

LEARNING TO GET ALONG: ALABAMA, GEORGIA, FLORIDA AND THE CHATTAHOOCHEE RIVER COMPACT

I. INTRODUCTION

Throughout history, water has proved to be a defining and dividing resource in societal evolution.¹ The present dispute between Alabama, Georgia, and Florida is emblematic of the dilemma which can arise when several groups share the same water resources. Cultures have developed around and fought to preserve their rights to bodies of water, like rivers and lakes, for a variety of reasons.² First, water is an essential element of life, without it living things like humans and plants wither and die.³ Irrigation, transportation, and trade are also responsible for the growth of many areas. As the industrial revolution unfolded, rivers were used to meet the growing needs of mass production and large scale manufacturing.⁴ Today, impoundment of water allows hydroelectric dams to create electricity while meeting society's other needs for transportation, recreation, domestic, and industrial uses.

II. THE DISPUTE

In 1989, the United States Army Corps of Engineers entered into a contract with the state of Georgia which allowed for significant withdrawal of water from the Chattahoochee River for the city of Atlanta's consumption.⁵ Atlanta's rapid development

1. See LUDWIK A. TECLAFF, *WATER LAW IN HISTORICAL PERSPECTIVE* 1-2 (1985).

2. See Kevin P. Scanlan, Note, *The International Law Commission's First Ten Draft Articles on the Law of the Non-navigational Uses of International Watercourses: Do They Adequately Address all the Major Issues of Water Usage in the Middle East?*, 19 *FORDHAM INT'L L.J.* 2180, 2184-85 (1996).

3. See Arthur M. Piper & Harold E. Thomas, *Hydrology and Water Law: What is Their Future Common Ground*, in *WATER RIGHTS* 2 (J. H. Beuscher ed., 1967).

4. See TECLAFF, *supra* note 1, at 2.

5. See *River Rivalry*, *THE ECONOMIST*, Mar. 30, 1991, at 26. Atlanta proposed additional withdrawals amounting to 529 million gallons a day, twice as much as the city had previously withdrawn. *Id.*; Ford Risley, *Water Rights Fights Move East*:

created an increasing need for water from the Chattahoochee River for drinking, sanitation, and industrial uses.⁶ When this contract was announced, the state of Alabama commenced a lawsuit in United States District Court for the Northern District of Alabama seeking an injunction prohibiting the implementation of the contract.⁷ Alabama considered it important to enjoin the contract before the water was allowed to be withdrawn because waiting could allow some rights to vest in the citizens of Georgia who consumed that water.⁸ The state of Florida later joined in the lawsuit against the Corps of Engineers.⁹

The case was moved to the inactive docket, by the consent of the parties, pending the results of a five year study conducted by the United States Army Corps of Engineers on the impact of the proposed water allocation for the entire Chattahoochee-Apalachicola basin.¹⁰ That five year study was due in October 1996 and was expected to be at least one year late.¹¹ In the meantime, the Governors of Alabama, Georgia, and Florida have signed an agreement to create a regional water planning authority to allocate the waters of the Chattahoochee, Flint, and Apalachicola rivers among all of their users.¹² Congress and

Atlanta at Center of Clash over Chattahoochee River, DALLAS MORNING NEWS, Nov. 15, 1990, at 42A. The Corps has the responsibility of overseeing the management of the Chattahoochee-Apalachicola Basin and all water withdrawal increases must pass their approval. See Brian Morris, *Unanswered Prayers: The Upper Missouri River Basin States Take on the U.S. Army Corps of Engineers*, 68 N.D. L. REV. 897, 903-04 (1992).

6. Atlanta's growth has been the cause of much of the damage which has taken place on the Chattahoochee River. See Lucy Soto, *New Alarm is Sounded About the River; Group Places Chattahoochee on the Top 10 Endangered List*, ATLANTA J. & CONST., Apr. 17, 1996, 1A. "One of their biggest threats, according to American Rivers and local environmentalists, is uncontrolled growth and development—the frenzied pace of bulldozers peeling back the earth to accommodate shopping centers, roads and new subdivisions." *Id.*

7. Complaint of Alabama, *Alabama v. United States Army Corps of Engineers* (N.D. Ala. June 28, 1990) (No. CV-90-H-01331-E).

8. See *id.* at 10-11.

9. Mike Williams, *Florida Seafood Workers Fear Being Left High and Dry in Water War; Compromise Sought over Chattahoochee Tri-State Tug of War*, ATLANTA J. & CONST., Aug. 9, 1991, at 4F.

10. Charles Seabrook, *Campbell Suspicious of Three State Pact to Divide Chattahoochee's Waters*, ATLANTA J. & CONST., Sept. 24, 1996, at 1C.

11. *Id.*

12. John D. Alcorn, *Compacts Could Part the Waters*, MONTGOMERY ADVERTISER, Feb. 27, 1997, at 1A.

President Clinton have both approved the structure of the compact.¹³

The agreement signed by the states simply created the planning board and guaranteed each state at least a minimal flow; however, it did not specify particular water divisions between the states.¹⁴ The planning authority will be composed one representative from each of the three state Governors and a Federal representative appointed by President Clinton.¹⁵ Each state's representative on the board will have an equal vote on the distribution plan.¹⁶ The negotiation process began after the Corps of Engineers' study was completed, and a resolution must be reached by December 1998.¹⁷

Alabama, Georgia, and Florida bring different concerns to the table in these negotiations. Both Alabama and Georgia require the waters of the Chattahoochee to support growth in population and industry.¹⁸ Droughts in the region in the early 1980s alerted the states to the danger a water shortage can create.¹⁹ Atlanta's rationale for increasing withdrawal of water from the Chattahoochee is that it expects population to swell to 3.7 million by the year 2010.²⁰ Georgia officials have indicated that allowing enough water to maintain a navigation channel on the lower Chattahoochee is not a significant state priority.²¹ Alabama contends that a decrease in the flow of the

13. Charles Seabrook, *Heading Off a Tri-State Water War—Governors of Georgia, Alabama, and Florida are working Out a Plan to Insure Equitable Share of Rivers*, ATLANTA J. & CONST., Feb. 19, 1998, at C1. See also U.S. CONST. art. I, § 10, cl. 3 (requiring that Congress approve all interstate compacts).

14. See 1997 Ala. Acts 67; Charles Seabrook, *Georgia, Neighbors See End to Water War—Governors of Three States Prepare to Sign Rare Compacts on Sharing Resources*, ATLANTA J. & CONST., Feb. 17, 1998, at A1. See also Russ Bynum, *Water Pacts Clear Georgia Legislature*, ASSOCIATED PRESS POL. SERVICE, Feb. 12, 1997.

15. 1997 Ala. Acts 67, at art. VI (b), (c); Sean Selman, *Leaders Updated on Water Pacts*, MONTGOMERY ADVERTISER, Dec. 18, 1996, at 3B.

16. 1997 Ala. Acts 67, at art. VI (d).

17. Selman, *supra* note 15, at 3B; *Best Option: Approve Water-Sharing Agreements*, MONTGOMERY ADVERTISER, Jan. 31, 1997, at 6A.

18. Charles Seabrook, *Water Wars Take Shape Between Georgia and Neighbors*, ATLANTA J. & CONST., Nov. 27, 1989, at A1.

19. *River Rivalry*, *supra* note 5, at 26.

20. See Seabrook, *supra* note 18, at A1.

21. Charles Seabrook, *Water WARS Three States Near Showdown: Georgia, Alabama, and Florida Declared a Ceasefire over Crucial Water Rights Pending a Study's Results. Time is Almost Up*, ATLANTA J. & CONST., Sept. 9, 1996, at 7B.

Chattahoochee would stunt the growth of its eastern counties, which border Georgia along the Chattahoochee.²² All the while, some in Georgia contend that Alabama is trying to steal business away from Atlanta by "turning off the city's tap."²³

Like droughts, significant withdrawal of water from the river can have a negative effect on barge traffic and even render some segments of the river impassible. However, Alabama's concern is not only with the amount of water that reaches the state, but also with the quality of that water.²⁴ In addition to being a tremendous water consumer, Atlanta is also a large scale producer of waste.²⁵ Currently, Atlanta discharges large amounts of treated waste into the Chattahoochee. The city is not able to comply with its discharge permits under the Clean Water Act²⁶ and is currently accruing fines of \$20,000 per day.²⁷ Compounding this problem are statistics which indicate that for each new resident of Atlanta, an estimated 85 gallons of sewage is produced daily.²⁸ This is particularly significant when considered alongside Atlanta's long term population projections of 3.7 million by the year 2010.²⁹

Florida shares Alabama's concern over access to clean water, but for different reasons. Florida has the disadvantage of being the last state the waters of the Chattahoochee flow through. As a result, Florida's water has accumulated the greatest amount of contamination, and the levels of the water flow

22. See Sean Selman, *Water Dispute Unites Diverse State Interests*, MONTGOMERY ADVERTISER, Aug. 4, 1996, at 1A.

23. *River Rivalry*, *supra* note 5, at 26.

24. Seabrook, *supra* note 18, at A1.

25. Martha Ezzard, *Another \$100,000 for River Spills*, ATLANTA J. & CONST., Feb. 1, 1997, at A10. Within seven months, Atlanta has had two major accidental sewage discharges. See Charles Seabrook, *City Faces Another Sewage Spill Fine This Time, State Levies \$100,000 for Sludge into Chattahoochee*, ATLANTA J. & CONST., Feb. 1, 1997, at D1. In June 1996, Atlanta was fined \$20,000 for the discharge of 500,000 gallons of untreated sewage from the R.M. Clayton sewage treatment plant. *Id.* Most recently, in January 1997, the city was fined \$100,000 for the discharge of 4,000 gallons of sewage sludge from the same plant into the Chattahoochee. *Id.*

26. 33 U.S.C. §§ 1251-1387 (1994).

27. See Charles Seabrook, *Atlanta Fines are Pouring Funds into State Coffers Every Month, City Sends \$600,000*, ATLANTA J. & CONST., Jan. 24, 1997, at B1. The city is paying these fines because it is required by the state to have five mini sewage treatment overflows and the city has only three. See *id.*

28. See Seabrook, *supra* note 18, at A1.

29. See Seabrook, *supra* note 18, at A1.

have also decreased most significantly.³⁰ This fact exacerbates the problems for one of Florida's industries, the oyster production beds at the mouth of the Chattahoochee-Apalachicola basin.³¹ The oyster industry depends on a steady flow of clean fresh water from rivers to pass over oyster beds.³² Without that water supply, the oyster industry in Northern Florida is doomed.³³

III. WATER RIGHTS DOCTRINES

A. Riparian Rights

Water laws in the United States fall into two primary categories: riparian rights and prior appropriations.³⁴ The predominant system of water rights analysis east of the Mississippi River is the riparian rights doctrine.³⁵ Under the riparian system, downstream landowners have the right to have water remain unpolluted and also the right to have the flow of the river continue uninterrupted.³⁶

It is important to note that a riparian owner does not have to own the watercourse in order to have vested rights to its use.³⁷ This is particularly significant in the Chattahoochee dispute. The Chattahoochee forms part of the border between Alabama and Georgia, with the high water mark on the West bank of the river serving as the actual boundary.³⁸ In *Alabama v. Georgia*, the United States Supreme Court held that the Chattahoochee River was entirely within the state of Georgia because of the west bank serving as the actual boundary.³⁹ However, the Court also noted that Alabama had unlimited use of

30. See *New Battle, Truce Threatened in Water War*, MONTGOMERY ADVERTISER, Aug. 19, 1996, at 8A.

31. Gady A. Epstein, *Apalachicola Water Subject of Three State Tiff*, TAMPA TRIB., Sept. 12, 1996, at Metro 6.

32. See *id.*

33. *Id.*

34. DAVID H. GETCHES, *WATER LAW IN A NUTSHELL* 3-6 (2d ed. 1990).

35. *Id.* at 5.

36. See *id.* at 32.

37. *Id.*

38. *Alabama v. Georgia*, 64 U.S. (1 How.) 505 (1859).

39. See *Alabama*, 64 U.S. at 515.

the river.⁴⁰ This ruling had the effect of rendering the Chattahoochee River an interstate waterway.⁴¹

The effective location of the boundary between Georgia and Alabama may be debatable today. In numerous cases, the United States Supreme Court has held that the "thalweg" or centerline of the river is the actual border between states.⁴² Because of the nature of Supreme Court opinions and the interstate use of the Chattahoochee River, Alabama should not be prevented from asserting the rights of a lower riparian in this case.⁴³

B. Prior Appropriations

Western parts of the United States employ a system of prior appropriations of water.⁴⁴ The prior appropriations doctrine in the United States evolved to meet the needs of the growing frontier west of the nineteenth century.⁴⁵ Rights attach to an

40. *See id.*

41. Carl Erhardt, *The Battle Over the "Hooch": The Federal-Interstate Water Compact and the Resolution of Rights in the Chattahoochee River*, 11 STAN. ENVTL. L.J. 200, 209 (1992).

42. *See, e.g., Georgia v. South Carolina*, 257 U.S. 516 (1922). In *Georgia*, the Court held that when the boundary between two neighboring states is a river, the mid point serves as the boundary between the states. *See Georgia*, 257 U.S. at 523. The Court's holding represented the argument advanced by Georgia in that case. *Id.* In 1859, Georgia made a different argument in *Alabama*, when Georgia asserted that the border between Alabama and Georgia was the west bank of the Chattahoochee River. *See Alabama v. Georgia*, 64 U.S. 505 (1859). *See also Arkansas v. Tennessee*, 397 U.S. 88 (1970) (identifying that the location of the channel at the time the boundary agreements were made determines where the border actually is); *Arkansas v. Tennessee*, 246 U.S. 158 (1918) (observing that the rule of the thalweg is supported by the interest in interstate navigation on interstate waters); *Louisiana v. Mississippi*, 202 U.S. 1 (1906) (tracing the thalweg's foundation in international law as a basis for setting state boundaries when a river forms the border); *Iowa v. Illinois*, 147 U.S. 1 (1893) (holding that the thalweg forms the line of separation when a river separates states).

43. Erhardt, *supra* note 41, at 208-11. Erhardt argues that despite the United States Supreme Court ruling in *Alabama v. Georgia*, Alabama should be allowed to assert the rights of a lower riparian to Georgia in this case. *See Erhardt, supra* note 41, at 208-11.

44. *See GETCHES, supra* note 34, at 74. For the purposes of the prior appropriations doctrine, the western parts of the United States refers generally to those states west of the Mississippi River. *See GETCHES, supra* note 34, at 74.

45. *See GETCHES, supra* note 34, at 74. The competing needs of miners, ranchers, and farmers necessitated the evolution of the prior appropriations doctrine. *See GETCHES, supra* note 34, at 74.

individual when he or she applies a particular quantity of water to a beneficial use.⁴⁶ The rights which attach to the user of the water continue as long as the beneficial use is maintained.⁴⁷ Additionally, states may require procedural actions like posting or filing a claim or receiving a permit from a regulatory agency or a court for the right to be finalized.⁴⁸

Under the prior appropriations system, when two or more uses of a body of water are in conflict, priority is given to the oldest use of the water.⁴⁹ Underlying this principle is the fact that according to the prior appropriations doctrine, no one owns a particular watercourse—in fact, they are considered a public resource.⁵⁰ Resolution of a conflict under the prior appropriations doctrine could conceivably leave a senior appropriator with fulfilled water needs and junior appropriators with partial or no water satisfaction.⁵¹

The Chattahoochee River dispute could present an interesting clash of the riparian and prior appropriations doctrines, at least in theory. Both Alabama and Georgia are riparian states.⁵² As such, the focus of the debate should be on equitable allocation of the waters of the Chattahoochee River basin.⁵³ Although the discussions appear to be directed towards of a riparian analysis, some comments by Georgians hint at prior appropriations-like arguments.⁵⁴ Nevertheless, the concept of the tri-state compact seems to indicate that the states intend to cooper-

46. GETCHES, *supra* note 34, at 74.

47. GETCHES, *supra* note 34, at 74.

48. GETCHES, *supra* note 34, at 75.

49. GETCHES, *supra* note 34, at 75. In fact, the system can be understood by the phrase, "first in time, first in right." GETCHES, *supra* note 34, at 75.

50. GETCHES, *supra* note 34, at 74.

51. See GETCHES, *supra* note 34, at 75.

52. See ROBERT CLARK KATES, *GEORGIA WATER LAW* 24 (1969); WILLIAM T. WATSON & STEVEN F. HARRISON, *GEOLOGICAL SURVEY OF ALABAMA, WATER LAWS OF ALABAMA* 194 (1974).

53. See generally A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* 3-7 (1996).

54. See Seabrook, *supra* note 18, at A1 (suggesting that Georgia has an advantage over Alabama and Florida in that the Chattahoochee's headwaters are within the state). Actually, Atlanta is involved in disputes internal to the state of Georgia with LaGrange, Columbus, West Point, and other downstream communities over water volume and quality. See Seabrook, *supra* note 18, at A1. There is very little evidence of independent consideration of reasonable uses on the part of Atlanta. See Seabrook, *supra* note 18, at A1.

ate in a riparian-like resource allocation.⁵⁵

IV. THE OPTIONS AVAILABLE TO RESOLVE THIS WATER DISPUTE

The Governors of Alabama, Georgia, and Florida have signed water compacts which commit the states to try to negotiate an allocation formula which will satisfy all parties in the region.⁵⁶ The compact must be agreed upon by December 31, 1998, or its elements will no longer have any authority and it will be rendered null and void.⁵⁷ However, the compact which has been signed is not the only option available to the three states.⁵⁸ The available options include: equitable apportionment by the United States Supreme Court, an interstate compact like the one the states have just signed, or congressional apportionment.⁵⁹

A. *Judicial Apportionment*

The Supreme Court of the United States maintains original jurisdiction over interstate water disputes like the tri-state Chattahoochee River dispute.⁶⁰ In *Rhode Island v. Massachusetts*,⁶¹ the Supreme Court examined the constitutional basis of its original jurisdiction over a boundary dispute between the two states.⁶² The Court determined that because Massachusetts and Rhode Island were not in agreement over the location of their border, the decision was appropriately made in the Supreme Court.⁶³

In 1907, the Court first used equitable apportionment to resolve a dispute between Kansas and Colorado over the use of

55. See Alcorn, *supra* note 12, at 1A.

56. See Alcorn, *supra* note 12, at 1A.

57. 1997 Ala. Acts 67, at art. VIII (a)(3).

58. See WILLIAM GOLDFARB, WATER LAW 52-55 (1988).

59. See *id.*

60. See U.S. CONST. art. III, § 2, cl. 1. Clause 1 grants original jurisdiction of the Supreme Court to "[c]ontroversies between two or more States." *Id.*

61. 37 U.S. (12 Pet.) 657 (1838).

62. See *Rhode Island*, 37 U.S. at 723-26.

63. See *id.* The Court also discussed the compact clause and the duty of the Congress to approve an agreement between Massachusetts and Rhode Island if they could have reached one. See *id.*

the Arkansas River.⁶⁴ The Court ruled in favor of Colorado on the merits of this case, while it articulated a different rule for future interstate water cases.⁶⁵ The Court determined that Colorado's withdrawal of water from the Arkansas River was reasonable, in keeping with the doctrine of equitable apportionment.⁶⁶ For future cases, however, the Court expressed the intention that disputes between states over interstate water resources be settled by the sharing of the water among the states.⁶⁷

The result in *Kansas* was the Court's adoption of the principle of equitable apportionment, which is a method of allocating water resources adapted from international water law.⁶⁸ The process of equitable apportionment by the Supreme Court involves abandonment of the traditional common law water allocations doctrines of riparian rights and prior appropriations.⁶⁹ The important consideration for the Court is arriving at an equitable distribution of the water among the disputing states.⁷⁰

William Goldfarb identified five generalizations which permeate the Supreme Court's decisions on equitable apportionment.

1. In appropriation states, the doctrine of prior appropriation will be presumptively applied across state lines in small river basins.
2. The doctrine of prior appropriation will also be presumptive-

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

65. *See Kansas*, 206 U.S. at 117-18.

66. *See id.* The Court noted that the fact that Colorado had developed at a faster rate than Kansas supported Colorado's claim to the reasonable use of the Arkansas River's waters. *See id.* at 112-13, 117-18. In the present case, this ruling could pose a problem for Alabama, since the state of Georgia, and Atlanta in particular, has grown at a much faster rate.

67. *See id.* at 97-98. The Court's policy goal of sharing water resources is consistent with its ruling in *Alabama v. Georgia* where it noted that both states have access to the use of the Chattahoochee River. *See Alabama v. Georgia*, 64 U.S. (23 How.) 505 (1858).

68. GOLDFARB, *supra* note 58, at 52.

69. GOLDFARB, *supra* note 58, at 52-53.

70. GOLDFARB, *supra* note 58, at 53. Given the highly discretionary nature of the Supreme Court's equitable apportionment jurisprudence, this method of dispute resolution could prove quite risky for a high water consumption state, like Georgia, which intends to continue growing, possibly at the expense of its downstream neighbors. *See also* CALIFORNIA OFFICE OF THE ATTORNEY GENERAL, *INTERSTATE CASES IN THE ORIGINAL JURISDICTION CONCERNING INTERSTATE WATERS* (1959).

- ly applied in large river basins, but the presumption is weaker on large compared to small river basins. . . .
3. In riparian states, the common law of riparian rights will be presumptively applied on both large and small river basins. As with the doctrine of prior appropriation, the court will temper the common law. . . .
 4. In both prior appropriation and riparian jurisdictions, the Court retains the power to displace existing uses but this power will be exercised sparingly. . . .
 5. State planning to conserve existing supplies will assume a larger role in state efforts to avoid sharing duties or to impose sharing duties on other states.⁷¹

In *New Jersey v. New York*,⁷² the Court used equitable apportionment to resolve the dispute between the two states over the use of the Delaware River.⁷³ The Court reasoned:

A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. *But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated.* And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the River might come down to it undiminished. Both States have real and substantial interests in the River that must be reconciled as best they may be.⁷⁴

In *New Jersey*, the Court allowed New York to continue diverting water to meet the needs of New York City, but it enjoined the state from increasing its water withdrawals.⁷⁵ This case is similar to the Chattahoochee dispute in that Georgia and Alabama's positions are similar to those of New York and New Jersey respectively.⁷⁶

71. GOLDFARB, *supra* note 58, at 53.

72. 283 U.S. 336 (1931).

73. *New Jersey*, 283 U.S. at 343.

74. *Id.* at 342-43 (emphasis added).

75. *Id.* at 346-48. The Court also specified effluent limitations for New York to follow when discharging waters back into the Delaware and further provided for the release of waters impounded in New York when the level of the Delaware dropped to a certain point at Port Jervis, New York. *Id.*

76. Atlanta might have a better claim under the holding in *New Jersey* if it had already begun diverting and consuming the additional waters of the Chattahoochee.

Alabama, Georgia, and Florida stand a better chance of getting what they want out of the water allocation if they can keep the case out of the Supreme Court and agree among themselves. However, the dispute could conceivably wind up before the Supreme Court even if the states can agree on the water compact. If the compact is approved and one of the states fails to comply, the court where the dispute will be heard is the United States Supreme Court, under its grant of original jurisdiction over disputes between states.⁷⁷

B. Interstate Compacts

The preferable option in resolving interstate water disputes is to have the parties themselves reach settlements they can all live with. The complexity of these issues is another reason for states disputing their water rights to keep their cases out of the Supreme Court.⁷⁸ Some commentators feel that the Court does not have the time, experience, or resources "to cope with the complicated hydrologic, economic, and sociological questions involved."⁷⁹

The interstate compact method draws its roots in the United States Constitution.⁸⁰ In the early days of the United States, the Compact Clause was used to resolve "disputes over navigation, boundaries, and fishing rights."⁸¹ The first time the interstate compact process was used for the settlement of a water dispute was in 1922 for the Colorado River Compact.⁸² The majority of water compacts have taken place in the western United States, where all of the western states have participated in at least one interstate water compact.⁸³

77. See U.S. CONST. art. III, § 2, cl. 1.

78. GOLDFARB, *supra* note 58, at 53.

79. GOLDFARB, *supra* note 58, at 53; Eddie Pells, *Tri-State Water Pacts Signed, Negotiators Get 10 Months to Resolve River Rights Battle*, FLORIDA TIMES UNION, Feb. 19, 1998, at B7 ("You get an outcome that's not necessarily based on cooperation between dueling hydrologists . . .").

80. See U.S. CONST. art. I, § 10, cl. 3. The Compact Clause states: "No State shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State. . . ." *Id.*

81. GOLDFARB, *supra* note 58, at 54.

82. GOLDFARB, *supra* note 58, at 54.

83. GOLDFARB, *supra* note 58, at 54.

River compacts have evolved a great deal since 1922. Early agreements, like the Colorado River Compact, simply allocated the waters of the river among the states who were parties to the compact.⁸⁴ More recent compacts take a management approach and create an independent commission to plan and monitor the compact.⁸⁵ Some hybrid compacts have even been approved which allow the compact commission to curtail use in times of shortage⁸⁶ or wield broad power to manage the resources of the region.⁸⁷ There are no particular requirements for an interstate compact, and no two are alike.⁸⁸ There is not even a requirement that a compact provide for a federal representative on the compact commission.⁸⁹

C. Congressional Apportionment

The third option for the three states is congressional apportionment. Congressional apportionment is a rarely used option for states disputing the allocation of their water resources.⁹⁰ In fact, congressional apportionment has only been used in two disputes: in the lower Colorado River Basin where optimum use of the waters of the Colorado River by California, Arizona, and Nevada was inundated with legal problems,⁹¹ and in the Truckee-Carson-Pyramid Lake Water Rights Settlement Act of 1990.⁹²

84. GOLDFARB, *supra* note 58, at 54.

85. GOLDFARB, *supra* note 58, at 54. This is the category in which the tri-state Chattahoochee River Compact falls. The independent commission was set up to be composed of representatives of the Governors of Alabama, Georgia, and Florida. They will negotiate the allocation of the water and supervise the implementation plan.

86. See, e.g., the Upper Colorado River Basin Compact 63 Stat. 31 (1949). See also 4 WATERS AND WATER RIGHTS 579 (Robert E. Beck ed., 1991).

87. GOLDFARB, *supra* note 58, at 54. For example, the Delaware and Sesquehanna River compacts grant the compact commission the authority to manage water allocations among the states, withdrawals of water, and approval of construction projects. GOLDFARB, *supra* note 58, at 54.

88. See GOLDFARB, *supra* note 58, at 54.

89. GOLDFARB, *supra* note 58, at 54. Some compacts provide a position on the compact commission for a non-voting federal representative while some compacts allow federal representatives to have a vote equal to one of the member states. GOLDFARB, *supra* note 58, at 54. The Chattahoochee Compact features a non-voting federal representative.

90. See GOLDFARB, *supra* note 58, at 54.

91. See GOLDFARB, *supra* note 58, at 54.

92. See 4 WATERS AND WATER RIGHTS, *supra* note 86, at 577. This water dis-

Congress discovered its apportionment power as a way to resolve the perplexing Colorado River Basin dispute. Initially, the states were trying to reach an agreement for the entire Colorado River Basin.⁹³ Negotiations had nearly broken down when President Hoover suggested that the states consider two separate agreements: one for the upper Colorado River Basin and one for the lower.⁹⁴ The compact for the upper Colorado River was agreed upon quickly, the states involved simply could not come to an agreement over the allocation of the lower Colorado's waters.⁹⁵ Seeing that the states were not going to agree, Congress created an allocation scheme and enacted it, signaling the birth of the congressional apportionment power.⁹⁶

The Supreme Court in *Arizona v. California*⁹⁷ considered the constitutional basis for Congress' act of apportioning the Colorado's waters among the concerned states.⁹⁸ The Court stated that, "[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."⁹⁹ The *Arizona* opinion, however, did not address the source of Congress' equitable apportionment power.¹⁰⁰

After the opinion was published in 1963, Frank Trelease examined the elusive scope of the congressional equitable apportionment power.¹⁰¹

Federal jurisdiction over navigable waters depends upon a rather attenuated construction of Article I, § 8, of the Constitution, giving Congress the power to "regulate commerce . . . among the

pute involved California, Nevada, and several Indian Tribes over the allocation and development of water impoundments. 4 WATERS AND WATER RIGHTS, *supra* note 86, at 581-83.

93. See *Arizona v. California*, 373 U.S. 546, 566 (1963).

94. *Arizona*, 373 U.S. at 566.

95. See *id.* at 575.

96. See Charles J. Meyers, *The Colorado River*, in WATER LAW, PLANNING & POLICY: CASES AND MATERIALS 85 (Joseph L. Sax ed., 1968).

97. 373 U.S. 546 (1963).

98. See *Arizona*, 373 U.S. at 564-68.

99. *Id.* at 565-66.

100. See *Arizona v. California*, 373 U.S. 546 (1963).

101. See Frank J. Trelease, *Arizona v. California: Allocation of Water Resources to People, States, and Nation*, in WATER LAW, PLANNING & POLICY: CASES AND MATERIALS 80 (Joseph L. Sax ed., 1968).

several States." Although the Supreme Court itself has termed its constructions "strained" and "highly fictional," commerce has been held to include transportation, which in turn includes navigation; the power to regulate navigation comprehends the control of navigable waters for the purposes of improving navigation; this power to control includes the power to destroy the navigable capacity by damming the waters to protect adjacent lands from flood. The power to obstruct leads to the power to generate electric energy from the dammed water. Congress can protect the navigable capacity of water by preventing diversions or obstructions, and the power to prevent obstruction leads on to powers to license obstructions. Congress need recognize no rights of private persons in or to navigable waters; any such rights are subject to a dominant servitude that the United States may impose to destroy the right without compensation. . . .¹⁰²

Prior to the *Arizona* opinion, neither the Supreme Court nor the states considered the possibility that Congress could also act to apportion the waters of interstate rivers.¹⁰³

Due to the intensely political nature of interstate water rights disputes, it is understandable that Congress has avoided excessive meddling in these matters. First of all, party politics and perceptions may leave individual members of Congress reluctant to choose a side in a water dispute unless their state is involved or all states involved have reached an agreement on allocation.¹⁰⁴ Another possible explanation for Congress' non use of the apportionment power is that they simply did not realize the power existed until 1963, when the Supreme Court affirmed the Lower Colorado River Basin Compact.¹⁰⁵

Whatever the reason, Congress' past hesitation will likely continue in the case of the Chattahoochee River dispute. An example of Congress' reluctance to resolve the Chattahoochee dispute may be seen in the activities of the Speaker of the House, Congressman Newt Gingrich of Georgia.¹⁰⁶ Speaker Gingrich has gone to great lengths to bring the states together

102. *Id.* at 81.

103. *See id.*

104. *See* 4 WATERS AND WATER RIGHTS, *supra* note 86, at 584.

105. *See* 4 WATERS AND WATER RIGHTS, *supra* note 86, at 584; *Arizona v. California*, 373 U.S. 546 (1963).

106. *See Gingrich Helps Move Water War Closer to Truce*, MONTGOMERY ADVERTISER, Jan. 15, 1997, at 14A.

in an effort to have them reach an acceptable agreement on their own.¹⁰⁷ The Speaker's motive is clearly to resolve the dispute in the most efficient manner, which would be a negotiated compact.¹⁰⁸ A negotiated solution would also work out better for the Republican party in Congress. Both Alabama and Georgia have been experiencing a swing to the right with predominantly Republican legislative delegations.¹⁰⁹ Debate in Congress over a solution to the Chattahoochee River dispute could pit the Alabama, Georgia, and Florida delegations against each other and leave other members of Congress reluctant to choose sides. For this reason, the chances of congressional apportionment as a viable option in this case are quite remote.

V. CONCLUSION

Clearly, the options of judicial apportionment, congressional apportionment, or an interstate compact are all technically available to Alabama, Georgia, and Florida to settle their dispute over the Chattahoochee River. The course which the states have chosen, the interstate compact, is their best alternative to reach the most mutually beneficial solution possible. The fact that the states have chosen to pursue an interstate compact in no way precludes the implication of congressional or judicial apportionment. If the states fail to negotiate an acceptable water allocation by December 1998, then it will be up to the Supreme Court or the Congress to solve this problem. Successful negotiations now will save money, time, and likely produce the most equitable division of the waters. The states seem to be on the right track, but they are likely to achieve success only if they can learn to live together.

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107. *See id.*

108. *See id.*

109. *See U.S. Congressional Directory* (visited Apr. 6, 1998) <<http://congress.nw.dc.us/congressorg/congdir.html>>. Georgia has one Republican Senator and 8 of 11 Republican Congressmen; Alabama has two Republican Senators and 5 of 7 Republican Congressmen; Florida has one Republican Senator and 15 of 23 Republican Congressmen. *See id.*

