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8 JAN 1981

MEMORANDUM FOR NEIL HAUGERUD
Chairman
Upper Mississippi River Basin Commission

Re: Voting Procedures for the Upper
Mississippi River Basin Commission

This responds to the request of November 10, 1980, for our opinion concerning the interpretation by the Upper Mississippi River Basin Commission ("Commission") of its statutorily-prescribed voting procedure. We conclude that the Commission must agree to the Master Plan by a vote of two-thirds of the members present at a meeting which is attended by a quorum. A requirement that this two-thirds be made up of a majority both of the federal and the state representatives is improper.

The Commission has seventeen members: eleven, including the Chairman, from the federal government and six from state governments. 1/ The Commission normally acts as an advisor to the Water Resources Council, 42 U.S.C. § 1962a, and arrives at a decision by consensus. 42 U.S.C. § 1962b-2(d). In 1978, however, Congress ordered the Commission to prepare a Master Plan for the management of the Upper Mississippi River System. Pub. L. No. 95-502, title I, § 101, 42 U.S.C. § 1962 b-3 note (Supp. III 1979). "All decisions of the Commission related to the master plan shall be made by a two-thirds majority vote of the Commission." Id., § 101(a).

1/ Exec. Order No. 11659, 3 C.F.R. 695 (1971-75 Comp.), reprinted in 42 U.S.C. § 1962b note, as amended by Exec. Order No. 11737, 3 C.F.R. 797 (1971-75 Comp.), reprinted in 42 U.S.C. § 1962b note and Exec. Order No. 12038, 43 Fed. Reg. 4957 (1978), reprinted in 42 U.S.C. § 1962b note (Supp. II 1978).

It is our opinion that the two-thirds majority requirement should be measured against a quorum ^{2/} of the Commission, rather than against the Commission's total membership. "The almost universally accepted common-law rule is . . . [that] in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body." FTC v. Flothill Products, Inc., 389 U.S. 179, 183 (1967). The federal courts have found that the same rule applies when the statute requires a two-thirds majority -- the majority is measured against the quorum, not the entire membership. Rhode Island v. Palmer, 253 U.S. 350, 386 (1920) (interpreting U.S. Const. Art. I, § 7, cl. 2); Missouri Pacific Ry. Co. v. Kansas, 248 U.S. 276, 280-85 (1919) (same); Jebbia v. United States, 37 F.2d 343, 343-44 (4th Cir.), cert. denied, 281 U.S. 747 (1930) (same); Ohio v. Cox, 257 F. 334, 346-50 (S.D. Ohio 1919) (same). See also Louisiana v. Poole, 243 So.2d 539, 549 (Ct. App. La. 1970); Mix v. City of New Orleans, 126 So.2d 1, 5-6 (Ct. App. La. 1960); Ellison v. City of Haverhill, 35 N.E. 2d 202 (Mass. 1941); 4 E. McQuillan, Municipal Corporations § 13.31c (3d rev. ed. 1979). As a general rule, courts have required language referring to "all" or "every" member before they will measure a majority against the total membership. Mann v. Key, 345 So.2d 293, 295-6 (Ala. 1977); Ezell v. City of Pascaguola, 240 So.2d 700, 702-4 (Miss. 1970); McQuillan, *supra*, § 13.31a. But see State v. Torrence, 310 S.W. 2d 425 (Tenn. 1958); Smithtown v. Howell, 292 N.E. 2d 10, 16 (Ct. App. N.Y. 1972).

The Commission has adopted a by-law interpreting § 101 which states, in part:

In all decisions of the Commission relating to the Master Plan, every reasonable effort shall be made to

2/ Section IV of the Commission's By-Laws states:

A quorum for the conduct of business at any regular or special meeting of the Commission shall consist of a majority of the State members or their alternatives and a majority of the Federal members, or their alternatives.

A majority of the state representatives is four, of the federal representatives, six, for a quorum of ten.

arrive at a consensus of all members. Failing to reach a consensus, decisions are to be made by a majority of the State members and a majority of the Federal members, but not less than two-thirds of the total Commission membership.

We believe that this by-law conflicts with the statute.

First, the requirement that each decision must be made by a majority of both state and federal members adds a condition that the statute does not contemplate. The two-thirds vote must, under the by-law, consist of at least four states, rather than of any possible combination of state and federal members. For example, at a meeting with thirteen members present, three states would be unable to vote with nine federal agencies to produce a "two-thirds majority vote of the Commission", even though the twelve votes would be two-thirds of both the quorum present and the total membership of the commission. It appears to us that the by-law purports to amend the statute, by giving the states a veto-power which Congress did not intend. While desirous of obtaining the views of the states and insuring their cooperation, see, e.g., 42 U.S.C. § 1962b-2(d), Congress gave federal members the larger number of seats, Exec. Order No. 11569, supra, n.1, § 3, and a dominant role through the Chairman. See, e.g., 42 U.S.C. §§ 1962b-2(d), -4(b), (d), (e). There is no indication that Congress wished to insure that a majority of the states agreed with each decision. Rather, disagreements are made part of the record, 42 U.S.C. § 1962b-2(d), so that the states' position can be fully reviewed by Congress. Giving a majority of the states a veto would, we think, subvert Congress' intent.

Second, if, as we believe, Congress intended the two-thirds majority to be measured against the Commission's quorum, the by-law also frustrates that intention. The by-law requires a decision by twelve, two-thirds of the total membership rather than seven, two-thirds of the Commission's quorum. Requiring more than two-thirds of a quorum violates the statute.

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