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November 8, 2006

TO: Members of the Special Committee on Great Lakes Water Resources Compact

CC: Mr. John Stolzenberg, Chief of Research Services, and Ms. Rachel Letzing, Senior Staff Attorney, Joint Legislative Council

FROM: Mike McCabe, Director, CSG Midwestern Office

RE: Interstate Compact Law; Ability of Congress to Change Compacts

Through its legal counsel, the Special Committee on Great Lakes Water Resources Compact has inquired about the ability of Congress to unilaterally change interstate compacts. I hope the following information proves useful.

As a general matter of compact law, Congress may neither compel states to enter into interstate compacts in the first instance nor unilaterally impose specific terms upon compacting parties. There are, however, at least two important ways in which Congress can effectively shape the terms of such interstate agreements or impact, for better or worse, their effectiveness as regulatory tools.

The first of these is the congressional consent requirement, which ensures that Congress retains ultimate authority over compacts that potentially infringe on federal prerogatives. By conditioning its consent to compact upon the acceptance by the party states of specific terms or limitations, Congress can effectively narrow the extent of state discretion in crafting and adopting new agreements. And, through the use of appropriate incentives, Congress can use its consent power to encourage the states to adopt compact language that furthers, or is consistent with, federal objectives.

This does not mean that Congress can enact incentives that are unduly coercive and that effectively compel the states to enter into unwanted interstate agreements. Thus, the Supreme Court invalidated certain incentive provisions contained in the Low-Level Radioactive Waste Policy Amendments Act of 1985, which authorized the states to enter into low-level waste storage compacts, on the grounds that they were too coercive and violated the Tenth Amendment by treating the states as mere agents of the federal government. See *New York v. United States*, 505 U.S. 144 (1992).

The consent power, and specifically the ability to condition consent, guarantees a potentially significant opportunity for Congress to shape the substantive terms of any compact requiring its approval. Once given, however, congressional consent may generally not be withdrawn or amended. Although the Supreme Court has not clearly addressed this point, the U.S. Court of Appeals for the District of Columbia concluded in *Tobin v. United States* that an unlimited power to alter or repeal congressional consent would call into question the permanency of state authority to act and "would be damaging to the very concept of interstate compacts." See *Tobin v. United States*, 306 F.2d 270, 273 (D.C. Cir. 1962).

More recently, other courts have reached the same conclusion when addressing the limits of the congressional consent power. See, e.g., *Mineo v. Port Authority of New York-New Jersey*, 779 F.2d 939 (3rd Cir. 1985). However, in at least one instance, Congress has expressly attempted

to reserve for itself the power to subsequently withdraw its consent to compact. Whether such a reservation would be upheld by the courts has yet to be determined.

The second way Congress can effectively change interstate compacts is by enacting substantive legislation that alters the regulatory context in which a compact operates. This is true even when such legislation significantly limits or arguably impairs the practical effect of a compact to which Congress has consented. For example, the Supreme Court once held that Congress was free to enact its own comprehensive plan to manage the Colorado River, despite the fact that it had also authorized cooperative state efforts on this issue by consenting to the Colorado River Compact. See *Arizona v. California*, 373 U.S. 546 (1963).

Therefore, it is clear that even though approval of an interstate compact binds the party states to the terms of the agreement, even limiting the discretion of future legislatures in those states, the granting of consent does not similarly limit Congress or in any way preclude future congresses from legislating in an area regulated by compact. This is a reflection of the fact that with the possible exception of the few compacts to which the federal government is an actual party, the granting of congressional consent to compact does not alone create a binding agreement between the states and the federal government.

As a practical matter, this means that while Congress may not unilaterally impose compacts or compact terms upon the states (and may neither withdraw nor amend its consent to a compact once given), it may well be able to achieve its desired objectives through the enactment of substantive legislation that effectively limits or overrides the authority of an interstate compact. In short, Congress retains the final say, and the only real checks on its ability to alter or intrude upon the workings of a compact are political rather than legal. These are not insignificant, however, and experience suggests that Congress rarely does interfere with compacts to which it has consented.

Please let me know if The Council of State Governments can be of further assistance to the Special Committee.