

## MEMORANDUM

**TO:** SC/GA Subcommittee of the Water Law Review Committee

**FROM:** Mullen Taylor, Law Clerk

**DATE:** October 13, 2003

**SUBJECT:** Available Options to Resolve Interstate Water Disputes

The Chairman of the SC/GA Subcommittee asked for a brief summary of the various means by which interstate water disputes are resolved in the United States. Water disputes have been addressed through congressional apportionment, judicial apportionment, and interstate compacts. A brief description of each is provided below.

### **Congressional Apportionment**

This method apportions water legislatively, either by Congress directly deciding allocation, or by Congressional delegation to an executive agency to apportion. Congress derives its power to legislate water allocation through the Commerce Clause. Water is considered an article of commerce. Congress has apportioned interstate water on two occasions. The first instance came as an unanticipated result of the Boulder Canyon Project Act of 1928, which the Supreme Court later held to be a legislative apportionment of the Colorado River basin. The second instance was an intentional effort to resolve a long-standing dispute between California and Nevada through enactment of the Truckee-Carson-Pyramid Lake Water Rights Settlements Act in 1990.

The benefit of Congressional apportionment is that the settlement is elevated to the form of federal legislation, which benefits from the Supremacy Clause of the Constitution. A federal statute (along with the Constitution and treaties) are the supreme law of the land, generally taking precedence over state laws addressing the same issue. Thus, Congressional apportionment offers uniformity because it likely supercedes state riparian law. However, states are generally reluctant to hand over their water allocation destinies to Congress, for fear of losing control. And Congress may be reluctant to force a resolution upon states.

Even so, where rivers are increasingly becoming “federalized,” Congressional apportionment may become more frequent. For example, the Mississippi River is subject to the control of the Corps of Engineers, Bureau of Reclamation, the Western Area Power Administration, the Fish and Wildlife Service, the Environmental Protection Agency, Bureau of Land Management, Department of the Interior, and Bureau of Indian Affairs. These federal agencies’ roles all affect interstate water use, yet have conflicting statutory mandates. Under this situation, Congress is the only entity with the authority to reconcile these conflicts. The Savannah River, with the Corps, FERC, EPA, DOE (Department of Energy via SRS), and FWS all playing a role in its use or management, may be a candidate of Congressional apportionment.

## **Judicial Apportionment**

States may choose to invoke the U.S. Supreme Court's original jurisdiction over interstate disputes to resolve water disputes. The Court's original jurisdiction is exercised cautiously and on a discretionary basis. Therefore, the Court has established a high standard for states to successfully invoke original jurisdiction. A state petitioning the Court must show that the water dispute is of "serious magnitude" supported by "clear and convincing" evidence. If the petitioning state meets this burden, the Court applies the principle of equitable apportionment, where the Court balances the equities between the states. The analysis includes consideration of each state's water law. However, state riparian law concerns itself with private individual rights, and equitable apportionment concerns itself with equity between states as equal sovereigns. The difference in context between the individual private right and equality of right between states generally results in state riparian law having little effect on equitable apportionment. Indeed, in the only two cases involving riparian states, the Court either refused to apply riparian law, *Connecticut v. Massachusetts*, 282 U.S. 660 (1931), or restricted its application, *New Jersey v. New York*, 282 U.S. 336 (1931). Other factors considered are physical and climatic conditions, water consumption, character and rate of stream flows, extent of established uses, availability of storage water, efficiency of use, comparison of harms and benefits, and water conservation.

In the Court's most recent case of equitable apportionment, the Court raised the bar on what is considered "clear and convincing evidence." As a result, the number of equitable apportionment cases may decrease, simply because states cannot afford to wait until its injury reaches the level of certainty that the Court requires. Other drawbacks to Supreme Court litigation are its expense and lengthy duration. Faced with such obstacles, states often pursue settlement by interstate compact.

## **Interstate Compact**

Interstate compacts are seen as the most preferable way to solve interstate disputes. Compacts are contracts between the states. Most are adopted legislatively by each state's general assembly and ratified by Congress. The federal government may also be a party to the compact. Congressional approval turns the compact into federal law. States can opt for a more informal approach by fashioning an interstate compact without Congressional ratification. However, because of the impact of interstate water allocation upon federal interests of commerce and navigation, Congressional approval is generally the norm. Compacts generally create mechanisms by which water allocation is determined. The compact may require a certain amount of stream flow to a downstream state and limit diversions adversely affecting stream flow. The stream flow granted to a state may be measured by a set quantity per year, or based upon an annual average. These measurement formulas must be based on the best data available in order to assure fair results. Compacts also as a general rule protect existing water uses or rights, including water used for fish and wildlife habitat, navigation, hydropower, and maintenance of water quality.

Water compacts provide states with the greatest degree of control over how water will be allocated. Compacts generally establish an agency authorized to implement the substance of the compact. Although states can delegate its power to the compact agency, states have been unwilling to delegate any significant authority for fear of losing control of the agency. Ironically, by not delegating enough power to the agency in the compact itself, states are more

vulnerable to the prospect that their water problems will be subject to federal programs that may preempt state authority to resolve water issues.

Compacts are also time consuming and expensive. Negotiations may extend for years and ultimately fail, as seen in the unsuccessful attempts among Georgia, Florida and Alabama to allocate water of the Apalachicola-Chattahoochee-Flint River basin. Enforcement of a compact also presents problems. Conflict resolution procedures are often included in the compact, but litigation is generally not precluded. Disputes arising from enforcement are also heard by the U.S. Supreme Court. The Court will not relieve a state from obligations imposed by a compact. Instead, the Court determines whether a breach of the contract occurred and what the remedy will be. Remedies for breach of a compact are the same as any other contract, and include specific performance or money damages.