



Delaware River 50th Year Celebration

Valuing River Basin Commissions:
From Interstate Allocation to Basin Management

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The Legal Basis for Interstate Basin Commissions

- Interstate Compact Clause U.S. Const. Art. I, §10
 - States must agree in domestic legislation
 - Congress must ratify
 - Becomes federal law
 - States can't unilaterally change it or their participation
 - Hard to amend other than by express terms in compact
 - Politically, need to recreate consensus
 - Legally, U.S.S.Ct. requires strict adherence to compact terms, even with badly flawed compact
 - » Texas v. New Mexico (1983)

The Principal Motivations for Having Interstate Basin Commissions

- Administer water allocation set out in interstate compact
 - It is a fair generalization to say this has been the role intended for most compact commissions
- Effective on-going water management of the shared water resource
 - DRBC, SRBC are the two pioneers, more recently newer forms of regional management are being tried in the Great Lakes, Lake Tahoe region and, likely, others to come, probably including groundwater basin compacts

Quantity Focus – Alternatives to Compacts and their Pitfalls

Allocation Alternatives

- Equitable apportionment
- Congressional apportionment
- Lower court litigation
 - Extraterritorial effects cases
 - Suits to control dam operations

Pitfalls

- Cost, uncertainty of outcome, lack of durability
- Congress only does it when the states already agree
 - Limited effect (Bean v. Morris, 1911)
 - The eastern “Water Wars”
 - ACF and Virginia Beach

Compacts and Quantity

- Initial agreement can be difficult to obtain
- Apportionment usually becomes inflexible
 - Annual delivery risk to upstream state
 - Average annual delivery risk to downstream state
 - Proportionate delivery more feasible now
 - Compact managed adjustment
- Post-compact remedies are very hard to obtain

Quality Focus – Alternatives to Compact Commissions and their Pitfalls

Quality Control Alternatives

- Clean Water Act(CWA)
 - TBELs & WQBELs
 - CWA §103 “cooperative activities”
 - §§ 401(a)(2) & 402(b) notice of NPDES permits to affected states
 - § 301 water quality standards (WQS)

Pitfalls

- *If* enforced rigorously, it sets a federal floor
- And I have a bridge for you
- Apply to EPA Adm’r and hope for finding of “undue impact” on interstate waters
- Arkansas v. Oklahoma (1992) gives some extraterritorial effect to WQS

Threats to Compact Commissions

Threat

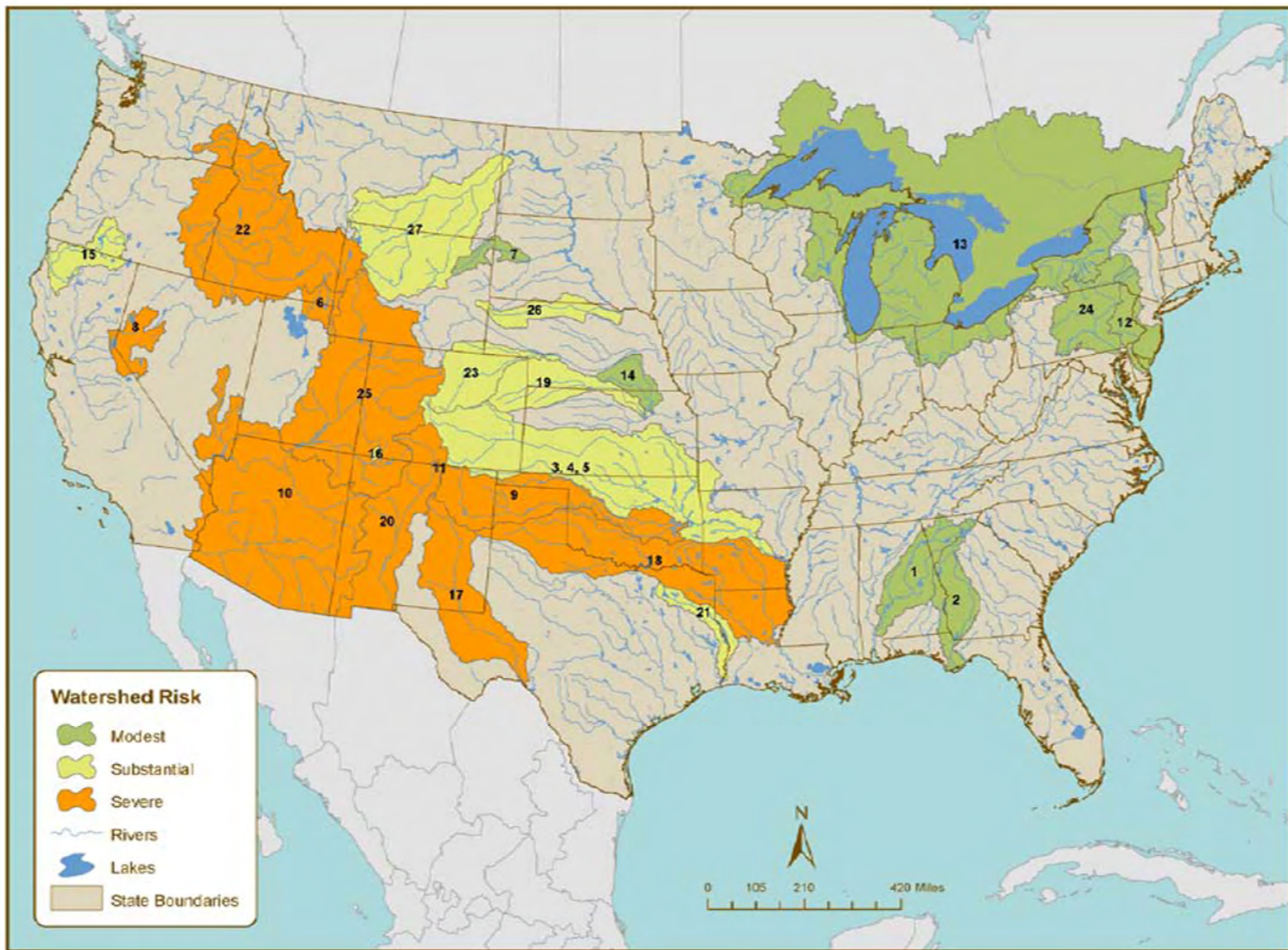
- Impasse and inflexibility
- Destabilization by the states (defunding, etc.)

Remedy

- Write the compact to have a means for achieving resolution/adaptation
- Provide funding sources *in the compact* (so the sources can't be abolished or raided by ordinary state laws)
 - Trust funds
 - Dedicated user fees
 - Ad valorem taxing authority

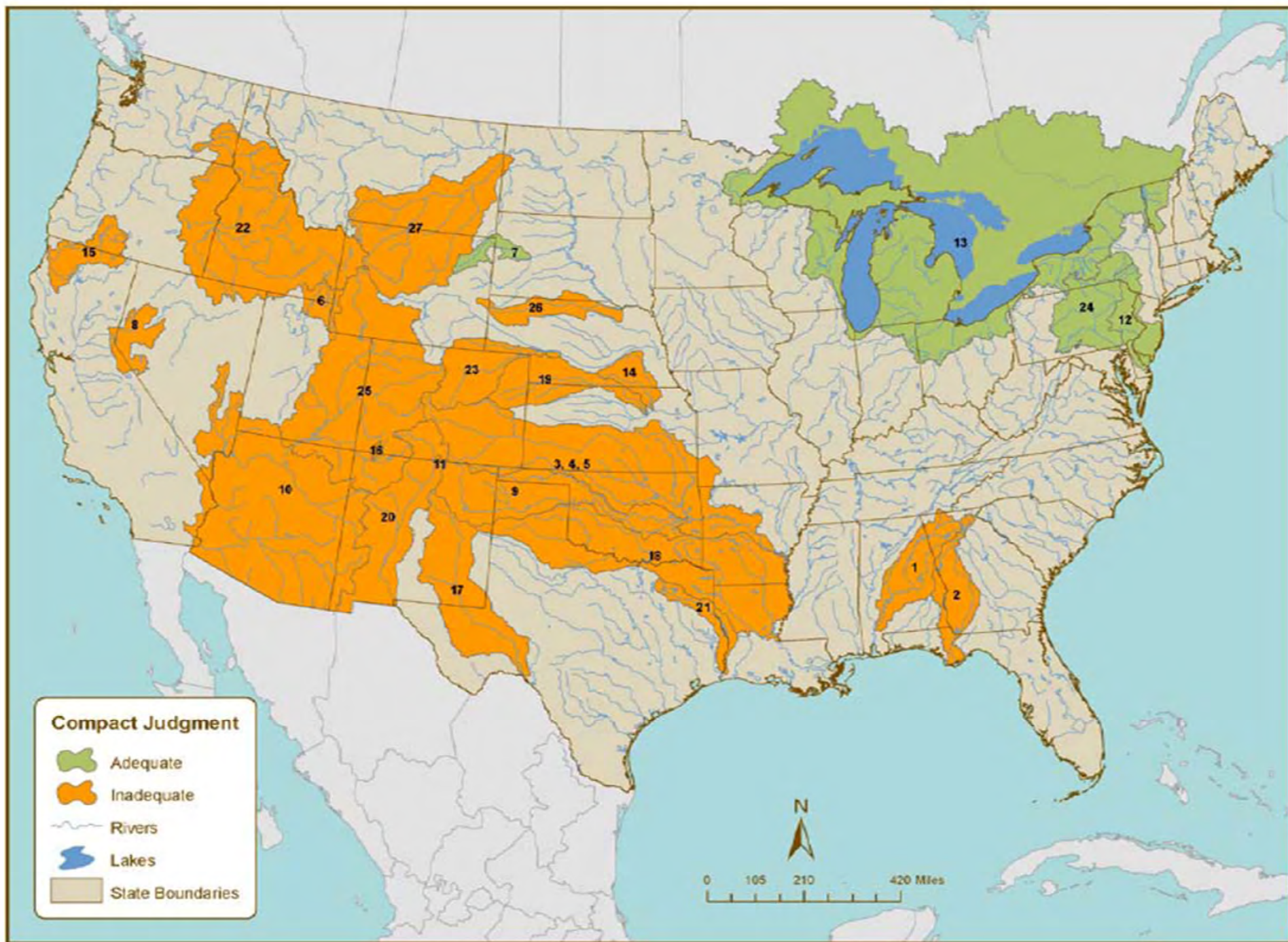
Measures of Watershed Vulnerability

- Total water supply relative to demand
- Natural variability – increasing with loss of stationarity; climate change impact on supplies
- Groundwater depletion
- Dryness ratio
- Water storage and delivery infrastructure
- Water use flexibility
- Instream use factors
 - List compiled by Professor Noah Hall
 - Appearing in 5 *Env't'l & Energy L. & Pol'y J.* 237 (2010)



Measures of Compact Governance Capacity

- Data collection and reporting
- Geographic and hydrologic scope
- Flexibility and adjustability of allocation
- Water conservation
- Ecosystem protection
- Restrictions on transbasin diversions
- Watershed governance institutions
- Duration, revision, and rescission



Interstate Basins Require Authority Available in Compacts

- Consider the ACF Basin under drought conditions



- The litigation is about all the wrong things and a compact commission with management authority could have avoided it

Interstate Management Models

- Vertical federalism (also called “Cooperative”)
 - CWA/CAA
 - Federal floor
 - States take delegation
 - Interstate Compact entity with authority (DRBC)
- Horizontal federalism
 - Great Lakes Compact
 - Agreed management standards
 - Parallel state implementation and regulation
- “Consistency” federalism
 - CZMA model applied to water resources

Compact Commissions Can Do More

- Integrate quantity and quality
- Plan and manage the resource
 - Plan across time (like regulated riparianism)
 - Allocate via permit
 - Permits can include conditions for conservation
 - Permits can include triggered reductions
 - Permits can include quality requirements
 - Reallocate if necessary on permit expiration
 - Respond to loss of stationarity
 - Control users
 - Co-ordinate with federal operations in the basin

Compact Commissions Ideal Role: Making Basin Management a Non-Zero Sum Game Having Stakeholder Buy-In

- Management begins with objectives
 - Possibly with some expressly designated priorities
- Management has a range of assets and tools
 - Facilities
 - Construction in this era will tend to be ASR
 - Operations
 - User regulation (conditions relating to quality, conservation, timing, reductions, etc.)
 - Financial structures (user fees, water banking)
 - New computer modeling and simulation capabilities
- Together, these can be used to get better results

21st Century Management Tools and Techniques in Action

- Computer-aided dispute Resolution (CADRe)
- Collaborative modeling for decision support
- Participatory processes
 - “Converging Waters” Lisa Bourget, ed. 2011
 - www.iwr.usace.army.mil/docs/maasswhite/Converging_Waters.pdf
- TO REPEAT: Basin management is not a zero-sum game
 - Concurrent and seriatim uses count
 - Timing counts
 - Few uses require an ideal amount of water at all times
 - Risks are to be managed – when they mature some consequences (especially economic) can be softened

DRBC in the Next 50 Years

- More important than ever ... carry on!

Thank you to Carol Collier for inviting me to speak today.