Water Wars in the Southeast: Alabama, Florida, and Georgia Square Off Over the Apalachicola-Chattahoochee-Flint River Basin

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WATER WARS IN THE SOUTHEAST: ALABAMA, FLORIDA, AND GEORGIA SQUARE OFF OVER THE APALACHICOLA-CHATTahooCHEE-FLINT RIVER BASIN

INTRODUCTION

"[W]hiskey is for drinking, but water is for fighting." These words of Mark Twain may seem ironic to people who have never known water as a scarce resource. However, there is no irony for those who live where water is scarce. Indeed, the unavailability of water may cause more fights than whiskey drinking.

In the past, because of the abundance of water in the eastern United States, water has rarely been a cause for fighting. However, new attitudes toward water resources in the East may be developing as Alabama, Florida, and Georgia begin to fight over the waters of the Apalachicola-Chattahoochee-Flint (ACF) River Basin. The current dispute has its roots in an Army Corps of Engineers’ (Corps) study which recommends a reallocation of water from the Chattahoochee River to provide for Atlanta's long-term water needs. The State of Alabama responded to the Corps’ recommendation by filing suit in federal court to enjoin implementation of the reallocation plan. The litigation has been stayed to enable the states to reach an agreement among themselves.

In January of 1992, Georgia, Florida, and Alabama entered into a joint agreement to conduct a three-year study with the Corps of Engineers to assess regional water needs. During this
period, the states will draw reasonable amounts of water from
the system. In addition, the plan creates an “executive
committee,” which consists of representatives from each state and
a member of the Corps, to supervise the study. During the study
period “each state must report its water usage annually to its
neighbors.”

Part I of this Note will discuss the background and litigation
involved in the dispute over the water reallocation of the
Chattahoochee River. Parts II through IV of the Note will focus
on the experience of other states in resolving interstate water
disputes. Within this section, parts II and III will examine the
Supreme Court doctrine of equitable apportionment. Part IV
looks at resolution through interstate water compacts and
problems with these compacts, and Part V suggests methods to
prevent interstate water compacts from inevitably resulting in
litigation. Part VI analyzes the arguments of those supporting
and opposing the Corps’ proposed reallocation plan. Finally, Part
VII will analyze the issues raised in the complaint in terms of
equitable apportionment and the possible violations of the
National Environmental Policy Act (NEPA) by the Corps of
Engineers.

I. HISTORICAL BACKGROUND OF WATER RESOURCES
DEVELOPMENT IN THE ACF RIVER BASIN AND
THE RESULTING LITIGATION

A. Historical Background of Water Use in the ACF River Basin

The Army Corps of Engineers (Corps) published its first report
on the development of water resources in the ACF River Basin in
1939. This report recommended approval by Congress of full
development of the ACF River Basin system for the purposes of
flood control, navigation, and hydroelectric power. Specific
improvements were later authorized, including the construction
of Buford Dam which was completed in 1958.

The Corps’ involvement in the reallocation of water to meet
Atlanta’s needs is based on two acts of Congress. The first is

5. Jim Yardley, States to Sign Accord on Water Study Today: Ga., Fla., Ala.,
Promise to be Good Neighbors, ATLANTA CONST., Jan. 3, 1992, at A3.
7. Id.
8. Id.
9. Id. at 169.
the Flood Control Act of 1944, which authorizes the Corps to reallocate surplus water at federal reservoirs to industrial and domestic use.\textsuperscript{10} The Flood Control Act defines surplus water as water in excess of that required to meet project purposes.\textsuperscript{11} The second law is § 301 of the Rivers and Harbors Flood Control Act of 1958 which allowed the Corps to store water in federal reservoirs for municipal and industrial uses.\textsuperscript{12} These two Acts do not authorize the Corps to make significant modifications of existing projects. If significant modification is required, such as the reallocation of water from Lake Lanier, further congressional approval is necessary.\textsuperscript{13}

In the early 1970s, the leaders of the State of Georgia realized that the growth of Atlanta was dependent on a stable water supply.\textsuperscript{14} In 1972, Congress authorized the Metropolitan Atlanta Area Water Resources Management Study (MAAWRMS) to develop a long-range water supply plan for the Atlanta area.\textsuperscript{15} During the MAAWRMS, the Corps analyzed over fifty alternative water supply plans from which it selected three.\textsuperscript{16} In 1981, the Corps published a feasibility study for public comment on the three final alternatives: 1) construct a reregulation dam downstream from Buford Dam; 2) reallocate storage in Lake Lanier from hydropower to water supply; or 3) dredge the Morgan Falls reservoir to increase the storage capacity.\textsuperscript{17}

The final report in 1982 recommended the construction of a reregulation dam.\textsuperscript{18} However, the reregulation dam attracted strong opposition due to environmental concerns.\textsuperscript{19} Upon reexamination, a further study revealed that "the net national economic development benefits of the reregulation dam and reallocation of storage alternatives were nearly equal."\textsuperscript{20} In 1988, additional analysis led to a reversal of the original decision and the adoption of the reallocation alternative.\textsuperscript{21} In 1989, the

\begin{itemize}
  \item \textsuperscript{10} \textit{Id.}
  \item \textsuperscript{11} \textit{Id.}
  \item \textsuperscript{12} \textit{Id.}
  \item \textsuperscript{13} \textit{Id.}
  \item \textsuperscript{14} \textit{Id. at 170.}
  \item \textsuperscript{15} \textit{Id. at 170-71.}
  \item \textsuperscript{16} \textit{Id. at 171-72.}
  \item \textsuperscript{17} \textit{Id. at 172.}
  \item \textsuperscript{18} \textit{Id.}
  \item \textsuperscript{19} \textit{Id. at 103 (testimony of Manuel Maloom).}
  \item \textsuperscript{20} \textit{Id. at 173 (testimony of Col. Michael F. Thuss).}
  \item \textsuperscript{21} \textit{Id.}
\end{itemize}
Corps issued a draft Post Authorization Change (PAC) report which recommended that twenty percent of the water currently reserved for hydropower production be reallocated for water supply.22 The PAC also contained an Environmental Assessment (EA) which concluded that the reallocation would not significantly impact the environment.23 The PAC is designed to provide for the water supply needs of Atlanta through the year 2010.24 In response to the PAC, the State of Alabama filed a lawsuit on June 28, 1990.25

B. The Litigation

The lawsuit filed by the State of Alabama names the Corps of Engineers as one defendant.26 The complaint alleges five counts designed to challenge the validity of the Corps’ reallocation plan.27 The first count challenges the reallocation as a violation of common-law water rights.28 Specifically, the complaint alleges that the PAC will vest Georgia interests with expanded water rights at the expense of downstream interests.29 In addition, this first count alleges that the Corps has breached its duty to operate the ACF River Basin system in a neutral manner by favoring Georgia interests.30

The remaining four counts of the complaint allege that the Corps violated the National Environmental Policy Act (NEPA) by failing to consider fully the environmental impacts of the proposed reallocation.31 The complaint asks for an injunction to

22. *Id.* at 103 (testimony of Manuel Maloof).
23. *Id.* at 174-75 (testimony of Col. Michael F. Thuss).
24. *Id.* at 173-74. The Corps entered into interim water contracts which allowed the following concerns to withdraw water from Lake Lanier: Cities of Gainesville, Buford, and Cumming, Georgia; Gwinnett County; and the Atlanta Regional Commission. *Id.* at 173-77. These contracts did not guarantee permanent use of the water, but were designed to allow water use until permanent agreements could be reached. *Id.* These contracts expired on December 31, 1989. *Id.* The Corps proposed new interim contracts along with the reallocation plan. *Id.* However, these contracts were also made the subject of the litigation instituted by Alabama. *Id.* at 176-77.
25. *Id.* at 177.
26. *Downstream Impacts, supra* note 1, at 84. The complaint identifies the State of Alabama as plaintiff and the United States Corps of Engineers as one of several defendants in Civil Action No. CV-90-H-01331-E. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
prevent the Corps from implementing the proposed reallocation or entering into any water supply contracts. 32 Additionally, the complaint asks for a judicial declaration that the Corps failed to comply with the NEPA. 33

In July of 1990, officials from Alabama and Georgia met twice to work out a compromise, but were unsuccessful. 34 In August, the Corps joined Alabama and Georgia at the bargaining table and presented a Memorandum of Agreement. 35 During this time, Florida petitioned to intervene in the lawsuit, as did Georgia and a number of other organizations. 36 On August 30, 1990, Florida, Georgia, Alabama, and the Corps negotiated a Joint Stay of Proceedings to be entered into by Alabama and the Corps. 37 The motion was filed on September 14, 1990, 38 and on September 19, 1990 the court granted the stay to allow the parties to reach a settlement. 39 Although the litigation has currently been stayed, the "fighting" over the water of the ACF River Basin is not over. 40 As will become evident, resort to the courts has been the usual ultimate result in interstate water disputes. 41

The next four sections of this Note will inspect the methods of interstate water dispute resolution. In the past, interstate water disputes have been resolved by judicial resolution in the Supreme Court, by interstate water compacts, and by Congressional action. 42 Congressional action is the least employed alternative 43 and will be addressed within the discussion of the

32. Id.
33. Id.
34. Id.
35. Id. at 85.
36. Id. The Alabama Wildlife Federation; The Cities of Montgomery and Gadsden, Alabama; and the City of Cartersville, Georgia also petitioned to intervene. Id.
37. Id.
38. Id. When the motion was filed, Georgia wrote to the court and objected to the motion because it did not provide for interim water storage agreements to meet Georgia's needs. Id. Florida also wrote to the court to express its agreement to the stay, but asked that the court rule on its Motion to Intervene before granting the Motion to Stay. Id.
39. Id. at 85-86. The court did not rule on the motions to intervene because of the Stay of Proceedings. Id. at 86.
40. Id.
41. See infra notes 148-50 and accompanying text.
43. Id.
Supreme Court doctrine of equitable apportionment as well as in a discussion of alternatives to litigation.

II. RESOLUTION IN THE SUPREME COURT: THE DOCTRINE OF EQUITABLE APPORTIONMENT

The doctrine of equitable apportionment was established in *Kansas v. Colorado* as a conflict of laws doctrine. Following the decision in *Kansas*, the doctrine was extended to apply to interstate water disputes between states with similar laws for governing internal disputes. However, after this initial expansion of the doctrine, the Court began to narrow the scope of its application through burden of proof requirements and deference to congressional action. Initially, the burden of proof focus in equitable apportionment cases centered on the burden of the complaining state to prove injury sufficient to make the dispute ripe for adjudication. Later equitable apportionment cases extended the burden of proof requirement to include proof that reasonable conservation measures would or would not avert injury of the proposed diversion of water. Finally, in one case the Court refused to apply the doctrine of equitable apportionment because Congress had already created its own scheme of apportionment.

A. Equitable Apportionment as a Conflict of Laws Doctrine

"Conflict of Laws" is a body of law which a court uses to choose "which law to apply where diversity exists" between the laws of two jurisdictions. As the following case demonstrates, equitable apportionment originated as a conflict of laws case. In *Kansas v. Colorado*, the State of Kansas brought suit in the Supreme Court to prevent Colorado from diverting waters

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44. 206 U.S. 46 (1907).
47. See infra notes 78-109 and accompanying text.
48. See infra notes 78-85 and accompanying text.
49. See infra notes 86-104 and accompanying text.
50. See infra notes 105-09 and accompanying text.
51. STEVEN H. GIFIS, LAW DICTIONARY (1975).
52. 206 U.S. 46 (1907).
from the Arkansas River. Kansas was a riparian rights state which vested property rights in land owners to the flow of the river "as it was accustomed to run." Conversely, Colorado law recognized the doctrine of prior appropriation which allows upstream landowners to "appropriate" the waters of a stream "for the purpose of irrigating its soil." The Court ruled that it would apply "interstate common law" to decide the dispute. Therefore, the Court held that the two states were entitled to an "equitable division of benefits" from the river. The Court found that the withdrawal of water from the river was a slight detriment to Kansas but provided a great benefit to Colorado. Therefore, the Court concluded that considerations of equity forbade "any interference with the present withdrawal of water in Colorado." However, the Court reserved to Kansas the right to bring a future action if the equitable apportionment of benefits was destroyed by a "material depletion" of the waters of the Arkansas River by Colorado.

53. Id. at 49.
54. Id. at 60. Under common law riparian rights, a landowner is entitled to have surface water pass over his property and to use that water. Mark W. Tader, Note, Reallocating Western Water: Beneficial Use Property and Politics, 1986 U. ILL. L. REV. 277, 279 (1986). In modern riparian jurisdictions, the landowner can make reasonable use of the water subject only to the identical rights of other riparian landowners. Id. The underlying assumption in both these theories is that there will be enough water available for all riparian landowners to use. Id.
55. Kansas, 206 U.S. at 98. The doctrine of prior appropriation developed in western states where water is a scarce resource. Tader, supra note 54, at 279-80. On the other hand, the doctrine of riparian rights was ill suited to water issues in the West. Id. The doctrine of prior appropriation developed because: [w]ith such limited surface water supplies, western lawmakers recognized that if all landowners had an equal right to use water, the rights would not assure landowners of enough water to use their land profitably. To ensure that landowners could productively use water without the threat of disruption from new users, western states required that users physically divert water from the stream bed. An appropriator obtains "priority" in the streamflow over subsequently established uses upon diverting water for a beneficial use. In times of shortage, earlier diverters have a right to fulfill their water requirements before later diverters may take any water. This right establishes "priority" as an important property right. Today, some variant of the "prior appropriation" system to allocate water appears in every western state.

56. Kansas, 206 U.S. at 98.
57. See id. at 98. The Court stated that it would settle the dispute "in such a way as will recognize the equal rights of both." Id.
58. Id. at 113-14.
59. Id.
60. Id. at 117. The Court stated, "[w]hen there is no longer an equitable division of
B. Expanded Applicability of the Doctrine of Equitable Apportionment

Although Kansas involved a conflict of laws issue, the Supreme Court soon expanded the doctrine of equitable apportionment to states which followed similar laws in resolving their internal water rights disputes.\(^{61}\) In Wyoming v. Colorado,\(^ {62}\) both states followed the doctrine of prior appropriation.\(^ {63}\) However, the Court applied a limited form of the doctrine of prior appropriation that imposed on both states a duty to use the water reasonably.\(^ {64}\) Nebraska v. Wyoming\(^ {65}\) was also an equitable apportionment case among prior appropriation states.\(^ {66}\) In Nebraska, the Court held that although “[p]riority of appropriation is the guiding principle” in equitable apportionment cases, the Court will look to many factors\(^ {67}\) in order to reach a just and equitable result.\(^ {68}\) This approach by the court is justifiable by the fact that water is a regional resource, and therefore, state laws should not be applied in a way which would deny a state access to a fair amount of the resource. The effect of considering the relevant factors was that the Court made a “mass allocation” of water without a determination of the rights of individuals within the states.\(^ {69}\)

Connecticut v. Massachusetts\(^ {70}\) and New Jersey v. New York\(^ {71}\) involved states that were riparian rights jurisdictions.\(^ {72}\)
In *Connecticut*, the Court held that "a consideration of the pertinent laws of the contending States" would be one of several factors the Court would consider in an equitable apportionment case.\(^{73}\) Likewise, in *New Jersey v. New York*,\(^{74}\) both states were riparian rights jurisdictions.\(^{75}\) The Court held that New Jersey, the downstream state, could not require New York to give up its right to use the river in order that New Jersey would receive an undiminished flow.\(^{76}\) The Court concluded that "the effort always is to secure an equitable apportionment without quibbling over formulas."\(^{77}\)

**C. The Court Begins to Limit the Doctrine**

The next group of equitable apportionment cases decided by the Supreme Court illustrates the Court's apparent desire to limit invocation of the doctrine by examining the complaining state's burden of proving injury.\(^{78}\) In *Washington v. Oregon*,\(^{79}\) the Court held that Washington could show no loss of benefit, because in periods of water shortage only a small amount of water would reach Washington if the diversions by Oregon were removed.\(^{80}\) Therefore, the Court concluded that Washington had not shown injury by clear and convincing evidence.\(^{81}\)

*Colorado v. Kansas*\(^{82}\) also demonstrates a complaining state's inability to show sufficient injury. In *Colorado*, the Court granted Colorado an injunction to prevent Kansas users of the Arkansas River from bringing further lawsuits against Colorado for violating Kansas water rights.\(^{83}\) The Court found that Kansas could not show that Colorado's increasing water diversions had "worked a serious detriment to the substantial interests of Kansas."\(^{84}\) In addition to their respective holdings, the above two cases indicate the Court's hesitation to adjudicate water

\(^{74}\) 283 U.S. 336 (1931).
\(^{75}\) Id. at 338.
\(^{76}\) Id. at 342.
\(^{77}\) Id. at 343.
\(^{79}\) 297 U.S. 517 (1936).
\(^{80}\) Id. at 523.
\(^{81}\) Id. at 524 (citing *Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1931)).
\(^{82}\) 320 U.S. 383 (1943).
\(^{83}\) Id. at 400.
\(^{84}\) Id.
rights disputes between states and the Court's preference to have such disputes settled pursuant to the Compact Clause of the U.S. Constitution. 85

D. The Standard of Proof Necessary to Show Injury and to Justify Diversion: Further Limitations

More recently, the Court has further expanded the burden of proof requirements necessary to sustain an action for equitable apportionment. 86 The Court was asked to apportion the waters of the Vermejo River in the following two cases. 87 In Colorado v. New Mexico (Colorado I), 88 both states were prior appropriation states. The Court held that its previous cases clearly illustrated that equitable apportionment would "protect only those rights to water that are 'reasonably required and applied." 89 The Court ruled that "wasteful or inefficient uses will not be protected" as such uses are not "reasonably required." 90 Also, the Court found that states have an affirmative duty to "conserve and augment" the water in their interstate streams. 91 The Court concluded that this duty to conserve was imposed on both sides of the dispute: the side wishing to divert as well as the side opposing the diversion. 92 The Court remanded the case to the special master for specific factual findings to determine if reasonable conservation measures by New Mexico could offset the reduction in supply due to Colorado's proposed diversion. 93

The case returned to the Court in Colorado v. New Mexico (Colorado II) 94 in 1984. In Colorado II, the Court addressed the standard of proof that Colorado must meet in order to support its claim 95 and held that the standard of proof was the clear and convincing standard. 96 The Court ruled that to meet this standard, Colorado must prove that its factual contentions are

85. Id. at 392.
86. Sherk, supra note 45, at 572-76.
89. Id. at 184 (citing Wyoming v. Colorado, 259 U.S. 419, 484 (1922)).
90. Id.
91. Id. at 185.
92. Id. at 186.
93. Id. at 190.
95. Id. at 316; see also Sherk supra note 45, at 571-76.
96. Colorado II, 467 U.S. at 316.
“highly probable.” The Court reasoned that this standard reflects the Court’s view that the diverter must bear the risk of an inaccurate prediction. The Court concluded that Colorado had not met its burden of showing that reasonable conservation measures would reduce the injury to New Mexico or that the benefits of diversion would outweigh the harms to other users.

The significance of Colorado II is the way in which the Court applied the clear and convincing standard. In prior cases, the doctrine was applied to satisfy the ripeness requirement for adjudication. States were required to prove injury by a clear and convincing standard. The Court in Colorado II expanded application of the standard to require clear and convincing proof that reasonable conservation measures by the downstream state could avert any injury to the downstream state when an upstream state proposes to divert water from a river. The expansion of the standard of proof requirement indicates the Court’s preference for avoiding a role in resolving interstate water disputes.

A final limitation on the doctrine of equitable apportionment is represented by Arizona v. California. In Arizona, the Court refused to apply the doctrine of equitable apportionment because the Boulder Canyon Project Act, passed by Congress, created its own scheme of apportionment, and, therefore, the Court ruled that it was without power to decide the case. The Court reasoned it could not substitute its judgment for that of the Congress.

97. Id.
98. Id. The Court stated:
   The standard reflects this Court’s long-held view that a proposed diverter should bear most, though not all, of the risks of erroneous decision: “The harm that may result from disrupting established use is typically certain and immediate, whereas the potential benefits from a proposed diversion may be speculative and remote.”
99. Id. (citing Colorado v. New Mexico, 459 U.S. at 187).
100. Id. at 323-24.
101. Id., supra note 45, at 578.
102. Id.
103. Id.
104. Id. at 579; see also supra notes 78-85 and accompanying text.
106. Id. at 565.
107. Id. at 564-65.
108. Id. at 565.
109. Id.
III. EQUITABLE APPORTIONMENT IN GENERAL

From the foregoing cases, some general principles regarding the doctrine of equitable apportionment can be ascertained.110 First, the doctrine of equitable apportionment has been described as a "downstream remedy."111 This description is appropriate because upstream states are rarely, if ever, injured by downstream users.112 However, upstream states have initiated an action for equitable apportionment where litigation has been enacted by citizens of other states in other courts.113 In Kansas, users of the Arkansas River brought suit against Colorado River users for an adjudication of priorities between the two. Colorado, the upstream state, then invoked the original jurisdiction of the Supreme Court to have the pending suits brought by Kansas users enjoined from proceeding further and to have Colorado's rights, as determined in Kansas v. Colorado, protected.114 In New Mexico, Colorado, the upstream state, brought an action in the Supreme Court for an equitable apportionment of the Vermejo River so that it could divert water from that river for future uses.115

Both of these cases are examples of upstream states making use of the doctrine of equitable apportionment which has largely been used by downstream states.116 This is a possible option for Georgia if the negotiations fall through or if Alabama persists with its litigation against the Corps. The present litigation between Alabama and the Corps of Engineers is an example of an "[a]lternative litigation strateg[y]" to adjudication of interstate water rights in the Supreme Court.117 The pending case between Alabama and the Corps could probably not have been brought as an action under the original jurisdiction of the Supreme Court because Alabama would probably be unable to prove injury by clear and convincing evidence.118

110. For a discussion of the general principles of the doctrine of equitable apportionment see Sherker, supra note 45, at 576-78.
111. Id. at 576.
112. Id.
114. 320 U.S. at 388.
115. 459 U.S. at 177.
116. Sherker, supra note 45, at 578.
117. Id. at 581.
118. See supra notes 88-98 and accompanying text.
underlying dispute may, however, be more with the method in
which the Corps manages the system than with the proposed
reallocation of Lake Lanier water for use by Atlanta.¹¹⁹
However, the effect is to deny Atlanta the use of water resources
it may rightfully be able to use. In order to avoid this effect, the
State of Georgia could invoke the original jurisdiction of the
Supreme Court to have the water equitably apportioned.

A second component of equitable apportionment is that once a
complaining state has proven its injury by clear and convincing
evidence, the burden shifts to the state proposing the diversion to
justify the diversion by clear and convincing evidence.¹²⁰ The
justification must show that the benefits of diversion outweigh
the detriment to other users or that conservation measures will
eliminate the detriment.¹²¹

Third, the Court will not follow the riparian rights doctrine in
cases where both states are riparian jurisdictions.¹²² However,
the Court may consider the laws of the respective states as one of
many factors relevant to resolving the dispute.¹²³ Likewise, the
Court will not apply a strict doctrine of prior appropriation in
deciding disputes between two prior appropriation states.¹²⁴ In
all cases, the Court will resolve the disputes in terms that are
fair and just.¹²⁵ In general, some form of the doctrine of prior
appropriation will be applied even in disputes between two
riparian jurisdictions.¹²⁶

In all the above mentioned cases, the Court has consistently
looked at the benefits of diversion and has weighed them against
the detriments of opposing users.¹²⁷ The doctrine of equitable
apportionment has been referred to as the doctrine of “equitable
priority.”¹²⁸ In other words, the Court determines if it is fair to
give one user priority over another.¹²⁹

¹¹⁹ See infra note 169.
¹²⁰ Sherk, supra note 45, at 577.
¹²¹ Id.
¹²² Id.
¹²³ Id.
¹²⁴ Id.
¹²⁶ Sherk, supra note 45, at 577.
¹²⁷ See supra notes 44-98 and accompanying text.
¹²⁸ Sherk, supra note 45, at 577.
¹²⁹ Id.
Finally, the Court prefers that states resolve water disputes by means other than through the Supreme Court. In general, the Court will apportion water between states only when Congress has not acted or the states have been unable to reach an agreement through an interstate compact.

IV. INTERSTATE WATER COMPACTS: AN ALTERNATIVE TO EQUITABLE APPORTIONMENT IN THE SUPREME COURT

This section of the Note will examine the application of the Compact Clause to resolve interstate water disputes and the Court's approach to such disputes. In addition, the Note will examine the inevitable problems that occur with these compacts.

A. Interstate Water Compacts and the Compact Clause

An alternate method of resolving interstate water disputes is the interstate compact. A state may enter into a compact with another state pursuant to the Compact Clause of the Constitution which provides that "no State shall without the consent of Congress ... enter into any Agreement or Compact." The Court has construed the Compact Clause as a complementary method of resolution of interstate disputes. Once Congress approves a compact between states, the compact becomes the law of the United States and the Court will not order relief inconsistent with the compact.

Hinderlider v. La Plata Co. was the first case in which the Court was asked to apply the Compact Clause to interstate water disputes. In Hinderlider, the Court held that a judicial

130. See supra notes 70-71 and accompanying text.
131. See supra notes 77-81 and accompanying text; see also Sherk, supra note 45, at 576.
132. See supra notes 77-81 and accompanying text; see also Sherk, supra note 45, at 576.
133. See supra note 39 and accompanying text.
134. U.S. CONST. art. I, § 10, cl. 3. The entire clause states: No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

137. 304 U.S. 92 (1938).
138. See Paul Elliot, Texas Interstate Water Compacts, 17 ST. MARY'S L.J. 1241, 1245
decision was not the sole remedy for interstate water disputes.\textsuperscript{139} The Court found that the Constitution provided two means of adjusting interstate controversies: legislative compact and judicial decisions.\textsuperscript{140} Further, the Court found that resort to judicial means is never essential unless states are unable to reach an agreement or Congress refuses to consent to a compact.\textsuperscript{141} The Court ruled that under the Compact Clause, states have the power to divide the flow of the river.\textsuperscript{142} The Court concluded that once the states have apportioned interstate water through a compact and Congress has consented, the compact is binding on all citizens of the respective states.\textsuperscript{143}

Although the court ruled that states may enter into binding compacts, the question remained as to what force of law such compacts maintained. \textit{Texas v. New Mexico})\textsuperscript{144} illustrates the Court's approach to construction of an interstate water compact. In \textit{Texas}, the Court ruled that once Congress has approved a compact, the compact is transformed into the law of the United States.\textsuperscript{145} Therefore, the Court held that unless the compact is unconstitutional, "no court may order relief inconsistent with its express terms."\textsuperscript{146} The Court concluded, however, that it would not construe a compact, in absence of an explicit provision to the contrary, to "preclude a state from seeking judicial relief to resolve disputes."\textsuperscript{147} Consequently, the Court allowed litigation over the terms of the compact to proceed.\textsuperscript{148}

It is important to note that states may enter interstate water compacts to avoid protracted litigation and to resolve disputes on their own terms.\textsuperscript{149} However, unless the compact expressly provides that the courts shall not be used in the case of an impasse or unless the compact provides a mechanism for dispute resolution, the dispute may eventually end up in the courts.\textsuperscript{150}

\textsuperscript{139} 304 U.S. at 105.
\textsuperscript{140} \textit{Id.} at 104.
\textsuperscript{141} \textit{Id.} at 105.
\textsuperscript{142} \textit{Id.} at 108.
\textsuperscript{143} \textit{Id.} at 106.
\textsuperscript{144} 462 U.S. 554 (1983).
\textsuperscript{145} \textit{Id.} at 564.
\textsuperscript{146} \textit{Id.}
\textsuperscript{147} \textit{Id.} at 569-70.
\textsuperscript{148} \textit{Id.} at 571.
\textsuperscript{149} Girardot, supra note 42, at 152.
\textsuperscript{150} See supra note 147 and accompanying text.
This is illustrative of some of the problems with interstate compacts.

B. Problems with Interstate Compacts

Interstate water compacts fail because they are drafted poorly, because compacting states fail to foresee future contingencies, or because of a combination of both.\textsuperscript{151} \textit{Texas v. New Mexico}\textsuperscript{152} and \textit{Oklahoma v. New Mexico}\textsuperscript{153} illustrate the problems states face with interstate water compacts.

In \textit{Texas v. New Mexico},\textsuperscript{154} the two states entered into a compact that guaranteed Texas a "quantity of water equivalent to that available under the 1947 condition."\textsuperscript{155} In addition, a commission was formed to administer the compact.\textsuperscript{156} However, since each state was represented equally on the commission and the commission could take no action without the approval of both states,\textsuperscript{157} litigation arose as to what exactly "the 1947 condition" meant.\textsuperscript{158}

This dispute over the meaning of "the 1947 condition" led Texas to invoke the original jurisdiction of the Supreme Court alleging that New Mexico had breached the compact.\textsuperscript{159} The special master concluded, and Texas agreed, that the Court could use its equitable powers to reform the compact and appoint a party to issue a tie-breaking vote.\textsuperscript{160} The Court ruled that it was precluded from granting relief that was inconsistent with the express terms of the compact.\textsuperscript{161} The Court held that to authorize a tie-breaking vote would be inconsistent with the

\begin{footnotesize}
151. Girardot, supra note 42, at 158.
155. \textit{Id}. at 559.
156. \textit{Id}. at 560.
157. \textit{Id}.
158. \textit{Id}. at 559. After a number of years of reduced flows entering Texas, a dispute arose as to the accuracy of the 1947 report upon which the "1947 condition" was based. \textit{Id}. The report defined the state of the Pecos River in 1947. \textit{Id}. The commission investigated the accuracy of the study, but was unable to take any remedial action because the commissioners from each state where unable to reach an agreement. \textit{Id}. at 559-62.
159. \textit{Id}. at 562.
160. \textit{Id}. at 563.
161. \textit{Id}. at 564. The Court stated "unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its terms." \textit{Id}.
\end{footnotesize}
express terms of the compact. The Court reasoned that once Congress has consented to a compact, it becomes the law of the United States, and, therefore, the Court is precluded from using its equitable powers to reform the compact. However, the Court allowed the litigation to continue as an action in contract.

This case illustrates possible problems with interstate compacts. Specifically, it demonstrates that this compact failed as a result of poor drafting and lack of foresight by the compacting states. The compact was drafted poorly because it failed to provide a "workable guide to the amount of water New Mexico owed Texas in a given year." The lack of foresight is demonstrated by the absence of procedures to handle situations when the two states could not reach an agreement.

The case of Oklahoma v. New Mexico also involved the inability of a commission created by a compact to resolve a dispute between the compacting states. The dispute revolved around the meaning of the word "originating" in the compact. Once again, the main flaw in applying the compact was the failure to provide for dispute resolution without having to resort to the courts.

V. SUGGESTIONS FOR AVOIDING LITIGATION

There are three possibilities to reduce the likelihood of litigation in interstate water disputes: requiring the compact to include an allowance for a federal commissioner to cast a tie-breaking vote as a condition of approval by Congress, creating a federal agency that would have the power to apportion interstate water, or requiring an arbitration clause in the compact.

162. Id. at 565.
163. Id. at 564.
164. Id. at 571.
165. Girardot, supra note 42, at 158.
166. Id.
167. Id. at 159.
168. Id.
170. Id. at 219.
171. Id. at 223. Article IV of the compact provides: "New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of the Canadian River above Conchas Dam." Id. at 219 n.2 (emphasis added).
172. Id. at 219.
imposition of a federal tie-breaking vote would eliminate the possibility of a commission deadlock. However, it would create a situation in which the commissioner would have to favor one side or the other, as opposed to an equitable division which theoretically would occur if both sides reached a compromise through bargaining.

The second suggestion for avoiding litigation is the creation of a federal water agency similar to the National Labor Relations Board to hear water disputes. Although, a "water board" would be similar to the adversarial proceedings in a court, it would be "superior to the Supreme Court" in that it would possess greater expertise in deciding water disputes. However, in view of the modern trend to reduce federal spending, it is unlikely that creation of another federal agency would attract much support.

The final suggestion is that an arbitration clause should be included in all compacts as a condition of congressional consent. The advantage of arbitration over litigation is that costs are significantly reduced. In addition, disputes in arbitration are initiated and settled much quicker than disputes that are taken to the Supreme Court. Under arbitration, states would retain control of resolving their regional disputes, and arbitrators could conceivably be allowed to reach a compromise of both sides’ positions as opposed to casting a vote for one side. However, procedural efficiency in the resolution of water disputes may not be conducive to allowing both sides to

174. Id. at 167.
175. Id. at 168-69.
176. Id. at 169-70.
177. Id. at 171.
178. Id.
179. Id. at 172.
180. Id. The following arbitration clause is found in the Sabine River Compact:
   In the case of a tie vote on any of the [Commission’s] determinations, orders or other actions subject to arbitration, then arbitration shall be a condition precedent to any right of legal action. Either side of a tie vote may, upon request, submit the question to arbitration. If there shall be arbitration there should be three arbitrators: one named in writing by each side and the third chosen by the two arbitrators so elected. If the arbitrators fail to select a third within ten days, then he shall be chosen by the Representative of the United States.
   Id. at 172-73.
181. Id. at 173.
182. Id. at 173-74.
183. Id. at 174-75.
fully investigate the legal positions of the other side.\footnote{Id. at 176.} Consequently, congressional requirement of arbitration raises due process concerns.\footnote{Id. at 175-76.} Nevertheless, arbitration does seem to be the most workable and efficient proposal.\footnote{Id. at 177.}

To this point, this Note has focused on the methods of resolving interstate water disputes. These cases and suggestions provide the background necessary to illustrate the problems in reaching a final resolution in a water dispute that will avoid protracted litigation. In the next sections, this Note will examine the specific issues involved in the ACF River Basin dispute from the practical as well as the legal standpoints.

VI. ANALYSIS OF THE ISSUES: LONG TERM WATER SUPPLY NEEDS FOR THE ATLANTA AREA V. DOWNSTREAM IMPACTS

The present dispute over the ACF River Basin is somewhat analogous to the biblical story of David and Goliath. Many downstream users of the ACF River Basin see Atlanta as a giant that threatens smaller downstream interests by hoarding the water of the system for itself without regard for the impacts of its use.\footnote{Downstream Impacts, supra note 1, at 58 (testimony of Mr. Hirt).} Likewise, the downstream interests in this dispute may be viewed as a parody of David as they challenge the giant that threatens their development and survival. However, as the following discussion will illustrate, the David in the present case may be attacking an innocent giant because of its dispute with another giant. The present dispute may be more of an issue of how the Corps operates the ACF River Basin system than of the actual amount of water Atlanta uses from the system.\footnote{See infra note 189 and accompanying text.}

Proponents of the proposed water reallocation argue that Atlanta's growth is contingent upon a dependable supply of water.\footnote{Water Supply Needs, supra note 2, at 108 (testimony of Manuel Maloof). Proponents also point out that water supply and water quality for the Atlanta area was an original project purpose. Id. at 102. Official project purposes are designated by Congress and receive priority when making decisions that affect the entire system. Downstream Impacts, supra note 1, at 19-20. In addition, supporters of reallocation indicate that "documentation shows that increased off peak releases for future Atlanta region water withdrawals was fully intended for the project." Id. In other words, it was fully contemplated that the Atlanta region would be entitled to draw more water.} They claim that the entire country will suffer if a
permanent solution is not reached to satisfy Atlanta’s water needs. The proponents begin their argument by pointing out that four times as much water flows in the Chattahoochee when it reaches Columbia, Alabama than when it leaves Atlanta, and twelve times as much flows in the Chattahoochee when the ACF River Basin system empties into the Apalachicola Bay. The proponents’ strongest argument centers around the Corps’ PAC report which determined that impacts on downstream users will be “minor and insignificant.” Finally, those who support reallocation posit that the flow level in the Chattahoochee river is more a result of how the Corps operates the dams than the amount of water Atlanta uses. In addition, they point out that in a worst case scenario, such as the drought of 1988, the flow of water in the system would only be reduced by one percent where the system empties into the Apalachicola Bay. However, they also argue that Atlanta’s commitment to water conservation during drought periods will make this level of reduced flow unlikely.

The opponents of the reallocation plan identify five problems with the Corps’ PAC report. First, the impacts on the Apalachicola Bay area were not considered; second, the plan will allow the Atlanta region to draw too much water out of the system; third, reallocation will reduce the depth of the river below the minimum needed for navigation; fourth, the water quality will be reduced; and finally, reallocation will reduce the number of recreation days on Lake Lanier.

First, Florida argues that the impacts on the Apalachicola Bay area were not considered in evaluating the alternatives to reallocation, and that the reduced flows in the system will harm the wildlife in the bay. Supporters of the reallocation plan respond to this by pointing out that the Corps sought the U.S.

out of the system in the future through increased releases. Id. Therefore, proponents conclude that the reallocation of water is not an expanded use of the system but an original purpose which Atlanta is prepared to fully realize now. Water Supply Needs, supra note 2, at 102 (testimony of Manuel Maloof).

190. Water Supply Needs, supra note 2, at 103.
191. Id. at 102.
192. Id. at 105.
193. Id. at 104.
194. Id.
195. Id.
196. See supra notes 160-70 and accompanying text.
Fish and Wildlife’s (Panama City, Florida office) opinion and received a letter from that office that it considered the project “favorably.”

Second, opponents are concerned about the large amounts of water the reallocation plan will allow the Atlanta area to draw out of the system. Supporters of reallocation respond that seventy-four percent of the water removed from the ACF River Basin system will be returned as treated water. Therefore, supporters conclude that Atlanta’s use is a small percentage of the entire system and is a “reasonable use.”

The third concern of opponents is that reallocation will reduce the depth needed for navigation in the ACF River Basin system. Supporters of reallocation respond that in some respects navigation will improve on the river and that the full depth of the river will only be reduced 2.1% of the time.

The fourth concern of opponents is that the quality of water in the ACF River Basin system will be reduced. Reallocation supporters only response to this is that requirements for treatment of Atlanta’s wastewater are progressing and that water quality is expected to improve in the future.

The final area of the opponents’ concern is the loss of recreation days on Lake Lanier. Supporters of reallocation admit that this will be the largest impact of reallocation but claim these effects will be minor. Supporters argue that even though recreational users will be forced to go elsewhere, the economic loss will be absorbed by future growth in the area due to increases in population. Proponents of the reallocation

198. Id.
199. Id. at 106.
200. Id.
201. Id.
202. Id.
203. Id.
204. Id. at 181 (testimony of Billy B. Turner).
205. Id. at 106 (testimony of Manuel Maloof). The proponents do not state how this will occur. Id. However, reallocation will result in water being released for use on a more constant basis than previously when releases only occurred during peak hydropower demand periods. Id. at 101. Therefore, the flow in the river will be more constant. In addition, proponents point to the State of Georgia’s and particularly the Atlanta region’s dedication to water conservation and pollution control. Downstream Impacts, supra note 1, at 58-60 (testimony of Ms. Stevens).
207. Id.
208. Id.
plan conclude that "[m]any of the fears of other users of the system are based on perceptions and not necessarily on fact." 209

VII. ANALYSIS OF THE ISSUES RAISED IN THE LITIGATION

This section will examine the issues raised in the Corps of Engineers litigation. Specifically, it will examine whether the Corps’ proposed reallocation will divest downstream interests of any water rights and whether the Corps violated the National Environmental Policy Act (NEPA).

A. Whether the Corps’ Reallocation Plan Vests Georgia Interests with Expanded Water Rights at the Expense of Downstream Interests

This issue will be examined in terms of the doctrine of equitable apportionment. Although the issue may never reach the Supreme Court, the determination of the rights of upstream interests and downstream interests can best be analyzed by looking at past actions of the Court in apportioning interstate streams. 210 After all, the ACF River Basin system is an interstate resource, and, therefore, relative rights to its water would not be determined by a strict application of common law principles. 211 Following this discussion, this Note will discuss the allegations in the complaint regarding the Corps’ failure to meet the requirements of NEPA.

Although the proposed reallocation of the ACF River Basin waters may reduce the flow of water in the ACF River Basin system, Alabama and Florida will not necessarily be divested of any water rights. In New Jersey v. New York, 212 the Court held that New Jersey could not require New York to give up its use of the river so that New Jersey would receive an undiminished flow. 213 Therefore, Alabama and Florida do not have an absolute right to require Georgia to deliver an undiminished flow of water to their borders. 214 The Court has also held, however,

209. Id. at 105.
210. However, Georgia could invoke the original jurisdiction of the Supreme Court to have the waters apportioned and thereby prevent other users from bringing subsequent lawsuits. See supra notes 114-17 and accompanying text.
211. See supra notes 51-77 and accompanying text.
212. 283 U.S. 336 (1931).
213. See supra notes 74-77 and accompanying text.
214. See id.
that upstream users are not entitled to use water to the extent of a "material depletion" of the downstream users' interest. In *Nebraska v. Wyoming* the Court identified the factors it would look at to determine an equitable apportionment between the states. If examination of these factors indicates that reallocation would impose a significant detriment on downstream Florida and Alabama users without an offsetting benefit, then the rights of the downstream users will have been invaded.

In the present case, the damage to downstream interests are minimal; this is evident in two ways. First, there is more water flowing in the ACF River Basin system when it enters Alabama and Florida than when it leaves the Atlanta area. Second, in a worst case scenario, such as the drought of 1988, the flow of the system will only be reduced by three percent as the river enters Alabama and one percent as the system flows into the Apalachicola Bay in Florida. From the perspective of water supply, the downstream states will still have significantly more water than the Atlanta region.

The only potential detriment to Alabama is the reduction of hydropower generation potential, thereby raising the costs to generate power. However, groups in Georgia and Alabama have already met and agreed to a lump sum settlement to compensate for lost hydropower generation capacity. In view of these facts, the overall detriment to Alabama is minimal. Therefore, it is difficult to conclude that Georgia will be vested with greater water rights than Alabama. However, Florida's concerns about the proposed reallocation are another matter.

Florida's concern about the proposed reallocation revolves around the potential environmental impacts on the Apalachicola Bay area. The Apalachicola Bay is an estuarine sanctuary. Diminished flow from the ACF River Basin

215. See supra notes 52-60 and accompanying text.
216. 325 U.S. 589 (1945).
217. See supra note 67.
218. See supra notes 51-60 and accompanying text.
220. Id. at 104.
221. Id.
222. *Downstream Impacts*, supra note 1, at 61.
223. Id. However, some groups claim that their interests were not represented at these negotiations. Id.
224. Id. at 109 (testimony of Al Lawson).
225. Id. An estuary is an inlet or arm of the sea where fresh water (usually from a
system could cause an increase in the salinity of the Bay, which will attract oyster predators into the Bay. This means diminished oyster production and corresponding economic losses. Florida argues that a combination of drought, increased demand, and the Army Corps of Engineer’s management of the river system have contributed to conditions that have caused an increase in oyster predators in the Bay. The increase of predators in the bay area could have detrimental effects on the entire Gulf of Mexico ecosystem. Florida argues that more study must be done to determine the environmental effects of reallocation on the Apalachicola Bay area.

Florida’s concerns about the environmental impact on the Apalachicola Bay area are understandable. However, the Corps considered the environmental effects on the area when it conducted its study to determine the proper alternative to satisfy Atlanta’s water needs. Florida’s real dispute may not be with the water reallocation, but with the manner in which the Corps operates the ACF River Basin system. This hypothesis is especially persuasive considering that climatic conditions and the method by which the Corps operates the system have a greater impact on the flow of the river than the reallocation will.

river) and salt water meet. WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 626 (2d ed. 1983). In addition, an estuary is fertile breeding ground for many aquatic species. Downstream Impacts, supra note 1, at 10 (testimony of Mr. Gallagher).

226. Downstream Impacts, supra note 1, at 11.

227. Id. Normally the Bay has just the right salinity for oyster production, but drought conditions experienced from 1986–1988 caused an increase in the salinity in the Bay and a corresponding increase in oyster predators. Id.

228. Id. at 110. Florida argues that in managing the system, the Corps has not addressed the Apalachicola Bay because the Bay is not considered an official user of fresh water. Id. In fact, the Bay is not a “project purpose” of the system. Id. The result could be that in the day-to-day operation of the system, the Corps does not consider the needs of the Apalachicola Bay area. Id. at 25. Water Supply Needs, supra note 2, at 108 (testimony of Manuel Maloof).

229. Downstream Impacts, supra note 1, at 111 (testimony of Al Lawson).

230. Id. at 111-12.

231. Water Supply Needs, supra note 2, at 172-73 (testimony of Col. Michael F. Thuss). The Corps had completed an EIS on a proposed reregulation dam. Id. Congress approved the construction of the reregulation dam. Id. It was later determined that a reregulation dam would be more environmentally hazardous than the reallocation alternative. Id. Subsequently, an Environmental Assessment was done to determine the effects of reallocation. Id.; see also id. at 105-08 (testimony of Manuel Maloof).

232. See supra note 188.

Reallocation may have detrimental effects on Florida’s interests. However, whether the possible detriment to Florida’s interests outweigh the Atlanta area’s interest in a dependable water supply is suspect, especially when one considers that climatic conditions and ACF River Basin system management may have a greater impact than Atlanta’s use of water on the system. The Supreme Court’s doctrine of equitable apportionment and its inherent balancing of benefit with detriment may not be applied in this case. However, it is helpful in assessing whether the states have a legitimate claim that they are being divested of water rights.

B. Whether Corps’ PAC Report Failed to Meet the Requirements of the NEPA

Four of the five counts of Alabama’s complaint allege that the Corps violated the NEPA by not conducting an Environmental Impact Study for the proposed reallocation plan. In general, a court will apply a deferential standard of review in assessing the Corps’ decision to conduct an Environmental Impact Study, even where other federal agencies believed additional study was warranted. In Marsh v. Oregon Natural Resources Council, the Supreme Court reviewed the Corps’ decision not to prepare a supplemental Environmental Impact Statement (EIS). In Marsh, the plaintiffs claimed that the Corps violated the NEPA by failing to describe adequately the environmental consequences of a three-dam construction project. The Court found that the decision to conduct a supplemental EIS is similar to the decision to conduct the first EIS. The Court held that “if there remains ‘major Federal action[n]’ to occur, and if the new information is sufficient to show that the remaining action will ‘affect[t] the quality of the human environment’ in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.”

234. See supra notes 224-30 and accompanying text.
235. See supra note 219-21 and accompanying text.
236. See supra note 31 and accompanying text.
238. Id. at 383.
239. Id. at 388.
240. Id. at 374.
241. Id.
Crucial to the issue is the standard to be applied in reviewing the Corps' decision not to conduct a supplemental EIS.\textsuperscript{242} The Court held that the review of the Corps' decision would be controlled by the "arbitrary and capricious" standard of § 706(2)(A) of the Administrative Procedure Act.\textsuperscript{243} The Court stated that in determining whether a decision is arbitrary and capricious the Court will "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."\textsuperscript{244} The Court noted that when specialists express conflicting views, an agency should be allowed to rely on the reasonable opinions of its own experts.\textsuperscript{245} After examining the record, the Court concluded that although the Corps' decision may have been disputable, the Corps had made no "clear error of judgment."\textsuperscript{246} In the present case, the Corps had already completed an EIS in which it determined that a reregulation dam represented the most economic benefits among the alternative sources of water supply for the Atlanta area.\textsuperscript{247} In 1988, the Corps prepared a supplemental EIS which indicated that the economic benefits of a reregulation dam and the reallocation alternative were relatively equal.\textsuperscript{248} Finally, the Corps prepared an Environmental Assessment (EA) of the impacts of the proposed reallocation in its PAC report.\textsuperscript{249} In view of the amount of environmental study the Corps had conducted before recommending the water reallocation and in view of the differences of opinion as to impacts of reallocation,\textsuperscript{250} it is difficult to conclude that the Corps made any "clear error of judgment."\textsuperscript{251} Further support for this conclusion is found in \textit{Roanoke River Basin Ass'n v. Hudson.}\textsuperscript{252}

\textsuperscript{242} Id. at 375-78.
\textsuperscript{243} Id. at 376 (citing 5 U.S.C. § 760(2)(A)).
\textsuperscript{244} Id. at 378 (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)).
\textsuperscript{245} Id. The Court recognized, however, that a reviewing court should not automatically defer to an agency's express reliance on its own experts, but should review the record to ensure that the agency had reached a reasoned decision. Id.
\textsuperscript{246} Id. at 385.
\textsuperscript{247} Water Supply Needs, supra note 2, at 172 (testimony of Col. Michael F. Thuss).
\textsuperscript{248} Id. at 173.
\textsuperscript{249} Id. at 174.
\textsuperscript{250} See supra notes 189-209 and accompanying text.
\textsuperscript{252} 940 F.2d 58 (4th Cir. 1991).
WATER WARS IN THE SOUTHEAST

Roanoke is similar to the ACF River Basin situation in that it also involved a reallocation of water that evoked significant controversy among experts. In Roanoke, the Corps issued a permit to the City of Virginia Beach to divert water via a pipeline from Lake Gaston for its water supply. The pipeline also required the reallocation of water from hydropower production to water supply. The State of North Carolina filed suit to prevent construction of the pipeline.

The plaintiff argued that because "disinterested federal agencies" requested an EIS for the project, the project was "controversial," and, therefore, the Corps abused its discretion in refusing to conduct an EIS. The court ruled that the disagreement as to whether an EIS should be conducted is not grounds for a court to order an EIS. The court held that it was only necessary that the Corps address the comments of other agencies, but it need not defer to them. Therefore, the court concluded that the Corps did not abuse its discretion.

Both Marsh and Roanoke indicate a willingness of courts to defer to the judgment of the Corps regarding the decision to conduct an EIS or supplemental EIS. In sum, it is only necessary that the Corps considered all relevant factors in coming to a reasoned conclusion. In the present case, Florida has argued that because the Apalachicola Bay is not a project purpose, the impacts on the Bay were not adequately considered. However, the Corps did look at the effects of reallocation on the entire ACF River Basin system before it recommended reallocation. The designation as project purpose is significant only in the day-to-day management of the system as to which uses have priority over the water flow.

253. Id. at 60-64.
254. Id. at 61.
255. Id.
256. Id.
257. Id. at 64.
258. Id.
259. Id.
260. Id.
262. 940 F.2d 58 (4th Cir. 1991).
263. See supra notes 256-52 and accompanying text.
264. Id.
265. Downstream Impacts, supra note 1, at 12 (testimony of Mr. Lawson).
266. Id. at 20 (testimony of Col. Michael F. Thuss).
267. Id. at 19.
addition, the Corps has conducted a study and has addressed the concerns of all parties opposed to its decision to reallocate water for use by Atlanta.\textsuperscript{268} Therefore, it is unlikely that a court will conclude that its decision was arbitrary and capricious. Consequently, the four counts of the complaint that allege that the Corps violated the NEPA are unlikely to be successful.

CONCLUSION

Water is not “for fighting,” it is for drinking; a responsible approach to water management will take this attitude. A responsible approach to water management is devoid of economic concerns and rich with concerns for preservation of the resource and the environment.

An understanding of the interstate water wars and the methods of resolution in the western United States is important in the attempt to resolve the conflicts that are destined to occur in the East. Commissions must be structured in a way to prevent deadlock and the terms of compacts must be defined more precisely to avoid litigation such as in Oklahoma. Eastern states should learn from the mistakes of their western counterparts.

The most important lesson to learn from both yesterday’s and today’s water disputes is that there is a need for conservation of water by all users. Conservation of water should not be viewed solely as the job of the entity that uses the most of the resource; it is every user’s duty to conserve. Users of a river system should be forced to comply with the conservation standards of the strictest state.\textsuperscript{269}

Whatever chance of success the present litigation has, it has probably served its essential purpose in seeing that all states in the ACF River Basin have a voice in determining its management.

Robert E. Vest

\textsuperscript{268} See supra notes 196-209 and accompanying text.

\textsuperscript{269} Water Supply Needs, supra note 2, at 108 (testimony of G. Robert Kerr).