LEGAL ISSUES OF WATER ALLOCATION FOR THE APALACHICOLA-CHATTAHOOCHEE-FLINT RIVER BASIN

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INTRODUCTION

Allocations for consumptive use of Chattahoochee River waters have led to a myriad of legal issues. Federal and state statutes and case law are conflicitng. Complicating the matter are political considerations among the three states involved. The need for identification of the issues has been stimulated by the Corps of Engineers' proposal to divert a portion of the Buford project waters from non-consumptive use in hydropower generation to consumptive use as municipal water supply. The implementation of this proposal will arguably have a significant impact on downstream users. Three questions evolve from the proposal. First, is there an ascertainable limit to consumptive use of Chattahoochee waters and is that limit being approached? Second, what political entities have the power, or the right, to allocate consumptive use of the Chattahoochee River waters? Finally, what are the mechanisms for such allocation and which mechanism will provide equitable allocation amongst the various users? This paper concentrates on answering the last two questions.

FEDERAL ALLOCATION

The U.S. Congress has exerted federal authority over the Chattahoochee River. Beginning in 1945, Congress authorized development of the river for navigation, flood control and hydropower purposes. Congress authorized, or at least acquiesced to, providing water supply to Atlanta, Georgia when it authorized the Buford project in 1945. The Dam was substantially completed in 1957. In 1972 Congress funded a study of an effective means of future water supply for Atlanta, resulting in the 1988 Corps reallocation proposal that is the focus of the present dispute.

The U.S. Army Corps of Engineers has proposed a Chattahoochee River water allocation policy that is at the heart of the current controversy. The Corps itself, however, does not have the power to direct the proposed allocation. Rather it is responding to U.S. Congressional statutes which permit the changes to authorized project purposes of existing federal projects to include municipal water supply (and other) purposes. The statute clearly indicates that such reallocation will occur only in "cooperation with States and local interests" and only when the federal project purposes are not "seriously affected." The Corps may reallocate a certain amount of total storage capacity to water supply purposes without further approval by Congress, but the Corps proposal for the Chattahoochee exceeds that amount. Significantly, the wording of this Statute suggests that Congress intended to leave general responsibility and authority of consumptive water allocation to the states themselves. This is in keeping with Congress' traditional deference to state water law.

Deference to state water law does not mean however that Congress has no Constitutional power to allocate such waters, especially state waters that can be considered navigable. Clearly the U.S. Congress has the power to regulate the allocation of navigable waters such as the Chattahoochee. The only question concerns the extent of that power.

The right of the Federal Government to regulate matters between states usually arises under in Article I, §8 of the Constitution. This article specifically provides the U.S. Congress with power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Known as the "Commerce Clause," this section provides extensive power to the Federal Government to regulate matters involving the states, both individually and collectively. It has formed the basis for most of the Federal power to manage and regulate water resources.

Early in the Country's history, navigable waters were identified as an integral part of interstate commerce. By 1899, the U.S. Supreme Court had defined Congress' power over navigable waters noting that the Federal Government had "the right to take all needed measures to preserve the navigability of the navigable water courses of the country even against state action." [U.S. v. Rio Grande D&I Co., 174 U.S. 690 (1899)] At the very least, this ruling establishes the power of the Federal Government to restrain state withdrawal which affects the navigability of a water course. In 1940, the Court expanded this power when it stated that "it cannot properly be said that the constitutional power of the

United States over its waters is limited to control for navigation ... In truth the authority of the United States is the regulation of commerce on its waters ... The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted to the Federal Government." [U .S. v. Appalachian EPC, 311 U.S. 377 (1940)]

This ruling can be clearly interpreted as authorizing the Federal Government to do more than simply restrain state water allocation that interferes with navigability. Rather the ruling can be interpreted as empowering the Federal Government to actively establish and direct the "when and where" of water allocation. As indicated by the Supreme Court, these rulings apply throughout the country regardless of the underlying theory of state water law and are not restricted only to areas of water scarcity.

In areas of water scarcity, the Court has extended the rule even farther. It has identified water, specifically groundwater, as an article of interstate commerce and, as such, subject to the same extensive regulation as any other item of interstate commerce. [Sporhase v Nebraska, 458 U.S. 941 (1982)] This expansive definition has not been applied to surface waters. However, it is not a major extension of the concept to include surface waters such as the Chattahoocheee River when the "safe yield" of the River is being approached and comprehensive regional water resources management is required.

Two factors inhibit implementation of the proposal in the near future however. The first restraint concerns the fact that the competing state political and economic interests make Congressional authorization difficult. A second limitation exists with possible competing federal interests involved in the allocation. The Corps and the Department of Energy apparently take contrary views regarding the economic impact of the proposal on hydropower generation. Another impediment is the delay that may develop as the result of the requirements of the National Environmental Policy Act (NEPA).

NEPA requires that federal agencies include environmental damage assessment in the decision-making process. When any major Federal action is proposed, the sponsoring agency must analyze the effect of the proposal on the environment and balance the benefits of the proposed action against any adverse effects. The agency must provide a report on its analysis and conclusion. In accordance with NEPA requirements the Corps has made the assessment of the environmental impact of its proposal and published its "Finding of No Significant Impact" (FONSI) with its draft proposal. This FONSI is subject to challenge by forces opposing the proposal however. Its appears the environmental analysis may have been limited to the various purposes authorized by Congress for projects in the ACF. It may be claimed that the Corps has failed to consider the impact of (possibly) reduced water supply to municipalities and industries downstream of Atlanta. The downstream users may bring an action in federal court, claiming the Corps has not met the NEPA requirements. While the courts cannot alter the substantive findings of the Corps analysis, it can require the Corps to make more detailed study of the environmental effects of the proposal. This could further delay the implementation of the proposal, perhaps for years.

The Atlanta Regional Commission has indicated that time is of the essence and that, if the water supply is not made available soon, Atlanta growth will be inhibited. From Atlanta's perspective it may be preferable to develop other alternatives to the Corps proposal to ensure adequate water supply is obtained in an expeditious manner.

STATE ALLOCATION

Traditionally, water allocation has been controlled by the water laws of the state jurisdiction through which the water course ran. Most disputes involve diversions by upstream users that allegedly harm downstream users and a significant body of law has developed addressing this issue. In a riparian water law jurisdiction such as Alabama, the rule is usually based on the "reasonable use" of water by the upstream user. In jurisdictions such as Georgia and Florida, large withdrawals are controlled by the state; and upstream-downstream controversies may be regulated soley according to the state's best interest. Since political boundaries generally do not follow watershed boundaries, however, conflicts arise that cannot be solved by applying specific state water laws; and the states must settle their differences through interstate agreement.

Article 1, §10 of the U.S. Constitution establishes the framework for interstate agreement on water allocation. Section 10 establishes the right of states to enter into agreements, or compacts, with each other to resolve disputes. Normally such an agreement must be ratified by the U.S. Congress, establishing the Compact as federal law. The Compact can therefore preempt state law. Thus Florida and Georgia can agree on an allocation scheme acceptable to both states. Once the compact has been established, the states may not arbitrarily withdraw from it and all state citizens are bound by the compact. As federal law, the Compact is immune to most legal challenges, to include a challenge that it interferes with interstate commerce.

Allocation of the Chattahoochee River waters between Alabama and Georgia is complicated because of the location of the border between the states and the issue of who owns and controls the water. When Georgia ceded its western portions beyond the Chattahoochee to the United States, before Alabama became a state, the Georgia border was established as the western bank of the Chattahoochee. This border issue has been upheld by the U.S. Supreme Court. [Howard v. Ingersoll, 54 U.S.

381 (1851); Alabama v. Georgia, 64 U.S. 505 (1859)] As a consequence, Georgia maintains that the waters of the Chattahoochee belong to Georgia exclusively to the Florida line. The Georgia view appears to be that withdrawal of water from the Chattahoochee by Alabama users must conform to the laws of Georgia and that Chattahoochee water withdrawal is solely within the Georgia state authority. Some support for this view does exist in the case law. However, a contrary view can be argued since a navigable waterway is involved and the Supreme Court holds that conflicting rights of states cannot be resolved under state law.

The attraction of a state Compact is that the states can directly influence water allocation and that the Compact can establish a truly efficient regional resource management scheme to maximize beneficial use of the water. The Compact mechanism can do this without the constraints of cumbersome federal restrictions.

JUDICIAL ALLOCATION

If neither of the above mechanisms are effective, the interstate conflict may be resolved in court. Bypassing both the Executive and Congressional branches, any state in the Union can bring an interstate conflict directly to the U.S. Supreme Court for resolution. The Court has traditionally applied the doctrine of "Equitable Apportionment" to interstate water disputes. This doctrine is based on the proposition that equality of right does not mean equality of apportionment. Rather, the basis for apportionment is similar to the concept of "reasonable efficient use of water." [Colorado v. New Mexico, 459 U.S. 176 (1982)] The Court weighs the harm and benefits to competing states but recognizes "that the equities supporting the protection of existing economies will usually be compelling." That is not to say however that future use in one state may not justify impact on an existing use in another state. Reasonable use would include reasonable conservation measures to prevent waste.

The Court's judgement settles the issue unless Congress intervenes and passes a law to resolve the conflict. The Supreme Court does not favor hearing such a suit, however, preferring that states enter into some sort of agreement or Compact. However, judicial allocation does not appear to be a viable resolution of the controversy from either Alabama's or Florida's perspective. Georgia's present economic use of the Chattahoochee River arguably lays claim to "better use."

CONCLUSIONS

A review of the legal issues in the Chattahoochee River water allocation controversy reveals that several mechanisms exist to establish a consumptive water allocation scheme The review reveals current and potentially significant water resources concerns that demand regional planning. Until now, the seeming abundance of water in the southeast allowed for segmented water use. The present allocation dispute over the Chattahoochee has highlighted the limitations of the existing Chattahoochee River basin and demonstrates that, as in the West, basin-wide planning considering all present and future interests is necessary.

APPENDIX-REFERENCES:

(1) Atlanta Regional Commission. Atlanta Region Water Resources Data Summary, 1987.

(2) Alabama Geological Survey. Use of Water in Alabama, 1980, IS 59,1982.

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(4) Georgia Geological Survey. Water Use in Georgia by County for 1987, Information Circular 85, 1990.

(5) U.S. Army Corps of Engineers, Mobile District. Definite Project Report on Buford Dam, 1949.

(6) U.S. Army Corps of Engineers, Mobile District. Post Authorization Change Notification for the Reallocation of Storage From Hydropower To Water Supply At Lake Lanier, Georgia (DRAFT), Oct. 1989.

(7) U.S. Army Corps of Engineers, Savannah District. Lake Lanier Reregulation Dam: DM, Oct. 1988.

(8) U.S. Geological Survey. National Water Summary: 1987, Water Supply Paper 2350, 1990.

(9) State Law List: Constitution of Alabama of 1901; OCA §§9 and 33; Fla. Laws 1957, 57-380 §11; Fla. Statutes 1989, Title XXVIII, Ch 373; OCGA, §§ 12, 44, 51.

(10) Case Law List: 22 US 1; 54 US 381; 64 U.S. 505; 146 US 387; 148 US 503; 174 US 690; 206 US 46; 229 US 53; 237 US 251; 282 US 660; 283 US 336; 283 US 423; 304 US 92; 311 US 377; 313 US 508; 325 US 589; 328 US 152; 328 US 408; 339 US 725; 341 US 22; 363 US 229; 363 US 229; 373 US 546; 373 US 546; 373 US 83 405 US 727; 412 US 669; 426 US 833; 438 US 645; 451 US 630; 452 US 264; 452 US 314; 452 US 314; 458 US 941; 459 US 176; 460 US 766; 462 US 554; 467 US 310; 469 US 528; 731 F2d 403; 449 F2d 1109; 683 F2d 752; 470 F2d 289 ; 370 FS 1044; 590 FS 293; 403 So. 2d 177; 80 So. 463, 202 Ala. 381; 17 So.2d 674, 245 Ala. 481; 6 So. 78, 86 Ala. 587; 245 Ga. 403, 265 SE2d 584.