A RIVER RUNS THROUGH IT: WHAT STATES ALONG THE MISSOURI RIVER CAN LEARN ABOUT WATER ALLOCATION FROM CONFLICT IN THE ACF RIVER BASIN

Se. Fed. Power Customers, Inc. v. Geren[1]

I. INTRODUCTION

The Missouri River -- flowing over 2,600 miles from its source in Montana to its mouth in St. Louis[2] and draining over 500,000 square miles of land in ten states and providences of Canada[3] -- is at the center of a dispute between its basin states. Recent droughts and the discovery of threatened species have pitted upper basin states against those in the lower basin as they compete for increased water amounts. Recreational activities in the upper basin, requiring increased reservoir levels, have come at a cost to lower basin states more concerned with navigation and flood control. Despite years of negotiation attempts and lengthy litigation, these states have yet to reach an arrangement that meets the needs of the upper and lower basin.

Comparatively, states[4] in the Apalachicola-Chattahoochee-Flint River basin (hereinafter "ACF Basin") fight over proper water allocation as well. This area, which begins with the Chattahoochee River in northern Georgia, flows south to mark the Georgia-Alabama border, confluences with the 349-mile long Flint River[5] and then flows south to join with the

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[1] Se. Fed. Power Customers, Inc. v. Geren, 514 F.3d 1316 (D.C. Cir. 2008).
[2] Northwestern Div., U.S. Army Corps of Eng'rs, Summary: Missouri River: Final Environmental Impact Statement: Master Water Control Manual and Update 6 (Mar. 2004), http://www.nwd.usace.army.mil/pa/report/summary.pdf.
[3] Norman W. Thorson, *Damned if You Do, Damned if You Don't—Reflections on John Ferrell's Big Dam Era*, 2 GREAT PLAINS NAT. RESOURCES J. 13, 16 (1997).
[4] Georgia, Florida, and Alabama compromise the ACF River Basin. U.S. Geological Survey, *Description of the ACF River Basin Study Area*, http://ga.water.usgs.gov/nawqa/basinall.html (last visited Sep. 29, 2008).
[5] Barlow Burke, Commentary, *Association of American Law Schools Conference: Transcript of the Section on Natural Resources in Atlanta, Georgia*, January 5, 2004, 21 GA. ST. U. L. REV. 245, 247. (2004).

Apalachicola River,[6] contributes to the Apalachicola Bay with flourishing shrimp, crab, and oyster industries.[7] Like the Missouri River Basin, recent drought reduced water flow and caused states at opposite ends of the system to compete to maintain their respective existing water levels.[8] At the northern end of the basin, Georgia uses a significant amount of water to provide for the ever-growing metropolitan Atlanta area[9] while at the southern end, the Apalachicola Bay's oyster population requires a high level of water to survive.

Costly litigation and failed negotiations in the ACF Basin serve as harsh reminders that states in the Missouri River Basin have yet to reach an agreement concerning its water allocation. In its recent decision, *Southeastern Federal Power Customers, Inc. v. Geren,*[10] the D.C. Court of Appeals demonstrates the difficulties of water allocation among the three states of the ACF Basin. This note will use *Southeastern* and its events to explore the potential consequences of litigation-based management of the Missouri River and to consider new options for an intrastate agreement. If the states are ever to reach an agreement that provides stability for long-term planning, the agreement must retain a high degree of flexibility in water allocation that allows the Corps discretion in considering the immediate interests of states in both the upper and lower Missouri River Basin.

II. FACTS AND HOLDING

In 1946, the United States Congress authorized the construction of the Buford Dam on the Chattahoochee River creating a federally owned and operated reservoir named Lake Sidney Lanier.[11] South of the Buford Dam is the ACF Basin that flows to Alabama.[12] Water from Lake Lanier flowing to the ACF Basin is at the heart of this litigation.

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[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.* at 246-47.
[10] Se. Fed. Power Customers, Inc. v. Geren, 514 F.3d 1316 (D.C. Cir. 2008).
[11] *Id*. at 1318.
[12] *Id*.

Lake Lanier was specifically authorized for navigational purposes, hydropower generation, and flood control; water supply was considered an incidental benefit.[13] Despite its classification in the 1970's, the U.S. Army Corps of Engineers (hereinafter "Corps") began entering into five-year renewable contracts allowing for the storage and withdrawal of local drinking water from Lake Lanier.[14] Prior to the expiration of the last temporary storage permit, the Corps sent a report to Congress recommending 207,000 acre-feet of storage in Lake Lanier be reallocated from hydropower to local consumption.[15] In response to this, Alabama sued the Corps to enjoin this reallocation.[16]

In 1992, Alabama, Florida, and Georgia entered into a joint agreement with the Corps allowing for continued withdrawals from Lake Lanier.[17] Additionally, in 1997, the same three states and Congress approved a compact governing water storage allocation, planning, and dispute resolution in the ACF Basin. The compact expired on August 31, 2003, with no permanent agreement on the allocation of water storage.[18]

Prior to the compact's expiration, Southeastern Federal Powers Customers, Inc. (hereinafter "Southeastern") sued the Corps alleging that it lacked authority to divert water from Lake Lanier to the detriment of hydropower users.[19] Additionally, Southeastern alleged that increased withdrawals from Lake Lanier compromised water use for hydropower and caused economic loss.[20] Shortly thereafter, Georgia petitioned the Assistant Secretary of the Army for Civil Works to "formally reallocate reservoir storage space for local consumption."[21] Georgia's request was denied because "[the] request involve[d] substantial withdrawals from Lake Lanier and accommodating it would affect authorized project

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[13] *Id.* at 1323.
[14] *Id.* at 1318; *see* Se. Fed. Power Customers, Inc. v. Harvey, 400 F.3d 1, 2 (D.C. Cir. 2005).
[15] Se. Fed. Power Customers, Inc. v. Geren, 514 F.3d 1316, 1318-19 (D.C. Cir. 2008).
[16] *Id.* at 1319; *see* Alabama v. USACE, No. CV90-H-1331-B (N.D. Ala. Sept. 19, 1990) (litigation resulted in a stay order and no permanent water storage allocation was undertaken.).
[17] *Se. Fed. Power Customers, Inc.*, 514 F.3d at 1319.
[18] *Id.* at 1319; *see* Pub. L. No. 105-104, 111 Stat. 2219 (1997).
[19] *Se. Fed. Power Customers, Inc.*, 514 F.3d at 1319.
[20] *Id.*
[21] *Id*.

purposes. [I]t cannot be accommodated without additional Congressional authorization."[22]

The D.C. District Court compelled Southeastern and the Corps to mediation, where they were joined by Georgia and a group of water supply providers (hereinafter "Providers").[23] The parties came to an agreement (hereinafter "Agreement") in January 2003, but it remains the source of contention for the parties in this case.[24] The Agreement stated that the Corps would allocate between 210,858 and 240,858 acre-feet of Lake Lanier's 1,049,400 acre-feet for local water usage for 10 to 20 years.[25] Further, the Agreement provided that the allocation become permanent only if the Corps recommends that Congress "formally make the storage covered by the Interim Contacts available on a permanent basis."[26] Such recommendations must receive Congressional approval or a judgment holding Congressional approval unnecessary; whichever comes first.[27] The Agreement further provided compensation to generators of hydropower in the form of hydropower rates credit for lost opportunities resulting from increased water storage.[28]

In October 2003, the D.C. District Court allowed Alabama and Florida to intervene in the suit between Southeastern and the Corps. Additionally, Alabama and Florida reinstated Alabama's original lawsuit against the Corps from 1990 that was filed in response to the Corps' 1989 recommendation to Congress to reallocate Lake Lanier storage space.[29] The Alabama District Court entered a preliminary injunction preventing the implementation of the Agreement.[30]

In the D.C. District Court, Alabama and Florida argued the Agreement exceeded the authority conferred on the Corps by Congress, specifically by violating the Water Supply Act[31] (hereinafter "WSA"), the

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[22] *Id*.
[23] *Id*.
[24] *Id.*
[25] *Id.*
[26] *Id.* at 1320 (internal quotes omitted).
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*; *see Alabama v. USACE supra* note 2.
[31] 43 U.S.C. § 390b(d) (2000).

Flood Control Act[32] (hereinafter "FCA"), and the National Environmental Protection Act[33] (hereinafter "NEPA").[34] The District Court rejected the arguments of Alabama and Florida, and approved the Agreement contingent upon the "dissolution of the [Alabama District Court's] injunction.[35] Further, the District Court concluded that while the Agreement would affect hydropower generation-- an original purpose of Lake Lanier--assent by hydropower generators indicated Congressional approval was not needed.[36]

Upon dissolution of the Alabama District Court's injunction, Alabama and Florida appealed the D.C. District Court decision, again arguing that the Agreement requires Congressional approval under the WSA because it both "constitutes a major operational change and seriously affects project purposes."[37] The states argued further that the Agreement violated the FCA[38] and the NEPA[39]. The D.C. Court of Appeals focused on the alleged violation of the WSA, which states in part that the "Corps must obtain prior approval before undertaking 'major . . . operational changes.'"[40] The Court held the reallocation of Lake Lanier's storage space represented a major operational change without Congressional authorization and therefore reversed the District Court's approval of the Agreement.[41]

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[32] 33 U.S.C. § 708 (2000).
[33] 42 U.S.C. § 4321 *et. seq.* (2000).
[34] Se. Fed. Power Customers, Inc. v. Geren, 514 F.3d 1316, 1320 (D.C. Cir. 2008).
[35] *Id.*
[36] *Id*.
[37] *Id.*
[38] *Id.* (arguing violation of FCA because it allows only a temporary sale of water whereas the Agreement is a long-term transaction involving non-surplus water).
[39] *Id.* (arguing violation of NEPA by "irrevocably committing[ing] [the Corps] to executing the [Agreement] at the completion of its NEPA analysis, effectively bypassing the statute").
[40] *Id.* at 1318 (citing 43 U.S.C. § 390b(d) ("Modifications of a reservoir project heretofore [before July 3, 1958] authorized, surveyed, planned, or constructed to include storage as provided in subsection (b), which would seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or which would involve major structural or operational changes shall be made only upon the approval of Congress as now [on July 3, 1958] provided by law")).
[41] *Id.* at 1318.

III. LEGAL BACKGROUND

A. Methods for Solving Interstate Allocation Problems

Conflicts of interstate water allocation can arise between individuals in states or between the states themselves.[42] The major methods of handling interstate water allocation conflicts include: (1) voluntary cooperation; (2) private suits between water users in different states; (3) equitable apportionment suits between states; (4) interstate water apportionment compacts; and (5) Congressional apportionment.[43] Each method for handling interstate water allocation conflicts will be examined in turn.

1. Voluntary Cooperation

Voluntary cooperation agreements use cooperative action by the states to reach a voluntary or binding agreement for water allocation.[44] A prime example of voluntary cooperation is an agreement reached in 1985 between the eight Great Lakes states.[45] Each state followed the provisions of the voluntary agreement until 2001, when the governors of the states and Canadian officials moved to a binding agreement.[46] Voluntary cooperation is rarely employed now as these agreements are extremely fragile and raise Constitutional concerns because they are not subject to Congressional approval.[47]

2. Private Suit

Private suits between water users in different states are normally between individual downstream users that assert claims against an

[42] 4 WATERS AND WATER RIGHTS 43-1 (Robert E. Beck ed., 2004).
[43] *Id.* at 43-2.
[44] *Id.*
[45] *Id.* at 43-3.
[46] *Id.* at 43-4.
[47] *Id.*

upstream user from a different state for interfering with water supply.[48] Early suits dealt with small streams that were often too small to maintain an adequate water supply.[49] As concerns about the adequacy of larger streams grew, states took a direct interest in interstate water allocation on behalf of their citizens.[50] As a result, private suits between interstate water users declined and now have sporadic use at best.[51]

3. Equitable Apportionment Suit between States

The essential feature of an equitable apportionment suit is the equal dignity shared by the sovereign states in the federal judicial system.[52] The United States Supreme Court maintains exclusive jurisdiction and applies federal common law, rather than applicable state law.[53] Equitable apportionment has been strongly criticized-- most notably by the United States Supreme Court, which urges states to resolve their disputes via compacts under expert advisement rather than employ an inflexible rule mandated by the Court.[54] The doctrine of equitable apportionment continues to play a strong role in interstate disputes since the threat of litigation induces upstream states-- which have greater control on stream flow-- to negotiate compacts with downstream states.[55]

4. Interstate Compact

An apportionment compact relies on "trading compromise of conflicting claims"[56] and does not require the judicial or quasi-judicial

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[48] *Id.* at 44-1 (Robert E. Beck, ed., 2004); *see e.g. Howell v. Johnson et al.*, 89 F. 556 (C.C.D. Mont. 1898); *see also Conant et al.*, *v. Deep Creek & Curlew Valley Irrig. Co*. *et al.*, 66 P. 188 (1901); *see also Willey et al., v. Decker et al*, 73 P. 210 (1903).
[49] ANDERSON, ET AL., *supra* note 42, at 44-1.
[50] *Id.* at 44-1,44-2.
[51] *Id.* at 44-2.
[52] *Id.* at 45-1.
[53] *Id.* at 45-1, 45-2. The federal Constitution gives the Supreme Court original jurisdiction of all suits in which a state is a party. U.S. CONST. art. III, § 2, cl. 2.
[54] ANDERSON, ET AL., *supra* note 42, at 45-7.
[55] *Id.* at 45-7.
[56] *Id.* at 46-1 (citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104 (1938)).

process; however, the Compact Clause of the U.S. Constitution requires Congressional approval of all agreements allocating interstate water.[57] Proponents of interstate compacts argue their superiority to litigation since compacts enable "sensible compromise, not following strictly legal lines,"[58] and allow for continued administration necessary to accommodate changed conditions.[59] Formation of a water apportionment compact traditionally occurs in five steps, beginning with Congressional authorization to negotiate a compact.[60] Next, the interested states appoint commissioners that negotiate the compact.[61] If the states reach an agreement, the Governor and Legislature of each state approve the compact. Finally, Congress enacts legislation approving the compact.[62] While agreements vary on the formulas used to calculate water allocation, compacts traditionally control water apportionment in one of two ways: (a) limit the amount of water used by the upstream state or (b) guarantee the downstream state a certain amount of water.[63]

5. Congressional Apportionment

Apportionment by Congress can be used to solve interstate allocation problems, although not often employed.[64] Commentators speculate the reason Congress rarely invokes its apportionment powers is twofold.[65] First, Congress was late to recognize a Constitutional power to apportion interstate waters until the 1963 United States Supreme Court decision of *Arizona v. California*.[66] Second, states are reluctant to seek congressional

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[57] *Id.*
[58] *Id.* at 46-4 (citing Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925)).
[59] *Id.*
[60] *Id.* at 46-7.
[61] *Id.*
[62] *Id.*
[63] *Id.* at 46-10.
[64] *Id.* at 47-2.
[65] *Id.* at 47-10.
[66] *Id.* at 47-2 (citing *Arizona v. California,* 373 U.S. 546 (1963) (holding "[w]here Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notions of an 'equitable apportionment' for the apportionment chosen by Congress.")).

apportionment, and Congress is hesitant to implement its apportionment power, unless specifically requested by the affected states.[67]

B. Water Allocation in the Missouri River Basin

Issues of water allocation with the Missouri River have a long history and are rooted in socio-economic and free market realities. Seeking relief from high railroad shipping costs, early modifications to the Missouri River were designed to enhance navigation.[68] In 1910, Congress appropriated money to establish a six-foot-deep navigational channel between Kansas City, Missouri and the river's juncture with the Mississippi River.[69] In 1927, Congress further allocated funds to extend the navigational channel upstream to Sioux City, Iowa.[70] In 1933, President Franklin Roosevelt authorized the construction of a dam across the Missouri River in eastern Montana to increase the number of jobs during the Great Depression.[71] The project, later known as the Fort Peck Project, ultimately promoted navigation and provided flood control.[72] The project foreshadowed years of dispute over the purpose of the newly created reservoir as upper basin residents expected to use the reservoir for irrigation while lower basin residents expected to use the reservoir for navigation and flood control.[73]

By the 1940's, changes in channelization contributed to severe flooding in the Missouri River Basin, resulting in lives lost and millions of dollars of property damage.[74] As a result, Congress conducted special hearings and passed a resolution urging the Corps to assess the need for

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[67] *Id.* at 47-10.
[68] Craig A. Street, *Addressing Missouri's Domestic Conflict of Interests in the Missouri River: A Suggested Approach for Resolution*, 5 MO. ENVTL. L. & POL'Y REV. 117, 121 (1998).
[69] *Id.*
[70] *Id.* at 122.
[71] *Id.*
[72] *Id.* at 123.
[73] Tim Garrison, *What does a Pallid Sturgeon Say When It Runs into a Cement Wall? "Dam!" the Interminable Revision of the Missouri River Master Manual*, 10 MO. ENVTL. L. & POL'Y REV. 61, 62 (2003).
[74] Street, *supra* note 68, at 123; *see generally* Henry C. Hart, THE DARK MISSOURI (Univ. of Wis. Press) (1957).

flood control on the Missouri River.[75] The Corps assigned Colonel Pick who developed a plan-- now known as the 'Pick Plan'-- that called for levees at varying points along the river and a deeper, wider navigational channel.[76] Although the Pick Plan was primarily implemented for navigation and flood control, it included multiple benefits, such as irrigation, hydroelectric power, and recreation, to ensure congressional approval and financial support.[77]

Almost concurrently with the Pick Plan, U.S. Department of Interior's Bureau of Reclamation (hereinafter 'Bureau') developed the Sloan Plan, which focused on irrigation and reclamation interests and called for the construction of ninety dams and reservoirs throughout the upper basin.[78] The Sloan Plan emphasized the benefit of hydroelectric power, justifying its expense through the sale of hydroelectric power and irrigation water.[79] Both plans were presented to Congress and resulted in deadlock.[80] President Roosevelt indicated his preference for creating an organization similar to the Tennessee Valley Authority and removal of control from both the Corps and the Bureau.[81] Faced with the prospect of losing total control, the Corps and Bureau met and developed the Pick-Sloan plan as part of the Flood Control Act of 1944, which combined the two plans. [82] In later negotiations, the Corps and Bureau agreed that "whichever agency constructed and subsequently maintained a particular project would retain primary responsibility for its operation with regard to all uses other than flood control and irrigation."[83]

The Bureau initially postponed the construction of its projects, letting the Corps develop its main reservoirs first. However, by the time the Corps had completed its projects and begun operation, there was no money available for the Bureau's projects.[84] Although some of the

[75] Garrison, *supra* note 73, at 62.
[76] *Id.*
[77] *Id.* at 63.
[78] Street, *supra* note 68, at 125.
[79] Garrison, *supra* note 73, at 64.
[80] *Id.*
[81] *Id.*
[82] *Id.* at 65.
[83] Street, *supra* note 68, at 126-27.
[84] *Id.* at 127.

Bureau's projects were eventually built, the Corps, by virtue of its agreement with the Bureau regarding which agency would construct and operate different projects, obtained far more operational control over the river.[85] The Corps' authority was solidified by the United States Supreme Court in its 1988 decision, *ETSI Pipeline Project v. Missouri*.[86]

In *ETSI*, the Court was asked to decide what may be done with surplus water from the Missouri River reservoirs.[87] Energy Transportation System, Inc. (hereinafter 'ETSI') intended to purchase excess reservoir water from South Dakota to operate a coal slurry pipeline transporting coal outside of the Missouri River Basin.[88] Missouri, Iowa, and Nebraska filed suit in federal district court to enjoin the sale. The suit alleged the Secretary of the Interior's proposed sale of reservoir water, without approval of the Secretary of the Army, went beyond the authority granted by the Flood Control Act of 1944.[89] The Court agreed and granted the Corps exclusive control of projects over which the Corps assumed primary responsibility.[90] Unfortunately, resolution of the Corps' authority did little to ease disputes between the upper and lower basin regarding water allocation. Following the construction of six reservoirs, the upper basin benefited greatly from the new-found recreational uses. However, this use was at odds with the navigational interests of the lower basin.[91] Tensions heightened between 1987 and 1992 when the entire river basin experienced a drought, thus calling into question the Corps' management practices.[92]

To combat this drought, the Corps followed the Missouri River Main Stem Reservoir System Reservoir Regulation Manual -- more commonly known as the Master Manual.[93] The Corps, following established manual priorities, released water to maintain river navigation

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[85] *Id.*
[86] ETSI Pipeline Project v. Mo., 484 U.S. 495 (1988).
[87] Garrison, *supra* note 73, at 66.
[88] Street, *supra* note 68, at 128.
[89] Garrison, *supra* note 73, at 66.
[90] Street, *supra* note 68, at 129.
[91] *Id.*
[92] *Id.*
[93] Garrison, *supra* note 73, at 67.

in the lower basin.[94] The release resulted in low reservoir levels and a decrease in recreational use in the upper basin, particularly in late summer.[95] As a result of the outcry from states located in the upper basin and alleged new developments in the public interest, the Corps began reevaluating the Master Manual.[96] In its reevaluation, the Corps identified a number of concerns regarding operation of the mainstream system; specifically flood control, navigation, and recreation in addition to other issues.[97]

C. Missouri's Interests in the Missouri River

The state of Missouri is divided by conflicting interest groups, each with its own opinion about the management of the Missouri River.[98] Missouri has not uniformly adopted any particular position in the interstate water dispute, but each interest presents a different perspective and a different set of challenges, specifically in interstate negotiations.[99] Primary and influential interests include flood control, navigation, fish, wildlife, recreation, and domestic and industrial water supply.[100]

As a lower basin state, Missouri has traditionally been interested in flood control and navigation.[101] Despite the numerous floods in the Missouri River Basin after the construction of upper basin dams, the Corps estimates approximately $7 billion in damages have been saved by flood-control measures between 1937 and 1993.[102] In addition to this, construction, maintenance, and operation costs associated with flood-control projects have been offset by other plan benefits, such as hydropower electricity and recreation.[103] On the other hand, navigational interests continue arguing over water allocation since requisite minimum

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[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] Street, *supra* note 68, at 130.
[98] *Id*. at 134.
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*

downstream flow is continually threatened by upper basin activities.[104] Downstream navigation also serves the Missouri agricultural community by providing alternative shipping means for its commodities.[105] As a result, navigation often receives the most attention from Missouri interest groups and government officials alike.[106]

Other Missouri interest groups are mindful of increased fish, wildlife, and recreational uses. They argue the Missouri River should be managed in a way to encourage environmental and recreational opportunities, specifically by returning the Missouri River back to its historical flow pattern.[107] Returning the river to its historical flow would recreate the historic "spring pulse" that accompanies spring rain and melting snow and creates a habitat for fish spawning and feeding.[108] Finally, a small number of groups are concerned with the maintenance of the domestic and industrial water supply.[109] While the Missouri River currently serves as the main water source for many community water supplies, those interested in protecting the Missouri River as a source of drinking water have yet to become involved since there is no immediate threat to current water supplies.[110]

D. Water Allocation in Apalachicola-Chattahoochee-Flint River Basin

Much like the dispute found between the upper and lower states of the Missouri River Basin, the ACF River Basin presents two competing interests that directly affect one another and have proven to be an impediment to water allocation negotiations.

The ACF River Basin is comprised of the Apalachicola, Chattahoochee, and Flint Rivers of Alabama, Florida, and Georgia and drains into the Gulf of Mexico at Apalachicola, Florida.[111] The basin

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[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.* at 135.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] Christine A. Klein, *On Integrity: Some Considerations for Water Law*, 56 ALA. L. REV. 1009, 1052 (2005).

begins with the Chattahoochee River in the northern mountains of Georgia, flows south to mark the Georgia-Alabama border and confluences with the Flint River at that point.[112] The Flint River is over 349 miles long and then flows south to join with Florida's longest river, the Apalachicola.[113] The Apalachicola River then flows into the Apalachicola Bay.[114]

The small fishing village of Apalachicola maintains a regional commercial fishing industry that supplies 90% of Florida's oysters and 10% of the nation's oysters.[115] The village, located on what is often referred to as Florida's "forgotten coast," has also developed a substantial tourist industry known for its "slow, old-South atmosphere."[116] Similar to threats of flow restriction in the upper Missouri River Basin, these industries in Apalachicola are at risk for decreased water levels as the Apalachicola River in 2002 was listed as the eleventh most endangered river in the country.[117]

Hundreds of miles upstream, Atlanta, Georgia continues to grow exponentially, placing a strain on local water supply.[118] Between 1970 and 1980, Atlanta's metropolitan population increased by 27% and by 33% between 1980 and 1990.[119] The increased population also increased demand on important resources such as water, usage of which is expected to increase over 40% by 2050.[120] Much like the Apalachicola River, the Chattahoochee River was named among the country's most endangered

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[112] Barlow Burke, Commentary, *Association of American Law Schools Conference: Transcript of the Section on Natural Resources in Atlanta, Georgia, January 5, 2004*, 21 GA. ST. U. L. REV. 245, 247. (2004).
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.* at 1053.
[117] *Id.* (citing PRWeb, *American Rivers, Most Endangered Rivers of 2002 Announced*, (Apr 4, 2002), http://www.prweb.com/releases/2004/4/prweb36216.htm).
[118] Klein *supra*, note 111, at 1053.
[119] *Id.*
[120] *Id.* (citing ROBERT GLENNON, WATER FOLLIES, GROUNDWATER PUMPING AND THE FATE OF AMERICA'S FRESHWATERS 185, 188 (2002) (stating that an increase in projected municipal and industrial water usage from 618 million gallons per day in 1995 to 872 million gallons per day by 2050)).

rivers because of this explosive growth.[121] Rural Georgia also consumes a significant amount of water both for consumption and irrigation purposes, placing additional pressure on already strained resources.[122]

Similar to the states along the Missouri River Basin, the ACF River Basin cannot accommodate all the demands; preference for one area is to the detriment of another.[123] Also like the Missouri River Basin, competing interests for water allocation are not easily resolved and often result in litigation.

IV. INSTANT DECISION

The D.C. Court of Appeals began its analysis by first determining whether Alabama and Florida have standing.[124] The Court noted that the states credibly claimed the fear of increased reallocation of water would result in "diminishe[d] flow of water reaching the downstream states."[125] Further, the states showed imminence of injury-in-fact, causation, and the fact that revocation of the Agreement would provide redress for their injuries.[126]

The Court then focused its attention on the argument that the Agreement's reallocation of storage space in Lake Lanier constituted a major operational change under the WSA and required Congressional approval.[127] The WSA addresses the development of "water supplies for domestic, municipal, industrial, and other purposes." It authorizes storage for those uses "in any reservoir project surveyed, planned, constructed or to be planned . . . by the Corps of Engineers or the Bureau of Reclamation" so long as construction costs are shared by the

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[121] *Id.*; *see also American Rivers' 10 Most Endangered Rivers for 1999,* PADDLER MAG., July-Aug. 1999, *available at* http//www.paddlermagazine.com/issues/1999_4/EcoRiver.htm ("Atlanta, the most sprawling city in the country, is growing so fast it threatens the health of nearby water-sources. The city's rate of land consumption is eight times greater than its population growth.")

[122] Klein, *supra* note 111,at 1054.

[123] *Id.*

[124] Se. Fed. Power Customers, Inc. v. Geren, 514 F.3d 1316, 1322 (D.C. Cir. 2008).

[125] *Id.*

[126] *Id.*

[127] *Id.* at 1323-24.

beneficiaries.[128] Additionally, the WSA provides "[m]odifications of a reservoir project heretofore authorized, surveyed, planned or constructed . . . which would seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or which would involve major *structural* or *operational changes* shall be made only upon the approval of Congress as now provided by law."[129]

Based upon a plain reading of the statute, the D.C. District Court concluded the Corps' authority to alter a project's operations is limited to non-major matters[130] and that the reallocation of approximately twenty-two percent of Lake Lanier's storage space constituted a major operational change considered by the WSA.[131] The Court then reinforced its position by rejecting each of the Appellee's arguments in turn.

Southeastern first argued the Agreement maintained the current *status quo* of water reallocation and therefore did not constitute a major operational change.[132] The Court rejected this argument by noting the appropriate baseline for measuring the effect of the Agreement's reallocation of storage space is zero, or the amount allocated for storage at the beginning of the project.[133] The Court noted if it were to adopt this logic, the rule would be moot as no major operational change would ever occur as long as the Corps continued to make gradual modifications to the reallocation limits.[134]

Second, Southeastern argued the amount of storage space reallocated by the Agreement was not enough in itself to constitute a major operational change.[135] The Court rejected this argument stating Southeastern failed to provide any data indicating why a reallocation of this magnitude would not constitute a major operational change.[136] The Court noted that although the Agreement provided hydropower generators compensation for the full financial benefit they would have received from

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[128] *Id.* at 1321 (citing 43 U.S.C. §§ 301(a)-(b) (2000)).
[129] *Id.* at 1321-22 (citing 43 U.S.C. §§ 390b(d), 390b(d) (2000)).
[130] *Id.* at 1323.
[131] *Id.* at 1324.
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*

Lake Lanier in the absence of reallocation, the compensation did not prevent the occurrence of a major operational change due to reduced water flow.[137]

Finally, Southeastern argued that because the terms of the Agreement were temporary, Congressional approval was unnecessary.[138] Again, the Court rejected this, stating it was unreasonable to believe Congress intended to limit the Corps' authority to non-major changes. Yet a loophole was left allowing for major modification so long as such changes were temporary.[139]

The Appellate Court concluded that the Agreement's reallocation of Lake Lanier's storage space to local consumption was a major operational change under the WSA and therefore required Congressional approval.[140] Because the Corps did not obtain Congressional approval for the reallocation of Lake Lanier storage space, the District Court erred in approving the Agreement.[141]

V. COMMENT

Unsurprisingly, Alabama and Florida intervened and opposed approval of the Agreement—until that point, negotiations had focused on the allocation of consumable water to the state of Georgia and had failed to protect either Alabama or Florida's interests. Debate is unlikely to end soon since the parties missed their first and second renegotiation deadlines of February 15, 2008 and March 1, 2008, respectively. The states are currently subject to plans implemented by the Corps and other federal agencies.[142] Although debates over the allocation of water in the ACF Basin are new in comparison to other water apportionment cases, thirteen years of litigation provide a significant amount of insight for the states of

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[137] *Id.*
[138] *Id.* at 1324.
[139] *Id.* at 1324-25.
[140] *Id.*
[141] *Id.*
[142] Stacy Shelton, *Georgia's Water Crisis: 'Big loser...is metro Atlanta'*, THE ATLANTA JOURNAL CONSTITUTION, Feb. 6, 2008 at 18A; Ben Evans, *Feds say Water Negotiations have Failed*, ASSOCIATED PRESS, Mar. 1, 2008 *available at* http://www.usatoday.com/news/washington/2008-03-01-2626509258_x.htm.

the Missouri River Basin. By reviewing failed attempts at negotiation, and the potential consequences of an equitable apportionment suit, the Missouri River Basin states have the opportunity to observe how similarly situated parties - with a limited amount of water and competing interests - can reach an agreement or fear being subject to court mandate.

A. The Potential for Court Mandate

In *Southeastern*, the court considered approving the Agreement reached between Georgia, the Corps, the Providers, and Southeastern that mandated a ten- to twenty-year allocation of water from Lake Lanier to Georgia for local use.[143] While at first glance a permanent allocation may seem appealing, often the drawbacks from a judicial mandate outweigh the benefits. First, judicial remedies are often limited by judicial resources, the court's inability to interpret complex facts, and the limits inherent in the adversary process.[144] These limits may result in a mandate that neither fits the needs of the interested parties nor accommodates the potential for an inadequate allocation of water necessary to satisfy future needs.[145] In *New Jersey v. New York*, the United States Supreme Court suggested the doctrine of equitable apportionment is based in fairness, where every abutting state should share fairly in the water distribution as every other abutting state.[146] The rigidity of a potential twenty-year agreement does not bode well for Georgia whose population is expected to double by 2030, with six to eight million individuals who are part of this increase in the Atlanta metropolitan area.[147] Currently, Georgia has approximately 90% of the Basin's population and 82% of the withdrawals of surface water.[148] An equal allocation between the three states would surely cause shortages in Atlanta and other areas of Georgia. Alabama, on the other hand, has 7% population and 11% of the withdrawals. Florida has only

[143] Se. Fed. Power Customers, Inc. v. Geren, 514 F.3d 1316, 1319-20 (D.C. Cir. 2008).
[144] Barlow Burke, Commentary, *Association of American Law Schools Conference: Transcript of the Section on Natural Resources in Atlanta, Georgia, January 5, 2004*, 21 GA. ST. U.L. REV. 245, 292 (2004).
[145] *Id.* at 293.
[146] *Id.* at 294 (citing New Jersey v. New York, 283 U.S. 336, 347 (1931)).
[147] Burke, *supra* note 144, at 250.
[148] *Id.* at 274.

3% of the Basin's population and 7% of the withdrawals.[149] It is quite clear that some parties have more to lose than others.

The Missouri and ACF River Basins are similar in that they both focus on navigation and flood-control with recreational purposes gaining interest.[150] Further, there are a number of interested parties in the basin, all with conflicting views about the 'proper' water allocation. The Missouri River Basin is currently managed by the Corps under the direction of the Master Manual, while operating plans stem from the FCA.[151] The term "multiple use" is often used to describe the management system, which is generally defined as "a combination of balance and diverse resources uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources."[152] In application, multiple use systems incorporate the difficult task of balancing among the many competing interests for which land can be used.[153] In reality, most management systems stem from litigation brought by plaintiffs motivated by deficiencies in the system. This results in a reactionary, *ad hoc* method for managing water allocation.[154] While a more concrete plan may lead to more consistent management, the recent developments in the ACF River Basin advise against judicial mandate. It is important for parties to understand that filing a reactionary suit in response to a current allocation problem may not result in a more desirable situation. As previously stated, equitable apportionment doctrines often result in mandates that fail to address the needs of all involved and prove inflexible over time. Further, litigation is time-consuming, expensive for taxpayers, binding, and typically leaves all parties dissatisfied. Members of the Missouri River Basin would be better suited by attempting to reach a distribution agreement between the upper and lower basins, rather than relying on revisions of the Master Manual or litigation.

Learning from the mistakes of the ACF River Basin, states of the Missouri River Basin must understand the significance of bringing all

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[149] *Id.*
[150] Garrison*, supra* note 65, at 67-68.
[151] Sandra Zellmer, *A New Corps of Discovery for Missouri River Management*, 83 NEB. L. REV. 305, 335-36 (2004).
[152] *Id.* at 340 (citing 43 U.S.C. § 1702(c) (2000)).
[153] *Id.* at 340.
[154] *Id.* at 336.

interested parties to the table. Because Florida and Alabama were not parties to the initial negotiations, their interests were not properly represented and their eventual intervention stalled negotiation efforts between Georgia, the Corps, Southeastern, and the Providers. Members of the Missouri River Basin would likely find themselves in the same situation since it is unlikely an agreement that alienated certain parties would receive Congressional approval. If the states of the Missouri River Basin are to ever reach an agreement, they must note the points of contention in past negotiation efforts both in the Missouri River Basin and the ACF Basin.

B. Agreement between the Parties

Rather than face a mandate that fails to protect their distinct interests, members of both the ACF and Missouri River Basins would benefit greatly by reaching an agreement on their own. First, renegotiations require a degree of awareness about the problems imbedded in the original compact. Two difficulties preventing an agreement are conflicting methods for determining current and future needs and the incompatibility of the uses at opposite ends of the basin.[155] If states in either the ACF or Missouri River Basin form a compact, it should include provisions for the formation of a commission with authority to remedy problems as they arise rather than follow a rigid formula for allocation.[156] The problem of conflicting interests must be resolved between the parties, often resulting in various compromises. However, the flexibility of a commission's authority is "a means of avoiding the necessity for overstating the need for water and also a means of avoiding wasteful or inefficient allocations, thus insuring the commissions allocate water as needed but not precipitously or in advance of foreseeable needs."[157]

States in the Missouri River Basin have such diverse and complex interests that possibly the only long-term solution is an adaptive management system. Rather than focus on setting specific allocation amounts, an adaptive management plan can provide a framework for

[155] Burke, *supra* note 144, at 267.
[156] *Id.* at 290.
[157] *Id.* at 291.

making decisions in the face of environmental and scientific uncertainty. It also gives the Corps the opportunity to consider all relevant factors when making allocation decisions.[158] Forcing the parties to reach an agreement on set allocation amounts will only result in states placing their immediate interests over those for long-term benefit of the entire Missouri River Basin.[159] Allowing for flexibility is more likely to result in a long-term agreement that has the ability to consider the interests of all parties.

VI. CONCLUSION

The ten states of the Missouri River Basin are in a constant state of flux as the Corps currently manages water allocation on a short-term, year-to-year basis. If the states are ever to reach an agreement that provides stability for long-term planning, the agreement must retain a high degree of flexibility in water allocation that allows the Corps discretion in considering the immediate interests of states in both the upper and lower Missouri River Basins. Reflecting on current decisions affecting the ACF River Basin, constant litigation risks a binding, inflexible judicial mandate that may not serve the parties' current or future interests. If an agreement is to be reached in either basin, collaboration amongst all interested parties and adoption of a flexible method for determining current water allocation is crucial.

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[158] Zellmer, *supra* note 151, at 349.
[159] *Id.* at 358.