal-state integration than is possible under any other form. The principal arrangements would be contained in a single basic document which would be federal law as well as state law. Second, state law and administration would not be displaced. Moreover, questions of pre-emption and conflict between federal and state law would be quieted. Third, state law, courts, agencies and officers—all the administrative and judicial machinery of state government—would become parties to the compact.

41 New York v. O’Neill, 79 S. Ct. 564, 571 (1959) in an opinion deciding that the Uniform Extradition Act is Constitutional, the Court said:

"To hold that these and other arrangements are beyond the power of the states and federal government because there is no specific empowering provision in the U.S. Constitution would be to take an unwarrantedly constricted view of state and national powers and would hobble the effective functioning of our federalism. Diffusion of power has its corollary of diffusion of responsibilities with its stimulus to cooperative effort in devising ways and means for making the federal system work. It is an interplay of living forces of government to meet the evolving needs of a complex society."


43 The District of Columbia is a member of the Potomac Valley Pollution and Conservation Compact. 54 Stat. 748 (1940). The Crime Control Act of 1934, 48 Stat. 909, Re-enacted 63 Stat. 107 (1949) was amended to add consent to territories to that given states in the original act for crime control compacts. 70 Stat. 1020 (1956).
Use of the Compact

Use of the Compact—would be available to the arrangement in a fashion not constitutionally possible under federal statute, nor as readily or effectively fashioned by parallel federal and state legislation. A significant feature of the detainers compact\textsuperscript{44} enacted by New York, New Jersey, Connecticut, New Hampshire, Pennsylvania and Michigan, and open to all states, is its availability for participation by the federal government as a party. For a number of years difficult interjurisdictional legal questions stood in the way of a solution of problems caused by the filing of detainers which affect a prisoner's program of treatment but which cannot be disposed of because they emanate from other jurisdictions. The agreement provides methods whereby either the prisoner against whom another jurisdiction has lodged a detainer or the prosecutor whose jurisdiction has lodged it may precipitate the clearing of the detainer and trial on the outstanding indictment, information or complaint. The federal prison system contains a sizable portion of the country's prison population. The treatment of federal prisoners also is affected by state detainers against them. A single interjurisdictional arrangement provides the simplest charter of limitations upon abuse of detainers.

The second method of federal-interstate integration by means of compact, namely, the combination of such an interstate agreement with complementary integrating provisions in the Congressional consent legislation, or possibly (although less desirably) elsewhere in federal law, is more complex. It runs more risks of leaving questions that, despite complementing verbiage, may fall between the federal and state provisions. Nevertheless, it can be used to achieve more effective and far-reaching federal-state integration than the relatively amorphous federal-state arrangements now customary. Examples of approaches to this method already exist. The operation of some interstate compacts, notably, the Republican River and the Belle Fourche River compacts, have been conditioned upon the inclusion of specific principles in the Congressional consent legislation.\textsuperscript{45} Both the Boulder Canyon Project Act of 1928\textsuperscript{46} and the 1956 legislation authorizing the Colorado River storage project\textsuperscript{47} subject the federal government to the provisions of the Colorado and Upper Colorado River compacts respectively. Similarly, complementary federal legislation effectively aids in achieving some of the purposes of the interstate oil compact by prohibiting the shipment of "hot oil" in interstate commerce.\textsuperscript{48}

In federal-interstate and interstate relations the potential usefulness of the compact is enhanced by its malleability—unequalled by any other intergovernmental device. Because it is a pattern of clearly related yet separable instruments—i.e., the compact itself, an enabling statute in each party state, and the federal consent statute—the compact method can provide interjurisdictionally a stable single core which, however,  

\textsuperscript{44}For text of the Interstate Agreement on Detainers, see N.Y. Laws C. 524 (1957)  

\textsuperscript{45}Zimmermann and Wendell, The Interstate Compact since 1925 (1951), p. 61.  

\textsuperscript{46}45 Stat. 1062, 43 U.S.C.A. Sec. 617g. (1952).  

\textsuperscript{47}70 Stat. 110, 43 U.S.C.A. Sec. 620m (Supp. IV, 1957).  

can be fitted into the law and administration of each jurisdiction by adjustable embodying statutes. A rich variety of combinations is thus available for tailoring the intergovernmental arrangement to cover jurisdictional gaps.

While the compact is not used in the vertical relations between a state and its political subdivisions, it is obvious that such an interstate agreement is as binding upon their political subdivisions as it is on the states themselves. Certainly compactual arrangements long have been used to meet local or regional problems which extend beyond state lines. The growing urbanization of the United States is likely to increase the use of the compact method to meet areal problems. The compact already is prominent in meeting some of the problems of interstate metropolitan areas as evidenced by the port authority, pollution and parks compacts. The employment of similar agreements between and among state governments to meet other interstate metropolitan problems seems very probable and on occasion could even include federal-state arrangements. The possibility of using the compact on the local government level is illustrated by the recent Illinois-Wisconsin enactment of an interstate compact authorizing establishment of school districts bridging the state line.49

In addition, the interstate compact has a further area of potential usefulness. It can be employed as a means of effecting agreements between political subdivisions of different states. Need for cooperation among communities of all sizes is growing and there has been a corresponding growth of interlocal arrangements and agreements, usually for narrowly defined purposes, on a purely intrastate basis. Neighboring local governments can be given the opportunity to utilize this procedure even though they are subdivisions of different states. However, the usual procedure of state initiation, negotiation and enactment of the agreement may unduly complicate interlocal cooperation across state lines. It is possible (and several states have enacted legislation for the purpose) to authorize, subject to some state controls, the localities themselves to negotiate and adopt agreements. When such agreements are between communities in different states they would have the status of interstate compacts. So far the single example of an interlocal compact bridging a state line is the state authorized, locally formulated, arrangement between Bristol, Tennessee, and Bristol, Virginia, which has been in effect for a number of years.50

The compact clause of the Constitution also contemplates compacts with "foreign powers." Mr. Chief Justice Taney's opinion in Holmes v. Jennison spoke of the "foresight of the framers" in providing for such state-foreign agreements. An early example of an actual arrangement

50 For some time the charters of both cities have provided for the making of agreements for the operation and performance of certain services on a cooperative basis. An agreement of 1933 provides for common sewage disposal facilities. See: Va. Acts of Assembly (1920), C. 409, Sec. 4 (17); Tenn. Private Acts of 1933, C. 219, Sec. 1.
51 14 Pet. 538, 578 (1840).
Use of the Compact

across the international border was litigated in the North Dakota case of McHenry County et al. v. Brady where an agreement between an American drainage board and a Canadian municipality relative to the construction of drainage works by the board in Canada was held to be not a prohibited treaty but a permissible compact.

Proposals for use of the compact in the international area fall into two main categories. First, the use of the compact has been suggested as the means by which states could, on occasion, become parties to the provisions of international treaties thus avoiding questions of constitutionality and conflict and making available state administrative and judicial machinery. The use of compacts along these lines originally was urged a number of years ago by Dean Wigmore and a committee of the National Conference of Commissioners on Uniform State Laws as a means of securing direct adherence by American states to projects of world legislation. There has been no instance to date of compact use in connection with treaties. However, the Interpleader Compact, which is open, subject to special safeguards, to participation by foreign nations as well as by jurisdictions within the United States, represents a somewhat analogous approach. The second area of usefulness for state-foreign agreements is their employment for making local areal arrangements. In 1957, the President signed a joint resolution which gave consent of Congress for New York to enter into the agreement or compact with the government of Canada, for the continuation of the Buffalo and Fort Erie Public Bridge Authority as a municipal instrumentality of the state. In 1958, Congress gave its consent to a compact between Minnesota and Canada for the construction of a highway across the so-called "Northwest Angle." Congress has also granted consent to participation by Canadian provinces in the Northeastern Interstate Forest Fire Protection Compact. As yet no Canadian province has joined this agreement among the northeastern states although the government of Canada in response to an inquiry by New Brunswick has indicated a method by which joinder could be effected. Clearly, it is constitutional and feasible to use the compact for state-foreign agreements in both the ways outlined above. At this time its use for local areal arrangements appears to hold most promise in view of the growing need of bridging the international boundaries for local purposes. Even here, however, compact use will face the hurdle of novelty when used in connection with the conduct of foreign relations as exemplified by opposition on the part of

52 37 N.D. 59, 163 N.W. 540 (1917).
54 Supra note 8.
55 71 Stat. 367.
some federal officials to formal participation by Canadian provinces in
the purely recommendatory Great Lakes Basin Compact.

B. CRITICISMS OF THE COMPACT APPROACH

There are weaknesses and difficulties in the use of the interstate com-
pact. The most obvious difficulty is the necessity for securing agreement
among several jurisdictions. Difficulty of agreement is, of course, relative
to the degree of controversy involved in the subject matter and, notably
so, when the controversy has economic or political aspects. But to portray
the interstate compact as subject in all cases to a requirement of unanim-
ity is overcoloring the picture. Often a compact can be effective among a
group of the states without the necessity of participation by all the pos-
sible parties. Similarly, time often erodes opposition so that what may
be thought an absolute veto proves to be only a suspensive one. In fact,
the normal expectation in the United States is that all legislation requires
time to be enacted. Noncontroversial undertakings proceed more rapidly.
Those which are the subject of substantial disagreement are characterized
by delay and discord that may extend over long periods of time, no mat-
ter what legal instrument is employed.

A related criticism is directed at the time involved in negotiating,
enacting and securing consent to compacts. One comparatively recent
study estimates that measuring the time period from the actual sign-
ing or the first ratification, whichever is earlier, to the date of federal
consent, without including the period of negotiation which would ob-
viously lengthen the proceedings, the average time period for compact
consummation for a group of sixty-five interstate agreements was four
years and nine months. For the thirty which dealt with natural resources,
the average period was six years and nine months. If narrowed to the
nineteen compacts which deal with various aspects of river management
and control, the average rose to eight years and nine months. The author
states "This last average period is substantially higher because of the
number of compacts which have dealt with allocation of the waters of
streams in the arid West where long continued controversy, litigation and
protracted investigations and negotiations have been the rule rather
than the exception." In fact, even if we accept this over-all average
time for all compacts it has undoubtedly been increased by the water
allocation agreements. Water allocation is a difficult, controversial and
time-consuming process no matter what the instrument of settlement.
But it is noteworthy that in this difficult field interstate compacts today
are the generally accepted procedure. The Supreme Court itself has
indicated the superiority of the device over judicial settlement. In any

60 Ibid., p. 9.
61 See Stinson, op. cit., supra, note 2, p. 657. "The States . . . have adopted the com-
 pact approach, having learned by forty or fifty more years of experience that water
 problems are rarely settled among states by litigation."
62 See Colorado v. Kansas, 320 U.S. 383, 392 (1943). "Such controversies may approp-
riately be composed by negotiation and agreement, pursuant to the compact clause of
Use of the Compact

case, time is far from being a fatal handicap to the compact. A great deal of our legislation requires a considerable period of gestation. It is not usually born full-grown.

Compacts on occasion have been consummated with considerable speed even in cases where they involved multistate participation. This was true not only of the emergency period of the civil defense compact, but of such interstate agreements as parole and probation, juveniles, and mental health. Bistate agreements frequently have been enacted with comparative ease, sometimes even when they have involved complex and difficult issues as in the New York Waterfront Commission Compact.

Finally, the interstate compact is criticized for inflexibility. The charge is related to a number of aspects of the compact process. First, it is said that the compact is difficult for the party states to amend. Certainly, it is true that a contract can be changed only with the consent of the contracting parties. Yet, no one suggests that this is a reason for not employing contracts. If flexibility is desired, much can be done by provision in the compact itself for an expedited process of amendment or even for adaptation by some other method such as authority to meet specified conditions when they arise. One of the oldest and most famous of modern interstate compacts, the New York Port Authority, has operated by the process of constant additional legislative authorizations as a means of embarking on new projects.

Another aspect of compact inflexibility in terms of amendment which is cited is the requirement of federal consent for changes. Congress "must occasionally pass on some picayune matters." But it is acknowledged that this difficulty can be overcome. Certainly, Congress might give prior consent in its original grant to changes clearly within the scope and standards of the original agreement.

Lastly, it is charged that the inflexible character of compacts places pressure on the federal government to accept unsatisfactory compact provisions rather than require re-enactment by the states. This criticism would not apply to a large proportion of interstate agreements since they are concerned solely with state matters. Even where there is a federal interest, there is really no cause for apprehension. Subsequent federal action can cure, or if necessary, obviate any very objectionable de-

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the Federal Constitution. We say of this case, as the court has said of interstate differences of like nature, that such mutual accommodations and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power." See also similar statements in other areas of interstate relations; Washington v. Oregon, 214 U.S. 205, 217 (1909); Minnesota v. Wisconsin, 252 U.S. 273, 283 (1920); New York v. New Jersey, 256 U.S. 296, 313 (1921).


64 For text of the Interstate Compact on Juveniles, see Wash. Laws C. 284 (1955).


67 Ibid., p. 8.
velopment which may arise. Even though it is unnecessary, the well-known clause reserving the federal government's right to "alter, amend or repeal" the consent statute can be incorporated in that instrument. In most cases, provisions in the consent legislation can satisfy federal concern without aborting state action. It also should be possible for Federal agencies to give earlier indication of their misgivings or suggestions prior to the point where the proceedings have reached the final step of consent legislation. Whatever may be the faults of the compact method, they are scarcely fatal to effective use of the device. In fact, it would appear that such weaknesses as the compact may have are shared with other legislative enactments. The process of arriving at and changing consensus in a democracy is seldom streamlined.
Appendix I
ANNOTATED MATERIALS

INTRODUCTION

These materials are intended as aids in the drafting of interstate compacts. They contain the texts of clauses gathered from a wide variety of existing and proposed compacts together with some other statutory provisions. These clauses have been arranged according to subject matter and are accompanied by interpretative comments.

However, no set of sample provisions can be all-inclusive. Any given compact necessarily varies in accordance with the requirements of its specific subject matter. The following pages are merely intended to suggest possibilities and to give an indication of what has been done in the past.

It will be noted that many of the sample compact provisions set forth in this appendix are useful for compacts establishing intergovernmental administrative agencies. Of course, a number of compacts do create such bodies. As pointed out in Chapter I of this manual, however, many compacts are designed for administration by existing agencies within each of the party jurisdictions. Negotiators, draftsmen and others who may be considering the plan of a projected compact may wish to study two very similar compacts which differ principally in their administrative pattern. The South Central Corrections Compact (so far enacted by Tennessee and Arkansas) sets up such an agency; the Western Interstate Corrections Compact does not.

PURPOSE

The chief reason for including an article on purpose is the same as that which can be advanced for the inclusion of a section on declaration of policy in a statute. The following are offered merely as sample clauses from existing or proposed compacts and statutes.

Colorado River Compact, Art. I.

The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River System; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies; and to secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters and the protection of life and property from floods. To these ends the Colorado River Basin is divided into two basins, and an apportionment of the use of part of the water of the Colorado River System is made to each of them with the provision that further equitable apportionments may be made.

Western Interstate Corrections Compact, Art. I.

The party states, desiring by common action to improve their institutional facilities and provide programs of sufficiently high quality for the confinement.
treatment and rehabilitation of various types of offenders, declare that it is
the policy of each of the party states to provide such facilities and programs on
a basis of cooperation with one another, thereby serving the best interests of
such offenders and of society. The purpose of this compact is to provide for
the development and execution of such programs of cooperation for the con-
finement, treatment and rehabilitation of offenders.

*Interstate Compact on Mental Health*, Art. I.

The party states find that the proper and expeditious treatment of the
mentally ill and mentally deficient can be facilitated by cooperative action, to
the benefit of the patients, their families, and society as a whole. Further, the
party states find that the necessity and desirability for furnishing such care
and treatment bears no primary relation to the residence or citizenship of the
patient but that, on the contrary, the controlling factors of community safety
and humanitarianism require that facilities and services be made available
for all who are in need of them. Consequently, it is the purpose of this com-
pact and of the party states to provide the necessary legal basis for the institu-
tionalization or other appropriate care and treatment of the mentally ill and
mentally deficient under a system that recognizes the paramount importance
of patient welfare and to establish the responsibilities of the party states in
terms of such welfare.

**Commission Membership**

In essence, the problem of commission membership is one of securing appro-
priate representation for each of the compacting jurisdictions. Joint agencies
customarily are empowered to employ technical and other staff assistance, and
this problem is dealt with under the heading of "Staff and Civil Service." The
following clauses illustrate the various methods which have been used in ar-
ranging commission membership. It should be noted that commissioners may be
selected as general representatives of their states or that they may be select-
ed in accordance with special qualifications, for example, residence in the
area or official position in internal state agencies. Where the latter method is
used it is generally for the purpose of coordinating the interstate agency with
its intrastate counterparts, or particular branches of the state government, or
to represent certain interests.

*Upper Colorado River Compact*, Art. VIII.

There is hereby created an interstate administrative agency to be known as
the 'Upper Colorado River Commission.' The Commission shall be composed
of one Commissioner, representing each of the States of the Upper Division,
namely, the States of Colorado, New Mexico, Utah and Wyoming, designated
or appointed in accordance with the laws of each such State and, if designated
by the President, one Commissioner representing the United States of America.
The President is hereby requested to designate a Commissioner. If so designat-
ed the Commissioner representing the United States of America shall be en-
titled to the same powers and rights as the Commissioner of any State. Any
four members of the Commission shall constitute a quorum.

*Red River Compact*, Art. V.

The Tri-State Waters Commission, hereafter in this compact called the
Commission, shall consist of nine Commissioners, three from each state, ap-
pointed by each state in such manner and for such length of term as may be
determined by the legislature thereof. Each Commissioner shall be a citizen of
the state from which he is appointed, and at least one Commissioner from
each state shall be a resident of the drainage area of the Red River of the North. Each Commissioner may be removed or suspended from office in such manner as shall be provided by the law of the state from which he shall be appointed. Each Commissioner shall receive such compensation as may be provided by the legislature of the state he represents, which compensation shall be paid by such state. Each Commissioner shall be paid actual expenses necessarily incurred in the performance of his duties as such Commissioner.

Port of New York Authority Compact, Art. IV.

The port authority shall consist of twelve commissioners, six resident voters from the state of New York, at least four of whom shall be resident voters of the city of New York, and six resident voters from the state of New Jersey, at least four of whom shall be resident voters within the New Jersey portion of the district, the New York members to be chosen by the state of New York and the New Jersey members by the state of New Jersey in the manner and for the terms fixed and determined from time to time by the legislature of each state respectively, except as herein provided.

Each commissioner may be removed or suspended from office as provided by the law of the state from which he shall be appointed.

Atlantic States Marine Fisheries Compact, Art. IN.

Each state joining herein shall appoint three representatives to a commission hereby constituted and designated as the Atlantic States Marine Fisheries Commission. One shall be the executive officer of the administrative agency of such state charged with the conservation of the fisheries resources to which this compact pertains or, if there be more than one officer or agency, the official of that state named by the governor thereof. The second shall be a member of the legislature of such state designated by the Commission or Committee on Interstate Cooperation of such state, or if there be none, or if said Commission on Interstate Cooperation cannot constitutionally designate the said member, such legislator shall be designated by the governor thereof; provided that if it is constitutionally impossible to appoint a legislator as a commissioner from such state, the second member shall be appointed by the governor of said state at his discretion. The third shall be a citizen who shall have a knowledge of and interest in the marine fisheries problem to be appointed by the governor. This Commission shall be a body corporate with the powers set forth herein.

TVA, Sec. 2 (f).

No director shall have financial interest in any public utility corporation engaged in the business of distributing and selling power to the public nor in any corporation engaged in the manufacture, selling, or distribution of fixed nitrogen or fertilizer, or any ingredients thereof, nor shall any member have any interest in any business that may be adversely affected by the success of the Corporation as a producer of concentrated fertilizers or as a producer of electric power.

Great Lakes Basin Compact, Art. IV.

B. The Commission shall be composed of not less than three commissioners nor more than five commissioners from each party state designated or appointed in accordance with the law of the state which they represent and serving and subject to removal in accordance with such law.

C. Each state delegation shall be entitled to three votes in the Commission. The presence of commissioners from a majority of the party states shall constitute a quorum for the transaction of business at any meeting of the Commission. Actions of the Commission shall be by a majority of the votes
cast except that any recommendations made pursuant to Article VI of this compact shall require an affirmative vote of not less than a majority of the votes cast from each of a majority of the states present and voting.

**PARTIES BOUND**

The compacting states themselves are naturally to be bound by the agreement. In most compacts nothing more than this is said or specifically implied as to the parties bound. However, an occasional compact provision does seek to make it clear that compact obligations also affect private citizens within the compacting jurisdictions.

*Yellowstone River Compact (1935), Art. III.*

Where the name of a State is used in this compact, as a party thereto, it shall be construed to include the citizens, corporations, partnerships, associations, districts, administrative departments, bureaus, political subdivisions, agencies, persons, permittees, appropriators, and all others using, claiming, or in any manner asserting any right to the use of the waters of either the Yellowstone River or its tributaries within said State except as in this compact provided.

Any citizen, corporation, partnership, association, district, administrative department, bureau, political subdivision, agency, person, permittee or appropriator authorized by or under the laws of a signatory State, and all others using, claiming, or in any manner asserting any right to the use of the waters of either the Yellowstone River or its tributaries within said State, shall be subject to the terms of this compact. Where the singular is used in this paragraph, it shall be construed to include the plural.

*South Platte River Compact, Art. I, Sec. 2.*

The provisions hereof respecting each signatory State shall include and bind its citizens and corporations and all others engaged or interested in the diversion and use of the waters of the South Platte River in that State.

**PRE-EXISTING LAW, PRECEDENTS AND OTHER COMPACTS**

Compacts must give careful attention to the possible legal effects on other compacts in the area and on other provisions of law relating to their subject matter. To date, most provisions dealing with this problem have sought to leave existing law (in whatever form) undisturbed except to the extent expressly indicated in the compact. But see Klamath River Compact, 71 Stat.497 (1957) which fixes certain aspects of substantive water law for the area to which it applies.

No Precedent Standard Clause

*Rio Grande Compact, Art. XV.*

The physical and other conditions characteristic of the Rio Grande and peculiar to the territory drained and served thereby, and to the development thereof, have actuated this Compact and none of the signatory states admits that any provisions herein contained established any general principle or precedent applicable to other interstate streams.

Pre-existing Law Not Affected

*Snake River Compact, Art. VIII.*

1. Except as modified by the terms of this compact the acquisition of water
Appendix

rights, the construction, maintenance and operation of reservoirs, ditches and other irrigation and diversion works in Wyoming by any citizen of Idaho, under the authority herein granted, shall be in full compliance with the laws of Wyoming, and the acquisition of water rights, the construction, maintenance and operation of reservoirs, ditches and other irrigation and diversion works in Idaho by any citizen of Wyoming, under the authority herein granted, shall be in full compliance with the laws of Idaho.

Interstate Compact on Mental Health, Art. VII (c).

(c) No provision of this compact shall be construed to alter or affect any internal relationships among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs, or responsibilities therefor.

Other Compacts and Activities

Northeastern Water and Related Land Resources Compact, Art. VI.

Nothing in this compact shall be construed to impair, or otherwise affect, the jurisdiction of any interstate agency in which any party state participates nor to abridge, impair, or otherwise affect the provisions of any compact to which any one or more of the party states may be a party, nor to supersede, diminish, or otherwise affect any obligation assumed under any such compact. Nor shall anything in this compact be construed to discourage additional interstate compacts among some or all of the party states for the management of natural resources, or the coordination of activities with respect to a specific natural resource or any aspect of natural resource management, or for the establishment of intergovernmental planning agencies in sub-areas of the region. Nothing in this compact shall be construed to limit the jurisdiction or activities of any participating government, agency, or officer thereof, or any private person or agency, except as expressly required by this compact.

Basin or Area Defined

Compacts are sometimes intended for watersheds or special districts rather than for the entire area of existing governmental units. Accordingly, there is need to define as precisely as possible the geographic area for which the compact is intended and within which compact provisions will be applicable. The several ways in which this has been done are illustrated in the clauses below.

Note especially the following:

1. The use of the map in the Republican River Compact (1942). This brings precision, but it may also bring rigidity especially if watercourses change their beds and channels as some of them do.

2. Note the use of combinations of existing political subdivisions as in the Bi-State Compact for the St. Louis Area.

3. Notice the shifting definition of the basin depending on compact membership in the Interstate Sanitation Compact.

Republican River Compact, Art. I.

The Republican River Basin, hereinafter referred to as the "Basin", is herein designated to mean all the area in the States of Colorado, Kansas and Nebraska, which is naturally drained by the Republican River and all of its tributaries to its junction with the Smokey Hill River in Kansas, a map of which signed by the commissioners hereinabove named, is attached hereto and by reference made a part thereof.

The Republican River and tributaries thereof within the Basin, as herein-
above defined, are not navigable, and all uses of water of a consumptive nature, as hereinafter defined, wherever such uses may occur within the Basin, shall constitute paramount uses.

**Colorado River Compact, Art. II.**

(a) The term "Colorado River System" means that portion of the Colorado River and its tributaries within the United States of America.

(f) The term "Upper Basin" means those parts of the States of Arizona, Colorado, New Mexico, Utah and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above Lee Ferry.

(g) The term "Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the system below Lee Ferry.

**(Missouri-Illinois) Bi-State Development Compact, Art. III, Sec. 1.**

The "Bi-State Metropolitan Development District" is defined as the "City of St. Louis and the counties of St. Louis, St. Charles and Jefferson in Missouri, and the counties of Madison, St. Clair and Monroe in Illinois."

**The Port of New York Authority District** is delineated by boundaries set forth in the compact by metes and bounds.

**Tri-State Sanitation Compact, Art. XVI.**

This compact shall become effective as to the State of New Jersey and the State of New York immediately upon the signing thereof by the representatives of such states, and thereafter it shall also become effective as to the State of Connecticut immediately upon the signing thereof by the Representatives of such State: Provided, however, that prior to the signing of this compact by the representatives of the State of Connecticut, the district as set forth in Article XI shall not embrace any territory within the jurisdiction of the State of Connecticut, nor shall the commission exercise any jurisdiction or perform any duties or acts affecting such territory; and the appropriations for salaries and office and other administrative expenses shall be borne equally by the State of New York and the State of New Jersey.

[Notice shifting definition of compact area depending on compact membership.]

**STANDARD POWERS CLAUSE**

All compacts establishing commissions require provisions of a "housekeeping" nature which empower them to manage their internal affairs, report to the party jurisdictions, and handle routine matters. Many of these subjects are dealt with in part under specific headings in this Appendix. Nevertheless, it may be helpful to reproduce an entire article of this nature from a recent compact. Article XI, Southern Interstate Nuclear Compact appears below. No effort is made in these materials to present sample powers provisions dealing more specifically with the substance of possible compact commission operations. Such powers must necessarily be drafted on an individualized basis.
Appendix

Southern Interstate Nuclear Compact, Art. II.

The Board

(a) There is hereby created an agency of the party states to be known as the "Southern Interstate Nuclear Board" (hereinafter called the Board). The Board shall be composed of one member from each party state designated or appointed in accordance with the law of the state which he represents and serving and subject to removal in accordance with such law. Any member of the Board may provide for the discharge of his duties and the performance of his functions thereon (either for the duration of his membership or for any lesser period of time) by a deputy or assistant, if the laws of his state make specific provision therefor. The federal government may be represented without vote if provision is made by federal law for such representation.

(b) The Board members of the party states shall each be entitled to one vote on the Board. No action of the Board shall be binding unless taken at a meeting at which a majority of all members representing the party states are present and unless a majority of the total number of votes on the Board are cast in favor thereof.

(c) The Board shall have a seal.

(d) The Board shall elect annually, from among its members, a chairman, a vice chairman, and a treasurer. The Board shall appoint an Executive Director who shall serve at its pleasure and who shall also act as Secretary, and who, together with the Treasurer, shall be bonded in such amounts as the Board may require.

(e) The Executive Director, with the approval of the Board, shall appoint and remove or discharge such personnel as may be necessary for the performance of the Board's functions irrespective of the civil service, personnel or other merit system laws of any of the party states.

(f) The Board may establish and maintain, independently or in conjunction with any one or more of the party states, a suitable retirement system for its full-time employees. Employees of the Board shall be eligible for social security coverage in respect of old age and survivors insurance provided that the Board takes such steps as may be necessary pursuant to federal law to participate in such program of insurance as a governmental agency or unit. The Board may establish and maintain or participate in such additional programs of employee benefits as may be appropriate.

(g) The Board may borrow, accept, or contract for the services of personnel from any state or the United States or any subdivision or agency thereof, from any interstate agency, or from any institution, person, firm or corporation.

(h) The Board may accept for any of its purposes and functions under this compact any and all donations, and grants of money, equipment, supplies, materials, and services (conditional or otherwise) from any state or the United States or any subdivision or agency thereof, or interstate agency, or from any institution, person, firm, or corporation, and may receive, utilize and dispose of the same.

(i) The Board may establish and maintain such facilities as may be necessary for the transacting of its business. The Board may acquire, hold, and convey real and personal property and any interest therein.

(j) The Board may adopt bylaws, rules, and regulations for the conduct of its business, and shall have the power to amend and rescind these bylaws, rules, and regulations. The Board shall publish its bylaws, rules, and regulations in convenient form and shall file a copy thereof and shall also file a copy of any amendment thereto, with the appropriate agency or officer in each of the party states.

(k) The Board annually shall make to the governor of each party state,
a report covering the activities of the Board for the preceding year, and em-
bodying such recommendations as may have been adopted by the Board,
which report shall be transmitted to the legislature of said state. The Board
may issue such additional reports as it may deem desirable.

**Voting**

The weighting of voting may be an important method in the operation of
a compact agency representative of both national and state governments. The
clause from the proposed Connecticut compact of 1936 even though it provides
for no federal representative is interesting because of the degree of delegation
of power to a central commission. This clause facilitates the view that each
state's delegation is a separate agency of the state which it represents. Majority
vote is necessary for each of these state agencies to take action. The action of the
entire joint agency comes about only as the result of the concurrence of the
four "state commissions."

In most compacts which establish commissions each commissioner has one
vote and all party jurisdictions have an equal number of commissioners. How-
ever, there are a few variations from this standard procedure. For an illustra-
tion of one such variant see the provision of the Great Lakes Compact repro-
duced under the heading of "Commission Membership" in this Appendix.

**Proposed Connecticut River Compact (1936). Art. II.** (Two out of three from
each state carries.)

There is hereby created "The Connecticut River Valley Flood Control
Commission", hereinafter referred to as the Commission, which shall con-
sist of twelve commissioners, three of whom shall be residents of the Common-
wealth of Massachusetts: three of whom shall be residents of the State of
Connecticut: three of whom shall be residents of the State of New Hampshire;
and three of whom shall be residents of the State of Vermont.

The members of said Commission shall be chosen by their respective
states in such manner and for such term as may be fixed and determined from
time to time by the law of each of said states respectively by which they
are appointed. A commissioner may be removed or suspended from office as
provided by the law of the state for which he shall be appointed; and any
vacancy occurring in said Commission shall be filled in accordance with the
laws of the state wherein such vacancy exists.

A majority of the members from each state shall constitute a quorum for
the transaction of business, the exercise of any powers or the performance of
any duties, but no action of the Commission shall be binding unless at least
two of the members from each State shall vote in favor thereof.

The compensation of the members of said Commission shall be fixed,
determined, and paid by the state which they respectively represent. All
necessary expenses incurred in the performance of their duties shall be paid
from the funds of said Commission.

The Commission shall elect from its members a chairman, vice-chairman,
clerk, and treasurer. Such treasurer shall furnish to said Commission, at its ex-
 pense, a bond with corporate surety, to be approved by said Commission, in
such amount as said Commission may determine, conditioned for the faithful
performance of his duties.

The Commission shall adopt suitable by-laws and shall make such rules
and regulations as it may deem advisable governing the operation of flood
control projects, not inconsistent with the laws of the signatory states or laws
of the United States, and any rules or regulations lawfully promulgated
thereunder.
The Commission shall make an annual report to the governor of each of the signatory states, setting forth in detail the operations and transactions conducted by it pursuant to this compact and any legislation thereunder, which said reports shall be submitted to the respective legislatures.

The Commission shall keep a record of all its meetings and proceedings, contracts, and accounts and shall maintain a suitable office, where its maps, plans, documents, records, and accounts shall be kept, subject to public inspection at such times and under such regulations as the Commission shall determine.

**Tri-State Sanitation Compact, Art. V.** (Majority of each State. This is also the general provision on routine commission powers and organization.)

1. The commission shall elect from its number a chairman and vice chairman and shall appoint and at its pleasure remove or discharge such officers and legal, clerical, expert, and other assistants as may be required to carry the provisions of this compact into effect, and shall fix and determine their duties, qualifications, and compensations.

It shall adopt a seal and suitable bylaws and shall promulgate rules and regulations for its management and control.

It may maintain one or more offices for the transaction of its business and may meet at any time or place within the signatory States.

A majority of the members for each State shall constitute a quorum for the transaction of business, the exercise of any powers, or the performance of any duties, but no action of the Commission shall be binding unless at least three of the members from each State shall vote in favor thereof.

The commission shall keep accurate accounts of all receipts and disbursements and shall make an annual report to the governor and the legislature of each State setting forth in detail the operations and transactions conducted by it pursuant to this compact, and shall make recommendations for any legislative action deemed by it advisable, including amendments to the statutes of the signatory States which may be necessary to carry out the intent and purpose of this compact, and changes in the district which concentration of population or other cause may require.

The commission shall not incur any obligations for salaries or office or other administrative expenses prior to the making of appropriations adequate to meet the same, nor shall the commission pledge the credit of any of the signatory States except by and with the authority of the legislatures thereof. Each State reserves the right to provide hereafter by law for the examination and audit of the accounts of the commission by its comptroller or other official.

The commissioners shall meet and organize within ten day after the effective date of this compact.

**Northeastern Water and Related Land Resources Compact, Art. III.**

No action of the Commission respecting the internal management thereof shall be binding unless taken at a meeting at which a majority of the members are present and vote in favor thereof: provided that any action not binding for such a reason may be ratified within thirty days by the concurrence in writing of a majority of the Commission membership. No action of the Commission respecting a matter other than its internal management shall be binding unless taken at a meeting at which a majority of the state members and a majority of the members representing the United States are present and a majority of said state members together with a majority of said members representing the United States vote in favor thereof: provided that any action not binding for such a reason may be ratified within thirty days and the concurrence in writing of a majority of the state members and the concurrence in writing of a majority of the members representing the United States.
FINANCE

The words "agree to appropriate" have been quite widely used in interstate compacts. While this language was not fatal in the litigation over the Ohio River Compact (Dyer v. Sims), there is ample indication that it is questionable language.

Attention is called to the allocation formulae as used in the Potomac and the Atlantic Fisheries Compacts and to the use of a straight list of initial state appropriations in the latter. Attention is also called to the Red River formula and to the provision on audit of that compact. The problem with regard to audit is analogous to that discussed with reference to staff and civil service elsewhere in this compilation.

If financing through bonding is desired, provision for it will have to be much more elaborate than anything illustrated below. Since the questions raised are intricate and difficult to discuss except in the context of a specific compact, no attempt is made to deal with the subject here.

Potomac River Compact, Art. III.

The moneys necessary to finance the Commission in the administration of its business in the Conservancy District shall be provided through appropriations from the signatory bodies and the United States, in the manner prescribed by the laws of the several signatory bodies and of the United States, and in amounts as follows:

The pro rata contribution shall be based on such factors as population, the amount of industrial and domestic pollution; and a flat service charge, as shall be determined from time to time by the Commission, subject, however, to the approval, ratification and appropriation of such contribution by the several signatory bodies. And, further provided, that the total of such sums from signatory bodies shall not exceed a total of $30,000 per annum.

Atlantic States Marine Fisheries Compact, Art. XI.

The states party hereto agree to make annual appropriation to the support of the commission in proportion to the primary market value of the products of their fisheries, exclusive of cod and haddock, as recorded in the most recent published reports of the Fish and Wildlife Service of the United States Department of the Interior, provided no state shall contribute less than two hundred dollars per annum and the annual contribution of each state above the minimum shall be figured to the nearest one hundred dollars.

The compacting states agree to appropriate initially the annual amounts scheduled below, which amounts are calculated in the manner set forth herein, on the basis of the catch record of 1938. Subsequent budgets shall be recommended by a majority of the commission and the cost thereof allocated equitably among the states in accordance with their respective interests and submitted to the compacting states.

Schedule of initial annual state contributions:

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<td>Maryland</td>
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### Appendix

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<th>State</th>
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</thead>
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<td>Georgia</td>
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<td>Florida</td>
<td>1,500</td>
</tr>
</tbody>
</table>

**Ohio River Valley Water Sanitation Compact, Art. V.**

The Commission shall elect from its number a chairman and vice-chairman, and shall appoint, and at its pleasure remove or discharge, such officers and legal, clerical, expert and other assistants as may be required to carry the provisions of this compact into effect, and shall fix and determine their duties, qualifications and compensation. It shall adopt a seal and suitable by-laws, and shall adopt and promulgate rules and regulations for its management and control. It may establish and maintain one or more offices within the District for the transaction of its business, and may meet at any time or place. One or more commissioners from a majority of the member States shall constitute a quorum for the transaction of business.

The Commission shall submit to the Governor of each State, at such time as he may request, a budget of its estimated expenditures for such period as may be required by the laws of such State for presentation to the legislature thereof.

The Commission shall keep accurate books of account, showing in full its receipts and disbursements, and said books of account shall be open at any reasonable time to the inspection of such representatives of the respective signatory States as may be duly constituted for that purpose.

On or before the first day of December of each year, the Commission shall submit to the respective governors of the signatory States a full and complete report of its activities for the preceding year.

The Commission shall not incur any obligations of any kind prior to the making of appropriations adequate to meet the same; nor shall the Commission pledge the credit of any of the signatory States, except by and with the authority of the legislature thereof.

**Red River Compact (1937), Art. X.**

Each state shall bear its proportionate share of the expense of the Commission based on the pro rata value to such state of the activities of the Commission, which expense shall be provided for by appropriation by the legislature.

**Red River Compact, Art, VI.**

The Commission shall keep accurate accounts of all receipts and disbursements and shall make an annual report to the Governor of each state setting forth in detail the operations and transactions conducted by it pursuant to this compact, and shall make recommendations for any legislative action deemed by it advisable, including amendments to the statutes of the said states which may be necessary to carry out the intent and purpose of this compact, and such changes in the area of the district as may seem desirable.

The Commission shall not incur any obligations for salaries, office, or other administrative expenses prior to the making of appropriation adequate to meet the same; nor shall the Commission pledge the credit of any of the said states except by and with the authority of the legislatures thereof. Each state reserves the right to provide hereafter by law for the examination and audit of the accounts of the Commission by its comptroller or other official.

The Commission shall meet and organize within thirty days after the effective date of this compact.
Southern Interstate Nuclear Compact, Art. III.

(a) The Board shall submit to the executive head or designated officer or officers of each party state a budget of its estimated expenditures for such period as may be required by the laws of that jurisdiction for presentation to the legislature thereof.

(b) Each of the Board's budgets of estimated expenditures shall contain specific recommendations of the amount or amounts to be appropriated by each of the party states. One half of the total amount of each budget of estimated expenditures shall be apportioned among the party states in equal shares; one quarter of each such budget shall be apportioned among the party states in accordance with the ratio of their populations to the total population of the entire group of party states based on the last decennial federal census; and one quarter of each such budget shall be apportioned among the party states on the basis of the relative average per capita income of the inhabitants in each of the party states based on the latest computations published by the federal census-taking agency. Subject to appropriation by their respective legislatures, the Board shall be provided with such funds by each of the party states as are necessary to provide the means of establishing and maintaining facilities, a staff of personnel, and such activities as may be necessary to fulfill the powers and duties imposed upon and entrusted to the Board.

Taxes

The subject of compensation for tax loss has been a difficult one. Existing and proposed compacts handle it in different ways. Sometimes property is left subject to taxation but more frequently some arrangement for payments in lieu of taxes is embodied in the compact. The following clauses illustrate the several methods so far employed. The 1951 Connecticut River compact and similar agreements on the Merrimack and Thames have as one of their principal purposes the provision of a method of tax compensation. [Connecticut, 67 Stat.45, 1953; Merrimack, 71 Stat.18, 1957; Thames, 72 Stat.364, 1958.1

Connecticut River Compact (1936), Art. VI. (Payment in lieu of.)

(c) . . . The lands, easements, and rights-of-way leased shall be exempt from all taxation; but the said Commission shall make payments on or before the first day of October of each year to each town in which such lands, easements, and rights-of-way, respectively, are located, of a sum equal to the taxes which would have been assessed against the said lands, easements, and rights-of-way in such town if the same had been included in the list of taxable property for such year, at the assessed valuation of the same as determined for the tax year 1936: Provided, however, that no payments shall be made or required hereunder on account of reimbursement for loss of taxes on any structure which may be erected on such premises in connection With the construction or use of said project; or on account of any railroad or other public utility which may be relocated under the terms of this agreement, and which is included in the list of taxable property in said town when relocated.

When said lands, easements, and rights-of-way essential to the construction of any dam or reservoir shall have been acquired as hereinbefore provided, the state wherein the same are located, shall make, execute, and deliver to said Commission a good and sufficient lease of the same, to include the structures thereon when completed and accepted by the state, except as hereinafter provided, upon the terms and conditions following, to wit:

(a) The said Commission shall save the State in which said reservoirs are respectively located, free and harmless from all loss, cost, damage, or expense
in connection with the control, operation, and maintenance of said reservoir or reservoirs except as hereinafter provided in Articles IX and XI.

Republican River Compact (1942), Art. VII. (Payment in lieu of.)

A lower signatory state, its citizens, agencies, associations and corporations, shall have the right to acquire in an upper state by purchase, or through exercise of the power of eminent domain, such easements and rights of way, for the construction, operation and maintenance of storage reservoirs, and of appurtenant works, canals and conduits, required for the enjoyment of the privileges granted by Article VI; provided, however, the grantees of such right shall pay to the governmental agencies in which such works are located, each and every year during which such rights of way are occupied for such purposes, a sum of money equivalent to the average annual amount of taxes assessed against the lands and improvements so occupied, based upon the ten years preceding the use of such lands, in reimbursement for the loss of taxes to said governmental agencies.

Connecticut River Flood Control Compact (1951), Art. V.

The Commonwealth of Massachusetts agrees to reimburse the State of New Hampshire fifty (50) per cent and the State of Vermont fifty (50) per cent of the amount of taxes lost to their political subdivisions by reason of ownership by the United States of lands, rights or other property therein for the flood control dams and reservoirs of Surry Mountain in New Hampshire and at Union Village in Vermont. The State of Connecticut agrees to reimburse the Commonwealth of Massachusetts forty (40) per cent, the State of New Hampshire forty (40) per cent and the State of Vermont forty (40) per cent of the amount of taxes lost to their political subdivisions by reason of ownership by the United States of lands, rights or other property wherein for the flood control dams and reservoirs of Tully, at Knightville and at Birch Hill in Massachusetts, at Surry Mountain in New Hampshire and at Union Village in Vermont.

The Commonwealth of Massachusetts agrees to reimburse the State of New Hampshire fifty (50) per cent and the State of Vermont fifty (50) per cent of the amount of taxes lost to their political subdivisions by reason of acquisition and ownership by the United States of lands, rights or other property therein for construction in the future of any flood control dam and reservoir specified in Article IV and also for any other flood control dam and reservoir hereafter constructed by the United States in the Connecticut river valley.

The State of Connecticut agrees to reimburse the Commonwealth of Massachusetts forty (40) per cent, the State of New Hampshire forty (40) per cent and the State of Vermont forty (40) per cent of the amount of taxes lost to their political subdivisions by reason of acquisition and ownership by the United States of lands, rights or other property therein for construction in the future of any flood control dam and reservoir specified in Article IV and also for any other flood control dam and reservoir hereafter constructed by the United States in the Connecticut river valley.

Annually, not later than November first of each year, the commission shall determine the loss of taxes resulting to political subdivisions of each signatory state by reason of acquisition and ownership therein by the United States of lands, rights or other property in connection with each flood control dam and reservoir for which provision for tax reimbursement has been made in the four paragraphs next above. Such losses of taxes as determined by the commission shall be based on the tax rate then current in each such political subdivision and on the average assessed valuation for a period of five years prior to the acquisition by the United States of such property, provided that whenever a political subdivision wherein a flood control dam and reservoir or portion thereof is located shall have made a general revaluation of property subject to
the annual municipal taxes of such subdivision, the commission may use such revaluation for the purposes of determining the amount of taxes for which reimbursement shall be made. Using the percentage of payment agreed to in said four paragraphs, the commission shall then compute the sum, if any, due from each signatory state to each other signatory state and shall send a notice to the treasurer of each signatory state setting forth in detail the sums, if any, each is to pay to and receive from each other signatory state in reimbursement of tax losses.

Each signatory state on receipt of formal notification from the commission of the sum which it is to pay in reimbursement for tax losses shall, not later than July first of the following year, make its payment for such tax losses to the signatory state wherein such loss or losses occur, except that in case of the first annual payment for tax losses at any dam or reservoir such payment shall be made by payor states not later than July first of the year in which the next regular session of its legislature is held. Payment by a signatory state of its share of reimbursement of taxes in accordance with formal notification received from the commission shall be a complete and final discharge of all liability by the payor state to the payee state for each flood control dam and reservoir within the payee state for the time specified in such formal notification. Each payee signatory state shall have full responsibility for distributing or expending all such sums received, and no agency or political subdivision shall have any claim against any signatory state other than the payee state, nor against the commission relative to tax losses covered by such payments. Whenever a state which makes reimbursement for tax losses and a state which receives such reimbursement from it shall agree, through the commission, on a lump sum payment in lieu of annual payments and such lump sum payment has been made and received, the requirement that the commission annually shall determine the tax losses, compute sums due from each state and send notice thereof to the treasurer of each state shall no longer apply to the aforesaid states with respect to any flood control dam or reservoir for which lump sum payment has been made and received. The Commonwealth of Massachusetts and the State of Connecticut each agrees to pay its respective share in reimbursement, as determined by the commission under the procedure following, for economic losses and damages occurring by reason of ownership of property by the United States for construction and operation of a flood control dam and reservoir at any site specified in Article IV, and for any other flood control dam and reservoir constructed hereafter by the United States in the Connecticut river valley; provided, however, that no reimbursement shall be made for speculative losses and damages or losses or damages for which the United States is liable. On receipt of information from the chief of engineers that request is to be made for funds for the purpose of preparing detailed plans and specifications for any flood control dam and reservoir proposed to be constructed in the Connecticut river valley, including those specified in Article IV, the commission shall make an estimate of the amount of taxes which would be lost to and of economic losses and damages which would occur in political subdivisions of the signatory state wherein such dam and reservoir would be located, wholly or in part, by reason of acquisition and ownership by the United States of lands, rights or other property for the construction and operation of such flood control dam and reservoir and shall decide whether the flood control benefits to be derived in the signatory states from such flood control dam and reservoir, both by itself and as a unit of a comprehensive flood control plan, justifies, in the opinion of the commission, the assumption by signatory states of the obligation to make reimbursement for loss of taxes and for economic losses and damages. Such estimate and decision shall thereafter be reviewed by the commission at five-year intervals until such time as the United States shall have acquired title to the site of such flood control dam or plans for
its construction are abandoned. The commission shall notify the governor, the
members of the United States Senate and the members of the United States
House of Representatives from each signatory state and the chief of engineers as
to the commission's decision and as to any change in such decision. On receipt
of information from the chief of engineers that any flood control dam and
reservoir is to be constructed, reconstructed, altered or used for any pur-
pose in addition to flood control, including those flood control dams and
reservoirs heretofore constructed and those specified in Article IV, the com-
misson shall make a separate estimate of the amount of taxes which would
be lost to and of economic losses and damages which would occur in political
subdivisions of the signatory state wherein such dam and reservoir would be
located, wholly or in part, by reason of acquisition and ownership by the
United States of lands, rights or other property for the construction and oper-
ation of such dam and reservoir in excess of the estimated amount of taxes
which would be lost and of the economic losses and damages which would occur
if the dam were constructed and operated for flood control and the com-
misson shall decide the extent to which, in its opinion, the signatory state
would be justified in making reimbursement for loss of taxes and for economic
losses and damages in addition to reimbursement for such dam and reservoir
if constructed and used for flood control only. Such estimate and decision
shall thereafter be reviewed by the commission at five-year intervals until such
time as such dam and reservoir shall be so constructed, reconstructed, altered
or used or plans for such construction, reconstruction, alterations or use are
abandoned. The commission shall notify the governor, the members of the
United States Senate and the members of the United States House of Repre-
sentatives from each signatory state as to the commission's decision and as to
any change in such decision. Within thirty days after acquisition by the
United States of the site of any flood control dam the commission shall pro-
ced to make a final determination of economic losses and damages occasioned
by such dam and reservoir. The commission shall not include in such deter-
mination either speculative losses and damages or losses and damages for
which the United States is liable. The commission shall compute the share the
Commonwealth of Massachusetts and the State of Connecticut shall each pay
to the state wherein such dam and reservoir is located by multiplying the sum
of such losses and damages, as previously determined, by the percentage of
flood control benefits which the Commonwealth of Massachusetts and the State
of Connecticut each receives, in the allocation by states, of the flood control
benefits resulting from the dam and reservoir. The commission shall send
a notice to the treasurer of the Commonwealth of Massachusetts and to the
treasurer of the State of Connecticut setting forth in detail the sum, if any,
which each is to pay to the state wherein such dam and reservoir is located in reim-
bursement for economic losses and damages and shall also send such notice to
the treasurer of the state wherein such dam and reservoir is located. The Com-
monwealth of Massachusetts and the State of Connecticut on receipt of such
formal notification by the commission shall each pay its share of such economic
losses or damages to the signatory states wherein such losses or damages occur.
Full payment by either state of the sum specified in such formal notification
from the commission as to the amount of economic losses and damages for
which each state is to make reimbursement shall be a complete and final dis-
charge of all liability by the payor state to the payee state for economic losses
and damages for each flood control dam and reservoir within the payee state
designated in such formal notification. Each payee signatory state shall have full
responsibility for distributing or expending all such sums received and no
agency, political subdivision, private person, partnership, firm, association or
corporation shall have any claim against any signatory state other than the
payee state, nor against the commission relative to such economic losses and
damages. A signatory state may, in agreement with the commission and the chief of engineers, acquire title or option to acquire title to any or all lands, rights or other property required for any flood control dam and reservoir within its boundaries and transfer such titles or options to the United States. Whenever the fair cost to said signatory state for such titles or options, as determined by the commission, is greater than the amount received therefor from the United States, the Commonwealth of Massachusetts and the State of Connecticut shall each pay its share of such excess cost to said signatory state, such share to be determined by the commission in accordance with procedure herein contained for determining reimbursement for economic losses and damages. Whenever the commission shall not agree, within a reasonable time or within sixty days after a formal request from the governor of any signatory state, concerning reimbursement for loss of taxes or for economic losses and damages at any flood control dam and reservoir heretofore or hereafter constructed by the United States in the Connecticut river valley, or concerning the extent, if any, to which reimbursement shall be made for additional loss of taxes for additional economic losses and damages caused by construction, reconstruction, alteration or use of any such dam for purposes other than flood control, the governor of each signatory state shall designate a person from his state as a member of a board of arbitration, hereinafter called the board, and the members so designated shall choose one additional member who shall be chairman of such board. Whenever the members appointed by the governors to such board shall not agree within sixty days on such additional member of the board, the governors of such signatory states shall jointly designate the additional member. The board shall by majority vote decide the question referred to it and shall do so in accordance with the provisions of this compact concerning such reimbursement. The decision of the board on each question referred to it concerning reimbursement for loss of taxes and for economic losses and damages shall be binding on the commission and on each signatory state, notwithstanding any other provision of this compact.

**Eminent Domain**

In public works compacts a power of eminent domain should be considered. Which of the participating governments will exercise the power depends on the ultimate distribution of functions among them. The following clauses are illustrative of differing arrangements, some of them more extensive than others. Note especially the provision of the 1936 proposed Connecticut River compact which envisaged cooperative federal-interstate development.

*Republican River Compact (1942), Art. VII.* (See also taxes.) (By one state in another.)

A lower signatory state, its citizens, agencies, associations and corporations, shall have the right to acquire in an upper state by purchase, or through exercise of the power of eminent domain, such easements and rights of way, for the construction, operation and maintenance of storage reservoirs, and of appurtenant works, canals and conduits, required for the enjoyment of the privileges granted by Article VI; provided, however, the grantees of such rights shall pay to the governmental agencies in which such works are located, each and every year during which such rights of way are occupied for such purposes, a sum of money equivalent to the average annual amount of taxes assessed against the lands and improvements so occupied, based upon the ten years preceding the use of such lands, in reimbursement for the loss of taxes to said governmental agencies.
Appendix

*Connecticut River Compact, Art. 1.* (Proposed, 1937.) Acquisition of land and relocation of facilities.

To the end that the Connecticut River Valley Flood Control Commission may give to the Secretary of War the assurances required under Section 4 of the Act of Congress hereinbefore referred to, and that the lands, easements, and rights-of-way necessary for the construction by the United States of the reservoirs and structures thereon, herein contemplated, may be provided, each state at the request of said Commission shall proceed forthwith to acquire title to and possession of the lands, easements and rights-of-way within its territorial limits, which are determined and designated by the Commission for the construction of such reservoir or reservoirs.

Such acquisition shall be by purchase or by the exercise of the right of eminent domain, as said Commission may direct, and in the manner now or hereafter provided for by the laws of the States wherein such lands, easements, and rights-of-way are located. Title to such lands, easements, and rights-of-way shall be taken in the name of the State wherein the same are located. The cost of acquisition, as hereinafter defined, shall be borne by said Commission and paid from and out of the funds contributed by the signatory States for such purpose, as hereinafter provided.

Each State, upon notice from and at the sole expense of said commission, shall forthwith proceed to make, or cause to be made, such highway relocations, including the acquisition of all necessary rights-of-way therefor, and the construction of such relocated highway, as may become necessary therefor. The character, location, route, and construction of such relocated highway, shall be determined by the State wherein such relocated highway is situated, or by its representatives.

In like manner, such State, at the expense of the Commission, and upon its request, shall procure the relocation of any railroad, electric transmission, telephone or telegraph lines, or other public utility structures, including new rights-of-way therefor as may be essential on account of the construction, operation, and maintenance of such reservoir for flood control purposes.

*South Platte River Compact, Art. V, Sec. 3.*

Nebraska grants to Colorado the right to acquire by purchase, prescription, or the exercise of eminent domain, such rights of way, easements, or lands as may be necessary for the construction, maintenance, operation, and protection of those parts of the above-mentioned canals which now or hereafter may extend into Nebraska.

**Assistance and Acceptance of Gifts and Grants**

A number of compacts contain clauses authorizing the acceptance of monies and other assistance from various sources including the federal government for the intergovernmental projects they embody. The following clauses illustrate some of the provisions which occur in extant agreements ranging from a definite assignment of a role to an assisting agency to general clauses permitting acceptance of offers of assistance from any source.

*Atlantic States Marine Fisheries Compact, Art. VZ.*

The Fish and Wildlife Service of the Department of the Interior of the Government of the United States shall act as the primary research agency of the Atlantic States Marine Fisheries Commission cooperating with the re-
search agencies in each state for that purpose. Representatives of the said Fish
and Wildlife Service shall attend the meetings of the Commission.

Northeastern Interstate Forest Fire Protection Compact, Art. VI.

The Commission may request the United States Forest Service to act as the
primary research and coordinating agency of the Northeastern Forest Fire
Protection Commission, in cooperation with the appropriate agencies in each
state and the United States Forest Service may accept the initial responsibility
in preparing and presenting to the commission its recommendations with re-
spect to the regional fire plan. Representatives of the United States Forest
Service may attend meetings of the commission and of groups of member
states.

Article XII. The commission may accept any and all donations, gifts and
grants of money, equipment, supplies, materials and services from the federal
or any local government, or any agency thereof and from any person, firm or
corporation, for any of its purposes and functions under this compact, and
may receive and utilize the same subject to the terms, conditions and regu-
lations governing such donations, gifts and grants.

Article XIII. . . . Nothing in this compact shall be construed to affect any
existing or future cooperative relationship or arrangement between the United
States Forest Service and a member state or states.

Civil Defense Compact, Art. 1.

The purpose of this compact is to provide mutual aid among the States in
meeting any emergency or disaster from enemy attack or other cause (natural
or otherwise) including sabotage and subversive acts and direct attacks by
bombs, shellfire, and atomic, radiological, chemical, bacteriological means, and
other weapons. The prompt, full and effective utilization of the resources of
the respective States, including such resources as may be available from the
United States Government or any other source, are essential to the safety, care
and welfare of the people thereof in the event of enemy action or other emer-
gency, and any other resources, including personnel, equipment or supplies,
shall be incorporated into a plan or plans of mutual aid to be developed
among the Civil Defense agencies or similar bodies of the States that are
parties hereto. The Directors of Civil Defense of all party States shall constitute
a committee to formulate plans and take all necessary steps for the implementa-
tion of this compact.

Article 8. Any party State rendering aid in another State pursuant to this
compact shall be reimbursed by the party State receiving such aid for any loss
or damage to, or expense incurred in the operation of any equipment answer-
ing a request for aid, and for the cost incurred in connection with such re-
quests; provided, that any aiding party State may assume in whole or in part
such loss, damage, expense, or other cost, or may loan such equipment or
donate such services to the receiving party State without charge or cost: and
provided further that any two or more party States may enter into supple-
mentary agreements establishing a different allocation of costs as among those
States. The United States Government may relieve the party State receiving
aid from any liability and reimburse the party State supplying civil defense
forces for the compensation paid to and the transportation, subsistence and
maintenance expenses of such forces during the time of the rendition of such
aid or assistance outside the State and may also pay fair and reasonable com-
ensation for the use or utilization of the supplies, materials, equipment or
facilities so utilized or consumed.
Northeastern Water and Related Land Resources Compact, Art. II (G).

G. The Commission may accept for any of its purposes and functions under this compact any and all appropriations, donations, and grants of money, equipment, supplies, materials and services, conditional or otherwise, from any state or the United States or any subdivision or agency thereof, or intergovernmental agency, or any institution, person, firm or corporation, and may receive, utilize and dispose of the same.

Article IV (C).

C. The Commission shall not pledge the credit of any jurisdiction. The Commission may meet any of its obligations in whole or in part with funds available to it under Article II (G) of this compact, provided that the Commission takes specific action setting aside such funds prior to the incurring of any obligation to be met in whole or in part in such manner. Except where the Commission makes use of funds available to it under Article II (G) hereof, the Commission shall not incur any obligations prior to the allotment of funds by the party jurisdictions adequate to meet the same.

**FEDERAL PARTICIPATION ON COMMISSION**

If federal participation is desirable the following clauses illustrate provisions in extant compacts for such participation. In drafting provisions for the appointment of federal representatives it is important to avoid any constitutionally questionable limitation of the President's power of appointment. The safest procedure would be merely to stipulate appointment of a federal representative or representatives in such manner as federal law may provide.

Ohio River Valley Water Sanitation Compact, Art. XV.

The Commission shall consist of three commissioners from each State, each of whom shall be a citizen of the State from which he is appointed, and three commissioners representing the United States Government. The commissioners from each State shall be chosen in the manner and for the terms provided by the laws of the States from which they shall be appointed, and any commissioner may be removed or suspended from office as provided by the law of the State from which he shall be appointed. The commissioners representing the United States shall be appointed by the President of the United States or in such other manner as may be provided by Congress. The commissioners shall serve without compensation, but shall be paid their actual expenses incurred in and incident to the performance of their duties; but nothing herein shall prevent the appointment of an officer or employee of any State or of the United States Government.

Rio Grande Compact, Art. XII.

To administer the provisions of this Compact there shall be constituted a Commission composed of one representative from each State, to be known as the Rio Grande Compact Commission. The State Engineer of Colorado shall be ex-officio the Rio Grande Compact Commissioner for Colorado. The State Engineer of New Mexico shall be ex-officio the Rio Grande Compact Commissioner for New Mexico. The Rio Grande Compact Commissioner for Texas shall be appointed by the Governor of Texas. The President of the United States shall be requested to designate a representative of the United States to sit with such Commission, and such representative of the United States, if so designated by the President, shall act as Chairman of the Commission without vote.

The salaries and personal expenses of the Rio Grande Compact Commis-
sionen for the three States shall be paid by their respective States, and all
other expenses incident to the administration of this Compact, not borne by
the United States, shall be borne equally by the three States.

**Potomac River Compact, Art. I.** (See also Personnel.)

The Interstate Commission on the Potomac River Basin shall consist of
three members from each signatory body and three members appointed by
the President of the United States. Said Commissioners, other than those
appointed by the President, shall be chosen in a manner and for the terms
provided by law of the signatory body from which they are appointed and
shall serve without compensation from the Commission but shall be paid by
the Commission their actual expenses incurred and incident to the perform-
ance of their duties.

**Upper Colorado River Compact, Excerpt from Art. VIII.**

The President is hereby requested to designate a Commissioner. If so
designated the Commissioner representing the United States of America shall
be the presiding officer of the Commission and shall be entitled to the same
power and rights as the Commissioner of any State . . . .

**PERSONNEL**

A general discussion of the subject appears in Chapter III.

Several compacts have clauses dealing with staff. The following are illustrative.
It would seem desirable that such clauses do not inadvertently restrict the inter-
state agency in establishing its own merit system.

**Upper Colorado River Compact, Art. VIII (c).**

The Commission shall appoint a Secretary, who shall not be a member of
the Commission, or an employee of any signatory State or of the United
States of America while so acting. He shall serve for such term and receive
such salary and perform such duties as the Commission may direct. The
Commission may employ such engineering, legal, clerical and other personnel
as, in its judgment, may be necessary for the performance of its functions
under this Compact. In the hiring of employees, the Commission shall not
be bound by the civil service laws of any State.

**Potomac River Compact, Art. I (B).**

The Commission shall appoint and, at its pleasure, remove or discharge
such officials and legal, engineering, clerical, expert and other assistants as
may be required to carry the provisions of this compact into effect, and shall
determine their qualifications and fix their duties and compensation. Such
personnel as may be employed shall be employed without regard to any civil
service or other similar requirements for employees of any of the signatory
bodies. The Commission may maintain one or more offices for the transaction
of its business and may meet at any time or place within the area of the
Conservancy District.

**CONCURRENT JURISDICTION AND EXTRATERRITORIALITY**

The use of compacts to establish concurrent jurisdiction and extraterritoriality
is increasing. (A notable use of a compact to meet problems of jurisdiction is the
Western Interstate Corrections Compact.)

It should be noted that the Oregon-Washington compact which is reproduced
below in its entirety has given rise to litigation and some confusion. This may be
Appendix

due to the substance of the compact, but it has also been urged that it is due to the extreme brevity of the compact.

Oregon-Washington Fisheries Compact (entire text).

All laws and regulations now existing, or which may be necessary for regulating, protecting, or preserving fish in the waters of the Columbia River over which the States of Oregon and Washington have concurrent jurisdiction, or any other waters within either of said States, which would affect said concurrent jurisdiction, shall be made, changed, altered and amended in whole or in part, only with the mutual consent and approbation of both states. Nothing herein contained shall be construed to affect the right of the United States to regulate commerce, or the jurisdiction of the United States over navigable waters.

New York and New Jersey Compact of 1833. (The relevant provisions of this compact are so woven into the instrument that to abstract them in meaningful form is difficult. Their effect is to give each state exclusive jurisdiction over specific portions of the other's territory with specific subject matter exceptions. The following excerpt is offered merely to illustrate the method used.)

Art. III. The State of New York shall have and enjoy exclusive jurisdiction of and over all the waters of the bay of New York, and of and over all the waters of the Hudson river, lying west of Manhattan island, and to the south of the mouth of the Spuytenduyval creek, and of and over the lands covered by the said water, to the low water mark on the westerly or New Jersey side thereof; subject to the following rights of property and of jurisdiction of the State of New Jersey, that is to say:

1. The State of New Jersey shall have the exclusive right of property in and to the land under water, lying west of the middle of the bay of New York and west of the middle of that part of the Hudson river which lies between Manhattan island and New Jersey.

2. The State of New Jersey shall have the exclusive jurisdiction of and over the wharves, docks and improvements made, and to be made on the shore of the said State, and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers, of the State of New Jersey, which now exist or which may hereafter be passed.

3. The State of New Jersey shall have the exclusive right of regulating the fisheries on the westerly side of the middle of the said waters, provided that the navigation be not obstructed or hindered.

Pymatuning Lake Compact (Ohio and Pennsylvania).

2. Arrest and Prosecution of Offenders

That each state shall enjoy and exercise a concurrent jurisdiction upon the water (but not upon the dry land between the shores of said lake including the islands therein) with respect to the arrest and prosecution of offenders but in such sort that any boat or vessel fastened to or aground on the shore of either state shall be considered exclusively within the jurisdiction of said state but that all capital and other offenses, trespasses or damages committed on or over said lake the judicial investigation and determination thereof shall be exclusively vested in the state wherein the offender or person charged with such offense shall be first apprehended, arrested, prosecuted or first brought to trial, it being the intent of this agreement that an offender may be pursued and arrested anywhere on or over said lake or shores thereof or islands therein regardless of the boundary line by any peace officers or persons of either state authorized to make arrests whether the offenses be committed on or over any
part of the lake on the shores or islands therein regardless of the state in which the place where the offense was committed lies.

**Panels or Subsidiary Agreements**

The use of panel or subsidiary agreement provisions permits a single interstate compact to be used for establishing other areas of interstate agreement among subgroups of the compacting states in addition to the general agreement in which all the member states are joined. This procedure permits contiguous or neighboring states to make local arrangements that are of interest only or primarily to those states but which may aid in contributing to the success of the parent agreement, as in the case of the bistate agreements for particular streams in the Upper Colorado River Compact. It also permits subgroups of states to go further either on a geographical (Atlantic Compact) or functional (out-of-state incarceration-parolee compact) basis than may be feasible politically or administratively for all the states party to the basic instrument. It is true, of course, that such subgroups of states could enter into separate compacts for these additional purposes, but this would result in a multiplicity of agreements, and possible administrative confusion and legal conflict.

The examples given here seem to fall into three categories:

1. The specific agreement on a particular subject between specific states with no need for participation by other states because of the limited character of the subject, as in the Upper Colorado River Compact, or in particular stream agreements.
2. The permissive clause that permits states which have adopted it to undertake additional functions or procedures by further action, as in the Atlantic States Marine Fisheries Compact, Amendment No. 1.
3. The self-executory clause which, when adopted by a state, goes into effect between that state and other states which have acted similarly, as in the out-of-state incarceration amendment.

**Upper Colorado River Compact, Art. XII (h).**

The State Engineers of the two States jointly shall appoint a Special Water Commissioner who shall have authority to administer the water in both States in accordance with the terms of this Article. The salary and expenses of such Special Water Commissioner shall be paid, thirty percent by the State of Utah and seventy percent by the State of Wyoming.

**Atlantic States Marine Fisheries Compact, Amendment No. 1.**

The states consenting to this amendment agree that any two or more of them may designate the Atlantic States Marine Fisheries Commission as a joint regulatory agency with such powers as they may jointly confer from time to time for the regulation of the fishing operations of the citizens and vessels of such designating states with respect to specific fisheries in which such states have a common interest. The representatives of such states on the Atlantic States Marine Fisheries Commission shall constitute a separate section of such Commission for the exercise of the additional powers so granted provided that the states so acting shall appropriate additional funds for this purpose. The creation of such section as a joint regulatory agency shall not deprive the states participating therein of any of their privileges or powers or responsibilities in the Atlantic States Marine Fisheries Commission under the general compact.

**Northeastern Interstate Forest Fire Protection Compact, Art. V.**

Any two or more member states may designate the Northeastern Forest Fire Protection Commission as a joint agency to maintain such common serv.
ices as those states deem desirable for the prevention and control of forest fires. Except in those cases where all member states join in such designation for common services, the representatives of any group of such designating states in the Northeastern Forest Fire Protection Commission shall constitute a separate section of such commission for the performance of the common service or services so designated provided that, if any additional expense is involved, the states so acting shall appropriate the necessary funds for this purpose. The creation of such a section as a joint agency shall not affect the privileges, powers, responsibilities or duties of the states participating therein as embodied in the other articles of this compact.

**Interstate Compact for the Supervision of Parolees and Probationers. Out-of-State Incarceration Amendment.**

Section 7. This amendment shall take effect when ratified by any two or more states party to this compact and shall be effective as to those states which have specifically ratified this amendment. Rules and regulations necessary to effectuate the terms of this amendment may be promulgated by the appropriate officers of those states which have ratified this amendment.

**Interstate Compact on Mental Health, Art. XI.**

The duly constituted administrative authorities of any two or more party states may enter into supplementary agreements for the provision of any service or facility or for the maintenance of any institution on a joint or cooperative basis whenever the states concerned shall find that such agreements will improve services, facilities, or institutional care and treatment in the fields of mental illness or mental deficiency. No such supplementary agreement shall be construed so as to relieve any party state of any obligation which it otherwise would have under other provisions of this compact.

**Rule Making and Enforcement**

While compacts are ultimately enforceable in the courts as contractual obligations, it is obviously desirable to forestall or avoid litigation wherever possible. To this end some compacts explicitly provide for enforcement. Another problem in enforcement relates to the power sometimes given a joint agency to compel compliance by private persons or other legal entities. The following clauses deal with both of these subjects. Attention is called to the method used in the case of the Ohio compact. There, the ratifying legislation passed by the states provided for enforcement. This provision was in addition to and supplementary to any provisions contained in the compact itself.

**Port of New York Authority Compact, Art. XVIII.**

The port authority is hereby authorized to make suitable rules and regulations not inconsistent with the constitution of the United States or of either state, and subject to the exercise of the power of congress, for the improvement of the conduct of navigation and commerce, which, when concurred in or authorized by the legislatures of both states, shall be binding and effective upon all persons and corporations affected thereby.

Art. XIX. The two states shall provide penalties for violations of any order, rule or regulation of the port authority, and for the manner of enforcing the same.

**Interstate Compact for the Supervision of Parolees and Probationers. Out-of-State Incarceration Amendment, Sec. 7.**

... Rules and regulations necessary to effectuate the terms of this amendment
may be promulgated by the appropriate officers of those states which have ratified this amendment.

**Tri-state Sanitation Compact, Art. X.**

1. Subject to the provisions of this compact, the commission, as soon as may be after its organization, after an investigation and after conducting public hearings upon due notice, shall by order prescribe the reasonable date on or before which each municipality or other entity discharging sewage into the designated **waters** within the district shall be treating such sewage in accordance with the standards specified in this compact. Such order may prescribe that certain specific progress shall be made at certain definite **times** prior to the final date fixed in such order.

   It is the desire of all parties to accomplish the objects herein set forth with the least possible injury to investments which have already been made in the construction of sewage-treatment plants within the district, and where changes or additions to such plants would be necessary to conform to the standards herein adopted, a reasonable time to effect such changes or additions may, in the discretion of the commission, be granted.

   **Art. XI.** . . . The Commission shall have authority to investigate and determine if the requirements of the compact and/or the orders of the commission pursuant thereto are complied with and if satisfactory progress has not been made, to bring action in its own name in the proper court or courts to compel the enforcement of any and all of the provisions of this compact, and/or the orders of the commission pursuant thereto.

**Ohio River Valley Water Sanitation Compact, Art. IX.**

The Commission may from time to time, after investigation and after a hearing, issue an order or orders upon any municipality, corporation, person or other entity discharging sewage or industrial waste into the Ohio River or any other river, stream or water, any part of which constitutes any part of the boundary line between any two or more of the signatory States, or into any stream any part of which flows from any portion of one signatory State through any portion of another signatory State. Any such order or orders may prescribe the date on or before which such discharge shall be wholly or partially discontinued, modified or treated or otherwise disposed of. The Commission shall give reasonable notice of the time and place of the hearing of the municipality, corporation or other entity against which such order is proposed. No such order shall go into effect unless and until it receives the assent of at least a majority of the commissioners from each of not less than a majority of the signatory States; and no such order upon a municipality, corporation, person or entity in any State shall go into effect unless and until it receives the assent of not less than a majority of the **commissioners** from such state.

   It shall be the duty of the municipality, corporation, person or other entity to comply with any such order issued against it or him by the Commission, and any court of general jurisdiction or any United States district court in any of the signatory States shall have the jurisdiction, by mandamus, injunction, specific performance or other form of remedy, to enforce any such order against any municipality, corporation or other entity domiciled or located within such state or whose discharge of the waste takes place within or adjoining such State, or against any employee, department or subdivision of such municipality, corporation, person or other entity; provided, however, such court may review the order and affirm, reverse or modify the same upon any of the grounds customarily applicable in **proceedings** for court review of administrative decisions. The Commission or, at its request, the Attorney General or other law enforcing official, shall have power to institute in such court any action for the enforcement of such order.
Effective Date

On the whole this is a matter of mechanics. Where a number of potential compacting states are involved it is necessary to make a decision as to how many states must enact before the compact becomes effective. In certain instances, it may be desirable to specify one or more states whose adherence is essential to the effectiveness of the compact. Although it does not appear in the compact itself some of the states conditioned their entry into the Ohio River compact on the adherence of other named states. (See Zimmermann and Wendell, The Interstate Compact since 1925, p. 88, note 320.)

Although this is a mechanical matter there are dangers. Care should be taken to see that all participating jurisdictions agree as to the precise meaning of the clause and as to the conditions precedent to the compact coming into effect.

Interstate Compact on Mental Health, Art. XII.

This compact shall enter into full force and effect as to any state when enacted by it into law and such state shall thereafter be a party thereto with any and all states legally joining therein.

Republican River Compact, Art. XI.

This compact shall become operative when ratified by the Legislature of each of the States, and when consented to by the Congress of the United States by legislation providing, among other things, that:

(a) Any beneficial consumptive uses by the United States, or those acting by or under its authority, within a State, of the waters allocated by this compact shall be made within the allocations hereinabove made for use in that State and shall be taken into account in determining the extent of use within that State.

(b) The United States, or those acting by or under its authority, in the exercise of rights or powers arising from whatever jurisdiction the United States has in, over, and to the waters of the Basin shall recognize, to the extent consistent with the best utilization of the waters for multiple purposes, that beneficial consumptive use of the waters within the Basin is of paramount importance to the development of the Basin; and no exercise of such power or right thereby that would interfere with the full beneficial consumptive use of the waters within the Basin shall be made except upon a determination, giving due consideration to the objectives of this compact and after consultation with all interested federal agencies and the state officials charged with the administration of this compact, that such exercise is in the interest of the best utilization of such waters for multiple purposes.

(c) The United States, or those acting by or under its authority, will recognize any established use, for domestic and irrigation purposes, of the waters allocated by this compact which may be impaired by the exercise of federal jurisdiction in, over, and to such waters; provided, that such use is being exercised beneficially, is valid under the laws of the appropriate State and in conformity with this compact at the time of the impairment thereof, and was validly initiated under state law prior to the initiation or authorization of the federal program or project which causes such impairment.

Klamath River Compact, Art. XIII B.

The act of Congress referred to in subdivision A of this article shall provide that the United States or any agency thereof, and any entity acting under any license or other authority granted under the laws of the United States (referred to in this article as "The United States"), in connection with developments undertaken after the effective date of this compact pursuant to laws of the United States, shall comply with the following requirements:
1. The United States shall recognize and be bound by the provisions of subdivision A of Article III.

2. The United States shall not, without payment of just compensation, impair any rights to the use of water for use (a) or (b) within the Upper Klamath River Basin by the exercise of any powers or rights to use or control water (i) for any purpose whatsoever outside the Klamath River Basin by diversions in California or (ii) for any purpose whatsoever within the Klamath River Basin other than use (a) or (b). But the exercise of powers and rights by the United States shall be limited under this paragraph 2 only as against rights to the use of water for use (a) or (b) within the Upper Klamath River Basin which are acquired as provided in subdivision B of Article III after the effective date of this compact, but only to the extent that annual depletions in the flow of the Klamath River at Keno resulting from the exercise of such rights to use water for uses (a) and (b) do not exceed 340,000 acre-feet in any one calendar year.

3. The United States shall be subject to the limitation on diversions of waters from the basin of Jenny Creek as provided in subdivision A of Article VIII.

4. The United States shall be governed by all the limitations and provisions of paragraph 2 and subparagraph (a) of paragraph 3 of subdivision B of Article III.

5. The United States, with respect to any irrigation or reclamation development undertaken by the United States in the Upper Klamath River Basin in California, shall provide that substantially all of the return flows and waste water finally resulting from such diversions and use appearing as surface waters in the Upper Klamath River Basin shall be made to drain so as to be eventually returned to the Klamath River upstream from Keno, unless the Secretary of the Interior shall determine that compliance with this requirement would render it less feasible than under an alternate plan of development, in which event such return flows and waste waters shall be returned to the Klamath River at a point above Copco Lake.

C. Upon enactment of the act of Congress referred to in subdivision A of this Article and so long as such act shall be in effect, the United States, when exercising rights to use water pursuant to state law, shall be entitled to all of the same privileges and benefits of this compact as any person exercising similar rights.

D. Such act of Congress shall not be construed as relieving the United States of any requirement of compliance with state law which may be provided by other federal statutes.

**Separability**

It is possible that as a general rule it would be desirable to include separability clauses in compacts for the same reason that it is desirable to include them in statutes. Such clauses have not been included in most extant compacts. Mr. Justice Jackson's concurring opinion in *Dyer v. Sims* raises an additional question as to such inclusion. He reasons that the doctrine of estoppel may apply where states have been induced to rely on commitments made by other compacting states. If this doctrine becomes the accepted law the separability clause might allow invalidation of part of the compact where in the absence of separability the entire compact would survive.

*Tri-State Sanitation Compact, Art. XV.*

Should any part of this compact be held to be contrary to the constitution of any signatory State or of the United States, all other severable objects of this compact shall continue to be in full force and effect.
Appendix

Wabash Valley Compact, Art. VZZZ.

The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be unconstitutional or the applicability thereof to any state, agency, person or circumstances is held invalid, the constitutionality of the remainder of this compact and the applicability thereof to any other state, agency, person or circumstances shall not be affected thereby. It is the legislative intent that the provisions of this compact be reasonably and liberally construed.

Withdrawal and Termination

The Port Authority clause reproduced below is unusual. It is a withdrawal clause only in the limited sense. The compact has no withdrawal or termination clause applicable after 1923. The Southern Regional Education clause contained herein is the most comprehensive one dealing with this subject to date. It may be of particular interest because of its provision in advance for the disposition of facilities and other property held by the joint agency.

Withdrawal clauses may also be useful in meeting possible constitutional issues under delegation of powers.

Colorado River Compact, Art. X. (Standard clause. At will.)

This compact may be terminated at any time by the unanimous agreement of the signatory States. In the event of such termination all rights established under it shall continue unimpaired.

Potomac River Compact, Art. VI. (Upon one year notice.)

Any signatory body may by legislative act, after one year's notice to the Commission, withdraw from this compact.

Port of New York Authority Compact, Art. XXI.

Either state may by its legislature withdraw from this agreement in the event that a plan for the comprehensive development of the port shall not have been adopted by both states on or prior to July first, nineteen hundred twenty-three; and when such withdrawal shall have been communicated to the Governor of the other state by the state so withdrawing, this agreement shall be thereby abrogated.

Southern Regional Education Compact, S.J.Res. 191.

After becoming effective this compact shall thereafter continue without limitation of time provided, however, that it may be terminated at any time by unanimous action of the States and provided further that any State may withdraw from this compact if such withdrawal is approved by its legislature, such withdrawal to become effective two years after written notice thereof to the Board accompanied by a certified copy of the requisite legislative action, but such withdrawal shall not relieve the withdrawing State from its obligations hereunder accruing up to the effective date of such withdrawal. Any State so withdrawing shall ipso facto cease to have any claim to or ownership of any of the property held or vested in the Board or to any of the funds of the Board held under the terms of this compact.

If any State shall at any time become in default in the performance of any of its obligations assumed herein or with respect to any obligation imposed upon said State as authorized by and in compliance with the terms and provisions of this compact, all rights, privileges and benefits of such defaulting State, its members on the Board and its citizens shall ipso facto be and become suspended from and after the date of such default. Unless such default shall be
remedied and made good within a period of one year immediately following the date of such default this compact may be terminated with respect of such defaulting State by an affirmativé vote of three-fourths of the members of the Board (exclusive of the members representing the State in default), from and after which time such State shall cease to be a party to this compact and shall have no further claim to or ownership of any of the property held by or vested in the Board or to any of the funds of the Board held under the terms of this Compact, but such termination shall in no manner release such defaulting State from any accrued obligation or otherwise affect this compact or the rights, duties, privileges or obligations of the remaining States thereunder.

Interstate Compact on Mental Health, Art. XIII.

(a) A state party to this compact may withdraw therefrom by enacting a statute repealing the same. Such withdrawal shall take effect one year after notice thereof has been communicated officially and in writing to the governors and compact administrators of all other party states. However, the withdrawal of any state shall not change the status of any patient who has been sent to said state or sent out of said state pursuant to the provisions of the compact.

(b) Withdrawal from any agreement permitted by Article VII (b) as to costs or from any supplementary agreement made pursuant to Article XI shall be in accordance with the terms of such agreement.

Amendment, Supplementary Agreements

Until fairly recent times, compacts did not contain any provision for growth or alteration through amendment or supplementary agreements. Since a compact is a contract, it is probably correct to say that any change in compact provisions agreed to by all of the parties can be successfully accomplished even in the absence of an amendment clause in the original compact. However, in the interest of flexibility and clarity, it is well to make organic provision for change in the compact. In recent times, this is being more and more recognized with the result that modern compacts tend to make specific provision for such change and growth.

The provisions reproduced below are of two types: those contemplating changes in the compact and those providing for additions to the substance of the compact by later agreement among some or all of the parties.

Note especially:

1. The Rio Grande Compact permits the interstate commission to propose changes. This is probably a sound idea but the clause describes no other procedure for amendment. In the absence of additional language, this provision could be interpreted to prevent amendment unless the commission acted. Such a result might be undesirable.

2. The Yellowstone provision is an interesting example of commission initiative.

3. The Civil Defense provisions illustrate the possibility of identifying the areas in which supplementary agreements shall be permissible and of supplying some indication in the compact itself of their substance.

Yellowstone River Compact, Art. VI (c).

When the Commission has made such determination for any interstate stream, it shall report its findings to the President of the United States and to the Governor of each State in the form of an agreement supplemental to this compact, which agreement shall be in full force and effect from the time of its
approval by the Commission until disapproved by the Congress of the United States or by the Legislature of Wyoming or by the Legislature of Montana.

**Rio Grande Compact, Art. XIII.** (Commission may propose. Is this unamendable if Commission does not propose?)

At the expiration of every five-year period after the effective date of this Compact, the Commission may, by unanimous consent, review any provisions hereof which are not substantive in character and which do not affect the basic principles upon which the Compact is founded, and shall meet for the consideration of such questions on the request of any member of the Commission; provided, however, that the provisions hereof shall remain in full force and effect until changed and amended within the intent of the Compact by unanimous action of the Commissioners and until any changes in this Compact are ratified by the legislatures of the respective states and consented to by the Congress, in the same manner as this Compact is required to be ratified to become effective.

**Port of New York Authority Compact, Art. VII.**

The port authority shall have such additional powers and duties as may hereafter be delegated to or imposed upon it from time to time by the action of the legislature of either state concurred in by the legislature of the other.

[A similar provision is contained in Article III of the Tri-State Sanitation Compact. However, despite the seeming desirability of flexibility such clauses have raised difficulties in securing the consent of Congress.]

**Port of New York Authority Compact, Art. III.**

There is hereby created "The Port of New York Authority" (for brevity hereinafter referred to as the "Port Authority"), which shall be a body corporate and politic, having the powers and jurisdiction hereinafter enumerated, and such other and additional powers as shall be conferred upon it by the legislature of either state concurred in by the legislature of the other, or by act or acts of congress, as hereinafter provided.

**Civil Defense Compact, Art. 8.**

Any party State rendering aid in another State pursuant to this compact shall be reimbursed by the party State receiving such aid for any loss or damage to, or expense incurred in the operation of any equipment answering a request for aid, and for the cost incurred in connection with such requests; provided, that any aiding party State may assume in whole or in part such loss, damage, expense, or other cost, or may loan such equipment or donate such services to the receiving party State without charge or cost; and provided further that any two or more party States may enter into supplementary agreements establishing a different allocation of costs as among those States. The United States Government may relieve the party State receiving aid from any liability and reimburse the party State supplying civil defense forces for the compensation paid to and the transportation, subsistence and maintenance expenses of such forces during the time of the rendition of such aid or assistance outside the State and may also pay fair and reasonable compensation for the use or utilization of the supplies, materials, equipment or facilities so utilized or consumed.

**Civil Defense Compact, Art. 6.**

Inasmuch as it is probable that the pattern and detail of the machinery for mutual aid among two or more States may differ from that appropriate among other States party hereto, this instrument contains elements of a broad case common to all States, and nothing herein contained shall preclude any State from entering into supplementary agreements with another State or States.
Such supplementary agreements may comprehend, but shall not be limited to, provisions for evacuation and reception of injured and other persons, and the exchange of medical, fire, police, public utility, reconnaissance, welfare, transportation and communications personnel, equipment and supplies.

**Mediation and Arbitration**

While arbitration and mediation arrangements have become frequent features of private contracts, they are only beginning to find use in compacts. The purpose for their inclusion is the same as that which is usually advanced for arbitral arrangements in general: namely, to provide machinery for the adjustment of disputes arising under the agreement without the necessity for resort to the courts.

**Arbitration**

*Snake River Compact, Art. IV, C.*

In the case of failure of the administrative officials of the two states to agree on any matter necessary to the administration of this compact, the Director of the United States Geological Survey or whatever official succeeds to his duties, shall be asked to appoint a Federal representative to participate as to the matters in disagreement, and points of disagreement shall be decided by majority vote.

[Article XIII of the old Pecos River Compact (1925) provided machinery for the adjustment of disputes arising under the agreement. But the proposed commissioners could only recommend solutions and could not make awards.]

**Mediation**

*Canadian River Compact, Art. VI.* (See also Judicial Settlement.)

Should any claim or controversy arise between any two or more of the signatory states: (a) with respect to the waters of the Canadian River System not covered by the terms of this compact; (b) over the meaning or performance of any of the terms of this compact; (c) as to the allocation of the burdens incident to the performance of any article of this compact, or the delivery of waters as herein provided; (d) as to the construction or operation of works within the Canadian River Basin to be situated in two or more states, or to be constructed in one state for the benefit of another state; or (e) as to diversion of water in one state for the benefit of another state, the Commissions of the states affected upon request of one of them, shall have authority to adjust such claim or controversy.

**Article IX.** Nothing in this compact shall be construed to limit or prevent any state from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right in any state, or in any of its citizens, arising under this compact, or for the enforcement of any of its provisions, but on the contrary this compact shall constitute an agreement waiving any question of the right by one state to have judicial remedy against another state, or its citizens, or inhabitants, or any states' citizens, arising hereunder.

*Yellowstone River Compact (Proposal of 1935), Art. VZI.*

Should any claim or controversy arise between the signatory States: (a) With respect to the waters of the Yellowstone River. (b) Over the meaning or interpretation of any of the terms of this compact. (c) As to the construction or operation of any works in one State for the benefit of the other State; the Governors of the signatory States, upon request of one of them, shall forthwith appoint commissioners with power to consider
and adjust any such claim or controversy, subject to ratification by the legislatures of the signatory states. Nothing in this article contained shall prevent the adjustment of any such claim or controversy by direct legislative action of the States or be construed to limit or prevent any State from instituting or maintaining suit to protect any right under this compact or to enforce any of its provisions.

**Colorado River Compact, Art. VI.**

Should any claim or controversy arise between any two or more of the signatory States: (a) with respect to the waters of the Colorado River System not covered by the terms of this compact; (b) over the meaning or performance of any of the terms of this compact; (c) as to the allocation of the burdens incident to the performance of any article of this compact or the delivery of waters as herein provided; (d) as to the construction or operation of works within the Colorado River Basin to be situated in two or more States, or to be constructed in one State for the benefit of another State; or (e) as to the diversion of water in one State for the benefit of another State; the Governors of the States affected, upon the request of one of them, shall forthwith appoint Commissioners with power to consider and adjust such claim or controversy, subject to ratification by the Legislatures of the States so affected.

Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method or by direct future legislative action of the interested States.

**Klamath River Compact, Art. IX (10).**

In the case of the failure of the two voting members of the commission to agree on any matter relating to the administration of this compact as provided in paragraph 2 of this subdivision A, the representative from each state shall appoint one person and the two appointed persons shall appoint a third person. The three appointees shall sit as an arbitration forum. The terms of appointment and the compensation of the members of the arbitration forum shall be fixed by the commission. Matters on which the two voting members of the commission have failed to agree shall be decided by a majority vote of the members of the arbitration forum. Each state obligates itself to abide by the decision of the arbitration forum, subject, however, to the right of each state to have the decision reviewed by a court of competent jurisdiction.

**Judicial Settlement**

Even in the absence of a specific compact provision recognizing judicial settlement of disputes, such settlement would be the normal procedure where methods short of litigation might fail. However, a few compacts specifically refer to judicial settlement. The Canadian River provision is included here because of its sweeping character.

**Rio Grande Compact, Art. XI.**

New Mexico and Texas agree that upon the effective date of this Compact all controversies between said States relative to the quantity or quality of the water of the Rio Grande are composed and settled; however, nothing herein shall be interpreted to prevent recourse by a signatory state to the Supreme Court of the United States for redress should the character or quality of the water, at the point of delivery, be changed hereafter by one signatory state to the injury of another. Nothing herein shall be construed as an admission by any signatory state that the use of water for irrigation causes increase of salinity for which the user is responsible in law.
Canadian River Compact, Art. IX.

Nothing in this compact shall be construed to limit or prevent any state from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right in any State, or in any of its citizens, arising under this compact, or for the enforcement of any of its provisions, but on the contrary this compact shall constitute an agreement waiving any question of the right by one state to have judicial remedy against another state, or its citizens, or inhabitants, or any states' citizens, arising hereunder.

DELEGATION OF TAXING POWER

Two recent compacts have delegated powers of taxation to interstate compact commissions. The pertinent clauses follow:

Waterfront Commission Compact, Art. XIII.

3. After taking into account such funds as may be available to it from reserves, federal grants or otherwise, the balance of the commission's budgeted expenses shall be assessed upon employers of persons registered or licensed under this compact. Each such employer shall pay to the commission an assessment computed upon the gross payroll payments made by such employed to longshoremen, pier superintendents, hiring agents and port watchmen for work or labor performed within the port of New York district, at a rate, not in excess of two per cent, computed by the commission in the following manner: the commission shall annually estimate the gross payroll payments to be made by employers subject to assessment and shall compute a rate thereon which will yield revenues sufficient to finance the commission's budget for each year. Such budget may include a reasonable amount for a reserve but such amount shall not exceed ten per cent of the total of all other items of expenditure contained therein. Such reserve shall be used for the stabilization of annual assessments, the payment of operating deficits and for repayment of advances made by the two states.

The Compact of 1958 (Potomac Fisheries), Art. III.

Section 9, Inspection Tax. The Commission may impose an inspection tax, in an amount as fixed from time to time by the Commission, not exceeding 25¢ per bushel, upon all oysters caught within the limits of the Potomac River. The tax shall be paid by the buyer at the place in Maryland or Virginia where the oysters are unloaded from vessels and are to be shipped no further in bulk in vessel, to an agent of the Commission, or to such officer or employees of the Virginia Fisheries Commission or of the Maryland Department of Tidewater Fisheries, as may be designated by the Commission, and by him paid over to the Commission.
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Appendix IV

REPRINTS

The following articles are reprinted from publications of the Council of State Governments, Lexington, Kentucky.

INTERSTATE COMPACTS

BY FREDERICK L. ZIMMERMANN AND MITCHELL WENDELL*

The number of interstate compacts has now become large enough so that in any given two-year period it may be difficult to determine whether it is more valuable to report on the development of entirely new instruments or to concentrate on the new activities initiated under existing agreements. Another consideration for the present article is that the incubation time for a new compact, like that for a major statute, often stretches over several years. This means that a compact reported as under development in a previous edition of this volume may not merit additional space in a brief survey of current activity, even though there has been some further progress. Everything considered, it would appear desirable to devote this edition of the biennial story mainly to new authority received or contemplated for existing compacts. Briefer mention will be made of entirely new compacts.

Environmental Programs

Environmental and natural resource matters have been one of the major fields of compact action for more than a generation. Of late there has been a sharp upsurge of interest in these subjects, particularly insofar as the improvement of environmental quality is concerned. The part biennium has seen several interstate developments of this kind.

The New England Interstate Water Pollution Control Commission, an agency which was originally established about twenty years ago, functions under a compact among the six New England States and New York. The compact conferred limited powers on the interstate body to deal with water pollution. The compact procedures call for the setting of water quality standards by the commission for particular interstate water bodies. It then becomes the responsibility of the individual member States to apply and enforce these standards on the designated waters.

During 1968 the commission devoted much attention to possible expansion of its responsibilities and developed a program in this regard. It included authority to conduct training programs for waste treatment plant personnel throughout the region; certify such personnel according to standards of occupational preparation; and power to take administrative and court action to abate pollution occurring at or near a state boundary. The commission had previously functioned in the first of these fields on an occasional and modest basis but felt that institution of a regular program should have legislative authorization. The other two activities will be entirely new for the interstate agency.

Amendment of the New England Interstate Water Pollution Control Compact is not involved. A provision of the original agreement as consented to by Congress contains authority for the commission to assume additional duties, if conferred by supplemental statutes of the party States. Statutes authorizing the training programs and the certification of treatment plant personnel were enacted by the 1969 legislative sessions in Connecticut, New York, and Maine. The enforcement statute was enacted by the same legislative sessions in Connecticut and New York.

The Interstate Sanitation Commission has functioned for over thirty years in the waters of the Greater New York Metropolitan Area under the Tri-State Compact of New Jersey, New York, and

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Connecticut. It has had enforcement and standards-making powers since its inception in the field of water quality. However, its standards-making authority has been more rigid than that conferred by many pollution control statutes because the specific standards applicable to classifications of waters made by the commission are written into the compact in specific numerical terms. An amendment to the Tri-State Compact adopted by Connecticut and New York in 1969 would make it possible for the commission to employ more customary administrative standards-making procedures. It also refers specifically to conformity with state water use plans, harmonization of standards throughout the Interstate Sanitation District, and compatibility with procedures for water quality standards contained in federal law. The amendment will become effective if enacted by New Jersey.

The Interstate Sanitation Commission also has operated a research and investigative 'air pollution program to assist New Jersey and New York in their control activities under legislative authorization by the two States. The 1969 session of the Connecticut Legislature enacted legislation making that Stat; a participant in the commission's air pollution program. Consequently, the Interstate Sanitation Commission is now a water and air agency for all three of its member States.

The Escatawpa River Basin Compact

The past several years have seen important instances of broadening of the water compact idea to include the comprehensive basin management approach. Perhaps the examples are still too few to constitute a trend, but the line of influence from one to another of the instruments is clear. The Delaware River Basin Compact described in earlier editions of this article has been followed by development of highly similar instruments for the Susquehanna and Potomac Rivers. The Susquehanna River Basin Compact was enacted by all three basin States: Maryland and New York in 1967; Pennsylvania in 1968. Since it resembles the Delaware compact in its interstate-federal character as well as in its subject matter and much of its language, only joinder by the federal government is necessary to place it in operation. The Potomac River Basin Compact is in an advanced stage of development but is not intended for serious consideration by Legislatures until 1970.

The drafting of an Escatawpa River Basin Compact was an entirely new development during 1969. The agreement is intended for submission to the Legislatures in Mississippi and Alabama.

The Escatawpa compact resembles the Delaware, Susquehanna, and Potomac instruments in that it is a comprehensive basin management agreement. It differs from them in that it is an interstate rather than an interstate-federal compact. In place of full participation by the United States, the Escatawpa agreement would have a nonvoting federal representative if the United States provides for one by administrative or statutory action.

On the other hand, federal activity has been a very important part in the genesis of the compact. The projected Harleston Reservoir of the Corps of Engineers will provide the major physical facility on whose effective operation a large part of the justification for the compact rests. The Escatawpa River Basin Commission is designed to assume operational responsibility for the Harleston project once it is built.

The compact is notable for its emphasis on stream flow regulation and flow augmentation. This is intended specifically for pollution control, water supply, and general river management. Another significant accomplishment of the compact will be the interstate settlement by agreement of the municipal water supply problem of the City of Mobile. Finally, it should be noted that the compact authorizes the interstate body which it creates to enter the fields of water supply, water quality management, watershed management, long range protection of water availability, and crisis management of drought shortages, flood plain management, and recreation. Much of the compact language has been drawn from the Delaware, Susquehanna, and Potomac models, but many adaptations have been
made to fit local desires, needs, and conditions.

Regional Development and Planning

A number of compacts have been concerned, either wholly or in part, with regional development, regional planning, or both. Water and related resources have figured significantly among the subjects involved. The most recent entry in this category is the Tahoe Regional Planning Compact enacted by California and Nevada in 1969 after several years of controversy over the exact provisions of the agreement.

As now consummated, the compact provides for joint planning and a considerable measure of joint land use regulation of Lake Tahoe and its environs. The interstate agency established by the compact is notable in the weight it gives to local interests. Most of the representation on the agency is of the local governments bordering the lake. Nevertheless, the compact is a creation of state law and each State has two members of the agency administering the agreement.

The basic thrust of the compact is conservation and orderly development of a major scenic and recreational resource with full recognition of the broad community implications. To this end, the compact provides for planning through the mechanism of comprehensive official plans that will have the force of law. Since the compact provides for enforcement of conformity with such plans, the powers also are of a zoning character. The Tahoe compact would seem a major step in intergovernmental regional zoning.

One feature of the congressional consent legislation for the Tahoe compact also deserves notice. It provides that no additional powers may be conferred upon the compact agency without the further consent of Congress. A number of earlier compacts have contained provisions authorizing the party States to confer additional authority on an interstate agency by legislative acts of their own, concurred in by the other party States. It has been taken for granted that in consenting to a compact including such a provision, Congress has consented to the authorized expansion of compact activities, at least with respect to the same subject matter contemplated by the original compact. There is no evidence that the caution exhibited by the Tahoe consent proviso stems from any unfortunate experiences with other compacts. Accordingly, it may be viewed as an unfortunate restriction that could unnecessarily impede interstate cooperation, burden Congress unnecessarily with future legislation in which it has no real interest, and tend to discourage California and Nevada from undertaking an expansion of the program for Lake Tahoe.

Although their formative periods have been long enough to attract attention in the past, two other compacts with planning and developmental features merit brief mention. The interstate-federal Susquehanna River Basin and Potomac River Basin Compacts have progressed in material ways. State action on the Susquehanna compact was completed with adoption in Pennsylvania during 1968. The Potomac compact has been completed and should receive its first serious consideration by one or more of the appropriate State Legislatures in 1970.

The enactment of the Susquehanna and Potomac interstate-federal compacts would result in wider application of the principles now in operation in the Delaware River Basin. In a country increasingly in need of effective mechanisms for comprehensive regional policy determination and administration, the gaining of more experience with the interstate-federal compact method is of great importance.

Other Regional Compacts

Development of regional compacts dealing with functions other than inland water management is also growing. The Pacific States Marine Fisheries Commission now includes Alaska and Idaho, in addition to the regional membership of Washington, Oregon, and California; the compact has been amended to provide a modified formula of state contributions that accommodates Idaho's more limited interest. The original transportation planning commissions for the Philadelphia and New York metropolitan areas established by compacts are becoming
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broad gauge metropolitan planning agencies. The Philadelphia agency has evolved into the Delaware Valley Regional Planning Commission with responsibilities including planning for land use, open space, water supply and water pollution, in addition to highway and public transportation planning. Six plans, one concerning each of these subjects, have been prepared by the commission to provide general guides for the physical development of the area until 1985. The commission states that "these plans represent the first steps the major governments of this region have taken towards establishing a comprehensive regional planning process for the Delaware Valley...the beginning of what must be a comprehensive, continuous and coordinated effort to develop practical guidelines for the planned and orderly growth of the greater metropolitan community." Besides members from the two States, the commission embodies voting representatives of the area's local governments in each State—four counties and two cities in Pennsylvania; four counties and two cities in New Jersey—and nonvoting representatives of the appropriate federal agencies. In the New York area, the Tri-State Transportation Commission is also issuing plans and recommendations that go beyond transportation for action by the governments of that urban region. The life of the agency was recently extended to permit consideration by the Legislatures of Connecticut, New Jersey, and New York of proposed amendments which would formally broaden its planning realm. Connecticut and New York have enacted a railroad passenger transportation compact authorizing the transportation authorities of the two States "acting individually, but in cooperation with each other, or as co-venturers when they deem it advisable," to act under the compact where desirable to continue and improve passenger service between New York and New Haven. This is the latest of several uses of the compact or compact agencies in providing interstate mass transportation.

Essentially, the agreement is a vehicle for effecting joint operation of the New Haven Railroad main line and its branches in southern Connecticut between New York and New Haven by the transportation agencies of the two States rather than a joint agency. In this regard, its purpose is partially similar to that of the Washington Metropolitan Areas Transit agreement which effects coordination of local transportation agencies in each State. However, the latter also creates a transit authority.

A Western Interstate Nuclear Compact has been ratified by eleven Western States, two in 1968 and nine in the legislative year of 1969. This agreement is similar to the recommendatory Southern Interstate Nuclear Compact, but its language does encourage-the interstate agency to function in a somewhat broader scientific and technological context.

A new interstate park agreement, the Falls of the Ohio Interstate Park Compact, was enacted by Kentucky and Indiana. It establishes a commission to "create, develop and operate a park located along the Ohio River at the Falls of the Ohio and on adjacent areas..." The arrangement follows the pattern of Kentucky's agreement with Virginia for the Breaks Interstate Park Commission. Its basic purpose is to protect the falls "noted for Devonian limestone containing fossils of animal life which existed 300 million years ago," and its land acquisitions may be limited.

Facilitative Compacts

The growing use of compacts, both interstate and interstate-federal, to establish regional intergovernmental agencies should not obscure the spreading enactment by the States of facilitative agreements to provide legal channels for interstate or intergovernmental action. Such arrangements have been used on the regional level and in some instances have also included the creation of agencies. However, most of the leading examples are open to membership by all States and frequently to Territories and possessions of the United States. The compacts dealing with parole and probation, juveniles, detainers, driver licensing, libraries, mentally disordered offenders, mental health, civil defense and disaster, and the placement of children are the most notable of the interstate agreements which
could be characterized as national facilitative agreements. None establish intergovernmental agencies.

In 1968–69 a new facilitative compact of this type, the Interstate Agreement on the Qualification of Educational Personnel, was enacted by twenty-three States. It is scheduled to be considered in a number of others in the legislative sessions of 1970 and 1971. The purpose of the agreement is to produce a convenient system for the interstate recognition of the qualifications of teachers and other educational personnel whose employment is subject to the holding of appropriate certificates. In the absence of the interstate agreement, there has been considerable acceptance by one State of the out-of-state preparatory and experience qualifications of teachers and other certificated school professionals, but usually only after an elaborate process of matching the specifics of such qualifications against the state requirements. A teacher lacking a given number of credits in a subject or having a slightly different course distribution than that specified in the State normally is denied a regular certificate and is forced to make up the "deficiencies," even if it is obvious that the applicant is well prepared. The alternative is to leave the profession and to be removed from the pool of manpower on which the schools can draw.

Some informal administrative agreements among groups of States have been tried to alleviate these difficulties. These agreements have been of very limited utility because of insufficient basis in law or because their uncertain status and obscurity have prevented most educational professionals from learning of their existence or, when they do, from relying upon them.

The Interstate Agreement on Qualification of Educational Personnel is a compact. Accordingly, it has the force of law and is more easily made known to those who would benefit from its provisions. The agreement is intended to function through contracts among state education agencies as authorized by the compact. These contracts will set forth the procedures and standards for interstate recognition of particular elements of qualification.
Recent editions of this biennial article have noted that compacts are now being utilized for a very wide range of subject matter areas. The 1971 Council of State Governments' compilation of interstate compacts evidences steady growth in their number with 160 such instruments now in operation. Because of both the number and variety of these interstate agreements, it is now as important to report trends in the employment and procedure of existing arrangements as to identify wholly new uses for the device. Although it would seem that precedents are now numerous enough so that entirely novel compact arrangements are bound to become infrequent, the period covered by this article has witnessed some developments which again emphasize the versatility of compacts in effecting joint interjurisdictional action, organization and administration.

The Federal Role

In recent years possibly the most innovative development was the interstate-federal Delaware River Basin Compact which, since it is both the law of the party States and of the federal government, produces both interstate and interlevel integration. When it was adopted in 1961 this agreement was characterized, at the federal level, as an "oddball" form of intergovernmental river basin management organization which would not be repeated. It is significant that similar instruments have since been formulated for two other river basins, the Susquehanna and the Potomac. Since river basin management organization has been a notoriously controversial issue not only in federal-state relations but also in federal administrative organization, this imitation is not only a tribute to the specific accomplishments of the Delaware Commission but also to the value of this new type of intergovernmental institution.

In December 1970, Congress enacted the Susquehanna River Basin Compact (New York, Pennsylvania, Maryland, and the United States) and the President signed it into law so that there are now two interstate-federal river basin management compacts. A third, the Potomac River Basin Compact (Virginia, Maryland, Pennsylvania, West Virginia, the District of Columbia, and the United States) has been enacted by Virginia and Maryland. Action by the other two States and by the Congress to effect membership of the federal government and on behalf of the District of Columbia has not yet occurred and consequently, at this writing, the compact is not in operation. While all three are similar in basic characteristics and often in language, there is a noteworthy progression. Susquehanna contains two articles which are not present in Delaware: (1) an article providing for commission powers with respect to floodplain management and (2) an article specifically recognizing the amenities values of water and related resources. The Potomac Compact also contains articles relating to floodplains and amenities values.

Possibly even more important than these innovative provisions are some of the circumstances surrounding federal joinder in Susquehanna.

When in 1961, the Delaware Compact gained the endorsement of the then national Administration, it was carefully specified that the action was not to be
regarded as a precedent. Of course no such statement can be taken literally. It must have been clear then as now that if this first example of an interstate-federal compact made its own way, others were likely to be considered. Nevertheless, the basic principle of the Delaware Compact—coordination of federal, state, local and private actions affecting the interstate resources of a major river basin—was still questionable in the minds of some federal agencies which may prefer a more independent position for themselves. The Susquehanna Compact came to Congress at the start of a new federal Administration. Its members were largely unfamiliar with the interstate-federal compact idea and with the history of the Delaware experience. As part of a comprehensive study of federal-state relations undertaken at White House level, the proper attitude of the Administration toward such compacts in general and toward the Susquehanna instance in particular was subjected to lengthy examination. In April 1970, speaking through the Secretary of the Interior, the Administration announced its support of interstate-federal compacts and of the Susquehanna River Basin Compact. Nevertheless, there were still accommodations to be worked out in the reservations portion of the federal enacting legislation.

The most stubborn bone of contention was a provision desired by the Federal Power Commission to the effect that regardless of what the compact said, the independent federal regulatory agencies and their licensees were to be amenable only to those agencies. Nevertheless, as enacted, the federal statute specifically provides that the compact procedures of project submission and approval by the Susquehanna River Basin Commission must be followed.

A somewhat similar problem arose on the eve of the passage of the compact in Congress. A provision was inserted relating to the Susquehanna River Basin in the Omnibus Rivers and Harbors Bill just before that measure went to the floor. It authorized the Army Engineers to continue and expand a study of the Susquehanna Basin that was thought to be at an end. It further directed the Corps to report any projects that might eventuate from the expanded study directly to Congress for authorization. However, in conference committee the language of this provision was modified to require that only projects approved by the Susquehanna River Basin Commission be presented to Congress for authorization. The conference report specifically explained the change by noting that the principle and purpose of the compact were to be honored.

In an entirely different field, there is now an example of compact participation by the United States as a full party. The Agreement on Detainers has been enacted by Congress both for the United States and for the District of Columbia. By the time of the 1970 congressional enactment, 28 States were participants in this compact which had been developed by the States some years before.

It should be noted that this compact had gone into operation among the parties with the first state enactments. It was not necessary for States to consider whether the Agreement on Detainers required congressional consent because the Crime Control Act of 1934 already provides consent in advance in broad terms to crime control compacts. While the congressional action of 1970 was concerned only with making the United States a party to an agreement among the States, it transformed that instrument into an interstate-federal compact open to membership by all the States, Territories and possessions—in short, a potentially nationwide, interlevel, interjurisdictional agreement. Considered together with river basin development this new use of interstate-federal compacts raises the possibility of the employment of such instruments in other fields, regulatory and administrative as well as facilitative, in providing better structured integration of federal-state coordination, not only regionally but available to all States.

Besides the growing range of the compact as an instrument of interlevel or vertical coordination, it has recently achieved a new dimension in interstate or horizontal coordination. Back in 1949
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the States of the Northeast joined in the Northeastern Interstate Forest Fire Protection Compact which, among other things, established an essential legal base for rendering aid by stipulating the powers and immunities of aiding forces acting in the territory of another compacting jurisdiction. The agreement consented to by Congress at that time authorizes joinder by Canadian provinces. In 1970 New Brunswick and Quebec, the two Canadian jurisdictions most concerned, joined the compact. By that action they became members, together with the six New England States and New York, of the Northeastern Forest Fire Protection Commission established by the agreement.

**Interstate Environment Compact**

A proposed Interstate Environment Compact is a novel interstate agreement in that it contains no substantive provisions but is designed solely to provide an expeditious means in stipulated situations for state enactment of and congressional consent to compacts to protect the environment. A criticism which has been made of the use of the compact device is that it entails a slow process of enactment. While any such broad generalization on this point is, of course, subject to many qualifications, as for example the character of the agreement, the environmental compact would assure prompt action at two vital points: enactment by State Legislatures and consent by Congress. Under its terms, Governors of States which become party to the compact are empowered to enter into supplementary agreements, which upon their signatures become immediately binding, to combat "interstate environmental pollution." The compact defines this term as pollution of a body of water crossing or marking a state boundary, pollution of a federally designated air quality control region, a solid waste disposal program participated in by more than one State or "land use practice affecting the environment of more than one State." The Legislature in the State whose Governor enters into such an arrangement is to review the agreement at its next session "competent to consider the same" and "approve, disapprove or condition the agreement."

Congressional consent to compacts has been criticized by the States and specifically by a 1957 study of the State Attorneys General both as delaying the compact effectuation and occasioning uncertainties in the consent process. The proposed federal consent legislation for this compact seeks to solve that problem with relation to the supplementary agreements it authorizes by a clause stating "Nothing in this agreement shall be construed to limit the right of Congress by Act of law expressly enacted thereafter for that purpose to disapprove or condition such a supplementary agreement."

It is interesting that in considerable degree this compact was shaped at the national level in the form of a Congressional Consent Act largely anticipating rather than following state action. The procedures it set forth with respect to state enactment of and congressional consent to supplementary agreements are not a new development. The Interstate Civil Defense and Disaster Compact enacted by all but three States and consented to by Congress in the early 1950s authorizes gubernatorial entrance into supplementary agreements without any legislative action or congressional review but includes other substantive provisions. The Interstate Environment Compact, however, is the first compact with the sole purpose of providing an expediting procedure for agreements entered into under its aegis.

**Mass Transit**

Because of the interstate character of many of our largest metropolitan areas, mass transit is a likely subject for compact activities. At various times through the years, it has been appropriate to report on developments in several urban regions, including those centering on New York, Philadelphia, Washington, D.C., and Kansas City. No new mass transit ventures via compact were initiated during the past two years. However, most of the metropolitan areas just mentioned saw one or more occurrences of interest in the time covered by this article.

The operation of Port Authority Trans
Hudson (PATH) by the Port of New York Authority, and that agency's activities in guaranteeing certain obligations of the Long Island Railroad are of some years standing. Nevertheless, the Port Authority has been under increasing pressure from the Governors of the two party States and local interests to become more heavily involved in mass transit. Accordingly, a study has been launched by the Authority to determine what additional role it can play. A specific example of a project: which 1971 legislation in both New York and New Jersey authorized the Port Authority to undertake in this field is the development and operation of rapid rail links to Kennedy and Newark airports.

The Delaware Port Authority has continued its activities in mass transit and now operates an interstate rapid rail line.

Financing of mass transit is an omnipresent problem. The past and present pressures on the Port of New York Authority have centered around this problem. The undertaking for the two Kansas Cities also faces the need for funds, and the Missouri Legislature has responded by providing for a special tax to be used for the benefit of the interstate transit program.

**Planning**

Regional planning and policy formulation has been given some attention in the past as a subject of compacts. New England undertook two efforts, each of which was reported in previous editions of this article for the appropriate time periods. The Northeastern Water and Related Land Resources Compact (1959) was a proposal for a cooperative planning mechanism in an important but limited subject matter area. Several years after it failed to come into operation, the New England States formulated a comprehensive planning compact, the New England Interstate Planning Compact (1965), but its functions were largely assigned to other interstate and interstate-federal cooperative mechanisms before it could be placed in operation.

The New York, Philadelphia and Lake Tahoe regions have actually embarked upon compacts for comprehensive plan-
initial operation is the same as that followed for the Compact for Education under which the Education Commission of the States was established. Ultimately, legislative action is required, but a State may adopt the Agreement for an initial period not to extend past December 31, 1973, by gubernatorial action.

The Southern Growth Policies Agreement is open to participation by the 17 States from Delaware and Maryland on the Northeast to Texas and Oklahoma on the Southwest. The agreement became effective November 1971 when nine States adhered by the executive order route.

TAHOE

The 1969 California-Nevada Tahoe Regional Planning Compact is notable for the weight it gives to representation of local governments and for the considerable measure of joint land-use regulation of Lake Tahoe and environs it envisions. The Tahoe Regional Planning Agency, formed in March 1970, "is directed to adopt and enforce a regional plan of resource conservation and orderly development and to effect the environmental controls through 19 ordinances as defined in the compact." It says of its role, "The basic concept is a simple one—to provide for the region as a whole the planning, conservation and resource development essential to accommodate the people within the region's relatively small area without destroying the environment." For the purposes of planning and implementation the agency is comprised of a governing body and an Advisory Planning Commission. Upon the basis of a massive environmental study, a plan was developed and presented in May 1971 which would affect all levels of government although, since the compact is interstate, federal lands are not subject to agency control. The plan, which among other things envisioned approximately 34,000 acres of private lands being removed from urban development and a limit on population, occasioned controversy with the California members favoring broad acceptance immediately and those from Nevada arguing that the legal notice prior to hearing did not cover adoption of all the proposals at this juncture. The compact, its jurisdictional composition, procedures, powers and plan together constitute a remarkable planning approach.

Several other developments related to regional planning and coordination deserve notice. In 1971 the Tri-State Transportation Commission (New Jersey, New York and Connecticut) became the Tri-State Regional Planning Commission. The compact under which the agency functions was amended to convert it from a transportation study commission to a comprehensive planning agency. Another significant change is that the commission which until now has been a temporary agency was made permanent.

The provisions of the Air Quality Act of 1967 relating to the delineation of air quality control regions by the Environmental Protection Agency were an invitation to state-federal and interstate-federal cooperation of a specialized kind. Under the act, designation by States of a coordinating agency for an air quality control region makes the agency eligible for federal grants to support the coordinating work. In June 1970, the Interstate Sanitation Commission (a joint agency of New Jersey, New York and Connecticut for water and air quality management) was designated by the three States to perform this function for the Greater New York air quality control region and applied for a grant. To date it has not yet been awarded despite the fact that the applicant commission is the only such coordinating agency in existence designated pursuant to the act.

Clearly, the compact instrument offers a valuable tool for planning and land-use controls in interstate areas. With approximately half of our 20 largest metropolitan areas interstate in character, increasing use of this constitutional instrument for these purposes seems both desirable and likely.
INTERSTATE COMPACTS

BY FREDERICK L. ZIMMERMANN AND MITCHELL WENDELL*

The Constitution of the United States established the world’s first federal system. A clause of that document provided for interstate compacts or agreements between States. Following the colonial use of such arrangements, employment of compacts was limited almost entirely to the settlement of boundaries until the 1920s when two landmark agreements, the New York-New Jersey Port Authority Compact and the multistate Colorado River Compact, began more imaginative application by States to major interstate problems. The past half century has seen such wide and innovative use of the compact that it now can be regarded as one of the most versatile coordinating instruments employed in intergovernmental relations. The scope of its employment is demonstrated by the number of instances, the variety of subjects, and the number and geographical range of employing jurisdictions. The breadth of its potential utility is emphasized by the constant innovation and new uses reported in previous editions of The Book of the States.

Present Trends

Present trends in the United States indicate the growth of conditions and corollary problems in which the compact instrument would be an effective tool—in some possibly the only tool which can do a balanced job. We are faced with the growing concentration of our population reflected in the steady increase in metropolitan areas, the decline of population in roughly one half our counties, and the fact that about 70 percent of our population now is located on 10 percent of the land. Moreover, a growing number of our most populated metropolitan areas are interstate or international in character, including approximately one half of the largest 20. Fully one third of our population is located in areas which have an interstate character.

We must increasingly recognize the control of land use. Many States have enacted legislation giving state government a role in such control which traditionally had been left to local governments. In many areas such regulation to be effective must have an interstate, even an intergovernmental, character involving all levels. This already has been approached to some degree at the state level by a number of compacts, some very limited in scope and others of a truly trail-blazing character. Some recent examples include compacts for the Delaware and Susquehanna River basins and the planning agencies created by interstate compacts for the New York and Philadelphia metropolitan areas and Lake Tahoe.

While the compact is now clearly emergent, it continues to face opposition from those who still think of it as a means of preventing what they believe is more effective direct federal intervention or who fear its effect on bureaucratic establishments. In the past, Congress and federal agencies often urged the use of interstate compacts. This is not as true today despite the creditable role of Congress in enacting the Delaware and Susquehanna compacts. Nevertheless, the steady growth of compact usage continues.

The interstate compact is a legal form which combines the attributes of a state statute and a contract. Just as those instruments may have virtually any content, so a compact may be developed for almost any subject matter. Any field that lends itself to interstate cooperation is potentially suitable for one or more compacts.

During different time periods, developments in the compact field have been

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noticeable in particular subject matter areas such as public works, water resources, or corrections. To some extent, the reasons for the prominence of any such subject matter may be fortuitous; to some extent they reflect the emphasis being given to legislation.

In recent years, compact activity has been pronounced in various aspects of human resources and social services. This article will deal particularly with efforts to develop an interstate compact in workmen's compensation; renewed activity relating to the placement of children; a proposal for a regional school of veterinary medicine; and the subject of disaster preparedness, protection and recovery.

**Workmen's Compensation**

State workmen's compensation systems have been in existence for approximately 60 years. They were devised to replace and obviate the hardships produced by the common law assumption of risk doctrine; Under this older approach, a worker was deemed to have assumed the risks of his employment. Consequently, if he was injured on the job, and the injury was not caused entirely by the employer's negligence, the personal and economic loss was borne by the employee.

On the whole, the state workmen's compensation systems have worked well, but they have been subject to a number of criticisms in recent years. Among them have been disparities in benefit levels among States, lack of universal mandatory coverage, differences in coverage, and a belief that improvements in administration could bring increased efficiency and perhaps lower costs.

There also has been increasing pressure for federal legislation. The Occupational Safety and Health Act of 1970, in addition to its primary purpose, established a National Commission on State Workmen's Compensation Laws to study the kinds and means of securing needed improvements. The commission's 1972 report recommended that the States be given until 1975 to make a long list of changes in their statutes and that, if sufficient progress were not forthcoming by that date, federal legislation should be enacted.

While the National Commission was still at work, a movement began to develop an interstate compact on workmen's compensation. It was led by private interests but participated in by some organizations of state officials. Its purpose has been to provide a mechanism for the upgrading of state workmen's compensation laws. Some supporters have considered it an alternative to federal displacement of state law and administration. Others have viewed the project as meritorious and worthy of consideration for its own sake.

The compact has been put into final draft form for consideration by State Legislatures. Perhaps the most important long-run value of the compact would be to establish an interstate commission to act as an official forum for development of improved workmen's compensation laws. The commission would also do research and disseminate information on the basis of which unsolved problems, such as the proper approach to permanent partial disability, could be better handled. Further, the compact contains common principles relating to the law and administration of workmen's compensation that would govern in all party States.

At least one jurisdictional problem of growing significance would be handled by the compact. At present, States have some statutory and judicial means of dealing with work injuries to employees who are hurt while in States other than the one of their regular employment. However, difference in the coverage and procedural provisions of the laws in the several States and differences in the means which employers are required to pursue or elect to use in obtaining coverage of their employees leads to some uncertainties and occasional failure of protection.

The Interstate Workmen's Compensation Compact is a major effort to apply the compact device to the subject matter of work injuries. However, the instrument that has been developed contains no elements not previously seen in other compacts.

**Placement of Children**

The Interstate Compact on the Placement of Children was developed some years ago and received its first enactments
in 1960. It was adopted rapidly by a group of Northeastern States and has been functioning well since. However, until recently there was little indication that it would spread, except by the occasional and random addition of a State or two. The compact is designed to make placements possible on an interstate basis with roughly the same facility and results that can be achieved on an intrastate basis. The most important ingredients for achieving this goal are the provision to assure that preplacement investigations will be made and their results communicated to the authorities in the State from which the placement is to be made; the obtaining of supervisory services during the continuance of the placement; and the firm fixing of jurisdictional and financial responsibilities with respect to the child. Within a single State, these elements are or can be supplied by the internal laws of the jurisdiction, but state law and administration normally stops at the boundary. Under the compact, these essential elements for properly safeguarded and implemented placement of children on an interstate basis are secured.

For the most part, the spread of the compact was not impeded by any negative activism about either the principles involved or their actual implementation. Rather, an absence of knowledge concerning the compact and the absence of sufficient means to assist States in learning of it and of studying its technical aspects were the inhibiting factors.

But in 1972 a grant was obtained by the American Public Welfare Association from the Department of Health, Education, and Welfare (HEW) specifically to increase services for the compact. Work under the grant began in earnest in October 1972. It consists of a higher level of secretariat services than was previously available; presentation of information on a systematic basis concerning the compact; and technical assistance to States studying the effect which adoption of the compact would have for them. During the first half of 1973, Minnesota and Pennsylvania enacted the compact to bring the total number of participating jurisdictions to 17. A number of other States actively commenced studies of the compact, in some instances including the introduction of legislation.

From time to time, the federal government has discouraged the initiation or development of particular compacts. In this instance, it should be noted, the federal action is concretely supportive. A somewhat similar instance is that of the Interstate Agreement on Qualification of Educational Personnel, where grants from HEW have been instrumental in the developmental work. That interstate agreement is a compact under which procedures are simplified for interstate recognition of qualifications of teachers and other educational professionals. By mid-1973, 31 States had enacted that compact.

**Veterinary Medicine**

States have considered the joint development and use of institutional facilities, particularly in the correctional field where regional compacts in the West and in New England authorize joint construction and operation of such facilities. To date, however, these agreements have been employed only to make space available in existing institutions.

There also has been some thought to operating institutions of higher learning on an interstate basis. In 1972–73 an effort to establish an interstate educational institution got under way. It is a project of the New England Board of Higher Education (NEBHE), created by compact some years ago. The impetus has come from the long-standing need in New England for a school of veterinary medicine. The region has had no such institution (public or private) since 1947.

The problem for the region has been further aggravated by the shortage of veterinary medical schools elsewhere in the country. Furthermore, existing schools, almost all of which are attached to state universities, give preference to resident students and, in the South and West, to students placed under the higher education compacts of those regions. NEBHE made a feasibility study of a regional school for New England. The possibility that New Jersey, although not in the NEBHE Compact, might be a seventh participating State had been specifically considered. The conclusions
Appendix

of the study were affirmative. Included were specific cost estimates and discussion of alternate sites for such a school. Consequently, the next several years may see the opening of the first interstate institution of higher learning.

CIVIL DEFENSE AND DISASTER

The Interstate Civil Defense and Disaster Compact is not a new compact. It was enacted at the time of the Korean War along with the model State Civil Defense and Disaster Act in response to a federal request for help in meeting the frightening possibility of a nuclear attack.

In passing the measures, it is significant that the States insisted on broadening them to include national disaster. As a consequence of this foresight, the enactments became the basic law in each State providing for response to disaster.

The rising tide of natural disasters in the United States and our growing vulnerability to their impact as a consequence of the mounting concentration of population in river valleys, on seashores and lakeshores, in interstate metropolitan areas, and the rise of dependence on an increasingly complex technology have given new emphasis to the importance of the disaster compact. Indeed, developing technology has added a new threat of disasters of its own. Accordingly, the Disaster Project of the Council of State Governments is urging all States to clarify any possible weaknesses in their employment of that instrument by making certain that it is embodied in completely uniform language in their state codes and entered into with all other States.

The Disaster Project is also requesting enactment of an amendment, which has been recommended by the Committee on Suggested State Legislation of the Council of State Governments, to broaden the scope of the disaster compact.

This amendment to the compact would extend the coverage to all kinds of disasters and emergencies in which interstate assistance might be useful. It will apply to:

1. searches for and rescue of persons who are lost, marooned, or otherwise in danger;

2. action useful in coping with disasters arising from any cause or designed to increase capability to cope with such disasters;

3. incidents which endanger the health or safety of the public and which require the use of special equipment or trained personnel in larger numbers than are locally available in order to reduce, counteract, or remove the danger;

4. the giving and receiving of aid by subdivisions of party States; and

5. exercises, drills, or other training or practice activities designed to prepare personnel to cope with any disaster or other emergency to which the compact applies.

An Example State Disaster Act, developed by the Disaster Project, authorizes local governments of different States to enter into agreements with each other. This act, coupled with the compact and its amendment, add a new dimension by directly bringing local governments engaged in giving or receiving disaster relief across state boundaries under the protection of the disaster compact.

In the area of disaster response and mitigation there are a number of other interstate agreements: four forest fire compacts (the Northeastern, Middle Atlantic, Southeastern and South Central); the New England Police, the New England Radiological Health and the Southern, Midwestern and Western Interstate Nuclear Compacts. The prototype of such compacts is the Northeastern Interstate Forest Fire Protection Compact enacted in the 1940s by six New England States and New York and joined in 1970 by the Canadian provinces of Quebec and New Brunswick.
INTERSTATE COMPACTS

BY FREDERICK L. ZIMMERMANN AND MITCHELL WENDELL*

**DURING THE PERIOD** covered by these biennial articles, there have been several changes in the character of the reports. The earlier ones in the series almost invariably contained information on the application of the compact device to new subject matter fields. Then, for a number of years, the development of the federal-interstate compact concept properly received major attention. More recently, the number of new compacts and unusual applications of the mechanism have decreased. New developments in the field have been more in the areas of the program activities of established compact agencies and in the attitudes of the federal and state governments toward the kind of interjurisdictional cooperation represented by the compact approach.

One should expect that in years to come there will continue to be developments in all of these categories, but that constant discovery of genuinely novel applications may be less frequent. The reason is the obvious one—all of the States are now party to a considerable number of compacts in a variety of fields. Perhaps least explored is the federal-interstate compact of which there are still only three full-fledged examples: the Delaware and Susquehanna River Basin Compacts and the Agreement on Interstate Medicine.

The policymakers in federal and state governments come to perceive the opportunities, this form of interlevel cooperation in the federal system can become a versatile and highly effective one. At the present writing, however, this observation is more a pointing to potentialities than a summary of achievements—albeit the three federal-interstate compacts do have accomplishments on the record.

**THE RECENT YEARS**

The reportable items since 1973 have centered around activities under existing compacts rather than the development of new ones. The financial stringencies felt by both federal and state governments in 1974 and 1975 did not provide a friendly climate for the conception of new programs. Since new compacts frequently mean the undertaking of new relationships and activities, there has been little encouragement for thinking along these lines. As will be illustrated shortly, this constriction has even affected projects which probably would result in economies in the long run but which require initial capital investment and new operating funds for their inauguration.

Perhaps the most striking illustration in recent compact developments has been the effort of the New England Board of Higher Education (NEBHE), a compact agency, to establish a regional college of veterinary medicine.

New England has no institution for the education of veterinarians and no single State which appears willing to support a college of this type by itself. Accordingly, the New England Board undertook extensive studies which resulted in the recommendation of a regional school which would be a joint public college of the six compact States, or as many of them as might wish to participate. The plan would go into effect with a minimum of four States. At their 1975 sessions, the Legislatures of all but one of the six States had bills to authorize the regional college of veterinary medicine under NEBHE auspices and to provide initial funding. Vermont had a bill only for continued planning of the institution. Legislation did pass both houses in four of the States. However, it was either vetoed because the Governors did not wish to entertain appropriation of new funds for

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the purpose, or enacted without funding. If the New England veterinary medical program is implemented, it will be the first jointly owned and operated institution of higher learning created as a new program and facility rather than as sharing of spaces in programs primarily intrastate in purpose and organization. Further, it would be the first joint interstate facility which is not of the boundary area public works type.

Seven compacts deal with water pollution control, either as their only purpose, or in conjunction with other subject matters. Six of them have interstate or federal interstate agencies administering water quality management programs. In view of the great changes which have been introduced into the water quality regulatory and planning fields in response to the federal Water Pollution Control Act Amendments of 1972, these agencies have devoted much attention to the roles which may be served by interstate agencies under these altered conditions. Each of the agencies has internally examined its own structure and activities with this situation in mind. The Ohio River Valley Water Sanitation Commission, backed by a grant from the U.S. Environmental Protection Agency (EPA), undertook jointly with the latter agency to secure an independent consultant report on its role and possible programs.

The Interstate Sanitation Commission (New York, New Jersey, and Connecticut) was especially fortunate in that its programs and facilities were already geared to the types of work emphasized in and as a result of the 1972 amendments. Accordingly, it has been able to assume some of the burden of compliance monitoring for the States and EPA. It also has undertaken, with grant assistance, a major investigation of regional sludge management possibilities in the New York-New Jersey Metropolitan Area. The immediate impetus for this activity are the provisions of the Marine Protection, Research and Sanctuary Act, provisions of the 1972 Amendments to the Federal Water Pollution Control Act, and current stated policies of EPA which would require the phasing out of ocean dumping of sludge and many other substances by 1981.

The fastest-growing compact during the past two years has been the Interstate Compact on the Placement of Children. This is an interstate agreement first operative in the early 1960s. It provides for the making of interstate placements of children in foster care preliminary to possible adoption and for adjudicated delinquents when they require special programs not available in the State where adjudicated. It also fixes the basic support and jurisdictional responsibilities with respect to such children. At the close of 1973, 17 States had enacted this compact. By the close of 1975, 34 States had enacted it. This marked upsurge of interest is in large measure due to renewed interest in the plight of children without family homes and to the activities of the American Public Welfare Association which, with the assistance of a grant from the Office of Child Development, U.S. Department of Health, Education, and Welfare, has been able to provide expanded secretariat services for the compact and to States considering its enactment.

**The District of Columbia**

From time to time, the participation of the District of Columbia in particular compacts has been actively sought, and that jurisdiction is party to several of them. The desirability of such participation springs from the fact that state government functions are performed for the District by its local government. Until the District of Columbia received its present home rule status, compact enactment and participation was unquestionably a unique combination of local and national action. As the District's legislature, Congress was the only authority competent to enact an interstate compact or authorize its execution. In the past, Congress has performed this function as local legislature and it has been recognized that, for compact purposes, the District of Columbia can be considered a State.

Currently, the procedures by which the District will become party to additional compacts are undergoing reexamination. Some interpretations of the home rule statute lead to the conclusion that the local legislative body (Council) of the Dis-
trict can enact compacts because the Council can generally enact all substantive "state type" laws other than its budget, and subject only to the possibility of congressional veto within 30 days. However, another interpretation of the home rule statute is that a compact is an "extraterritorial" measure within the meaning of a provision of the law which reserves such enactments for Congress on behalf of the District. Amid such uncertainty, legislation has been introduced into Congress specifically to authorize the Council to adopt compacts for the District. Until enactment of such legislation, or general agreement on the interpretation of present statutes, the subject may continue confused.

**The Longer View**

The difficulty with examining compact developments in two-year chronological segments is that it is hard to fasten on trends. For the most part, this larger purpose is subordinate in these articles to the highlighting of current developments. However, in a bicentennial year it may be appropriate to give some attention to overall meaning and to the longer view. This is especially true when it is considered that the compact is approximately the same age as the Republic, although admittedly, its modern form and uses are much younger.

The truly remarkable thing about the compact device is that it has provided a legal and administrative means of breaking through the jurisdictional and program limitations of state boundaries and also of integrating law and programmatic action on a federal-interstate basis. Recognition of the significance of these features has been less than it might have been because these concepts are more complex than the traditional compartmentalization of thinking about federalism. For generations Americans have been taught that what is too large for a State lies in the domain of the federal government. This view is further nurtured by the fiscal system within the United States which, in modern times, has emphasized the growing dependence of States on financial aid from the national treasury.

Nevertheless, the felt need to decentralize even federal activities gives new cogency to the observation that in a country as large and populous as the United States, everything cannot effectively be handled from the national capital. For the same reasons which support this conclusion, neither the Congress nor the national Administration can effectively grapple with the total range of governmental problems and services. Even among problems which have come to be recognized as heavily national in import, such as water and air quality, energy production and conservation, welfare services, and the processes of transportation and industrial production, federal legislation increasingly looks toward implementation of national policies by the States. However, in many instances, the most appropriate geographic areas for administration of some of the programs may be somewhere between State and Nation. In what is so far an important but limited number of instances, compacts have provided the necessary interstitial bridges to permit States to develop such regional administration. This has been done in some interstate river basins, interstate metropolitan areas, and in some culturally defined regions such as New England and the South. However, much more should be possible along these lines.

While many compacts create new agencies to administer their provisions, a strength of the device is that it utilizes the existing governmental units and generally gives their governmental structures a place in the conduct of the intergovernmental relationship. The compact, whether or not it establishes an interstate or federal-interstate agency, is therefore a means of getting the existing federal and state apparatus to address itself to intergovernmental problems in concert, with the intergovernmental agency as a specialized staff resource for the purpose.

This same kind of approach can be useful on intermunicipal and international bases as well. Because of the symbolisms of international relations and the unfamiliarity of most kinds of subnational concerns to those trained and experienced to think in terms of international diplomacy, cooperation between component units of the federal system within
the United States and subordinate units of other countries has not been nourished to the extent that it might be. However, some cooperation of this sort occurs, especially between contiguous jurisdictions on either side of an international boundary. This has been true particularly in the vicinity of the U.S.-Canadian border. In a few instances, the compact has been used, despite the need to make adjustments to the varying concepts and procedures in the Canadian and United States systems. A recent example of this kind is the entry of the Provinces of Quebec and New Brunswick into the Northeastern Forest Fire Protection Compact, reported in the 1974-75 edition of the Book of the States.

Local communities on either side of a state line have also been authorized on occasion to enter into agreements which are in effect compacts. This has been done by a number of States on a generalized basis in their interlocal cooperation statutes. It is also done from time to time on a special basis for particular instances, as in the case of some interstate school district arrangements. In 1975, New Hampshire and Vermont enacted such a compact for localities to use in a common sewage treatment venture. The point here is the same as with the international instances—existing units and agencies can handle intergovernmental problems through the compact mechanism. The formality and contractual character of the compact lends a feature of stability and binding legal force not found in arrangements of a less formal nature.

The subject matter division of jurisdiction in our federal system also produces a need for formal interstate cooperation in which the compact has been useful and could be even more so in the future. Although there is today hardly a field of governmental activity in which the national government does not participate to some extent, education, crime control, public recreation, resources management, and many others remain significantly or predominantly in state hands. Compacts are being successfully employed in all of these areas.

Sometimes an obstacle to greater employment of the compact device is the fear of national and state bureaucracies that some of their policy-making freedom be displaced by interstate or federal-interstate bodies. An interstate agency can be looked upon as a rival for funds or a competitor for specific responsibilities. However, this should not be the case. In a complex federal system, there is enough of a peculiarly interjurisdictional character, or enough that can most efficiently be done by coordinated or pooled resources of member governments to make existing and future compact activities and agencies of the greatest utility. The challenge is to identify the functions and services which can benefit from intergovernmental approaches of a legal and administrative character.
The complexities of modern society have accentuated the need for effective intergovernmental relations. The author of this article outlines the evolution of various intergovernmental commissions. He notes that the States have taken the lead in forming compacts and similar cooperative agreements and that the federal government is showing increased interest in such endeavors. The author, Frederick L. Zimmermann, sees advantages in the creation of interstate-federal compacts. Such compacts, he says, result in uniform laws binding both federal and state governments. At the same time they curtail the duplication of existing agencies and prevent the obscuring of political and public responsibility in the maze of multigovernmental authorities. Professor Zimmermann is on the faculty of the Political Science Department at Hunter College of the City University of New York.

INTERGOVERNMENTAL COMMISSIONS: THE INTERSTATE-FEDERAL APPROACH
by Frederick L. Zimmermann

In meeting intergovernmental issues occasioned by growing geopolitical and jurisdictional problems, we have moved steadily from a juridical to a cooperative federalism. It is a "shared power" approach of action through all levels of government—national, state and local. There is general agreement on both the virtue and the inescapable necessity of cooperative federalism in the United States. The very size of the Nation in both area and population probably makes some kind of federal system inevitable. But we have not been as successful in agreeing upon or fashioning structural patterns for effecting intergovernmental action. In fact, our current emphasis on the need for "creative" federalism is in large part an expression of our search for structural innovation in intergovernmental relations.

There is no development in modern American government that deserves more to be designated creative federalism than the employment of intergovernmental regional commissions. Wide use of such agencies in the United States is notable in comparison with comparable democratic federal states (Australia, Canada, Switzerland, and West Germany) and is growing rapidly.

A number of factors contribute to the particular need for and growth of such intergovernmental regional agencies in our federal system. The United States is clearly the largest of these federalisms in population and populated area, as well as in the number of its component jurisdictions. Its geography is characterized by
a large number of interstate river basins with divided jurisdiction in water management. Many of these are in the Western part of the country, in water-short areas where interjurisdictional allocation of available water is essential. Rivers are also frequently the boundaries between American States. As a result, in part, of these two geopolitical factors—river boundaries and limited jurisdictional areas—a number of American cities, including such regional centers as New York, Philadelphia, Washington, D.C., Chicago, St. Louis, Kansas City, and Omaha, are located on or closely adjacent to state boundary lines. The great increase in the size, mobility and urbanization of the population of the United States over the past fifty years has resulted in the rise of great megalopolises or vast urban regions spreading across many States, such as those along the Atlantic coast from Boston to Virginia and from Pittsburgh to Milwaukee in the Great Lakes area. At this time, river basins, urban areas and impoverished rural areas are clearly the principal American regions needing intergovernmental action and organizations, but this should not obscure the possibilities of regional organizations for other purposes.

**HISTORY OF INTERSTATE COMPACTS**

In the United States, the leading role in the development of intergovernmental regional organizations has been played by an institutional device that provides a superior legal instrument for that purpose—namely, the interstate compact. Compacts are authorized by Article 1, Section 10 of the United States Constitution which reads: "No State shall without the Consent of Congress... enter into any Agreement or Compact with another State, or with a foreign Power..." Descended from colonial procedure in the settlement of boundary disputes (i.e., agreement between jurisdictions with the approval of the monarch), the clause continued to be used for the settlement of interstate boundary disputes after the Constitution was adopted. It was not until the 1920s, however, that it was applied in other areas. The initiative in these new applications came from the States, which turned the device of interstate compacts into a means for securing effective intergovernmental regional cooperation in a variety of problem areas, a prominent one being river basin management, particularly for the allocation of water. Through the compact device, the States have not only pioneered in the creation and acceptance of intergovernmental regional agencies, but also have progressed much further along these lines than the federal government, which has come to accept the intergovernmental regional agency concept only recently, very reluctantly, and in a biased form.

Employing the authorization of the compact clause of the Constitution, the States initiated two interstate compacts in the 1920s. One, a compact between New York and New Jersey, was a regional agreement designed to meet a problem of that metropolitan area. It established the first intergovernmental agency in our history, the New York Port Authority, with power to finance, build and operate public works. The other agreement, the Colorado River Compact, was designed
to meet a river basin problem. It provided for allocation of water between the States of the river's upper and lower basins. This was the first interstate compact in our history to include a number of States.

The 1930s saw further development of intergovernmental regional bodies for two additional purposes. One was their use as consultative communication channels for advice and recommendation to the participating States with respect to particular functions. The first agency of this type, the successful Interstate Oil Compact Commission, was functional rather than regional, since it was open to oil-producing States without regard to region. It has been followed by a number of intergovernmental advisory commissions, both regional (e.g., the Interstate Commission on the Potomac River Basin, and the Atlantic, Gulf, and Pacific interstate marine fisheries commissions) and functional (e.g., the recently established Education Commission of the States). The second development in the 1930s was a remarkable breakthrough, namely, the delegation of regulatory powers by the compacting States to two interstate regional water pollution abatement commissions: the Interstate Sanitation Commission (New York harbor and adjacent waters) and the Ohio River Valley Sanitation Commission (ORSANCO). Growth in the use of interstate agencies with delegated powers has understandably progressed very slowly. American Legislatures normally hesitate to delegate powers, and their hesitation is even greater when the delegation is to agencies in which other jurisdictions are involved. Nevertheless, the modern trend among the States is towards intergovernmental regional agencies with such powers.

By the 1960s the interstate compact had been established as one of the most versatile devices of American federalism. States were steadily increasing their use of the instrument in terms of both numbers and purposes. State governments, particularly those in the Northeast, were effectively employing intergovernmental regional agencies established by interstate compact.

DELAWARE RIVER BASIN COMPACT

In 1961 a revolutionary development occurred when Delaware, New Jersey, New York and Pennsylvania enacted the Delaware River Basin Compact, which was to go into effect upon Congressional enactment of legislation making the federal government a party to the agreement. Intergovernmental regional cooperation was extended to another jurisdiction relevant to the region, the national level of government, by making the federal government a member jurisdiction of an intergovernmental regional body. The compact established the Delaware River Basin Commission, composed of the Governors of the four States and a representative of the President. Moreover, it delegated adequate power to this intergovernmental regional commission to establish effective management of the waters of the basin, utilizing existing agencies of the jurisdictions party to the agreement wherever possible.

The creation of the Delaware River Basin Commission was indeed a significant development. One of the most critical basic problems of an
increasingly urbanized, mechanized and affluent society, with its voracious consumption of resources, is the effective management of that most central of all natural resources—water. In its discussion of the alternatives in water management, a publication of the National Academy of Sciences designated the river basin as a "coherent hydrological unit relevant to water control." Integrated water management of such a "coherent hydrological unit" requires a comprehensive plan and program for the river basin. In turn, the formulation of a comprehensive plan and program and the effectuation of integrated management for the basin area require a single comprehensive agency. In the United States the task of dealing with the problem of water management is complicated by our federal system with its division of powers between the Nation and the States. Water resources management has occasioned more experimentation with the structuring of intergovernmental interaction than any other problem.

FEDERAL ATTITUDE TOWARD COMPACTS

Until the enactment of the interstate-federal Delaware River Basin Compact, the division between Nation and States had not been effectively bridged in law or in structure. The States had approached water resources problems through their interstate compacts and compact agencies, particularly in the allocation of waters in Western river basins. The federal government, on the other hand, had used two quite different approaches.

In the 1930s it created the most widely known regional agency in the United States, the Tennessee Valley Authority, which has become the symbol of river basin management throughout the world. The TVA is, however, clearly a federal agency. Although it has established praiseworthy cooperative relationships with the States, their agencies and subdivisions, it is not an intergovernmental institution. Its achievements, particularly in the field of power generation and development in the Tennessee Valley, are outstanding. Beyond the issue of public versus private power, however, it has been criticized on three grounds: (1) it is not rooted in the basin by any institutionalized channels; (2) to the extent of the powers it was granted, it displaced all other water agencies, national and state, in the Tennessee Valley; (3) it was not given all the powers desirable for basin water management. Whatever the degree of justification for these criticisms, the fact remains that no more federal authorities have been established on the TVA prototype, and it remains the only federal regional basin agency. This result cannot be attributed to state opposition alone. Probably the most effective opposition to TVA was that of the federal agencies which do not wish to be displaced in any other river basin, and which argue that the TVA approach aborts national functional administration.

The other federal approach is the basin interagency committee, which is favored by the federal agencies because it is a basin organization of federal and state water agencies for planning purposes only. It is thus their preferred alternative to a regional agency which would encompass both planning and management. The role of such a committee in achieving agreement among
federal agencies on their functioning in the Missouri Valley is probably the best known use of the interagency device. Particularly in view of the political and financial strength of the federal agencies, the interagency committee is basically a federally favored device.

The Delaware River Basin Commission is not only a new and "revolutionary" type of river basin agency but also an intergovernmental agency of a distinctly new character, bridging both the jurisdictional division between States and the division of powers between state and federal levels of government. Like TVA, it combines planning and management, but rather than displacing the activities of federal and state agencies, it coordinates them. It is the first interstate-federal commission which unites the constitutional powers of both levels of government and which constitutes an agency of all the party jurisdictions—each of the States as well as the federal government—established by a single law which is both federal and state law since it is the law of every party jurisdiction.

A 1967 report of a special task force of the federal Water Resources Council (a statutory organization of federal agencies concerned with water resources) analyzed eight alternatives of management arrangements, including the "Federal Regional Agency" (i.e., TVA). It concluded that, "...three types can be useful instruments in appropriate circumstances and under appropriate terms and conditions in the management of river basin resources: Interstate Compacts, Federal-Interstate Compacts, Separate Federal and State Institutions assisted by joint Federal-State planning bodies." A test is at hand of how far acceptance of the Delaware arrangement (which was regarded at the time of its adoption as an experiment, certainly at the federal level) will extend to use in other basins. Two interstate-federal compacts modeled on the Delaware Compact are in advanced stages of consideration. A Susquehanna River Basin Compact has been enacted by the States of that basin (Maryland, New York and Pennsylvania) and is now awaiting Congressional enactment, and a Potomac River Basin agreement is approaching legislative consideration in Maryland, Pennsylvania, Virginia, West Virginia, and the District of Columbia. One thing is certain however. The federal agencies, by and large, would prefer the third alternative—"Separate Federal and State Institutions assisted by joint Federal-State planning bodies." When they speak of joint planning bodies, they mean either the interagency committee or a river basin commission for planning established under Title 2 of the 1965 federal Water Resources Planning Act; and they speak of such joint organizations only for planning, and not for management.

Over a number of years, many statements from Washington have urged federal-state partnership and coordination, acceptance by the States of their responsibilities, and creative federalism. Actions at the federal level have often contrasted with these well-publicized preachments. Despite the recognition of the interstate-federal compact in the 1967 task force report to the federal Water Resources Council, many of the federal agencies in that organization have been reluctant to accept not only this innovative concept initiated by the States but
even the actuality of interstate-federal agreements establishing intergovernmental water basin commissions.

At the outset it took an unusually bipartisan combination of the President, prominent members of Congress, strong Governors and Mayors, and a very effective citizens' organization to quiet the resistance of the agencies to the Delaware Compact arrangement—and then only with reservations that could badly weaken the commission were they ever to be fully exercised by a federal administration. The aforementioned 1967 report may reflect some relatively greater agency acceptance of the Delaware Compact type of agreement, but probably only to the degree it does not constrict agency interests. A proposed draft of federal legislation enacting the Susquehanna River Basin Compact recommended by a committee representing the States of that basin accepts for all practical purposes the federal reservations in the case of the Delaware Compact arrangement. In response, the federal Water Resources Council has indicated that it will seek to add significantly to those limitations. Like the earlier ones, these new reservations tend to weaken the intergovernmental character of the river basin commission. So far, there has been no indication that there will be an attempt to apply them to the Delaware agreement as well.

STATES' ATTITUDES TOWARD COMPACTS

The States, through their long use of interstate compacts and interstate agencies established thereby, are more accustomed to intergovernmental agencies than is the national government. The constitutional authorization of the compact device, the fact that the States are on an equal plane, and the earlier incidence of regional interjurisdictional problems at the interstate level have reinforced the acceptability of intergovernmental agencies on the part of the States. In fact, some early interstate compacts, such as ORSANCO, even provided for a limited type of federal membership in the agencies they established.

Before the Delaware agreement, little attention had been given at the federal level to the possibility of federal-state intergovernmental agencies. It is true that in the late 1950s the federal Advisory Commission on Intergovernmental Relations, established by federal statute, provided for representation of state and local interests, but all its members were federally appointed. The unusual character of this agency undoubtedly aided its establishment. At that time, proposals for state representation in other bodies established by federal law to deal with issues of an intergovernmental character encountered strong legalistic opposition despite the realistic advantages of such representation. Several little-publicized clashes on this issue were a prelude to the Delaware Compact arrangement and illustrate the extremely narrow federal viewpoint towards intergovernmental agencies before the enactment of that agreement, as well as the distance the federal bureaucracy has had to travel since. An obscure legislative proposal for the establishment by federal law of a temporary agency called the Commission on International Rules of Judicial Procedure led to one
precedent. Despite the fact that the subject under consideration was of concern to state as well as federal courts and agencies, the original bill did not provide for the appointment of any members with background in state law and administration. The defense of this position was that legislation should not "tie the hands of the President" in making appointments. Following state protest of the lack of state representation, the bill as enacted was amended to provide for two members from the States. This precedent was followed in the creation of the Texas and Southeastern River Basin study commissions, where Congress specified membership representative of the States concerned. A similar struggle secured state representation on the Great Lakes Fisheries Commission. The principle supported by these precedents, namely, that a responsible representative must be named and be answerable to the jurisdiction he represents, was embodied in the interstate-federal compact establishing the Delaware River Basin Commission. Significantly, the Delaware Commission example was followed in both of the federal statutes establishing intergovernmental regional commissions: the federal Water Resources Planning Title 2 authorization of regional and river basin commissions, and the authorization in the Public Works and Economic Development Act of 1965 of regional development commissions (of which the Appalachian Regional Commission is the prototype).

While this principle of responsible representation now seems to be firmly established, legalistic argument on the part of the federal agencies continues as to the effect of interstate-federal compacts of the Delaware type. In the struggle over the Delaware Compact, some federal agency lawyers questioned whether Congress could make binding agreements with States, despite the fact that it had enacted an interstate-federal compact as federal law and even though federal contracts with individuals or business organizations are clearly binding when so authorized by federal enactments. Now that the Delaware Commission has been in successful operation for a number of years, the legal rationale of agency opposition has shifted. Currently, doubts are raised as to whether Congress can bind federal agencies to obey the terms of an interstate-federal compact or a decision of the intergovernmental agency created thereby if any other act of Congress, irrespective of its content or date of enactment, gives or can be said to give any authority over such subject matter to a wholly federal agency. Basically, the issue is the relative independence and role of the federal agencies vis-a-vis the intergovernmental basin commission and the Congress. The federal agencies, always wary of coordination, even with other federal water resources agencies, are even less friendly to coordination through an intergovernmental commission. The general effect of the reservations now proposed by the federal Water Resources Council would be to give veto power to the agencies. For their part the States insist that any veto should be confined to the politically responsible action of the President or Congress. It should be noted that the States, too, have had resistance from some of their agencies, particularly those with strong functional ties to their federal counterparts. However, on the issue of interstate-federal compacts, state bureaucracy has not been able to wield the same weight in state government as has the federal bureaucracy at its own level.
Interestingly enough, the Delaware River Basin Commission has not only inspired imitation through similar compacts in neighboring basins but also has played a major role in bringing about federal interest in intergovernmental agencies in water resources and other areas. The federal creations represent a complete reversal of previous federal position and emphasize intergovernmental organization, but by federal statute rather than interstate-federal compacts. Title 2 of the 1965 federal Water Resources Planning Act made the first break with the past when it authorized regional and river basin planning commissions "to prepare and keep up to date to the extent practicable, a comprehensive, coordinated joint plan for Federal, State, Interstate, local and non-governmental development of water and related resources." The act as originally presented to Congress contemplated a completely federal water resources planning agency with very limited state participation. State pressure resulted in the more intergovernmental body ultimately created. Such basin commissions are formed upon the concurrence of the Governors of not less than half of the States of the basin. However, since the role of the commission is only advisory, it is difficult for States which do not concur to remain outside the planning body. These commissions are purely creatures of federal law, even though their exclusively planning character would make state enactment of an interstate-federal compact containing the same provisions far easier than the much broader provisions of an interstate-federal planning and management compact of the Delaware type. So far, compacts of the latter category have required adherence of all the basin States. In the case of the Delaware and Susquehanna agreements, the two considered by State Legislatures to date, no State has refused favorable action. The chairman of a Title 2 commission is selected by the President, in contrast to the Delaware agreement provisions where a chairman from either the state or federal side is elected by the members, i.e., the four Governors and the representative of the President. The vice-chairman of a Title 2 commission is elected by the States. The state member may be a Governor or his designee or the person chosen in accordance with the law of the State he represents. Financing is shared between the two levels, but the federal Water Resources Council fixes the federal maximum.

PROSPECTUS FOR THE FUTURE

Since the enactment of the Water Resources Planning Act, four multistate-federal river basin commissions encompassing twenty-three States have been established under its provisions: New England (six New England States and New York); The Great Lakes (eight Great Lakes States); Souris-Red-Rainy (Minnesota, North Dakota, and South Dakota); and the Pacific Northwest (Idaho, Montana, Oregon, Washington, and Wyoming). Such commissions are limited to planning, and as the third alternative of the federal Water Resources Council indicates, "Separate Federal and State Institutions" are contemplated as the parallel administrative structure to such "joint planning agencies." While these Title 2 commissions represent a tremendous advance from the previous
narrow federal position with respect to intergovernmental interaction through a single basin agency, they are not intergovernmental agencies of the Delaware Compact type, nor do they represent the coordinated water resources management embracing both planning and operation possible under the latter instrument. Although falling short of the Delaware Compact approach, these Title 2 commissions are better structured and have a more adequate intergovernmental inter-agency approach than the previous federal position permitted. They also preserve the present management roles of the federal agencies. The federal Water Resources Council in its foreword to the report of its task force comments:

The Report recognizes that no one institution can be said to be the best for all situations and recommends that normally, before a new institutional arrangement is established in any basin, the needs of the basin should be determined and the major outlines of a basic comprehensive plan for the conservation, development, and management of the basin should be clearly seen. Congress has provided in the Water Resources Planning Act approved in 1965, a new method for developing joint comprehensive basin-wide plans through the establishment of a River Basin Commission. This method is now available in addition to existing methods such as the Interagency River Basin Committee for developing a comprehensive plan. Any of these methods may be used in tailoring such institutions to the needs of specific basins.

It may well be that those basins which organize Title 2 commissions will find them a step toward the adoption of the more comprehensive and more truly intergovernmental commissions of the Delaware River Basin Compact type. Even the council has remarked that "as the pressure upon river basin resources increases, more sophisticated mechanisms may be required for these purposes." However, it should be noted that the Potomac States chose the direct route and have already produced the draft of a compact of the Delaware type for legislative consideration.

Areas other than water resources are now also subjects of new federal intergovernmental arrangements. The Appalachian Regional Commission is undoubtedly the most famous of these. Made up of the Governors of the twelve States of the region and a representative of the United States, the commission is responsible for planning and promotion of economic development in that area. Similar federal intergovernmental regional commissions for these purposes have been established pursuant to the Public Works and Economic Development Act of 1965.

With a single exception, interstate-federal compacts have so far been limited to the problem of water basin management. The one exception is the Middle Atlantic Air Pollution Compact enacted by New York, New Jersey, and Connecticut, and awaiting Congressional action. This agreement follows the Delaware prototype, except that it extends commission jurisdiction to the entire area of each party State. It does, however, provide for the delineation of interstate air sheds. State enactment of this type of compact was at one point encouraged, at least at the regional level, by the Department of Health,
Education, and Welfare, but on reaching Washington seemingly met with federal reluctance. In any event, there has been no federal action yet. Mention should be made of a much publicized Hudson River Compact proposal which was based upon the Delaware prototype but dealt only with the protection of scenic and other amenities. While New York enacted this agreement, there has been much doubt with respect to its suitability as presently drafted, with consideration limited to amenities alone, because of the almost completely New York State character of the basin.

Thus far, at the metropolitan area level, while the States have used the interstate compact inventively and effectively for a number of problems, there has been no proposal for an interstate-federal agreement in the urban field. Interstate compacts have been used in the establishment of regional intergovernmental agencies engaged in such activities as the operation of ports, airports, bridges, and mass transportation; metropolitan area planning; regulation of a port's waterfront labor; and maintenance of interstate parks. The use of interstate compacts has been prominent in the New York, Philadelphia, District of Columbia, St. Louis, and Omaha metropolitan areas. One aspect of recent interstate compact development which should be noted is the expansion of their operation to include participation by local governments. This ranges from specified representation of local government (as in the transportation planning commissions of the New York and Philadelphia metropolitan areas) to the use of the interstate compact device to provide a vehicle through which local governments of different States, or their agencies, coordinate their activities (as in the Washington Metropolitan Area Transit Authority and the proposed compact to effect planning, zoning, and other controls for the Lake Tahoe region on the California-Nevada boundary).

The use of interstate compacts to effect interlocal cooperation and the grant of authority to local governments in some States to enter into such compactual agreements with local governments in neighboring States are avenues of approach to urban and other local government boundary problems that are yet to be fully exploited. It is quite conceivable that the interstate-federal compact could be utilized in metropolitan areas of megalopolises. For example, it is conceivable that in the East Coast megalopolises there could be a series of tandem interstate compacts to cover four metropolitan core areas—the Boston metropolitan area (Massachusetts and Rhode Island); the New York metropolitan area (Connecticut, New Jersey, and New York); the Philadelphia metropolitan area (Delaware, New Jersey, and Pennsylvania); the Washington, D.C. metropolitan area (the District of Columbia, Maryland, and Virginia)—with an overall interstate-federal compact which would provide for linkage and a federal role in the overall region.

The same sort of approach might be applied to water resources. For example, the author of the Colorado River Basin Project Act says that the statute extends "the basinwide water planning concept to a westwide concept." It is conceivable that a series of related basin compacts could be brought under the umbrella of a wider regional compact which would link the more management-
oriented basin agencies in a regional policy. In fact, it is conceivable that the interstate-federal compact approach could be applied to wider functional interrelationships as well as to regional ones. From the beginnings already made through the inclusion of local government or the representation of local government, such instruments could clearly provide an organizational structure for vertical as well as horizontal intergovernmental relationships. Nor is it likely that we have yet exhausted all the possibilities of intergovernmental compacts with respect to subject matter, procedures or their use as a legal instrument.

This does not mean that the interstate-federal compact supplies all alternatives, nor that the pattern should necessarily be uniform. For example, no one would deny that there are differences among basins and watersheds or that there may be alternative approaches to their problems. But the difference in approach can often be handled in terms of the functions which are to be included in the management of that basin and the powers granted to the basin administrative agency. Obviously, an agency for a river basin with neither wild rivers nor alligators would have dubious need for provisions covering either subject. Similarly, a basin agency with both these problems to face could be granted appropriate power. Certainly, it can hardly be argued that the basic intergovernmental machinery—the institutional characteristics of the agency—need be different in the two cases. The basic intergovernmental structure of the Delaware, Susquehanna, Potomac, and Middle Atlantic Air Pollution arrangements is the same, but the Potomac covers functions not included in the Delaware, while the Middle Atlantic deals with an entirely different subject. The proposed Hudson River Valley interstate-federal compact dealing only with the preservation of scenic and other amenities is of the Delaware type but may differ in voting pattern as well as purpose. There is no doubt that there are cases where there would be no need for an intergovernmental structure of the Delaware compact type. Some of the interstate water allocation compacts of the West which completely allocate the waters of a stream may not need the multi-purpose, agency-integrating, interstate-federal pattern of the Delaware. Thus, while not arguing that the Delaware type of intergovernmental organization should be used in every instance of intergovernmental water management, it should be pointed out that the interstate-federal compact is a superior form of intergovernmental regional structure, particularly where, as in water resources, the issue is federal-state relations.

GUIDELINES FOR COMPACTS

The values of the interstate-federal compact agency approach, as the instrument for establishing intergovernmental machinery, can be examined by dealing with the central issues. Such an examination must certainly take into account both our general governmental organization and the relationship of the agency to the structure of the participating governments and to the interrelationship among jurisdictions. Accordingly, some of the guidelines in terms of desirable characteristics in intergovernmental organization—
recognizing that they cannot be applied either dogmatically or universally—can be stated as follows:

1. The basic consideration is the intergovernmental character of the agency. It should be truly intergovernmental. It should be an agency of all the governments concerned, not merely an agency of one of them performing an intergovernmental function presumably for all.

2. Its legal charter—its creation, existence and authority—should be rooted in the laws of all the participating jurisdictions uniformly, not in an empowering statute in one jurisdiction even when that is supplemented by ancillary legislation in the others.

3. All participating governments and their subdivisions and agencies should be encompassed under the aegis of the intergovernmental agency but operate within the administrative structure of their own jurisdiction. The agencies of the participating jurisdictions should be integrated in a common plan and program and not displaced or duplicated by a parallel structure or operation. Nor should their role in their own jurisdiction be bypassed or distorted by intergovernmental channels of command.

4. The intergovernmental mechanism should effect horizontal integration within its jurisdictional area among the agencies of the national and state governments to the degree appropriate to the function being performed. It should effect vertical integration of the operations of the three levels of government—national, state, and local—with respect to the exercise of their powers and acceptance of their responsibilities in the joint performance of the designated functions.

5. Agency decision-making should be effected by the chief executives, or their designees, of the participating jurisdictions, who can speak for those jurisdictions and who, under the laws of the jurisdictions establishing the intergovernmental agency, can direct their agencies to carry out the intergovernmental decisions.

6. The staff should be intergovernmental in the sense that it is the staff of the intergovernmental agency itself. The influence of a staff composed of personnel from and authorized by the laws of only one of the jurisdictions can unduly affect the attitudes of an intergovernmental agency. This general position should not bar the use or employment of staff of the memberjurisdictions at particular times or for specific purposes.

7. To assure effective responsibility to the electorate:
   (a) the intergovernmental machinery should be enacted through the legislative process in each participating jurisdiction;
   (b) responsibility should not be fragmented and obscured by giving votes or vetoes to the agencies of jurisdictions;
   (c) the representatives of the jurisdictions, either as chief executives elected by the people or as designees of such elected chief executives, should make the actions of their jurisdiction in intergovernmental decision-making clearly responsible and visible to their voters by casting the vote of their jurisdiction;
(d) while the institution should be responsive to the needs of all interests, particular interests will not be able to count as much on related agency influence, since in voting the Chief Executive or his designee must consider a broader spectrum of interests. These criteria can be met to some degree by other alternatives, or new variations of agencies established by interstate compact could comply with a number of them. But the interstate-federal compact of the Delaware type is the most truly intergovernmental agency yet devised. The Appalachia and Water Resources Planning Act agencies certainly mark an improvement in federal attitudes towards intergovernmental agencies, since they are intergovernmental so far as their membership from the States is concerned; but they do not have anything like the powers of a Delaware type agency, nor do they have any roots in state law, being the creation of federal statutes alone. Governors of affected States are members, but can really act only in an ancillary fashion under federal law.

CONCLUSION

An interstate compact is the most effective instrumentality for enabling the States to meet their responsibilities in a joint enterprise such as the control of a river basin or the operation of a joint public work. In the first place, it establishes one law for all the States which are party to the compact. It is not only the law of each of them, but the law of all of them. It is true that uniform statutes in the States could create uniformity. The difficulty is that they could not maintain such uniformity in the sense that a compact can. The history of uniform laws is replete with examples of amendments by State Legislatures or interpretations by state courts that made them nonuniform. A compact, however, cannot be amended by any party without the consent of all of them. A later statute which conflicts with a compact can be declared ineffective by the courts. Court decisions about the interpretation of such interstate agreements can be taken to the federal courts, so that a uniform interpretation can be established and maintained. Thus the compact is clearly the most effective by far; and in many senses it may be the only method of coordinating the work of the agencies of several States. It is also the most effective vehicle for coordinating subdivisions of different States, as illustrated by the recent Washington Metropolitan Area Transportation Compact, and for authorizing interlocal agreements across state lines. Through the federal enactment of its terms, a compact becomes federal law, as well as the law of each of the compacting States, and uniform in all participating jurisdictions. Because it is both federal and state law, the Delaware type compact mitigates a very serious problem of water resources management—federal-state conflict and confusion in the realm of water law.

Effective coordination of administration among different jurisdictions requires a joint agency as well as a common law, and the trend in interstate relations has been toward the creation of such joint agencies. Interstate agencies on occasion have been created by parallel or uniform state statutes and, while the use of this method has at times served a purpose, it cannot be used to establish an
operating or regulatory agency. In fact, the best examples of such statutory agencies have been replaced by compacts. The compact is the only legal tool we have whereby we can create a single joint instrumentality of several jurisdictions, operating under a common delegation of powers and governed by common law.

Without downgrading the accomplishment of recommendatory agencies, some of which have notable records, those interstate agreements which embody delegation of powers to joint agencies have been uniformly successful. There is little doubt that the delegation of powers to meet their responsibilities made the difference.

The compact has another unique quality which can be exceedingly helpful in effecting regional administration. Through such agreements, States can and have on various occasions established mutual extraterritorial exercise of powers beyond their respective boundaries. In today's world, with a different scale of the politically possible, there is an increasing use of compacts for complex operations.

Certainly one of the most promising avenues to a more creative federalism is the use of federal-state agencies. The Appalachia Act and similar legislation are welcome examples of progress through establishing agencies which embrace both levels of government. However, the interstate-federal compact is the most effective instrument of interstate-federal relations for the coordination of a broad spectrum of administration on both levels and an overall directive to all the administrative agencies of all the party governments. Only an interstate-federal compact can create a joint federal-state agency which, since it provides a simple legal pattern of integration, can achieve more effective coordination of administration while avoiding displacement and duplication of agencies.

Effecting political responsibility for such joint agencies is another aspect in which the Delaware Compact broke new ground. The issue of public responsibility has been one of the major criticisms of the authority type of organization, since responsibility is divided and obscured in multigovernmental authorities or commissions even further than in the case of state authorities. In the Delaware type compact, the problem has been solved by providing that the members of the Commission be the Governors of the four States and a representative of the President, thus achieving a higher degree of political responsibility than has been achieved in single-jurisdiction authorities. The device of advisors permits a breadth of representation without diluting political responsibility. The proposed Potomac Compact provides in its second article that the Commission "shall provide by its rules for the appointment by each member in his discretion of advisors to serve without compensation from the commission, who may attend all meetings of the commission and its committees." A similar clause in the Delaware Compact—but limiting advisors to one from a State—has been utilized to provide representation for local government in New York and Pennsylvania, notably from New York City and Philadelphia. The broader provision of the Potomac would make possible, in those jurisdictions desiring to do so, representation of both local government and other interests.
**THE ROLE OF THE COMPACT**

**IN THE NEW FEDERALISM**

by Frederick L. Zimmermann

Increasingly, Presidents, Governors, legislators, publicists, and other concerned citizens are calling for new approaches in our federal system. Colorful terms such as "Creative Federalism" and "New Federalism" have been coined to express a need for innovation. This is a shift in emphasis from the widely echoed theme of a few years ago that the principal problem was to get the States to assume their responsibilities with the concomitant inference that not only did the federal government's assumption of such responsibilities occur only when the States "failed" to act, but that resultant federal action met the problems. Of late, there has been growing recognition that while this explanation is not without some relevance, it is also something of an oversimplification and a rationalization favoring preemption over coordination.

Our Constitution mandates a federal system as clearly as it mandates any other characteristic of our government—in fact, it established the world's first federalism. Realistically, as well as constitutionally, the maintenance of an effective federalism is primarily a responsibility of the central government—of the whole more than of its parts. Many of the major basic problems of American intergovernmental relations can be met only on the national level. Certainly, this is true of some central issues such as the allotment of revenues from the richly productive federal income tax to the financially hard-pressed state and local governments.

The States can also play a role in creative federalism. It will be remembered that Mr. Justice Brandeis once spoke of the States as laboratories of the federal system. In recent years, political scientists have tended to downgrade the innovative role of the States. However, an imaginative and important new
approach to the long-fought controversial issue, comprehensive river basin water resources management, has been entirely initiated and developed at the state level. This instrument, the interstate-federal compact, is exemplified at the present time by only one operating example, the Delaware River Basin Commission established in 1961 upon the enactment of the Delaware River Basin Compact by Delaware, New Jersey, Pennsylvania, New York, and the United States.

One significant evidence of the Delaware commission's success was the tribute of its federal member, Vernon D. Northrup, in his article “The Delaware River Basin Commission, a Prototype in River Basin Development," in the March-April 1967 issue of the Journal of Soil and Water Conservation. "Five years of operation has conclusively demonstrated that this federal-interstate agency can effectively marshal the forces of the federal government, the states and the local political subdivisions in a unified and integrated program of water resources development and management." This conclusion has been strengthened since 1967. Efforts to imitate Delaware in neighboring river basins by States which are either participants in Delaware or close to it are additional eloquent testimony of its effectiveness. A similar agreement for the Susquehanna enacted by Maryland, Pennsylvania, and New York is awaiting congressional enactment. One for the Potomac is entering the stage of legislative consideration in that basin by Maryland, Pennsylvania, Virginia, West Virginia, and the District of Columbia. It should be noted in passing that there already has been some consideration of this type of intergovernmental regional organization for other than water resources problems, and that it is quite conceivable that it could be adapted to federal-interstate organization of broader than regional character.

COMPACT INNOVATIONS

The development of the interstate-federal compact is the latest stage in a story of state innovation in the use of the interstate compact—that binding agreement between States authorized by Article I, Section 10 of the Constitution. Historically descended from colonial boundary settlements, the first use of the compact clause for other purposes was a major step—the creative employment of such a common law by New Jersey and New York in 1921 to establish the first joint intergovernmental agency—the Port of New York Authority. An equally innovative development followed when compacting States not only created but delegated regulatory powers to two now famous regional water pollution control agencies, the Interstate Sanitation Commission (INCOSAN) established by New Jersey and New York in 1935 and joined in 1941 by Connecticut; and the Ohio River Valley Water Sanitation Commission (ORSANCO) established in 1948 with Illinois, Indiana, Kentucky, New York, Ohio, Pennsylvania, Virginia, and West Virginia as parties. There are two interesting features which should be underlined with respect to these compacts. First, the delegation of such powers to interstate agencies was a remarkable step particularly in view of the judicial attitudes of that day and the general reluctance of State Legislatures to delegate
powers even to state agencies. Second, the movement to establish these interstate compacts antedated not only in many cases equivalent state laws on water pollution but any general federal anti-pollution legislation, since such action was initiated only by the limited Federal Water Pollution Control Act of 1948 and even with strengthening supplements is yet to be implemented fully at the federal level by either adequate appropriations or adequate legislative application to federal agencies. ORSANCO also pioneered in another respect. Although an interstate compact, it provided for three voting members representing the federal government in the interstate commission it created.

THE DELAWARE BASIN COMPACT

The Delaware River Basin Compact, a further advance of a far broader trailblazing character, was initiated by the Delaware Valley States in the 1960s. They enacted an interstate compact which was not to go into effect until enacted by the United States government as a party thereto—in short, a compact among States which would also be an interlevel agreement, an interstate-federal compact. Moreover, this agreement was drafted in a series of meetings confined to the States, enacted by the States, and then presented to the federal government for federal enactment. The proposed compact embodied a variety of major innovative features almost any of which would have been noteworthy in itself. First, since the federal government is a party to the compact, the text of the agreement constitutes law enacted by the four States and the national government. Thus it is both state law and federal law. Such a compact joined as no other device in our constitutional armory ever has, and quite possibly as no other device can, the powers of both levels of government. Second, the agreement established a comprehensive river basin agency with broad powers. The powers of the Delaware Basin Commission center around the development of a comprehensive plan for the basin and a program of projects to fulfill it. The commission is empowered to review projects in terms of their relevance to its plan and program. Third, unlike TVA, the federal and state line agencies are not displaced within the basin. Rather, the commission is to coordinate the activities of all water resources agencies. Finally, the membership of the commission is the four Governors and a representative of the President of the United States. This membership of the Chief Executives of the compacting jurisdictions in a potent joint intergovernmental agency effected the political responsibility, both regional and national, which has been cited as a needed element in interstate compacts and federal river basin organizations.

This drastic new approach to the controversial issue of river basin organization that had been so bitterly fought for years was enacted by the Legislatures of the four States without significant opposition in any of them. Such surprising action arose out of a long history of efforts which were largely unsuccessful or achieved only limited results. Over an extended period from the 1920s through the 1950s, three previous Delaware compact proposals of a more orthodox character had been defeated. Issues taken to the Supreme Court in two
expensive litigations between States had established water release requirements and a river master but had not solved the central problem that could be met only by legislation—the establishment of a comprehensive water resources administrative structure for the basin as a whole. Following the failure of the first two compacts and the initial Supreme Court decision, the Legislatures of the four States in the 1930s established through very informal action the Interstate Commission on the Delaware River Basin, better known as INCODEL, to mount a continuing attack on the problems of the Delaware. Over a period approaching a quarter of a century, this organization maintained constant efforts which did secure some results in law and administration but most notably in education of the public. While INCODEL came to be named to some degree in statutes as an instrument of the States, it certainly was never based on a compact among them. In fact, because of the previous compact failures on the Delaware, it was committed for a number of years to a policy which might be described as "cooperation without compact." Ultimately the organization was forced to the conclusion that the only answer was an interstate compact. When a compact sponsored by INCODEL, after passing three States and one house in the fourth, was bottled up in a committee in the Pennsylvania Senate on the request of the Governor of that State, the situation reached a stage of crisis. A bad flood had emphasized the need for action. At this point the four Governors, including fortunately both strong Democrats and a potential Republican presidential nominee, decided that something must be done and created a Governors' Advisory Committee, which also was largely an informal arrangement like INCODEL. A study by Syracuse University, authorized by the committee, recommended a national agency which might give way to an interstate-federal compact, a new organizational approach which, following the failure of the INCODEL compact, had been proposed to INCODEL and the Syracuse group. Instead, the Governors decided to go to the interstate-federal compact immediately. Their impressive advisory committee produced a far stronger interstate-federal compact than anyone had imagined would be politically possible. The combination of a group of prominent, politically powerful Governors, INCODEL, with its long-time legislative standing and connections, an outstandingly effective citizens' group, the Water Resources Association of the Delaware together with the League of Women Voters, and other civic groups added up to such a powerful array that it practically produced consensus at the state level.

CONSTITUTIONALITY QUESTIONED

The matter was then before the national government, not only for its normal consent to an interstate compact but to join in the agreement as a party thereto. As is often the case in the United States with respect to any major innovative departure from the norm, the question of constitutionality was raised. In large part, the opposing arguments had been made about a year before against a proposed compact among the New England States, the Northeastern
Water and Related Resources Compact. While this was an agreement of very limited scope to establish a purely advisory agency, it included innovative features resembling some of Delaware's. Although it did not require the federal government to become a party for the compact to take effect, it did provide in Article IV for federal participation in a single planning agency with one member from each State through "seven members representing departments and agencies of the United States having principal responsibilities for water and related land resources development to be appointed and to serve in such manner as may be provided by the laws of the United States" [Article IV] and for an annual federal contribution not to exceed $50,000 for each fiscal year. Except for internal management, any action by the proposed commission required concurrent majorities of the members of both levels. While the report of the House Committee on Public Works stated that the agreement "reflects the initiative of the States—four of whom—New Hampshire, Connecticut, Rhode Island, and Massachusetts—have already ratified the compact," it is interesting that the agreement had been drafted by an intergovernmental group, the Northeastern Resources Committee, composed of water resource officials of the New England States and the regional officers of seven federal water resources agencies. This committee had been set up in 1956 by the Governors of those States and the Inter-Agency Committee on Water Resources of the federal government as an agency for the coordination of the State and Federal plans and programs for development of the water and land resources of New England." By 1958 it had become apparent to the Northeastern Resources Committee, particularly in view of the size of its tasks, now further emphasized by the forty-six volume final report of the New England-New York Interagency Committee, that coordinated planning could be effected only by a more formally established agency.

The compact the state officials and the federal regional officers had drafted required action by three States, so that with its enactment by four of the six eligible States in 1959, only congressional consent was now needed. Consent legislation was reported favorably by the House Committee on Public Works on June 6, 1960, but over a dissenting minority. The very measure which had been strongly supported by the field officers of federal agencies encountered strong opposition in many cases in their Washington offices. Generally, opposition was occasioned by agency fears of anything which might seem to limit their freedom of action. This is evidenced by an amendment to the congressional consent legislation accepted by the majority of the House committee, which added to the words "Nothing contained in said compact or in this consent thereto shall be construed as impairing or in any manner affecting any right, power or jurisdiction of the United States," the phrase "or any agency thereof"; and by two other amendments proposed by the committee minority, which the majority did not accept, "to substitute seven Federal nonvoting advisory members for the provision for seven Federal voting members" and to provide that "no Federal

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1Report No. 1767, H.R., 86 Congress. 2d Session. p. 2
2Italics by the author.
funds should be required as a contribution toward this compact." Despite the favorable committee report, the proposed northeastern agreement was stalled in Congress.

Obviously, if these objections could be made to such a limited compact as Northeastern, they were equally germane less than a year later to the much stronger, much broader Delaware interstate-federal agreement. A single dissenter to the favorable report of the House Judiciary Committee did repeat the general constitutional argument made against Northeastern some months before:

The wisdom and possibly the constitutionality of such a radical departure from compact precedent...is subject to grave question when it is realized that the powers of the State representatives can derive only from the reserve powers of the States and the powers of the Federal representatives must be grounded only on the delegated powers of the United States. A State cannot bargain away its reserved powers to the National Government, nor can the United States surrender its delegated powers to State control. Similarly, it would seem equally true that neither the States nor the United States can bargain away their respective types of power to a new kind of Federal-State creature.

The precedent established is of grave concern. Traditionally Federal participation in compacts authorizing interstate action and planning is limited to advice and consideration. It is so limited to avoid constitutional questions and Federal interference with the actual internal administration of interstate compacts which are traditionally submitted to Congress principally to empower the States themselves to operate in an interstate cooperative manner.

The majority of the House committee stated bluntly that:

There can be little doubt that the Congress has the constitutional power to enter into a compact or contractual agreement with the States for the purpose of developing the water and other resources of the Delaware River. The Supreme Court has uniformly upheld contractual arrangements in the nature of compacts between the Federal Government and one or more of the States. As early as the 1800s the United States entered into an agreement with four States for the repair and maintenance of the Cumberland Road, which the United States had built (Seawright v. Stokes, 3 How. 151 [1845]).

The constitutional objections were predicated on the language of the compact clause which reads: "no state shall without the consent of Congress...enter into any agreement or compact with another state or with a foreign power." The question of constitutionality was raised by a narrow construction of the words "consent of Congress." In actuality Congress has at times done more than merely consent. And certainly federal participation is a positive form of consent, particularly when it strengthens the intergovernmental mechanism which the use

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*Report 310, H.R., 87 Congress, 1st Session.*
of the clause establishes. Mr. Justice Frankfurter, speaking for the majority in a case involving ORSANCO, commented:

A compact is more than a supple device for dealing with interests confined within a region. That it is also a means of safeguarding the national interest is well illustrated in the Compact now under review. Not only was Congressional consent required, direct participation by the Federal Government was provided by the President’s appointment of three members of the Compact Commission. (West Virginia ex rel. Dyer v. Sims [341 U.S. 27-28] (1951).)

Congress contracts with private individuals and such contracts have been held enforceable. Certainly Congress can enter into an agreement with the States. In fact, the major thesis of the House Judiciary Committee in its report on Delaware was that the arrangement was desirable from the point of view of the national government. The committee took occasion to point out that:

Since President Truman’s administration there have been at least five national commissions which have carefully examined the question of administrative organization for water resources development. Every one of them has indicated a need for a new form of cooperative instrument to be used by the Federal departments and the States jointly.

"The conclusion," said the committee, "is inescapable: If the powers and functions of law, planning, administration, and finance for a single river basin are to be integrated properly, the solution lies in a single joint agency composed of the governmental bodies concerned." It added that the concept behind the argument of unconstitutionality is one that would define a federal system of separate realms, "one whereby the National Government may pursue, without inhibition, objects of government over which it has power of direct action — both exclusive and concurrent'. This notion assumes that there is something in federalism which requires Federal departments to remain free to move about in their own spheres of influence, to compete, and to confuse their parochial interests with national policy. This may have been a timely view half a century ago; it is antique today."

A NEW INSTRUMENT FOR FEDERAL-STATE ACTION

Certainly, the interstate-federal compact has great importance constitutionally, but it is positive not negative. The new instrument opens a constitutional gateway of potentially great importance. We have discovered a constitutional instrument, the only instrument we have which can be both federal law and state law; which can not only mitigate the conflict and confusion between the two categories of law that have been so common in the water resources field by providing a single law for the basin, but also can authorize a degree of joint action impossible through any other means. It has been utilized with marked success in the water resources field. The House Judiciary Committee in its report appropriately cited Englebert's statement: "In no other area are the complex aspects of
aspects of federalism so starkly presented as in water resources. Their development epitomizes, perhaps better than any other function, the need for intergovernmental cooperation. " (Englebert, "Federalism and Water Resources Development," *Law and Contemporary Problems*, XXII[1957], 325.) Certainly, there are other arenas where its use is possible. Here, at least, is one creative tool that the national government can utilize to achieve a more effective federal system. Through it the federal government can participate in appropriate interstate compacts and attain new heights in intergovernmental partnership and coordination. As a party to a compact, it is a participant in the considerations and decisions of the agency it has joined in creating. It can have a direct voice in the decisions of an intergovernmental commission—a position which it cannot equal from outside the agency. The 1967 report of a task force of the federal Water Resources Council (a statutory organization of federal agencies concerned with water resources) recognized both the constitutionality and the utility of the new device when, analyzing eight alternatives of water resource management arrangements, it concluded that "... three types can be useful instruments in appropriate circumstances and under appropriate terms and conditions in the management of river basin resources: Interstate Compacts, Federal- Interstate Compacts, Separate Federal and State Institutions assisted by joint Federal-State planning bodies."

However, there is another issue, raised at the 1961 enactment of Delaware, that still is raised by some federal agencies. Under the literal terms of the interstate-federal compacts, the States can outvote the federal member since each jurisdiction has a single vote. However, this is not the practice in the Delaware, nor will it be the practice in either the Susquehanna or the Potomac. In the Delaware, with only one or two exceptions, all decisions have been unanimous. The federal member has never been in the minority. In fact, in the over one thousand determinations of the Delaware commission, unanimity has, for all practical purposes, become the method of operation.

Certainly the role of the federal government cannot be compromised by the compact. Obviously, federal participation in the compact has not overruled the supremacy clause of the Constitution. Moreover, even though such protective clauses are not necessary, all three compacts embody explicit clauses underlining the constitutional position of the national government. The one contained in the latest agreement, the Potomac River Basin Compact, is illustrative:

(a) Nothing contained in this compact shall impair, affect, or extend the constitutional authority of the United States.
(b) The signatories hereby recognize the power and right of the Congress at any time by any statute expressly enacted for that purpose to revise the terms and conditions of its consent, withdraw the United States as a party, or revise the terms and conditions under which the United States may remain a party to this compact.
(c) Nothing contained in this compact shall restrict the executive powers of the President in the event of a national emergency.
The House Judiciary Committee in approving the Delaware Compact in 1961 pointed out that:

The Congress would also retain that domination which goes with control over the purse strings, since projects are left for future authorization. The basin agency would only have such powers as are delegated to it, and with respect to national policy, the Congress, by qualifying the terms and conditions under which the Federal Government would remain a partner, may at all times limit the activities of the basin agency to conform to national policy. The compact itself would make all of the basin agency's operation subject to audit by the Comptroller General. In addition, the right is reserved to the committees of Congress to require full disclosure by the Delaware compact agency, of all information and data in the agency's files. All future amendments to the compact must be approved by Congress. The basin agency would thus be fully accountable to the Congress.

This final point is emphasized by the fact that interstate-federal compact commissions are federal as well as state agencies, and therefore are fully accountable to congressional investigation and do not fall under the limitations to such congressional action in the case of interstate agencies as were sustained in the Port Authority case *(United States v. Tobin*, 306 Fed. Rep. 2nd Series 270 [19621)].

Clearly, in view of both the explicit provisions and the realities, both sides can appeal to the Congress or the President or to both, with respect to an issue, if one ever arises, between the federal government and the States which cannot be agreed upon by the two sides within the commission. Certainly, in all reason, this effects as balanced a mechanism as it is possible to design. However, it does not satisfy some of the federal agencies which would like a federal veto power at the agency level. In December 1968 the Federal Water Resources Council submitted the draft of an executive order to the White House which provided that in the administration of water compacts "It shall be the duty of the Federal Representative to obtain and be guided by the views of the designated representatives of interested federal agencies on all issues of substance arising in the administration of the compact before acting in his official capacity thereon . . ." and "any Federal representative, department or agency, or the Water Resources Council on its own initiative may bring before the Water Resources Council for assistance, discussion or coordination any matter involved in the administration of a water compact and the Federal Representative shall be guided by the decision of the Council." In short, the President's representative on an interstate-federal compact would report to the President through the Water Resources Council and would be required to obtain and be guided by the views of the designated representatives of interested federal agencies on all issues of substance before acting thereon. The States are willing to carry an issue to the President or to Congress, but not to vest a veto power in the federal agencies or what in practice might be a single federal agency, depending on the issue. In the

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4Italics by the author.
case of the Susquehanna, they have indicated their willingness to accept generally the congressional reservations to the Delaware, although they make some suggestions for congressional consideration. The Delaware River Governors in a telegram to the President attested to the success of the Delaware River Basin Commission, and stated that placing the federal member's actions under the Council's control would "dilute and perhaps cripple his policy role." Some feel that the proposal was an agency attempt by executive order to vitiate a specific act of Congress. They recall the words of the House Judiciary Committee's 1961 report:

Having the Federal Government as one of the primary parties to the compact is the best way to enable the basin agency to effectively coordinate and integrate the programs of the Federal Agencies. Without integration, comprehensive development plans cannot be effectively implemented. If the basin agency were to be non-Federal, it would mean that coordination and integration of Federal agency programs, both among themselves and with the programs that the basin agency itself would carry out, would rest solely on voluntary cooperation. The reports of both Hoover Commissions and the other national water resources study commissions show conclusively that voluntary cooperation has never yet worked in a satisfactory manner.

If there is ever a necessity for a federal veto it should be exercised by the President or the Congress—the politically responsible officers of the United States Government, as is now possible, not shifted to the federal agencies or a representative responsible to them. Nine years have passed in the Delaware with no need for a veto. If coordination has been that successful, we should not consider any change in the present procedures for such action until the need for one is clear and unavoidable.