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CORRECTION & CONTROL OF
POLLUTION IN DELAWARE RIVER

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STATEMENT AND ARGUMENT
in support of
THE CONSTITUTIONALITY OF THE RECIPROCAL AGREEMENT
FOR THE CORRECTION AND CONTROL OF POLLUTION
IN THE INTERSTATE DELAWARE RIVER

March, 1943

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FOR THE CORRECTION AND CONTROL OF POLLUTION

IN THE INTERSTATE DELAWARE RIVER

as filed in Brief Amicus Curiae

By HOBART, MINARD & COOPER, Solicitors

For THE INTERSTATE COMMISSION ON THE DELAWARE RIVER BASIN

on Bill for Injunction between

DEPARTMENT OF HEALTH OF THE STATE OF NEW JERSEY, Complainant
and

CITY OF GLOUCESTER CITY AND CITY OF CAMDEN, Defendants

February 15, 1943

Incodel

Philadelphia

March, 1943

Brief.

IN CHANCERY OF NEW JERSEY

On Bill for Injunction
Between

DEPARTMENT OF HEALTH OF THE STATE OF NEW JERSEY,
Complainant,
And

CITY OF GLOUCESTER CITY and CITY OF CAMDEN,
Defendants.

BRIEF AMICUS CURIAE

ON BEHALF OF INTERSTATE COMMISSION ON
THE DELAWARE RIVER BASIN

STATEMENT

The Interstate Commission on The Delaware River Basin, (hereinafter called "Incodel") on whose behalf this brief is respectfully submitted, is a voluntary association formed, and maintained, by the states whose territories (in part) comprise the Delaware River watershed, in the manner, and for the purposes, recited in the Preamble of Chapter 146, of the laws of 1939 (pp. 477-479).

A brief summary of the historical background of Incodel will aid in the consideration of its interest, and part, in the abatement of pollution in the Delaware River.

Pursuant to Joint Resolution 14 (N.J.P.L. 1929, p. 823) what is known as the "Delaware Diversion Case" was instituted as an original suit in equity by complaint filed May 1, 1929 in the Supreme Court of the United States by the State of New Jersey to enjoin the State of New York and the City of New York, (in which the Commonwealth of Pennsylvania intervened on the side of the defendants) from undertaking the proposed immediate diversion of 600, and the

ultimate diversion of 2400, million gallons per day from the upper tributaries of the Delaware River located within the State of New York.

The complaint alleged injuries to the use of the river in New Jersey for water power, navigation, sanitation, industries, oyster culture, fisheries, water supply, agriculture and recreation. In the preparation and presentation of that case exhaustive research was made, and extensive and complete data was compiled and presented in evidence, on each of these subjects with relation to the Delaware River and its watershed. They were all evaluated and decided in the Master's report, which was confirmed by the court (New Jersey v. New York, et als., 283 U.S. 341).

Because the fruits of that research and the material accumulated in that record were too valuable to be disregarded or lost, all of the states interested, and the State of Delaware, decided to utilize them as a basis for the future conservation, development and protection of the vast resources of that river.

To that end they established, and have since maintained, Incodel, as a co-operative agency, in the manner and for the purposes described in the Preamble of Chapter 146, laws of 1939. A program has been formulated to develop co-operative action, and uniform laws, in the several constituent states to conserve, develop and protect the various uses of the river involved in the "Delaware Diversion Case."

Naturally, the first, and necessarily basic project was the control of pollution, and the act in question was the result of that effort. A similar co-operative project, in the form of uniform laws, is now before the legislature of New Jersey, and the other states for the rationing and utilization of the river waters for public water supply. The plan is to promote similar co-operation, and uniform laws, covering other river uses according to their relative importance, but the control of pollution is the primary, and basic, necessity for the utilization of all other resources of the river.

The sanitary code in question is implemented with a nationwide pollution abatement plan of the various interested agencies of the federal government. In the second report of the Water Pollution Committee of the National Resources Committee, presented before the Committee on Rivers and Harbors of the House of Representatives, April 7, 1937 (Appendix to report of hearings on H.R. 2711, H.R. 2300 and H.R. 3419), the recommendations included (pp. 8-9) the following:

"(2) prepare comprehensive programs, covering the various drainage basins of the United States, designed to eliminate or reduce pollution and to improve conditions affecting the various interests concerned; and (3) encourage uniform and simplified State pollution-control legislation. Such drainage-basin programs should be reconciled with plans conserving water and promoting its use as needed for public-water supplies; propagation, conservation and use of fish, waterfowl, and other aquatic life; for recreational purposes; agriculture and other uses."

Reference is therein made (p. 9) to discussions held and tentative organization formed for the Delaware watershed.

On February 15, 1939, the President transmitted to the Congress of the United States a report on Water Pollution in the United States, prepared at his request by a special advisory committee of the National Resources Committee composed of experts from the Departments of War, Treasury, Interior, Agriculture and Commerce, and from private and state agencies (House Document No. 155, 76 Cong., 1st Session).

The following extracts are taken from that report:
(p. 57.)

"No single standard is applicable generally, but it is practicable and desirable to set standards for selected portions of drainage basins with due regard for the natural conditions of the water for its present and potential use."

"First, interstate organizations have agreed upon standards for water zones in two large areas having severe pollution problems--the New York-New Jersey coastal waters and the Delaware Basin;"

"Practical application of this principle has been made during the past year by the Interstate Commission on the Delaware River Basin. It divided the basin into four zones as follows:"

Here follows (pp. 59-60) descriptions of the zones specified in Article II of the code (P.L. 1939, pp. 481-483), and reference to, and a statement of the reasons for, the several standards of quality prescribed for each zone (P.L. 1939, pp. 483-487).

(p.72) "C. NEED FOR INTERSTATE COMPACTS AND AGREEMENTS.

Inasmuch as many heavily polluted streams flow through more than one state, enforcement by states individually may prove ineffective. The chief interstate drainage areas which have serious pollution problems are the Delaware,..... . However, in the remaining areas where pollution is serious, the interstate compact or agreement offers a possible remedy to the ills resulting from inconsistent and non-uniform state laws."

(p. 73) "an informal agreement on standards of water quality has been adopted by the Interstate Commission on the Delaware River Basin."

(p.76). "DELAWARE BASIN RECIPROCAL AGREEMENT.

Rapid strides toward pollution abatement in an interstate area have been taken in the Delaware Basin under the leadership of the Interstate Commission on the Delaware River Basin. This group is composed of legislative members of Delaware, New Jersey, New York and Pennsylvania, appointed under provisions of State legislation establishing commissions on interstate co-operation. As a part of its program for the development of the Delaware Basin, 'Incodel' has brought about agreement on standards of quality as described in section (Article) III (P.L. 1939, pp. 481-483) and on a schedule of needed construction.

"The commission and the responsible administrative agencies in the four states have ratified a classification of the waters of the basin along lines which are described in section III. It is the commission's opinion that further or additional pollution of the waters of the river is definitely prevented by the terms of the reciprocal agreement."

In the Delaware Diversion case the City of New York was allowed to divert a maximum of 440 million gallons a day from the tributaries of the Delaware river in that state, but only on two conditions:

(a) Treatment of water by New York City to provide a specified maximum of animal and chemical pollution of the water at the New York-New Jersey state line.

(b) Maintenance of an established minimum flow at Port Jervis and Trenton by means of additional reservoir capacity to avoid unsanitary effects of the diminished flow. (*New Jersey v. New York*, 283 U.S. 341, 346-7).

Those conditions were imposed to prevent the river between Pennsylvania and New Jersey from suffering increased pollution resulting from the diversion of water from its tributaries and to enable those states to preserve a suitable sanitary condition for water supply, recreation, industry, agriculture, fishing, oysters, and other beneficial uses. They were adopted by the court on the recommendation of the Master, who said in his report (pp. 126-7):

"After the waters of the Delaware River leave New York State, it is then the problem of Pennsylvania and New Jersey to see to it that the waters of the river are not unduly polluted from sources on the New Jersey side and the Pennsylvania side. All three states have laws relative to preserving the sanitary condition of their waters ... (referring to existing sanitary code agreements between the Health Departments of Pennsylvania, New Jersey and New York) for preserving the Delaware River in a sanitary condition. The agreements provide for a high degree of treatment of sewage before it is discharged into the Delaware River above Easton, Pennsylvania, and Phillipsburg, New Jersey, and provide for a sedimentation of sewage before it is discharged into the river below said points Mr. Stevenson (Chief Engineer of the Pa. Dept. of Health) testified that these agreements had been fruitful of good results.

..... I find that there is an effort on the part of all three states to require the treatment of sewage and industrial wastes so as to preserve the sanitary condition of the Delaware river, and these efforts are progressive and may be expected still further to reduce pollution of the stream, but there remains much yet to be done in that regard."

The sanitary code, embodied in Chapter 146 (laws of 1939) to establish standards of quality of water, is the result of further co-operative efforts of the states mentioned, and of the National Resources Committee and Public Health Service of the federal government (p. 479). A definite, uniform public policy for the prevention of pollution, and the protection and preservation of potable water supplies is declared in the act.

This is one of many acts of concurrent legislation enacted pursuant to mutual agreements between states prescribing reciprocal and uniform regulations of sanitation or other matters within their territorial limits, respectively, in bodies, or streams, of water lying between or adjacent to the constituent states. The object is to avoid conflicts between the laws and regulations of such states which might, and often do, interfere with the health and welfare of their respective citizens.

This case involves an act of the legislature of New Jersey, adopted in the furtherance of the co-operation of the constituent states respecting the Delaware River watershed, in which New Jersey, as well as the other states involved, has a common interest in the objects above mentioned (p. 477).

Such co-operative enterprises are so obviously beneficial to the public interest that public policy requires their encouragement, and they should not be stricken down unless a state (in this instance New Jersey) attempts to exercise a jurisdiction that would be unlawful if exercised within its own territorial limits if the co-operative feature was not involved.

This brief discusses certain defenses raised by the defendants, respectively, in which they challenge the constitutionality of Chapter 146, P.L.1939. The other defenses presented in the answers will be considered in a brief to be filed by the Attorney-General.

ARGUMENT

I.

Statutes Are Presumed Constitutional

The burden of showing that a statute is unconstitutional is upon the person alleging that it violates the constitution.

State Board v. Newark Milk Co., 118 N.J.E. 504, 519 (E. & A. 1935).

"A legislative enactment should not be set aside unless its constitutionality indisputably appears. If there be a permissible doubt as to the existence of the constitutional limitation invoked against the validity of an act, the courts will not declare the act to be contrary to the constitution.

Attorney-general v. McGuinness, 78 N.J. Law 346."

II.

FIRST DEFENSE FILED BY BOTH DEFENDANTS.

The First Defense filed by both the defendants alleges that Chapter 146, P.L. 1939 is unconstitutional and void, because it is an agreement or compact entered into by one state with another state without the consent of Congress, in violation of Article I, section 10 of the Constitution of the United States.

The applicable provisions of the U.S. Constitution are:

"No state shall enter into any Treaty, Alliance, or Confederation," and "No state shall, without the Consent of Congress . . . enter into any agreement or Compact with another State."

(Article I, Section 10.)

Since only the interests of the United States can be adversely affected by a compact between states, it lies not in the mouth of these defendants, as creatures of the state which has sanctioned this agreement by legislative action, to make such an objection. As appears from the recitals in the Statement at the beginning of this brief, and the fourth recital in the Preamble of the act

(P.L. 1939, p. 479), this agreement was made pursuant to recommendation of, and in co-operation with, the responsible agencies of the federal government. If there is any question about the lack of Congressional approval only the federal government can (and it does not) make such objection. Congress has given its blanket approval of such agreements:--

"Consent of the Congress of the United States is given to each of the several States of the Union to enter into any agreement or compact, not in conflict, with any law of the United States, with any other State or States for the purpose of conserving the forests and the water supply of the States entering into such agreement or compact." (Title 16, Sec. 552, USCA. p. 373). Mar. 1, 1911.

Congressional consent in advance of an agreement is equally valid with one given afterwards, *Virginia v. Tennessee*, 148 U.S. 501, 521, 59 Corpus Juris, sec. 13, p. 38. Three other instances have been noted in the federal statutes of Acts of Congress giving advance blanket authority for interstate agreements or compacts relating to various other subjects.

We think the foregoing consent of Congress is amply clear and comprehensive, but if it is urged that it is too narrow, or of doubtful application to this reciprocal code, there is ample authority to show that this is not a "Treaty, Alliance, Confederation," or an "Agreement or Compact," requiring congressional approval.

This is not a matter involving a joint enterprise, like the Port of New York Authority, or the Delaware River Joint Commission, where a joint administrative, or governmental, agency is set up to operate an interstate facility. Here, each state deals reciprocally, but separately through its established agencies, with a problem clearly within its jurisdiction, and solely within its own territorial limits.

Although the National Resources Committee and the Public Health Service of the federal government participated in the deliberations on this code, (P.L. 1939, p. 479), its promulgation and enforcement involves no question of federal

jurisdiction and is not inconsistent with any federal law. The purification of navigable inland waters is as beneficial to navigation, water power, or any other federal interest, as it is to other uses of the waters of the river, and federal governmental approval is unnecessary unless an obstruction to navigation occurs.

The question of what state compacts or agreements must be approved by Congress was considered by the United States Supreme Court in *State of Virginia v. State of Tennessee*, 148 U.S. 501, 518, (37 L. ed. 537, 542) where the court upheld a compact fixing the boundary line. We quote (p. 542-3 in 37 L. Ed.):

"There are many matters upon which different states may agree that can in no respect concern the United States. If the bordering line of two states should cross some malarious and disease producing district, there could be no possible reason, on any conceivable public grounds, to obtain the consent of Congress for the bordering states to agree to unite in draining the district, and thus remove the cause of the disease."

The Court held that compacts or agreements which do not affect the political influence of either state or the Federal government are not within the prohibition.

In *Wharton v. Wise*, 153 U.S. 155, the court dealt with a compact between Virginia and Maryland to regulate oyster fishing in boundary waters. It quoted and followed the decision in *Virginia v. Tennessee* and held that such a compact did not require approval of Congress for the reasons stated in the *Virginia-Tennessee* case.

The *Wharton* decision (pp. 370-3) states that:

"Various compacts were entered into between Pennsylvania and New Jersey and between Pennsylvania and Virginia, in reference to boundaries between them, and the rights of fishery in their waters, and to titles to land in their respective states, without the consent of Congress, which indicated that such consent was not deemed essential to their validity."

The compacts between Pennsylvania and New Jersey above referred to are found in Revised Statutes sections 52:28-23 to 52:28-32, and were adopted as the present one was, without Congressional approval. They have been in force, and respected, throughout the entire history of the State of New Jersey.

When those compacts were made Article VI of the Article's of Confederation, provided as follows:--

"No State without the consent of the United States shall ... enter into any agreement, alliance or treaty with any ... state; No two or more States shall enter into any treaty confederation or alliance whatever between them, without the consent of the United States in Congress assembled"

(Title Constitution, N.J. Code Annotated, P. 19).

In *Dixie Wholesale Grocery, Inc. v. Marlin*, 278 Ky. 705, (Cert. denied, 308 U.S. 609; 84 L. Ed. 509) the court held that section 10 applied only to political compacts, alliances and treaties. Under the agreement in that case one state agreed to supply another state with certain sales figures to aid in enforcing sales taxes. The court held that a mere reading of this section (10) shows conclusively that it has no application to the reciprocal agreement under attack.

In *McHenry County v. Brady*, 163 N.W. 540 (N.D. 1917) there was an agreement to drain a certain river. The court said that the prohibition applies only to a treaty of alliance or some joint scheme of commercial or industrial enterprise, and does not apply when one state wishes to agree with an adjoining state to erect a levee in the latter state. Other illustrations of state agreements which do not require congressional consent are given. The prohibition applies only to such an agreement or compact as is in its nature political, and does not apply to the drainage agreement in question.

The rule is stated in 59 Corpus Juris, p. 37, as follows:

"This provision does not apply to every possible agreement or compact between two states, but only to such as might tend to alter the political power of the states affected, and thus encroach on, or interfere with, the supremacy of the United States; agreements incapable of operating thus may be made by the states without the consent of congress."

On either basis of the above argument, it is clear that this defense is frivolous, or sham, according to the view taken, and invalid on its merits, and should be stricken out.



INTERSTATE COMMISSION
on the Delaware River Basin

BROAD STREET STATION BUILDING • PHILADELPHIA • PENNSYLVANIA

April 15, 1943

Hon. David Young, 3rd.
House of Representatives
Trenton, New Jersey

Dear Mr. Young:

As you know, the Interstate Commission on the Delaware River Basin was organized in 1936 as a joint governmental agency of the states of New York, New Jersey, Pennsylvania and Delaware through which these states cooperatively could formulate policies and programs for the development and conservation of the natural resources of the Delaware River.

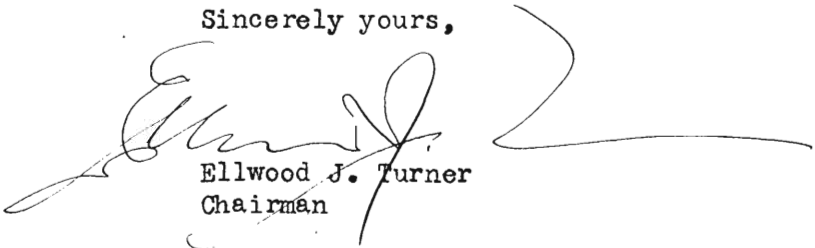
One of the Commission's first objectives was to devise a plan for the correction and control of pollution in the interstate Delaware River. The states, through the Commission, decided this could be accomplished most effectively by attacking the pollution problem within their respective jurisdictions concurrently, and on the basis of standards to which they mutually agreed. To effectuate this policy, they adopted reciprocal legislation.

In the administration of this program, the State Department of Health of New Jersey issued orders to the Cities of Camden and Gloucester to cease pollution. These two municipalities now are contesting the authority of the Department of Health to act under the Incodel reciprocal legislation, claiming it to be unconstitutional because it does not carry the consent and approval of Congress.

Entering the case, amicus curiae, the Commission through its solicitors has filed a Brief in which the question of the right of states to enact and operate under reciprocal legislative agreements is covered comprehensively.

Believing you are interested, we are sending you a copy of that part of the Brief which relates to this question. We also have a limited supply of printed copies of the complete Brief. We shall be glad to furnish a copy to you upon request if then available.

Sincerely yours,



Ellwood J. Turner
Chairman

EJT
NNM