

The Potential for a Savannah River Basin Compact

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I. Introduction

The boarder between South Carolina and Georgia is formed by the Savannah River. The Savannah River is crucial to both states as if provides drinking water, recreational opportunities, economic development, wastewater disposal, flood control, and critical habitat to than 75 species of rare plants and animals. South Carolina and Georgia are in somewhat of a unique situation in that, despite the fact that they both utilize the River, there are no current disputes between then over water usage. This make now an opportune time for the states to address their respective uses and to reach an agreement about future uses.

Throughout history water scarcity has typically been a problem facing western states. As populations continue to grow and demand for water continues to rise,

eastern states are beginning to face these problems as well. Florida, Alabama and Georgia, for example, have been arguing for years over the water resources of the Apalachicola-Chattahoochee-Flint and Alabama-Coosa-Tallapoosa River Basins. After Alabama filed a lawsuit regarding the allocation of the waters, the states agreed that the best way for them deal with the situation was to come to an agreement over the use of the water resource. After years of negotiations, however, the states failed to reach an agreement. If South Carolina and Georgia work together now, before a dispute arises, to reach an agreement detailing their respective usage of the River, they will likely save themselves a long, costly, hostile process later.

II. Savannah River: An Overview

The Savannah River begins in the mountains of Georgia, North Carolina, and South Carolina near Ellicott Rock, the point where the borders of these three states meet.¹ It flows 300 miles through the Blue Ridge Mountains, the Piedmont, and the Coastal Plain, forming the boarder between South Carolina and Georgia, before emptying into the Atlantic Ocean near Savannah, Georgia.² The River drains a basin spanning 10,577 square miles, including 4,581 square miles in South Carolina, 5,821 square miles in Georgia, and 175 square miles in North Carolina.³ Within these three states, the basin covers portions of 44 counties and boardsers two major metropolitan areas, Augusta and Savannah.⁴

The Savannah River and its resources are crucial to both South Carolina and Georgia as it provides many services to both states.⁵ Perhaps most importantly, it supplies drinking water in Georgia to Augusta and Savannah and in South Carolina to

Hilton Head and Beaufort, as well as to many smaller municipalities in throughout the basin.⁶ This is especially important near the coast where salt water is intruding into the aquifers that supply drinking water.⁷ The Savannah River also provides recreational opportunities, economic development, wastewater disposal, flood control, and critical habitat to than 75 species of rare plants and animals.⁸ One such example is the robust redhorse, which was believed to be extinct until found living in the River.⁹

III. Water Rights

When the original colonies separated from England they obtained sovereignty over navigable waters and submerged lands previously held by the Crown.¹⁰ States admitted later also received this authority under the equal footing doctrine.¹¹

There are two basic doctrines addressing water rights law: the riparian doctrine and the prior appropriation doctrine.¹² The riparian doctrine predominates eastern states, while the prior appropriation doctrine is most common in western states.¹³ Both South Carolina and Georgia follow the riparian doctrine.¹⁴

Under the riparian doctrine, water rights are based on ownership of the land adjacent to the waterway.¹⁵ Within this doctrine, two theories of riparian rights have developed: the reasonable use theory and the natural flow theory.¹⁶ The natural flow theory is based on the principal that each riparian owner is entitled to the natural flow of the stream.¹⁷ Under the reasonable use theory, a riparian landowner has the right to make any use of water so long as the use is reasonable in relation to the needs of others.¹⁸ The modern version of the riparian doctrine focuses on reasonable use.¹⁹

The doctrine of prior appropriation is based on the hierarchical right to divert water, not land ownership.²⁰ Under this doctrine, the rights of users of a water resource are ranked in the order in which the users initiated their use.²¹ The right of an earlier user is therefore superior to that of a later user.²² This concept is also referred to as "first in time, first in right."²³

IV. Disputes over a Water Resource

Disputes between states over their shared water resources have existed for many years.²⁴ While they have historically been most common in the West, states in the East are now also beginning to deal with such disputes.²⁵ These disputes are a result of the states' competing demands for these resources which provide drinking water, flood management, wastewater treatment, recreation, and navigation.²⁶ As populations continue to rise and demand for water continues to grow, such disputes will become more frequent and more hostile.²⁷

Dispute between states over water allocation can be addressed in three different ways: (1) congressional apportionment, (2) equitable apportionment by the Supreme Court, and (3) the formation of interstate compacts.²⁸

A. Congressional Apportionment

Under Article I, Section 8 of the United States Constitution, Congress has the authority to apportion waters of interstate rivers by virtue of its power to regulate commerce among the states.²⁹ Under the Constitution's Supremacy Clause, congressional appointment supersedes any previous arrangement made by the states.³⁰ Further, the Supreme Court has held that it will not disturb congressional

apportionment, so long as it is constitutional.³¹ While the Supreme Court originally held, in *Kansas v. Colorado*,³² that congressional apportionment of water rights was not valid under the Constitution, this ruling was overturned fifty years later in *Arizona v. California*.³³ In that case, the Court held that Congress' implied powers allowed for congressional apportionment of water rights, especially given its power under the Commerce Clause.³⁴

Congress typically, however, refrains from applying this power.³⁵ In fact, Congress has only actually apportioned interstate waters twice.³⁶ Congressional apportionment has been criticized for a variety of reasons, such as the influence of politics and special interests, the lack of technical knowledge needed to make such decisions, and the disinterest in water problems specific to a localized region.³⁷

B. Judicial Resolution

The United States Constitution gives the Supreme Court original jurisdiction over any dispute between two or more states.³⁸ The Supreme Court first announced that it had the authority to apportion interstate streams under its original jurisdiction power in 1907 in *Kansas v. Colorado*, holding "[t]he clear language of the Constitution vests in this court the power to settle those disputes."³⁹ This case dealt with a conflict between the laws of the two states.⁴⁰ Kansas, which was a riparian rights state, sued to prevent Colorado, which was a prior appropriation state, from diverting waters from the Arkansas River.⁴¹ The Supreme Court rejected Colorado's argument that it had the right to deplete the entire flow of a river based on its territorial sovereignty.⁴² The Court instead found that while states may determine how water is allocated within their

own borders, they may not impose their methods on other states.⁴³ The Court turned to the rule of “equality of right,” which recognized that “[e]ach state stands in the same level with all the rest.”⁴⁴ The Court then held that its role was “to settle [the] dispute in such a way as will recognize the equal right of both and at the same time establish justice between them.”⁴⁵

The Court later extended the doctrine of equitable apportionment to states that followed similar water laws, in the case of *New Jersey v. New York*.⁴⁶ After New York proposed to divert water from the Delaware River watershed,⁴⁷ New Jersey sued claiming that New York’s proposed diversion would deprive it of the flow of the stream, diminish hydropower potential, lower water quality, make cultivation of farmlands more difficult, and impair recreation.⁴⁸ New Jersey argued for application of the riparian doctrine and sought an undiminished flow of the river.⁴⁹ Although both states followed the riparian doctrine, the Supreme Court held that the riparian and prior appropriation doctrines were not controlling in interstate water disputes.⁵⁰ Instead the Court found that its role was to “secure an equitable apportionment without quibbling over formulas.”⁵¹

In applying the doctrine of equitable apportionment, the factors the Court will consider include established rights under state water law, physical and climatic conditions, consumptive use patterns, character and rate of return flows, extent of established uses, availability of water storage, practical effect of wasteful uses on downstream areas, damage to upstream areas as compared to benefits to downstream areas if the former are limited.⁵² The Court thus evaluates the water demand and use

in addition to ecology considerations. The Court has laid down the following three foundational principals regarding the rights of states: (1) a state may not preserve solely for its own use natural resources located within its own borders; (2) no state has priority over any other state in the use water from an interstate stream; and (3) all states must take reasonable steps to conserve water use and augment water supply as a condition to making a successful claim to their share of water from an interstate stream.⁵³

The Supreme Court, however, is reluctant to decide interstate water disputes, stating that "litigation of such disputes is... a poor alternative to negotiation between the interested States."⁵⁴ The Court has limited the application of the doctrine of equitable apportionment by requiring that a state meet a high standard of injury as a prerequisite to seeking right to remove more water from an interest stream.⁵⁵ The state must show clear and convincing evidence of a substantial injury to its interest as a result of another state's use of the water resource.⁵⁶ This indicated the Court's reluctance to adjudicate states' water right disputes and preference to have the states settle the disputes through an interstate compact.⁵⁷ The Court has also refused to apply the equitable apportionment doctrine when Congress has created its own scheme of apportionment, refusing to substitute its judgment for that of Congress.⁵⁸

In addition, judicial apportionment has been criticized by others for a number of reasons, including the Court's lack of expertise in a highly technical area, ability of state to continually re-litigate whenever it believes the allocation is no longer equitable given the circumstances, the open-ended and unpredictable legal standard applied by the

Court, the preference for existing and imminent uses over more uncertain and remote future uses, and difficulties in ensuring compliance.⁵⁹ For states, judicial equitable apportionment is both a lengthy and a costly process that leaves them with no say over the outcome.⁶⁰

C. Interstate Compacts

A compact is a binding, enforceable agreement between states provided for in the United States Constitution.⁶¹ A compact is created when an agreement between states is passed in state legislation, and then enacted by Congress.⁶²

River Basin Compacts are not a new idea. While they are most prevalent in the West, they are certainly not unique to the West.⁶³ The first river compact, the Colorado River Compact, was signed in 1922.⁶⁴ Since then, many states have instituted compacts as an alternative to disagreement and litigation over water issues. As early as 1938, the Supreme Court recognized that because of the difficulties in litigating interstate water disputes, states were settling their conflicts by interstate compacts more frequently.⁶⁵

While originally compacts were used almost solely to apportion water between the states, compacts today have evolved to cover a range of issues.⁶⁶ Because a compact can include any issues the parties agree on, it is a comprehensive method of dealing with any number of issues, such as water supply, wastewater disposal, flood control, economic development, and recreation, among others.⁶⁷ In addition, because the states create the compact, each state is guaranteed to at least get some of what it wants.⁶⁸ There is no such guarantee if the case is litigated or decided by congressional

mandate as those methods do not allow for state participation in the outcome.⁶⁹

Currently, there are currently 25 compacts appropriating interstate water.⁷⁰

In 1938, the Supreme Court first held that a judicial decision was not the only remedy for interstate water disputes.⁷¹ It found instead that the Constitution provided another method of addressing interstate water disputes, an interstate compact.⁷² The Court has also recognized the authority of these interstate compacts, holding in a later case that “no court may order relief inconsistent with [a compact’s] express terms,” unless it is unconstitutional.⁷³ However, the Court also added that, absent an express provision to the contrary, it would not construe a compact to “preclude a state from seeking judicial” relief to resolve disputes.⁷⁴

While many say that compacts are the preferred method of dealing with interstate water disputes, they still have problems of their own.⁷⁵ Compacts do allow states to allocate water as they see fit, taking into consideration comprehensive technical information, the needs and concerns of the region, and the relationship between the various users.⁷⁶ However, to enter into a compact, states that are fighting for their share of a limited water resource must to reach some type of agreement. In order to make all participants happy and willing to consent to the agreement, the results are often watered-down and ambiguous, allowing the states “a bit of ‘wiggle room’ around the more contentious issues”.⁷⁷

V. Savannah River Basin Compact

Although there is no currently pending compact or compact discussion regarding the Savannah River Basin, both South Carolina and Georgia have seemed receptive to

the idea of a compact.⁷⁸ In fact, the governors of both states have supported the idea of a compact.⁷⁹

On June 24, 2003, South Carolina's governor created the Governor's Water Law Review Committee.⁸⁰ The Committee was charged with conducting a comprehensive review of the state's water law and recommending changes that would improve those laws.⁸¹ As part of this task, the Committee was also to evaluate whether the state should "enter into compacts with neighboring states regarding shared water resources."⁸² The Committee released its final findings in January 2004 in a report entitled Water Law Report.⁸³

The introduction of the Report notes:

Competition for water use, both intrastate and interstate, is fast approaching reality for South Carolina. The State should meet this challenge now. At the present moment it is highly fortunate that no severe drought exists and therefore no water crisis is imminent. ... [I]f nothing is done at present, the next water conflicts and future droughts will cause real concerns inside this State. Wise decisions – made now – can avoid these unfortunate impacts and ensure our water supplies and adequate.⁸⁴

The Committee recognizes that as the state's population continues to grow, so will the state's water need.⁸⁵ Because these water issues effect not only South Carolina, but all of its neighboring states as well, the Committee urges cooperation with these other states, recognizing that "[i]nstead of contentious and expensive litigation, cooperation offers the promise of ensuring our own water supplies for decades to come."⁸⁶

In its Report, the Water Law Review Committee addressed seven major water issues facing the state and made recommendations to the Governor regarding each of

them.⁸⁷ The first issue was "Interstate Questions," which addressed water issues related to both Georgia and North Carolina.⁸⁸ As to the issue of the Savannah River Basin, the Committee's recommendation was as follows:

The State of South Carolina should consider entering into a Compact with the State of Georgia and the Federal Government concerning the Savannah River. It would be in the interest of South Carolina to take the initiative to make this happen and the time to undertake this activity is now.⁸⁹

According to the Committee a binding agreement is a "highly desirable method to deal with otherwise foreseeable serious conflicts between the States and which, if done properly, will assure that South Carolina obtains its equitable share of the Basin's resources."⁹⁰ The Report also addressed the areas a compact should address, which included allocation of the water supply, interbasin transfers, allocation of the pollutant assimilative capacity, and management of the Basin during drought, among others.⁹¹

In November 2004, the South Carolina Water Resources Center at Clemson University and the Georgia Water Research Institute at Georgia Tech co-sponsored a workshop addressing a potential Savannah River Compact between South Carolina and Georgia.⁹² The workshop came about because the River Basin is a limited resource and therefore protecting the water supply and meeting water demands will take a concerted group effort.⁹³ The goals for this workshop were "identifying the key issues for water quantity and quality within the Savannah River basin, identifying gaps in information necessary for a river compact, and supplying information derived from the workshop to decisions makers in both states."⁹⁴ The results from this workshop have not yet been released.

VI. Delaware River Basin Compact

The Delaware River Basin Compact, considered “a breakthrough in water resource management,” went into effect in 1961.⁹⁵ In the more than 40 years since its creation, it has proven to be a model in River Basin management.

A. The Delaware River Basin

The Delaware River is the longest un-dammed river east of the Mississippi.⁹⁶ It spans 330 miles and is fed by 216 tributaries.⁹⁷ The Delaware River Basin drains 13,539 square miles, including 6,422 square miles in Pennsylvania, 2,969 square miles in New Jersey, 2,362 square miles in New York, and 1,004 square miles in Delaware.⁹⁸ While the River Basin only actually contains four-tenths of one percent of the total land area of the contiguous United States, 15 million people, or five percent of the nation’s population, rely on its waters for drinking and industrial use.⁹⁹ New York City, for example, gets approximately half its water from the Delaware River.¹⁰⁰

The River is important not only for the water it provides, but also for its economic significance.¹⁰¹ It is the home to the largest freshwater port in the world, the Delaware River Port Complex.¹⁰² The Port Complex includes docking facilities in Pennsylvania, New Jersey, and Delaware, and generates \$19 billion in annual economic activity.¹⁰³ In addition, the Delaware River is home to the third largest petrochemical port and well as five of the largest east coast refineries.¹⁰⁴ Every day, nearly 42 million gallons of crude oil are moved on the Delaware River.¹⁰⁵

B. History of the Delaware River Basin Compact

Disputes over the Delaware River Basin started in the early 20th century, resulting in a case before the United States Supreme Court.¹⁰⁶ The Supreme Court apportioned the River in 1931,¹⁰⁷ and later modified that apportionment in a separate case in 1954.¹⁰⁸ Although the Court had settled the issues of apportionment, the states were still acting as separate entities, all with competing interests.¹⁰⁹ Recognizing that this regime was inadequate to effectively manage the resource, on November 2, 1961, President Kennedy and the governors of Delaware, New Jersey, Pennsylvania, and New York signed a concurrent compact legislation into law creating a regional body with the force of law to oversee a unified approach to managing the river system without regard to political boundaries.¹¹⁰ This was the first time the federal government and a group of states joined together as equal partners in a river basin planning, development, and regulation.¹¹¹ The signing of the Delaware River Basin Compact was considered a breakthrough in water resources management.¹¹²

The regional body established by the compact is now known as the Delaware River Basin Commission (DRBC).¹¹³ It consists of the governors of the four basin states and a federal representative appointed by the President of the United States.¹¹⁴ These five members each appoint alternate commissioners.¹¹⁵ Each commissioner has one vote of equal power.¹¹⁶ A majority vote is needed to decide all issues, with the exception of the commission's annual budget and drought declarations, which require unanimity.¹¹⁷ All meetings and hearings on policy matters and water resource projects under regulatory review before the Commission are open to the public.¹¹⁸ The Commission oversees water quality protections, water supply allocation, regulatory review and permitting,

water conservation, watershed planning, drought management, flood control, and recreation.¹¹⁹

This Compact, which incorporates five separate governmental bodies, each with their own sovereign powers, is unique not just to the United States, but around the world as well.¹²⁰ In fact, officials from countries around the world have sought advice and guidance from the Commission.¹²¹

The Compact has been commended for its comprehensive planning a regional management scheme which goes beyond the provisions of most compacts which typically merely ratify apportionments and provide methods for each state to protect its share of the resource.¹²² In this respect, the Compact has been referred to as a “flexible, cooperative, planning-oriented structure [that] has enabled the DRBC to meet challenges including droughts, water supply development, and pollution control.”¹²³

C. Provisions of the Delaware River Basin Compact

The compact first creates the Delaware River Basin Commission, and lays out the Commission’s organization and its powers and duties.¹²⁴ It also addresses the funding of the Commission which comes from the signatory parties, project review fees, water use charges, and fines, as well as federal, state, and private grants.¹²⁵

Perhaps one of the most important features of the Compact is its requirement of a comprehensive plan.¹²⁶ The Compact requires the Commission to develop and adopt “a comprehensive plan for the immediate and long range development and of the water resources of the basin.”¹²⁷ The Compact also allows for public participation in the adoption and revisions of the comprehensive plan by requiring the commission to

conduct public hearings and to consult with users, public bodies, and public utilities.¹²⁸

Further, any project approved by the Commission must be in conformity with the comprehensive plan.¹²⁹ The Compact also addresses pollution control, flood protection, watershed management, recreation, hydroelectric power, and water withdrawals and diversions.¹³⁰

VII. Apalachicola-Chattahoochee-Flint and Alabama-Coosa-Tallapoosa River Basin Compacts

A. Background

In the 1980's, facing a severe drought, Alabama, Florida, and Georgia began to experience a strain on the water resources of the region as a result of population growth and economic expansion.¹³¹ Following litigation, formal studies, and an interim agreement, the states entered into two interstate compacts with the goal of negotiating a long-term allocation of surface water resources in the river basins shared by the states.¹³²

The dispute involves two river basins.¹³³ The first is known as the ACF basin, named after the rivers that it serves, the Apalachicola, the Chattahoochee, and the Flint Rivers.¹³⁴ The second basin is known as the ACT basin, also named from the rivers it serves, the Alabama, the Coosa, and the Tallapoosa Rivers.¹³⁵ The two river systems are valuable to the states as they provide a number of services, including municipal and industrial water supply, hydroelectric power, fisheries, navigation, recreation, and waste assimilation among others.¹³⁶

In 1990, after a proposal by the United States Army Corps of Engineers and the State of Georgia to divert water from reservoirs in Georgia, Alabama filed a lawsuit to protect its interest in the water.¹³⁷ Florida subsequently intervened in the lawsuit also to protect its interests.¹³⁸ Following the filing of the lawsuit, officials from all of the states and the Corps negotiated a Joint Stay of Proceedings, the purpose of which was to allow the parties to the lawsuit reach a settlement without further litigation.¹³⁹ In 1992 the parties reached an agreement whereby the Corps would withdraw its proposal to reallocate water, Alabama would stay the pending litigation, and a comprehensive study of the local water resources would be performed, addressing water resource demands, water resource availability, flood and drought management, and coordination mechanisms.¹⁴⁰

The states agreed that their water resource problems would be best addressed by entering into two interstate water compacts, one for each basin.¹⁴¹ Accordingly, in 1997, Alabama and Georgia entered into the ACT Compact, and Alabama, Georgia and Florida entered into the ACF Compact.¹⁴² The basis of the compacts was an agreement between the states to negotiate an equitable apportionment of the water resource.¹⁴³ Neither compact actually contained an actual allocation of water, instead the compacts created a commission for each basin, which would approve an allocation formula.¹⁴⁴

The specific language of the Compacts was based, in part, on the Delaware River Basin Compact.¹⁴⁵ There are however a number of notable differences between the two compacts.¹⁴⁶ Of the differences, the most significant is that the federal government is not a signatory to or full voting member of the Commission.¹⁴⁷ In fact

the original compact prepared by the states did not include a major role for the federal government at all.¹⁴⁸ As a result of threats by the Department of Justice to withhold Congressional approval of the Compacts, the states provided for a non-voting member of the federal government on the Commission in the final version of the Compacts.¹⁴⁹ While the federal commissioner cannot vote, he or she must concur or nonconcur, based solely on federal law, with any agreement on allocation by the states, in effect giving him or her the power of veto.¹⁵⁰

The Compacts required the Commission to reach an agreement on an allocation formula by January 1, 1999.¹⁵¹ However, the Compact additionally provided that states could extend this deadline one year until January 1, 2000, which the states did.¹⁵² While negotiating allocation, differences among the states' perceptions of how the water resource should be shared became evident.¹⁵³ While Alabama and Florida argued that consumptive uses should be defined and limits on consumptive uses should be set, Georgia argued for state sovereignty and resisted external limits on consumption as long as state line flows were delivered.¹⁵⁴ Further, Georgia argued that federal reservoirs should be operated based on the assumption that drought was imminent, which meant keeping the reservoirs full until drought conditions required releases to supplement river flows.¹⁵⁵ Both Alabama and Florida opposed this approach.¹⁵⁶ Florida supported a natural flow regime, which mimics historical conditions of the river, while Alabama asserted that reservoirs should be used for what they were originally intended, navigation.¹⁵⁷

The January 1, 2000 deadline also passed without significant progress in the states' negotiations.¹⁵⁸ Following years of negotiations under the Compacts and several additional extensions of the deadline, the states failed to reach an agreement on the proper allocation of water.¹⁵⁹ In July 2003, the states signed a memorandum of understanding of several key principals that were intended to guide the development of the allocation formula and came very close to a final agreement.¹⁶⁰ Ultimately, however, the states failed to reach an agreement and the August 31, 2003 deadline the states had set passed without being extended, and as a result the Compacts terminated.¹⁶¹

The next step for the states is likely an equitable apportionment by the Supreme Court.¹⁶² Commentators have noted that it is unlikely that Congress will resolve the issue through federal legislation,¹⁶³ which makes a judicial determination the only remaining option.¹⁶⁴ Yet, while litigation seems imminent, all three states have stated a preference for avoiding such action if at all possible.¹⁶⁵

According to commentators, the success of ACT and AFC basin compacts would have had broad implications.¹⁶⁶ It has been asserted that had negotiations on an allocation formula been successful, "then the Comprehensive Study/Interstate Compact/Negotiated Allocation Formula approach may form the new paradigm for resolving interstate water disputes, especially in the eastern United States."¹⁶⁷ The Compacts, however, had some major flaws, which likely led to their ultimate failure, including the requirement of unanimity among the states for any decisions with no

method of breaking deadlocks, and the failure to impose any type of restrictions on water use during the allocation formula negotiations.¹⁶⁸

VIII. The Future of the Savannah River Basin

Given the growing populations of South Carolina and Georgia and the increasing need for water it is likely, if not inevitable, that disputes over the water resources of the Savannah River will arise. In dealing with these water use issues, the states have three options: congressional apportionment, equitable apportionment through litigation before the Supreme Court, and the formation of an interstate compact.

While all options are available to the states, an interstate compact would be in the states' best interests. Both Congress and the Supreme Court lack the technical knowledge to apportion waters. In addition, apportionment by Congress will likely be influenced by politics and special interests. Litigating the issue before the Supreme Court will be a long and costly process for the states. The states also will receive no finality on the issue, as either state can relitigate whenever it believes the allocation is no longer equitable. Further, because the only way to enforce the allocation is to litigate it before the court, the states will be able to stretch the rules as small indiscretions simply are not worth having to litigate to remedy. In both cases, whether decided by Congress or the Supreme Court, the decision will be made by a body that is removed from the situation and not familiar with local needs and concerns, leaving the states with no say in the final outcome.

An interstate water compact would be the referred option for the states because it would allow the states to be directly involved in the outcome. A compact would be a

comprehensive solution to any water disputes because it is created and designed by the states so it can address any issues they believe need to be addressed. The states are in the best position to determine what is best for each state, the region, and the water resource itself. By entering into an interstate water compact, the states can use this knowledge to reach the best possible outcome for all parties involved.

There certainly is great potential for the creation of a Savannah River Basin Compact, as both states have shown an interest in doing so. However, time is of the essence and affirmative action by the states is needed now. The situation with the Savannah River is somewhat unique in that there are currently no formal disputes between the two states and there is a willingness by the two states to undertake discussions and negotiations. The ACT and ACF River Basin Compacts were created only after disputes between the states arose and litigation had already begun.¹⁶⁹ This is likely one of the major factors that led to the ultimate failure of those compacts. While the compact's structure seemed to be ideal on paper as it required all of the involved parties to work together to create an allocation scheme that would reflect their collective needs, the states were not able to come to any type of agreement.¹⁷⁰ Negotiations between South Carolina and Georgia will be successful if they take place before such hostilities arise.

In designing a river basin compact, South Carolina and Georgia should look both to the Delaware River Basin Compact and to the ACT and ACF River Basin Compacts for guidance, evaluating the strengths and weaknesses of both. Since its creation over 40 years ago, the Delaware River Basin Compact has proven to be a model of how an

interstate water compact should and can work. Most importantly is its creation of a Compact Commission.¹⁷¹ By having a regional body making decisions, these decisions will be comprehensive and address the river basin as a whole, as opposed to countless inconsistent decisions made by a number of different agencies, departments, municipalities, etc. Also important is the fact that the Delaware River Basin addresses more than just the allocation of water.¹⁷² It also addresses important issues such as pollution control, flood protection, watershed management, recreation, and hydroelectric power.¹⁷³

While the ACT and ACF River Basin Compacts ultimately did not succeed, they did incorporate several elements that would benefit South Carolina and Georgia in the formation of their own compact. The ACT and ACF Compacts, for example, were based on a comprehensive study, which many find to be the best way to assess demands on the water resource and how the water resource can be managed to accommodate those demands.¹⁷⁴ These Compacts also established a unique way to deal with the federal government's role in a compact. While some states do not want the federal government to have a voting membership in a Compact Commission, the federal government has expressed their desire to be involved in Compacts.¹⁷⁵ Allowing for a non-voting representative of the federal government (while still having a veto power) on the Compact Commission serves as an effective compromise.¹⁷⁶

IX. Conclusion

Given growing problems with drought, water demand and population growth, water compacts will become increasingly important to states across the country. This

holds true for South Carolina and Georgia as they are forced to face their joint use of the Savannah River. Of the several options before South Carolina and Georgia, the creation of a river basin compact is the best option as it is the most practical and the most efficient. Through creation of a compact the states can apply their knowledge of local concerns and needs as well as their expertise in issues related to the Savannah River Basin to reach an agreement that will address the particular needs and desires of both states.

¹ Savannah Riverkeeper, *River Geography*, http://savannahriverkeeper.org/river_maps.shtml (last accessed Mar. 15, 2005).

² *Id.*

³ Savannah Riverkeeper, *River Facts*, http://savannahriverkeeper.org/river_facts.shtml (last accessed Mar. 15, 2005).

⁴ *Id.*

⁵ Savannah Riverkeeper, *River Geography*, *supra* n. 1.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Kansas v. Colorado*, 206 U.S. 46, 94 (1907).

¹¹ *Id.* at 95.

¹² Joseph W. Dellapenna, *The Law of Water Allocation in the Southeast States at the Opening of the Twenty-First Century*, 25 UALR L.J. 9 (2002).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 65, 82.

¹⁶ *Id.* at 11.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 11-12.

²⁰ *Id.* at 19.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ See Josh Clemons, *Interstate Water Disputes: A Road Map for States*, 12 S.E. Envtl. L.J. 115, 115 (2004).

- ²⁵ *See id.*
- ²⁶ *Id.*
- ²⁷ *See id.*
- ²⁸ *Id.* at 118.
- ²⁹ U.S. Const. art I, § 8; *Arizona v. California*, 373 U.S. 546, 564-65, 587 (1963).
- ³⁰ U.S. Const. art VI, § -2.
- ³¹ *Arizona v. California*, 373 U.S. at 565.
- ³² *Kansas v. Colorado*, 206 U.S. 46, 97 (1906).
- ³³ *Arizona v. California*, 373 U.S. at 565.
- ³⁴ *Id.*
- ³⁵ Clemons, *supra* n. 24, at 128; Robert Haskell Abrams, *Interstate Water Allocation: A Contemporary Primer for Eastern States*, 25 UALR L.J. 155, 158 (2002).
- ³⁶ Clemons, *supra* n. 24, at 128.
- ³⁷ Dustin S. Stephenson, *The Tri-State Compact: Falling Waters and Fading Opportunities*, 16 J. Land Use & Envtl. Law 83, 93-94 (2000).
- ³⁸ U.S. Const. art III, § 2.
- ³⁹ *Kansas v. Colorado*, 206 U.S. 46, 97 (1907).
- ⁴⁰ *Id.* at 85, 95.
- ⁴¹ *Id.* at 95, 99.
- ⁴² *Id.* at 117-18.
- ⁴³ *Id.* at 95.
- ⁴⁴ *Id.* at 97.
- ⁴⁵ *Id.* at 97-98
- ⁴⁶ *N.J. v. N.Y.*, 283 U.S. 336 (1931).
- ⁴⁷ *Id.* at 342
- ⁴⁸ *Id.* at 343-44.
- ⁴⁹ *Id.* at 342.
- ⁵⁰ *Id.* at 342-43.
- ⁵¹ *Id.* at 343.
- ⁵² *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945).
- ⁵³ *Idaho v. Oregon*, 462 U.S. 1017 (1983).
- ⁵⁴ *Texas v. New Mexico*, 462 U.S. 554, 568, n. 13 (date).
- ⁵⁵ *See Washington v. Oregon*, 297 U.S. 517, 522 (1936).
- ⁵⁶ *Id.*
- ⁵⁷ *See* C. Grady Moore, *Water Wars: Interstate Water Allocation in the Southeast*, 14 Nat. Resources & Env. 8 (1999); *see also* Roy R. Carriker, *Water Wars: Water Allocation Law and the Apalachicola-Chattahoochee-Flint River Basin* 1 (University of Florida 2000).
- ⁵⁸ *Arizona v. California*, 373 U.S. at 565-66.
- ⁵⁹ *See* Clemons, *supra* . 24, at 126-27; Stephenson, *supra* n. 37, at 96-97.
- ⁶⁰ Stephenson, *supra* n. 37, at 96-97.
- ⁶¹ U.S. Const. art I, § 10.

⁶² See *Abrams*, *supra* n. 35, at 130

⁶³ Clemons, *supra* n. 24, at 115; Moore, *supra* n. 57, at 5.

⁶⁴ Colorado River Compact, Colo. Rev. Stat. Ann. §37-61-101.

⁶⁵ *Hinderlider v. La Plata River and Cherry Creek Ditch Co.*, 304 U.S. 92, 105 (1938).

⁶⁶ See Clemons, *supra* n. 24, at 131.

⁶⁷ *Id.*

⁶⁸ See Clemons, *supra* n. 24, at 129.

⁶⁹ See *id.*

⁷⁰ *Id.*

⁷¹ *Hinderlider v. La Plata River and Cherry Creek Ditch Co.*, 304 U.S. at 105.

⁷² *Id.* at 105.

⁷³ *Texas v. New Mexico*, 462 U.S. at 564.

⁷⁴ *Id.* at 569-70

⁷⁵ Stephenson, *supra* n. 37, at 93, 100.

⁷⁶ *Id.*

⁷⁷ Stephenson, *supra* n. 37, at 100; Jeffrey P. Featherstone, *Symposium: The National Water Crisis: A Great Lakes Response Symposium: Existing Interstate Compacts: The Law and Lessons*, 4 Tol. J. Great Lakes L. Sci. & Pol'y 271, 274 (2001).

⁷⁸ *Savannah River Water Up for Grabs: Governors of S.C., Georgia to Work on Compact Defining Water Rights*, The State (Columbia, S.C.) (June 7, 2004).

⁷⁹ *Id.*

⁸⁰ S.C. Exec. Or. 2003-16 (June 24, 2003) (available at <http://scwaterlaw.sc.gov/2003-16.pdf>).

⁸¹ *Id.* The Committee's Mission Statement, as unanimously agreed upon by the Committee, was as follows:

To advise the Governor about initiatives needed to preserve, maintain, and manage the water resources of this state to ensure available and affordable quantities and qualities of water for present and future multiple uses.

⁸² *Id.*

⁸³ Governor's Water Law Review Committee, *Water Law Report* (2004) (available at http://scwaterlaw.sc.gov/Governors%20W%20L%20R%20%20Report%20revised4_27.pdf).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² South Carolina Water Resources Center and Georgia Water Resources Institute, *Savannah River Basin Water Policy Workshop – Home*, http://www.strom.clemson.edu/teams/water_resources/savannah/INDEX.HTM (last updated Oct. 14, 2004).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Delaware River Basin Commission, *The Delaware River Basin*, <http://www.state.nj.us/drbc/thedrb.htm> (last accessed Mar. 15, 2005).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *N.J. v. N.Y.*, 283 U.S. 336 (1931).

¹⁰⁷ *Id.*

¹⁰⁸ *N.J. v. N.Y.*, 347 U.S. 995 (1954).

¹⁰⁹ Delaware River Basin Commission, *The Delaware River Basin*, *supra* n. 96.

¹¹⁰ Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 689 (1961); Delaware River Basin Commission, *DRBC Overview*, <http://www.state.nj.us/drbc.over.htm> (last accessed Mar. 15, 2005).

¹¹¹ Delaware River Basin Commission, *DRBC Overview*, *supra* n.110.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* The governors typically select high-ranking officials from their respective state environmental agencies.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* Commission representatives have been invited to countries such as Australia, Slovakia, and Bulgaria to explain the program and offer assistance. Further officials from Sri Lanka, the People's Republic of China, Indonesia, the United Kingdom, South Korea, the Czech Republic, Hungary, Jordan, Portugal, Sweden, Turkey, Uganda, Uruguay, India and Japan, among others, have visited the commission's offices.

¹²² Clemons, *supra* n. 24, at 134.

123 *Id.*
124 Delaware River Basin Commission, *The Delaware River Basin*, *supra* n. 96.
125 *Id.*
126 *Id.*
127 *Id.*
128 *Id.*
129 *Id.*
130 *Id.*
131 Moore, *supra* n. 57; *see also* Roy R. Carriker, *supra* n. 57.
132 Moore, *supra* n. 57, at 5.
133 *Id.*
134 *Id.*
135 *Id.*
136 *Id.*
137 *Id.* at 6.
138 *Id.*
139 *Id.* at 7.
140 *Id.*
141 Carriker, *supra* n. 57, at 4.
142 Apalachicola-Chattahoochee-Flint River Basin Compact, Pub. L. No. 105-104 (1997);
Alabama-Coosa-Tallapoosa River Basin Compact, Pub. L. No. 105-105 (1997).
143 Moore, *supra* n. 57, at 7.
144 *Id.*
145 *Id.*
146 *Id.*
147 *Id.*
148 *Id.*
149 *Id.*
150 *Id.*
151 *Id.* at 8.
152 *Id.*
153 *Id.*
154 *Id.*
155 *Id.*
156 *Id.*
157 *Id.* at 9.
158 *Id.*
159 Clemons, *supra* n. 24, at 138.
160 *Id.* at 138
161 *Id.* at 138-139
162 *Id.* at 139
163 *Id.*

¹⁶⁴ Clemons, *supra* n. 24, at 139.

¹⁶⁵ Moore, *supra* n. 57, at 11.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*; *see also* Carriker, *supra* n. 73, at 14.

¹⁶⁸ Clemons, *supra* n. 24, at 139-140

¹⁶⁹ Moore, *supra* n. 57, at 7.

¹⁷⁰ *See* Stephenson, *supra* n. 37, at 101-105.

¹⁷¹ Delaware River Basin Commission, *DRBC Overview*, *supra* n.110.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *See* Moore, *supra* n. 73, at 11.

¹⁷⁵ *Id.*

¹⁷⁶ *See id.*