

THE TRI-STATE COMPACT: FALLING WATERS AND FADING OPPORTUNITIES

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INTRODUCTION

In today's rapidly expanding global marketplace, water is indeed a precious commodity. Water is absolutely critical in many phases of life; it provides life to crops, an ecosystem to aquatic life, an air purification system, it satisfies people's needs for domestic use, drinking, recreation, and beauty.¹ However, for this primary natural resource to be useful, it must be available to people in sufficient quantity and quality, be located at the right place at the right time, and be cost efficient.² In the United States, water rights disputes are common in the arid West, where the supply of water is simply not plentiful when compared to the vast area of land; in fact, the western water rights doctrine dates back to the Gold Rush days of the mid 1800's.³ The Southeastern United States, however, with its humid climate, lush greenery, and plentiful rainfall, has always had an abundant

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1. See DAVID H. GETCHES, *WATER LAW IN A NUTSHELL* 1 (2d ed. 1990).

2. See WILLIAM GOLDFARB, *WATER LAW* 8 (2d ed. 1988).

3. See Larry Copeland, *Water Wars Loom Amid Southern Boom*, USA TODAY, Nov. 24, 1998, at 5A.

water supply for its needs.⁴ Therefore, the region has been mostly immune from the 'water wars' that have plagued the west. With such a bounty of water, the Southeast seems an unlikely locale for a water war. But the sprawling development and booming industry in and around the Atlanta, Georgia, area has sparked a three state dispute between Alabama, Florida, and Georgia over water rights in the Chattahoochee River.⁵ Indeed, a water war has begun in the Southeast, and the first battle is over the "Hootch."⁶

I. THE DISPUTE: BACKGROUND AND HISTORY

A. *The Chattahoochee River as a Water Resource*

The Chattahoochee River Basin is one of the primary water resources of the Southeast. It begins with the headwaters of the Chattahoochee River in the north Georgia mountains and flows southwesterly over 400 miles where it intersects with the Flint River near the Alabama and Florida borders. There it becomes the Apalachicola River, which continues to run south through the Florida panhandle before emptying into the Gulf of Mexico at Apalachicola Bay.⁷ The river's flow passes the burgeoning city of Atlanta and continues on to form the southern half of the Georgia-Alabama border. The water of the Chattahoochee River is critically important to communities throughout the region as a primary source of drinking water, hydroelectric power, and local impoundment, as well as industrial transportation, recreation and many other uses.⁸

The Chattahoochee is especially important to north Georgia, specifically, the Atlanta area. As the river runs southwest, it feeds Lake Sidney Lanier, located just outside of Atlanta. Lake Lanier is the largest source of water for the metro-Atlanta area, providing approximately 70% of the city's drinking water.⁹ Atlanta depends heavily upon the Chattahoochee for its very survival. However, Atlanta's geographical location creates a problem of its own. Since the city is located near the headwaters of the Chattahoochee, the natural flow is smaller there; this is unfortunate because the greatest

4. See *id.*

5. See *id.*

6. Locals often refer to the Chattahoochee River simply as the "Hootch." See *id.*

7. See GUY J. KELNHOFER, JR., METROPOLITAN PLANNING AND RIVER BASIN PLANNING: SOME INTERRELATIONSHIPS 30 (1968).

8. See *id.* at 31-43.

9. See *River Rivalry*, THE ECONOMIST, Mar. 30, 1991, at 26.

demand as a water resource is placed upon the river before it can really accommodate it.¹⁰

Furthermore, a remarkable 45% of Georgia's entire population is concentrated in the Atlanta area, which only intensifies the pressure put on the Chattahoochee as a water resource.¹¹ With a population of approximately 3.5 million residents and the boom of industrial and residential development in and around the Atlanta area, there is an incredible need for water.¹² Also, along with such rampant growth comes the corresponding increase in population. According to 1990 estimates, Atlanta should expect approximately 800,000 new residents as people move to the city over the course of the next twenty years.¹³ As of 1997, the population was already approaching the year 2000 estimates, so clearly the growth is occurring faster than expected.¹⁴ Atlanta's industrial growth and urban sprawl have put a great deal of strain upon the Chattahoochee River as a water resource because of the enormous amounts of water required to sustain such a localized boom.

Additionally, downstream communities in both Alabama and Florida need the Chattahoochee's water. Southeastern Alabama relies upon the Chattahoochee for much of its water supply for drinking, industry, agriculture, and recreation.¹⁵ This water supply is critical for Alabama to sustain its own future growth, albeit at a much slower pace than Atlanta's. On the other hand, Florida relies upon the waters of the Chattahoochee to fertilize the rich oyster beds found in Apalachicola Bay.¹⁶ Florida has a \$70 million per year oyster industry,¹⁷ 90% of which comes from Apalachicola Bay.¹⁸ The fresh water from the Chattahoochee (which becomes the

10. See Melanie Peeples, *NPR's Morning Edition: Battle for Water Rights* (NPR radio broadcast, Oct. 9, 1998), available in 1998 WL 3309037.

11. See *id.* Additionally, "[t]he Chattahoochee is the smallest river in the country serving as the primary water source for a major metropolitan area." Jay Bookman, *My Opinion: Water, Water Everywhere: But is it Pure?*, ATLANTA J. & CONST., Apr. 12, 1999, at E3.

12. See Peeples, *supra* note 10.

13. See Greg Jaffe, *Water Deal May Settle Old Dispute*, WALL ST. J., Sept. 11, 1996, at F1.

14. See Charles Seabrook, *Georgia's Growth Muddies Water Sharing Pact - State's Partners Irked: Population Estimates for Allocating Rivers' Largess are Already Exceeded*, ATLANTA J. & CONST., Apr. 25, 1998, at D5. In fact, "[m]etro Atlanta is the fastest growing metro region in the country." Bookman, *supra* note 11.

15. See Jim Nesbitt, *Water Wars Move South, East as Cities Gulp Supplies*, NEW ORLEANS TIMES-PICAYUNE, May 24, 1998, at A25.

16. See *id.*

17. See Jonathan Kerr, *Southeastern States form Interstate Compact to Resolve Water Disputes*, WEST'S LEGAL NEWS, Sept. 18, 1996, available in 1996 WL 524406.

18. See Peeples, *supra* note 10. Apalachicola Bay also comprises about 10% of the *national* oyster industry. See *id.*

Apalachicola River in Florida) is necessary to flush crucial nutrients from the surrounding Florida wetlands into the river and bay, which stabilizes the salinity of the bay water at the optimum level for oyster bed cultivation.¹⁹ The fresh water also helps to nurture many other juvenile seafood species found in the bay that are important to Florida's economy, such as several species of fin fish, blue crab, shrimp, and scallops.²⁰ Finally, of difficult measurability, are demands on the Chattahoochee to furnish the fresh water needs of both South Georgia farmers and the planned development of thousands of acres of pulp wood forests in the northwest Florida panhandle, just north of Apalachicola Bay.²¹ With Georgia, Alabama, and Florida all placing significant demands upon the same water resource, the Chattahoochee River is simply becoming overburdened. If all three states intend to continue using the Chattahoochee as a fresh water resource in the years to come, some limits may need to be set to ensure its future sustainability.

B. History of the Water Rights Dispute

The dispute between Alabama, Florida, and Georgia over the Chattahoochee River began in the late 1980's when Alabama realized the upstream demands placed on the river by Georgia's robust growth could detrimentally affect Alabama's own ability to use the Chattahoochee as a source of fresh water. The problems first arose in 1986, when Georgia weathered an extreme drought.²² The condition forced Atlanta to implement water rationing; it dropped the flow of the Chattahoochee to a level that threatened barge traffic; and it dropped the level of Lake Lanier so low that its dam could not produce normal levels of electricity for the city of Atlanta.²³ In 1989, to negate the effects of the drought on Atlanta's fresh water needs, to prepare for the influx of an estimated 800,000 new residents over the next twenty years, and to better protect itself from future droughts, the city of Atlanta and the U.S. Army Corps of Engineers announced a plan to withdraw an additional 529 million gallons of water *per day* from the Chattahoochee River as it flowed through Lake Lanier.²⁴

19. See Nesbitt, *supra* note 15.

20. See Peebles, *supra* note 10.

21. See Nesbitt, *supra* note 15.

22. See Charles Seabrook, *Atlanta to Get More Water From Lanier*, ATLANTA J. & CONST., June 10, 1988, at A1.

23. See *River Rivalry*, *supra* note 9; Charles Seabrook, *Water Wars Take Shape Between Ga., Neighbors*, ATLANTA J. & CONST., Nov. 27, 1989, at A1.

24. See Jaffe, *supra* note 13; *River Rivalry*, *supra* note 9.

This withdrawal amounted to a 50% increase over then current withdrawal levels.²⁵ Additionally, the plan provided for the creation of several new reservoirs that would serve as water supplies for north Atlanta suburbs and other areas throughout north Georgia.²⁶

The response from Alabama was not long in coming. In 1990, Alabama filed suit in federal court against the U.S. Army Corps of Engineers seeking an injunction to prevent the implementation of Atlanta's withdrawal plan.²⁷ Shortly thereafter, Florida joined the suit to protect its own interest in maintaining the flows of the Chattahoochee.²⁸ Alabama and Florida officials claimed that the Corps' plan threatened the water supply necessary to ensure their own expected growth. Specifically, Alabama claimed that such drastic water withdrawal upstream would curtail "badly needed economic development" throughout southeast Alabama;²⁹ it needed the river flow primarily for farming, industry, hydropower, and barge navigation. Florida claimed that the additional withdrawals upstream would disrupt the natural flow and cause significant damage to its multi-million dollar seafood and oyster industry.³⁰ Additionally, Florida was concerned about losing the water source it needed for the potential future residential or commercial development of thousands of acres of pulp wood forests in the panhandle region.³¹

Water *quantity* was not the only concern for Alabama and Florida. Officials from both states claimed that the additional withdrawals upstream would cause further deterioration of the water *quality* downstream.³² Since Georgia's already polluted water runs downstream to Alabama and Florida, increased withdrawals in north Georgia would decrease the water flow to Alabama and Florida, which would cause the pollutants to be less diluted upon reaching those downstream states.³³ In addition to maintaining a *sufficient* water flow all along the Chattahoochee, both downstream states wanted to ensure it remained a *clean* water flow.

25. See Jaffe, *supra* note 13.

26. See Seabrook, *supra* note 23.

27. See Carrie Teegardin, *The Shot Heard Round the Hooch*, ATLANTA J. & CONST., June 29, 1990, at A1.

28. See Mike Williams, *Florida Seafood Workers Fear Being Left High, Dry in Water War*, ATLANTA J. & CONST., Aug. 9, 1991, at F4.

29. See *id.*

30. See *id.*

31. See Nesbitt, *supra* note 15.

32. See Seabrook, *supra* note 23.

33. See *id.*

Before the dispute escalated into a court battle, the Governors of all three states signed an agreement on January 3, 1992, that moved the dispute from the courtroom to the negotiating table.³⁴ The agreement was very important because it suspended the legal action, it forced the states to support a five year, \$15 million U.S. Army Corps of Engineers comprehensive study of the current and future water requirements of the three states, it froze water usage levels, and it called for the states to negotiate and share information with one another.³⁵ During the 1996-1997 legislative session, in anticipation of the study's completion, all three states introduced to their state legislatures a bill for an interstate water compact that would create a committee made up of one representative from each state (appointed by the state's Governor) plus one federal representative (appointed by the President) to analyze the results of the comprehensive study and negotiate each state's allocation accordingly.³⁶ The compact was approved by all three states and subsequently by the United States Congress and President Clinton.³⁷

II. TOWARD A SOLUTION

In order to understand this type of a resolution, two preliminary matters warrant discussion. First, the different water rights doctrines found in the United States must be explored, fostering a better understanding of the different types of water rights claims of each state involved in the present dispute. Next, the various options for a solution to the water rights dispute must be examined to reveal the best option for bringing the dispute to a resolution.

A. *Water Rights Doctrines*

Water is somewhat of a unique natural resource. It is migratory, it has a natural flow that often crosses many different boundaries and landscapes, and it is relied upon by both upstream and downstream users. This migratory nature has made it difficult to assign property rights in the flow of water. Across the United States, three

34. See Tom Watson, *Pact Eases Water War in Southeast; 3-State Dispute on River Supply Has Threatened Atlanta's Growth*, WASH. POST, Jan. 4, 1992, at A8.

35. See *id.*; see also Jay Reeves, *States Sign a Cease-fire in Water War*, MACON TELEGRAPH, Jan. 4, 1992, at 1. The original agreement included a \$9 million dollar comprehensive study, but that figure grew to \$15 million.

36. See Charles Seabrook, *Heading Off a Tri-State Water War*, ATLANTA J. & CONST., Feb. 19, 1998, at C1.

37. See *id.*; see also U.S. CONST. art. I, § 10, cl. 3 (requiring Congressional approval of all interstate compacts).

main water rights doctrines have developed to address this unique problem. The western states have adopted a form of prior appropriation, the eastern states have adopted a riparian system, and some states have developed new, hybrid regimes.³⁸ The doctrine adopted by any particular state will often dictate *who* can make claims to use a water resource and *how* it may be used. However, under each of the systems, the right to the water generally only goes to its *use*, not actual ownership of the resource itself.

1. *The Western Model: Prior Appropriation*

In the more arid states, west of the Mississippi River, the regime of prior appropriation developed as the controlling doctrine for water rights.³⁹ This doctrine evolved in response to the competing water demands of a growing western frontier in the nineteenth century.⁴⁰ The regime is well suited for the relative scarcity of water in the west because it is based not upon riparian ownership, but upon an economically beneficial use of the water.⁴¹ A right to use water under the prior appropriation doctrine attaches when three requirements have been met: an *intent* to divert water for a beneficial use,⁴² an actual *diversion* of water, and application of the water to the *beneficial use* intended.⁴³ Procedurally, most states also require the appropriator to get a permit or decree from the relevant administrative agency or a court before the right becomes fully vested.⁴⁴ However, even when the right attaches, it is not an absolute right to the water; the state can still apply certain restrictions to protect downstream users.⁴⁵ Also, in order to keep the

38. See Patricia K. Flood, *Water Rights of the Fifty States and Territories*, in *WATER RIGHTS OF THE FIFTY STATES AND TERRITORIES*, 31, 35-69 (Kenneth R. Wright ed., 1990).

39. See A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* § 5:1 (1988).

40. In addition to a scarcity of water in the west, there was a growing population, an emerging agriculture industry, and an extensive mining industry all competing for water resources. See WILLIAM GOLDFARB, *WATER LAW* 8 (2d ed. 1988).

41. See GOLDFARB, *supra* note 40, at 33.

42. Historically, a beneficial use had to be either a domestic or an economic use, however, now it also includes aesthetic beauty, recreation, and ecological concerns. See *id.* at 35. However, it is sometimes difficult to determine exactly what constitutes a beneficial use because the definition varies from state to state. Generally, states employ a hierarchy of uses: 1) domestic, 2) agricultural, and 3) industrial are "top tier," while 4) fish, wildlife, and recreation are distinctively "bottom tier." See *id.* at 37.

43. See GETCHES, *supra* note 1, at 75.

44. See *id.*

45. See Stuart L. Somach, *Water Rights*, in *NATURAL RESOURCES LAW HANDBOOK* 202, 210-12 (Government Institutes, Inc., 1991).

right, the appropriator must “use it or lose it,” as the right to the water will continue only so long as the beneficial use is maintained.⁴⁶

One of the precepts of the prior appropriation doctrine is “first in time, first in right.”⁴⁷ Essentially, whoever first acquires the right to use the water acquires the most senior claim, with all other claims falling junior to the first, in chronological order of attachment.⁴⁸ This means that if a conflict of use arises, the water needs of the senior appropriator will be met, while junior appropriators may conceivably encounter a water shortfall. One potential drawback to this system is that it favors older users over more efficient users. The regime, however, has attempted to preempt this critique by allowing water rights to be bought and sold.⁴⁹ Although the state can place certain restrictions on these water rights transfers to protect downstream users,⁵⁰ the water rights can still be traded just like any other commodity. According to economic theory, this should allow water rights to end up in the hands of the most efficient user at the end of the day.

2. *The Eastern Model: Riparian Rights*

In contrast to the arid west, the eastern states have always enjoyed a humid climate, plentiful rainfall, and an abundant water supply.⁵¹ As a result, a strict system of water allocation was not required. States east of the Mississippi River, where water resources have historically been accessible and available, adopted a form of the English regime of riparian rights as the dominant water rights doctrine.⁵² England had used a strict “natural flow” version of riparian rights, which stated that an owner of property adjacent to a watercourse was entitled to an undiminished portion of the water.⁵³ Over time, however, that system proved inefficient with the Industrial Revolution placing ever-greater pressures on water resources, spotlighting the need for a regime to protect more efficient uses of water. As an answer, the eastern United States developed a

46. See GETCHES, *supra* note 1, at 74.

47. See *id.* at 75.

48. See *id.*

49. See Kathleen Marion Carr and James D. Crammond, *Introduction to WATER LAW TRENDS, POLICIES, AND PRACTICE* (Kathleen Marion Carr and James D. Crammond eds., 1995).

50. See *id.*

51. See Copeland, *supra* note 3, at 5A.

52. See Somach, *supra* note 45, at 203-04.

53. See GETCHES, *supra* note 1, at 17.

“reasonable use” version of riparian rights.⁵⁴ Under the “reasonable use” doctrine, a riparian owner⁵⁵ can make any reasonable use of the water flowing through a watercourse adjacent to land the riparian owns, so long as that use does not adversely affect the rights of other riparian owners along the watercourse.⁵⁶ In order for riparian rights to attach, the water flow must be part of a natural watercourse.⁵⁷ As a general rule, riparian rights cannot attach to the water flow in an artificial watercourse unless it has been maintained as a natural watercourse for a period of years.⁵⁸ In sum, a riparian owner possesses a right to reasonably use the water on her land, so long as the use does not detrimentally affect other riparians along that same natural watercourse.

One of the significant features of a riparian system is its relative self-governance. Riparian systems generally require very little control from a centralized authority.⁵⁹ While this system keeps cost and regulation to a minimum, the resulting riparian rights are very generalized, increasing uncertainty and creating enforcement problems.⁶⁰ Also problematic is an imprecise definition of the term “reasonable use.”⁶¹ These shortcomings often force riparians to look to the courts — the most inefficient and costly method possible — for dispute resolution and clarification of rights

3. *The New Model: Hybrid Systems*

In many eastern states, the once rich supply of water resources is now showing signs of scarcity. The riparian system has failed to adequately deal with continually increasing demands on fewer available water flows in several states. Therefore, the trend in the

54. See *id.* at 18-19 (the “reasonable use” standard was eventually embraced by England); see generally *Tyler v. Wilkenson*, 24 F. Cas. 472 (1827) (rejecting the natural flow theory of riparian rights in favor of a reasonable use standard).

55. A riparian owner is a person who owns real property bordering a natural watercourse. See BLACK’S LAW DICTIONARY 1327 (6th ed. 1990).

56. See Somach, *supra* note 45, at 204.

57. A natural watercourse is defined as “[a] natural stream flowing in a defined bed or channel; one formed by the natural flow of the water, ... as distinguished from an “artificial” water course, formed by the work of man, such as a ditch or canal.” A watercourse is defined as “[a] running stream of water; a natural stream fed from permanent or natural sources, including rivers, creeks, runs, and rivulets.” BLACK’S LAW DICTIONARY 1592 (6th ed. 1990).

58. See Somach, *supra* note 45, at 204-05.

59. See James B. MacDonald, *Riparian Doctrine*, in WATER RIGHTS OF THE FIFTY STATES AND TERRITORIES, 19, 21 (Kenneth R. Wright ed., 1990).

60. See *id.*

61. See George A. Gould, *Water Rights Systems*, in WATER RIGHTS OF THE FIFTY STATES AND TERRITORIES, 9 (Kenneth R. Wright ed., 1990) (stating that there is a general trend in the East of moving towards hybrid systems).

East is toward a hybrid or combination system of water rights, which blends the “reasonable use” riparian system with elements of prior appropriation.⁶²

Generally, hybrid systems recognize riparian rights, while also implementing an administrative permit mechanism for new demands placed on water resources.⁶³ These new use permit programs vary widely across the states. None, however, place as much emphasis on priority in time as does the western model of prior appropriation.⁶⁴ Further, nearly all hybrid systems have one centralized state authority issuing new water use permits. The notable exception is Florida, which has five regional water management districts rather than one central state agency.⁶⁵

Each of these water rights doctrines are important in the present dispute over the Chattahoochee River. Georgia and Alabama employ a regime of riparian rights, whereas Florida uses a hybrid system.⁶⁶ While none of these states rely solely on prior appropriation (which focuses on beneficial use), Florida’s hybrid system could be called a “reasonable beneficial use” standard of water rights allocation.⁶⁷ This water rights system attempts to blend the elements of riparian rights doctrine with the elements of prior appropriation doctrine to eliminate the shortfalls of each. In Florida, new permit applicants must meet a three-prong test to be granted a water use permit: the use must be defined as a reasonable beneficial use,⁶⁸ the use must not adversely affect other riparian users, and the use must be consistent with the public interest.⁶⁹

Despite Florida’s hybrid system, a riparian rights analysis should figure prominently in the Chattahoochee River dispute. Therefore,

62. *See id.*

63. *See* GOLDFARB, *supra* note 2, at 26.

64. *See id.*

65. *See id.*

66. Technically, Alabama also uses a hybrid system of “regulated riparianism,” but the Alabama Water Resources Act specifically states that the Act is *not* intended to change or modify the existing riparian system of water rights allocation. Thus, Alabama should be treated as a riparian state rather than a hybrid state. *See* William S. Cox III, *The Alabama Water Resources Act: A Hybrid Model of “Regulated Riparianism,”* in WATER LAW TRENDS, POLICIES, AND PRACTICE, *supra* note 49, at 151.

67. *See* Ronald A. Christaldi, *Sharing the Cup: A Proposal for the Allocation of Florida’s Water Resources*, 23 FLA. ST. U. L. REV. 1063, 1080 (1996); *see generally* Frank E. Malony et. al., *Florida’s “Reasonable Beneficial” Water Use Standard: Have East and West Met?*, 31 U. FLA. L. REV. 253 (1979) (discussing and explaining Florida’s reasonable-beneficial use standard).

68. Reasonable beneficial use is defined as, “the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner which is both reasonable and consistent with the public interest.” FLA. STAT. § 373.019 (13) (2000).

69. *See* Christaldi, *supra* note 67, at 1080-81.

debate will likely focus on an equitable allocation of the Chattahoochee River. However, since this dispute is over rights to a limited water resource, prior appropriation-type arguments are certain to make their way into the discussions.

B. Resolution Options

There are primarily three methods of solving these types of water rights disputes: legislative or congressional apportionment; judicial apportionment; and, interstate compacts.⁷⁰ Although, on occasion, Congress or the Supreme Court has been called upon to resolve these disputes, an interstate compact is the preferred method of resolution.⁷¹ Compacts are more popular than judicial and legislative apportionment solutions because the latter are often based on incorrect or incomplete information. Further, courts and legislative bodies often lack the technical knowledge and ability to gather and incorporate all the information needed for an allocation decision. Despite these general shortcomings, all three allocation methods are viable options for Alabama, Georgia, and Florida to consider as possible solution mechanisms to this dispute.

1. Legislative Apportionment

The Supreme Court first acknowledged legislative apportionment in 1963 by holding Congress' implied authority under the Commerce Clause includes the authority to apportion or regulate interstate waters.⁷² With this new power, Congress could then settle interstate water rights conflicts itself by introducing and passing a bill to distribute the water to the disputing states, thereby settling the dispute. Since that time, however, Congress has been very reluctant to use this authority. As a result, legislative apportionment has been used only once since *Arizona v. California* to resolve a conflict between California and Nevada over the Truckee and Carson Rivers and Lake Tahoe in 1990.⁷³

There are three primary reasons why legislative apportionment is a disfavored methodology: politics, limited information, and a lack of interest. First, Congress operates within a political system where

70. See GOLDFARB, *supra* note 2, at 52-55.

71. See *id.*

72. See *Arizona v. California*, 373 U.S. 546, 597-598 (1963) (allowing legislative apportionment under the Commerce Clause); see also U.S. CONST. art. I, § 8, cl. 3 (granting Congress the ability to regulate commerce among the states).

73. See Jerome C. Muys, *Approaches and Considerations for Allocation of Interstate Waters*, in WATER LAW TRENDS, POLICIES, AND PRACTICE, *supra* note 49, at 311, 312.

members, lobbied by all interested parties, are heavily influenced by special interests.⁷⁴ Consequently, water rights disputes are highly politicized, leaving individual members of Congress very hesitant to choose a side, unless their home state has a stake in the outcome or all the parties have reached a compromise. A second major drawback to legislative apportionment is that Congress is usually not very well informed about a particular region's water problems.⁷⁵ Congress may inform itself to some degree through speeches and legislative hearings, but individual legislators themselves often lack the technical, specialized knowledge necessary to fully understand all the issues in a water rights dispute.⁷⁶ Third, most members of Congress have little or no interest in water problems specific to a relatively localized region.⁷⁷ For example, it is doubtful that a member of Congress from North Dakota will have any particular interest in the present Chattahoochee River dispute. Under such conditions, party politics are likely to play a role in any decision.

2. *Judicial Apportionment*

The second option for resolving the Chattahoochee River dispute is judicial apportionment, in which states litigate the issue and the United States Supreme Court issues a ruling allocating water rights between the states. Although the Supreme Court routinely functions as an appellate body, it maintains original jurisdiction over "controversies between two or more states."⁷⁸ Thus, the Supreme Court possesses original jurisdiction in a multi-state rights dispute, such as the current controversy between Alabama, Florida, and Georgia, over the Chattahoochee River.

Judicial apportionment as a means of solving water rights disputes was first applied in 1907, in a dispute between Colorado and Kansas over the Arkansas River.⁷⁹ Although the Supreme Court ruled for Colorado on the merits of the case, it announced that in all future water rights disputes, the equitable apportionment doctrine would be the applicable rule.⁸⁰ The equitable apportionment doctrine was adopted from international law and favors a fair distribution of water between the disputing states over any existing

74. See *id.* at 312.

75. See *id.*

76. See *id.*

77. See *id.*

78. U.S. CONST. art. III, § 2, cl. 1.

79. See *Kansas v. Colorado*, 206 U.S. 46 (1907).

80. See *id.* at 117-18.

common law water rights regime, such as prior appropriation and riparianism.⁸¹ If, however, a dispute arises between two states using the same water rights doctrine, then that doctrine will be presumptively applied.⁸² Under equitable apportionment, if two states use different water rights systems, or if local law will leave one state at a significant disadvantage, the Court is free to disregard the existing regimes and fashion a more equitable resolution.⁸³

The case of *New Jersey v. New York*⁸⁴ is illustrative of the equitable apportionment doctrine at work, and contains similar facts to the Chattahoochee River dispute. That case involved a conflict between two states regarding the use of the water in the Delaware River. Essentially, New York claimed it needed more of the water to sustain its growth (much like Georgia), while New Jersey claimed that it had a right to an undiminished quantity of the water as a downstream user (much like Alabama and Florida). The Court recognized that both states had valid claims which had to be reconciled as fairly as possible.⁸⁵ Neither state could win completely; New York could not appropriate all the water for itself, leaving nothing for downstream users, and New Jersey could not turn off the water supply to New York.

The Court ultimately allowed New York to continue diverting water from the Delaware River to meet the needs of New York City, but prohibited the state from increasing its current level of water withdrawal.⁸⁶ Additionally, the Court placed certain water quality and quantity regulations on New York governing the discharge of water back into the Delaware River.⁸⁷ This result seemed fair to both states because it met New York's current needs while still protecting New Jersey, a downstream user. This case provides an obvious corollary to the current Chattahoochee River dispute; if the states involved choose to settle the water rights dispute in court, judicial apportionment may be the mechanism used and the final resolution will likely resemble the outcome in *New Jersey v. New York*.

81. See GOLDFARB, *supra* note 2, at 52-53.

82. See *id.*

83. "The [equitable apportionment] doctrine is neither dependant on nor bound by existing legal rights to the resource being apportioned." Idaho ex rel. Evans v. Oregon, 462 U.S. 1017, 1017 (1983).

84. 283 U.S. 336 (1931).

85. The court said, "[b]oth states have real and substantial interests in the [Delaware] River that must be reconciled as best they may be." *Id.* at 342-43.

86. See *id.* at 346-48.

87. See *id.* (requiring water treatment, release limitations, and permission for Delaware to inspect certain New York dams and other relevant facilities).

Judicial apportionment, although fraught with serious problems, appears to be more favored and utilized more often, than legislative apportionment. The three significant drawbacks to using judicial apportionment as a method for resolving a water rights dispute are lack of expertise, extremely high costs, and lack of ability to monitor the solution. The most common critique of equitable apportionment is that the Court lacks the technical resources and expertise necessary to make important water allocation decisions.⁸⁸ Critics contend that as an institution, the Court is simply “not equipped to deal with the mass of technical data introduced into evidence in equitable apportionment litigation. ... [E]valuating conflicting evidence on these points requires the help of a trained technician, and the tradition of the courts tends to restrain them from securing such help.”⁸⁹ In fact, the Court is often reluctant take up these questions, pronouncing instead that it is not the best forum in which to resolve these issues.⁹⁰ Currently to assist the court with the technical issues involved in most water rights cases, the Court appoints a Special Master to hear evidence, preside over hearings, report findings, and recommend a resolution.⁹¹ Although the Court is the final arbiter and is not bound to follow the Special Master’s recommendation, it is usually given great deference.⁹²

A second problem with judicial apportionment is the high cost of litigation.⁹³ It is extremely expensive to gather the technical data necessary to litigate a water rights dispute. In addition, the resolutions are rarely final, and are often re-litigated, further increasing costs.

A third sizable drawback to judicial apportionment is that the Court simply does not have the resources to monitor the parties compliance with the resolution. Unfortunately, this creates an

88. See GOLDFARB, *supra* note 2, at 53.

89. CHARLES J. MEYERS & A. DAN TARLOCK, WATER RESOURCE MANAGEMENT 401-02 (2d ed. 1980).

90. See *Kansas v. Colorado*, 206 U.S. 46 (1907) (noting that interstate water controversies ... necessitate expert administration rather than judicial imposition of a hard and fast rule); *New York v. New Jersey* 256 U.S. 296, 313 (1921) (stating that a water rights dispute “is one more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of the representatives of the States which are vitally interested [in it] than by proceedings in any court however constituted.”).

91. See William D. Olcott, Comment, *Equitable Apportionment: A Judicial Bridge Over Troubled Waters*, 66 NEB. L. REV. 734, 736 (1987).

92. See *id.*

93. “[J]udicial apportionment is expensive ... the Special Master in *Arizona v. California* [*supra* note 72] received, as compensation (not including expenses), \$185,000. Prof. Corker, who represented California in the litigation, estimates total costs at \$50 million.” MEYERS, *supra* note 89, at 402.

incentive for the parties to cheat or push the envelope since the only way to enforce the resolution is through further litigation. Consequently, small transgressions are not remedied because it is simply not cost efficient for the state to do so.

Taken together, the lack of expertise, expense of litigation, and inability to monitor the parties make equitable apportionment a problematic resolution option. The unpredictability of the result makes it a particularly risky endeavor for the Chattahoochee River dispute. Furthermore, the Court is usually hesitant to take on questions involving interstate water conflicts, which tend to resemble legislative decision-making.⁹⁴ The Court, instead, openly favors the use of interstate water compacts as a resolution mechanism.⁹⁵

3. *Interstate Water Compacts*

The third primary method to resolve the Chattahoochee River rights dispute is through an interstate water compact. A compact is essentially a contract in which the disputing states negotiate their own settlement for water allocation with a focus on "present appropriation for future use."⁹⁶ The process of creating an interstate compact often begins with the states requesting congressional authorization to negotiate a resolution among themselves. Once Congress grants authorization (often mandating that a federal representative be present at the negotiations), the states may begin the negotiation process.⁹⁷ When the states reach an agreement, they must then seek congressional approval of the terms of that agreement.⁹⁸ Only after Congress has given final consent does the compact become federal law.

Beyond the approval process itself, no additional federal regulations govern interstate compacts. Since the agreement reached is based on negotiations between the states involved, Congress assumes the compact is suitable to the states involved. Thus, once the negotiations have yielded an agreement, Congress almost always ratifies it. In fact, Congress rarely restricts, or gets involved with, the mechanics of an interstate water compact. Therefore, interstate

94. See GOLDFARB, *supra* note 2, at 53.

95. See *id.*

96. GETCHES, *supra* note 1, at 406.

97. See *id.* at 407.

98. See TARLOCK, *supra* note 39, § 10.24, at 10-25; See JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS 736 (1986) (noting that once ratified, compacts become federal law and the compact takes precedence over inconsistent state laws. Further, a compact state cannot withdraw from the compact by any means other than those established by the compact itself).

compacts can be set up in virtually any manner to solve any type of interstate water rights dispute.

The states' authority to create interstate compacts, subject to Congressional approval, is found in the Compact Clause of the U.S. Constitution.⁹⁹ The first interstate compact resolving water rights dispute was the Colorado River Compact of 1922, which simply allocated the waters of the Colorado River between the states involved.¹⁰⁰ Since that time, Congress has approved over thirty interstate water compacts, each with varying complexities stemming from various water resource disputes.¹⁰¹ The vast majority of these water compacts have taken place in the arid western states where the water supply is relatively scarce.¹⁰² In fact, every western state has participated in at least one interstate water compact.¹⁰³

A significant dynamic underlying these water compacts is that the states are negotiating their water allocations for *future* use. As such, the states must anticipate their future water needs as accurately as possible and negotiate an appropriation accordingly. However, even the best estimates are sometimes off the mark and as a result, the compact's enforcement mechanism becomes extremely important. A water compact can be enforced in two ways: through the compact itself or through an interstate commission. The compact itself acts as the enforcement mechanism by providing certain guidelines for state agencies to follow in allocating the water supply. This prescriptive scheme was used in the early water compacts.¹⁰⁴ Today, this scheme is disfavored because it does not really provide enforcement at all. Rather, it merely provides guidelines for the state agencies to follow. As a result, any enforcement of the compact usually requires court intervention, at a significant cost to the litigants.

It is far more common today to use the second model, which incorporates a standing interstate commission or agency to plan, operate, monitor, and enforce the compact.¹⁰⁵ These commissions all vary to some degree but most include one or more federal repre-

99. See U.S. CONST. art. I, § 10, cl. 3 (stating, "No State shall, without the Consent of Congress ... enter into any Agreement or Compact with another State,").

100. See GOLDFARB, *supra* note 2, at 54.

101. See *id.*

102. See *id.*

103. See *id.*

104. For example, the Colorado River Compact of 1922 may be considered a prescriptive-type compact because all it did was simply allocate the water between the states by providing a few guidelines for the state agencies to follow in allocating the water within each state.

105. See GOLDFARB, *supra* note 2, at 54.

sentatives for each state involved, usually appointed by the respective governors.¹⁰⁶ Depending on how the compact arranged the commission, the federal representative(s) may or may not have full voting rights.¹⁰⁷

These permanent commissions are how interstate water compacts make their greatest contribution to water resource management. Through these commissions, compacts create the much-needed authoritative structure for true regional water-resource management.¹⁰⁸ The permanent commission can constantly gather new information and can remain in continuous negotiation, allowing adaptation to new circumstances. Also, because the commission is one centralized body, the costs normally associated with information gathering and continuous negotiation may be drastically reduced. Thus, these commissions are able to enforce (or adapt) the compact efficiently.

Interstate compacts are, by far, the preferred method for resolving interstate water rights conflicts.¹⁰⁹ They enjoy three principal advantages over other methods of water allocation. First, the compacts are much more flexible in that they are tailored to each situation and can be set up with few external constraints.¹¹⁰ Also, if a commission is established, flexibility increases because the water allocations can be continually adjusted to meet changing conditions. Secondly, one of the best attributes of a water compact is that it routinely involves water resource management experts.¹¹¹ Usually, the chief negotiators and those appointed to the commission are water resource experts. This arrangement offers advantages over other water allocation methods simply because the decision-makers understand the technical data, the long-term consequences and ramifications, and the different solution options. Thus, they are the most qualified to make these choices in the first place. Thirdly, compacts with a commission have a much better enforcement mechanism in the form of the commission itself.¹¹² Since it is an independent body, it is less likely to be influenced by the motives of individual states. The commission can also enforce the compact cheaper and just as

106. *See id.*; *See also* TARLOCK, *supra* note 39, § 10:25, at 10-36.

107. *See id.*

108. *See* SAX, *supra* note 98, at 736-37.

109. *See supra* notes 74-77, 88-95 and accompanying text; *see also* GOLDFARB, *supra* note 2, at 53 (stating that although the Supreme Court has used judicial apportionment at times, it has more often discouraged lawsuits in favor of interstate compacts).

110. *See* TARLOCK, *supra* note 39, § 10.24, at 10-34.

111. *See id.*

112. *See id.*

effectively as the court. In addition, the commission scheme also grants more certainty, efficiency, and equity to the water allocation issue. Overall, an interstate water compact is the best resolution for a water rights conflict.

Interstate water compacts, however, are not perfect solutions, and have some problems of their own. Water compacts have three main recognized detriments, although the benefits still seem to outweigh the shortfalls. First, water compacts are often preceded by long, protracted negotiations.¹¹³ These initial negotiations can be very complex, expensive, and time consuming. Yet if the compact is set up properly, these negotiations may prove to be a worthwhile investment down the road. Secondly, very difficult issues are usually drafted with a great deal of ambiguity.¹¹⁴ The states involved are hesitant about signing a compact that does not include a bit of "wiggle room" around the more contentious issues. Such ambiguity could conceivably unravel even the best of compacts if it is too pervasive or creates loopholes in the agreement. Thirdly, the commissioners are appointed by the governors of the states involved and are not given free rein over the water policy of the state.¹¹⁵ The commissioners are still accountable to each respective governor and state legislature, so each commissioner is neither completely independent nor autonomous. The commissioner must rely on state policymakers to inform her of the state water policy and its position on certain issues. Thus, if the state water policy shifts, it could alter the work of the commission, or perhaps the entire compact. While interstate water compacts are not a perfect solution, they remain the preferred option to resolve a water rights dispute.

III. THE COMPACT APPROVED

Recognizing the significant problems associated with judicial apportionment, on January 3, 1992, Alabama, Florida and Georgia removed the Apalachicola-Chattahoochee-Flint River dispute from the pageant of the courtroom in favor of negotiating a water compact.¹¹⁶ The agreement signed by the states suspended legal action, pending the completion of a U.S. Army Corps of Engineers five-year comprehensive study of the entire river basin system and

113. See MEYERS, *supra* note 89, at 419.

114. See *id.*

115. See TARLOCK, *supra* note 39, § 10:25 at 10-36.

116. See *supra* note 34 and accompanying text.

the three states' current and future water needs.¹¹⁷ The agreement also froze water withdrawals at current levels, with small increases to be made only with the consent of all three states.¹¹⁸ Further, it called for all three states to cooperate and share information regarding the river basin.¹¹⁹

The 1992 agreement served as a "treaty" that stayed legal proceedings while the study was conducted over the course of several years. The estimated completion date of the study was late 1997. During their respective 1997 legislative sessions, the Alabama, Georgia, and Florida legislatures adopted identical bills creating the Apalachicola-Chattahoochee-Flint River Basin Compact ("ACF Compact").¹²⁰ The compact allowed each state to study the Corps of Engineers' completed research, and to negotiate a water allocation formula accordingly.¹²¹ The bills were subsequently ratified by Congress and signed into federal law by President Clinton on November 20, 1997.¹²²

The compact's structure was absolutely ideal. It created the ACF Basin Commission to negotiate a water allocation formula among the three states.¹²³ The commission is comprised of one representative from each state, appointed by its respective governor, and one non-voting federal representative, appointed by President Clinton.¹²⁴ The commission is an effective mechanism, because it allows the appropriate experts to be involved in the negotiations and enforcement of any final agreement. Also, if an agreement is reached, the compact makes the ACF Basin Commission a permanent standing body that will monitor, enforce, and alter the agreement as needed.¹²⁵

Under the compact, the commission was to meet and negotiate a water allocation plan by December 31, 1998.¹²⁶ If no agreement resulted, the compact itself would terminate, essentially sending the

117. See *supra* note 35 and accompanying text.

118. See *id.*

119. See *id.*

120. See FLA. STAT. § 373.71 (2000); GA. CODE ANN. § 12-10-100 (2000); ALA. CODE § 33-19-1 (2000).

121. See *supra* note 36 and accompanying text.

122. See Apalachicola-Chattahoochee-Flint River Basin Compact, Pub. L. No. 105-104, 111 Stat. 2219 (1997).

123. See *id.* at § 1, art. VI (a).

124. See *id.* at § 1, art. VI (a-c). Although the federal representative is non-voting, she does have the ability to concur with or veto any agreement the states reach. A veto terminates the compact and sends the dispute back to litigation. See *id.* at § 1, art. VII (a); art VIII (a)(4).

125. See *id.* at § 1, art. VI (g).

126. See *id.* at § 1, art. VI (g)(12); art. VII (a); art VIII (a)(3).

states back to court, unless the commissioners unanimously agreed to extend the negotiations.¹²⁷ Since the ACF Compact was signed into federal law on November 20, 1997, this gave the commission a little over one year to reach an agreement over the water allocation formula. While the states laid the groundwork for achieving a commission-based water compact, the time restrictions proved too burdensome for resolving such complex issues.

IV. AN OVERVIEW OF THE COMPACT NEGOTIATIONS

The compact negotiations have, indeed, proven to be too complex to be resolved thus far. The negotiations were ready to begin only after the ACF Compact was signed into federal law, the ACF Commission was created, and the commissioners themselves were officially appointed and charged with the duty of negotiating a water allocation formula.¹²⁸ After the commission was established, the commissioners knew they only had about a year in which to do a great deal of work. Thus, the commission immediately began meeting on a monthly basis.¹²⁹ At the beginning of the process, the negotiators were mostly feeling each other out; there was a great deal of hesitancy about seriously negotiating.¹³⁰ As a result, there was simply not much substantial progress made at first. Over time, however, the commission established a better working relationship and was able to make progress toward an agreement, despite large differences still remaining.¹³¹

By the Fall of 1998, the states were still significantly far from agreement and the deadline was quickly approaching. Adding to the pressure of the looming December 31 deadline were the gubernatorial elections in November of 1998.¹³² As politics would have it, Alabama, Florida, and Georgia, all elected new governors, which put the negotiations in a questionable position. The three previous

127. See *id.* at § 1, art. VIII (a)(3).

128. Bob Kerr is the Georgia representative, Jim Campbell is the Alabama representative, David Struhs is the Florida representative, and Lindsay Thomas is the federal representative.

129. See Telephone Interview with Ruth Mathews, (Apalachicola Project Manager) of the Nature Conservancy (Apr. 4, 1999) (on file with author) (hereafter Telephone Interview). The Nature Conservancy is a nationwide conservation and environmental organization working directly with the state of Florida to protect Apalachicola Bay in the Apalachicola-Chattahoochee-Flint Compact negotiations.

130. See *id.*; see also *Negotiator Fears Stall in Water-Sharing Talks*, ATLANTA J. & CONST., Apr. 17, 1999, at G2; Charles Seabrook, *The Water War: Drought of Compromise*, ATLANTA J. & CONST., Feb. 15, 1999, at E5 (quoting Jim Lloyd of the Southeastern Power Administration, that the states have done "a lot of posturing for a whole year.").

131. See Telephone Interview, *supra* note 129.

132. See *id.*

governors had all been very engaged in the water compact negotiations and had been working together toward a resolution.¹³³ The election of new governors brought new policies, less cooperation, and less knowledge of the situation as a whole.¹³⁴ This was a serious setback to the commission and the negotiation process because the governors could not tell their commissioners the state's negotiation position or policy until the governors themselves formulated it. With the deadline for an agreement only a few weeks away, it was apparent that time would run out on the compact before any agreement could be reached. The commission agreed that the negotiations were a very complex process, but that it had made some significant steps toward an agreement and had worked too hard to simply allow the compact to dissolve.¹³⁵ Therefore, on December 18, 1998, the commissioners unanimously agreed to a one-year deadline extension so the compact negotiations could continue without losing the enormous investment the states had made.¹³⁶ With the negotiations beginning to pick up steam, the extension was seen as a positive thing, an endorsement of the entire compact process.¹³⁷ It gave the commission a renewed sense of faith and more time to come to an agreement, but more importantly, it also gave the new governors time to educate and engage themselves enough in the issue to be able to effectively direct the negotiators as to the states' policy and negotiation position.

Unfortunately, the second year of negotiations did not get off to a good start. The elections had simply turned both the commission and the negotiations upside down. In both Florida and Georgia, there was no practical difference after the election because both states maintained the same policy position the previous administration had maintained.¹³⁸ In fact, if anything, the election had a positive effect on those two states because both new governors wanted to continue with the negotiations. However, in Alabama, the gubernatorial election caused problems. The new governor was not engaged in the issue and did not have a working relationship with its representative on the ACF Commission.¹³⁹ The political situation in

133. *See id.*

134. *See id.*

135. *See id.*

136. *See id.*

137. *See id.*

138. *See id.*

139. *See id.*; see also *Negotiator Fears Stall in Water-Sharing Talks*, *supra* note 130 (quoting Georgia Representative Bob Kerr that the Alabama negotiator's office had "opposed the new

Alabama remained a bit disorganized and chaotic for several months as the new administration established itself. As a result, the Alabama representative refused to meet with the commission to negotiate until he had a clear directive from his governor.¹⁴⁰ Meanwhile, the other representatives of the ACF Commission continued to meet on a monthly basis, albeit in an unofficial capacity, to discuss technicalities of the water compact.

The first official ACF Commission meeting since December of 1998, when the deadline extension was signed, took place on March 12, 1999, when Alabama decided to rejoin the negotiations.¹⁴¹ Thus, the commission lost about three months negotiation time while it waited on the Alabama political situation to iron itself out. Since the new deadline for an agreement was December 31, 1999, the commission again had its work cut out. Although the states were further along at this point than they were the year before, they were still far from an overall agreement on a water allocation formula.¹⁴² With only eight months left before the new deadline, and significant issues still to be resolved, a legitimate question was raised as to whether the states could meet such a deadline. After all, if the ACF Commission could not reach an agreement in twelve months, despite having made some progress, was it realistic to expect an agreement in only eight months? The answer, unfortunately, was no.

On December 28, 1999, just three days before the deadline was to expire, the states agreed to yet another extension, which put the new deadline at May 1, 2000. Florida officials were becoming less and less willing to extend the negotiations any longer because Georgia was simply refusing to agree to any specific minimum flow conditions on the river system.¹⁴³ With Georgia steadfastly maintaining such a position, and Florida and Alabama both requiring some type of minimum flow guarantee, there remained significant distance between the three states. Furthermore, all three states were seemingly entrenching themselves into their respective positions and becoming more and more disenfranchised with the lack of progress in the negotiation process. Compounding the difficulty was the

governor" and was "feuding with the governor" which "certainly hinders the ability of the Alabama people to sit at the table with a lot of confidence.").

140. See Telephone Interview, *supra* note 129.

141. See *id.*

142. See Stacy Shelton, *States Far From Water Pact, Negotiator Says*, ATLANTA J. & CONST., Apr. 21, 1999, at JJ3.

143. See Charles Seabrook, *States Far From Extending Deadline to Reach Water Pact*, ATLANTA J. & CONST., Dec. 13, 1999, at B2.

limited five-month timetable before expiration of this new deadline. Unfortunately, very little headway was made in those five months.

The ACF Commission agreed to yet another, even shorter, deadline extension creating a new, August 1, 2000, deadline.¹⁴⁴ However, with such distance still remaining between the states, it is unlikely they will be able to resolve the impasse in only three additional months of negotiation. A bit of a twist has recently been introduced to the ACF Commission, though. The federal representative has strongly recommended that the states bring in a mediator to aid in reaching an agreement.¹⁴⁵ The states have apparently reached a deadlock and without mediation, may not be able to make further progress.¹⁴⁶ In response to that suggestion, Talbot "Sandy" D'Alemberte, the President of The Florida State University, and a former President of the American Bar Association, was just named as a mediator for this water rights dispute.¹⁴⁷ Evidently, the three states have now agreed to non-binding mediation with a December 30, 2000, deadline.¹⁴⁸ Although the mediation session(s) will be held behind closed doors¹⁴⁹, perhaps this move signals a significant effort by all three states to reach some sort of a positive compromise. If the mediation efforts go awry, or the states simply continue their pattern of just agreeing to disagree, this conflict may well be headed to the United States Supreme Court for one of the most costly and complex water rights disputes in the history of this country.¹⁵⁰ Of course, the commission can always agree to another deadline extension if need be, but only time will tell.

V. QUESTIONS RAISED BY THE NEGOTIATIONS

If the states are unable to come to an agreement, the conflict will return to the court, and no state is likely to get exactly what it wants. The negotiations have raised several questions as to whether this dispute may be, in fact, headed for judicial apportionment. First, a

144. See "Water Wars" Deadline Is Extended, GEORGIA ENVTL. L. LETTER, May 2000.

145. See Charles Seabrook, *Mediator Needed in States' Water Fight, Observer Says*, ATLANTA J. & CONST., Apr. 22, 2000, at C3.

146. See *id.*

147. See Charles Seabrook, *Water War Mediator is Floridian*, ATLANTA J. & CONST., Nov. 1, 2000, at C1.

148. See *id.*

149. See *id.*

150. In fact, Bob Kerr, Georgia's chief negotiator on the ACF Commission has stated that this dispute, "would be one of the most complex water cases ever before the court ... [i]t could be tied up in the court for years, and the court could put a moratorium on new uses of water. The economic loss to Georgia could be in the billions of dollars." Charles Seabrook, *Water Wars: Seven Year Battle*, ATLANTA J. & CONST., Oct. 18, 1999, at C1.

big question is simply whether the states can come to an agreement by the December 30, 2000 deadline. If no agreement is reached by that time, it looks like the compact may be headed for termination (which would lead to judicial apportionment, with its corresponding costly and complex litigation) or another deadline extension,¹⁵¹ before any agreement is reached.¹⁵²

Another question has been raised as to Georgia's good faith participation in the negotiations. In late 1997, Georgia budgeted \$46 million in state funds to go ahead with one of its planned reservoirs, despite the original agreement of 1992, which halted the legal action and froze water withdrawal rates until a compact, and allocation formula, was agreed upon.¹⁵³ After loud protests from Alabama, Georgia withdrew its permit application until such time as the ACF Commission has agreed upon a water allocation formula.¹⁵⁴ Georgia's plan had threatened to derail the entire compact process.

It is also possible that Alabama and Florida are dragging out the negotiation process to force Georgia to look elsewhere for its water supply. Since north Georgia is the "water hog" of the Chattahoochee, using an enormous amount of its flow and leaving a great deal of pollution (in a reduced flow) to the downstream states, both Alabama and Florida would love to cut out Georgia as much as possible. Since water withdrawal levels are frozen until an agreement is reached,¹⁵⁵ one way to tie Georgia's hands is to drag out the negotiation process as long as possible. Growth is going to occur in north Georgia, whether an agreement is reached or not, and when that growth occurs, Georgia must find a fresh water supply somewhere. Thus, postponing any agreement may force Georgia to either violate the compact (by increasing its withdrawal levels and proceeding with the development of its reservoirs) or turn to other sources of water for its water supply. If Alabama and Florida stall the negotiations long enough to force Georgia to look to other sources of fresh water to fuel this growth, Georgia's claim to such a large allocation of the Chattahoochee River flow will be seriously undermined. If that occurs, both Alabama and Florida should be practically guaranteed a very healthy allocation of the Chattahoochee

151. See *supra* notes 125, 126 and accompanying text.

152. See Seabrook, *supra* note 130.

153. See Kathy Pruitt, '98 *Georgia Legislature: Budget Writers are Ready to Go to Work*, ATLANTA J. & CONST., Jan. 19, 1998, at B1.

154. See *id.*

155. See *supra* notes 35, 36 and accompanying text.

River flow for years to come with few, if any, concessions given to Georgia.

In addition, the political situation in Alabama had created some concern as to whether or not the state was really still in the game.¹⁵⁶ It now appears that Alabama has returned from the sidelines and is permanently back at the table.¹⁵⁷ This is critically important because Alabama was the original state that filed suit against Georgia to stop the additional withdrawals. If Alabama actually withdrew itself from the negotiation process, a question would arise regarding the validity and effectiveness of the ACF Compact itself. The compact requires all three states to form a unanimous agreement on an allocation formula; if Alabama withdrew, there could be no unanimity. At that point, Florida would have had to decide whether or not to seek an entirely new water compact with Georgia. This subplot appears to have ironed itself out, as Alabama seems back in the ACF Compact to stay.¹⁵⁸

Lastly, a concern has been raised regarding how close (or far) the states actually are to an agreement. One of the first plans introduced by Georgia called for guaranteed minimum levels in Lake Lanier. In return, Georgia would reduce the water flow it used to generate hydroelectric power, but Alabama and Florida would have to accept a reduced downstream flow.¹⁵⁹ Neither Alabama nor Florida was willing to entertain Georgia's plan, but it was a first attempt. Shortly thereafter, Alabama countered with a plan of its own, calling for a release of more water than usual from Lake Lanier to ensure downstream users an increased flow in the Chattahoochee River.¹⁶⁰ Georgia, however, did not believe Alabama's plan was realistic.¹⁶¹ More recently, after nearly three years of negotiations between the states, Georgia has rejected Alabama's "final offer" of February 23, 2000, on the grounds that it would still take too much water from Georgia.¹⁶² Thus, the states seem to be at an impasse with the negotiations; and without a bit more compromise, flexibility, or the use of mediation, the current outlook is poor for the ACF Compact.

In the grand scheme of the negotiations, it appears Georgia's claims are nearly mutually exclusive of Alabama's and Florida's

156. See Telephone Interview, *supra* note 129.

157. See *id.*

158. See *id.*

159. See Charles Seabrook, *Tri-State Water War Rages Again; Glitch Further Threatens Negotiations*, ATLANTA J. & CONST., May 24, 1999, at 2E.

160. See *id.*

161. See *id.*

162. See Seabrook, *supra* note 145.

claims. Georgia wants a minimum level established for Lake Lanier, as well as increased withdrawals from the river to develop additional reservoirs that will fuel north Georgia's growth in the coming years.¹⁶³ Meanwhile, downstream, Alabama seeks to ensure that it receives a plentiful flow in the Chattahoochee River to fuel its own needed industrial and farming growth in the South Alabama region.¹⁶⁴ Alabama also wants to ensure the levels of the river remain sufficient to maintain commercial barge navigation, and support the hydropower needs of the state.¹⁶⁵ Florida primarily wants to protect its seafood and oyster industry, as well as the ecosystem of Apalachicola Bay, where the Chattahoochee (Apalachicola) empties into the Gulf of Mexico.¹⁶⁶ In order to do so, Florida wants to ensure that enough clean, fresh water comes downstream for the seafood industry and ecosystem to survive. In addition, Florida has the potential of a great deal of development and growth in the panhandle region in the coming years, and the Chattahoochee is an essential water resource if that is to occur.¹⁶⁷ Also, to further complicate the issue, there have been some recent federal environmental concerns regarding threats to various species found within the river system if the levels of the river downstream are not maintained above minimum flows.¹⁶⁸ In fact, the Endangered Species Act has emerged as a new player in this dispute, adding yet another tangled web of complexity to the existing difficulties.¹⁶⁹ With these complicated, competing interests and the extremely high stakes involved, it is no wonder that the three states have not yet come to an agreement. It is becoming all too clear that no state will get everything it wants out of these negotiations. Use of the ACF Compact will allow them to come as close as possible. It is most likely a better solution than anything litigation would yield.

163. See discussion, *supra* Part II.

164. See *id.*

165. See Telephone Interview, *supra* note 129; Seabrook, *supra* note 130.

166. See discussion, *supra* Part II.

167. See *id.*

168. See Seabrook, *supra* note 130.

169. The U.S. Army Corps of Engineers is currently refusing to increase Atlanta's draw on the river system's headwaters because of the effects of a reduced downstream flow in the Apalachicola River. Such a reduced flow would adversely impact certain species of threatened and endangered mussels found in the Apalachicola River. See Bruce Ritchie, *U.S. Law Prevents Reduction of River's Flow*, TALL. DEM., Aug. 16, 2000.

VI. CONCLUSION

The ACF Compact presents an opportunity for the states of Alabama, Florida, and Georgia to get it right the first time. The three states have a unique chance to learn from what has worked (and not worked) and avoid the lengthy 'water wars' and court battles that have plagued many western states. Although the Southeast has never had a serious water shortage, the boom of a healthy economy, and the growth that follows comes with a price tag. The growth seems to have finally caught up to the Apalachicola-Chattahoochee-Flint River Basin.

One thing is certain, to ensure the future sustainability of the Chattahoochee River as a water resource, sacrifices will have to be made. The states have simply put too much demand upon the river for it to continue support all the competing claims; some limits must be set and some changes must be made if the Chattahoochee is to remain a usable fresh water resource.

The states have answered the bell with the ideal mechanism for resolving the water rights dispute. The ACF Compact is the best regime under which to allocate the waters of the river. It is not necessarily a perfect solution, and the states will not necessarily get everything they want, however, it is far better than relying upon the judiciary or the legislature to allocate the waters. The big question now becomes, will the states choose to take full advantage of this opportunity?

