

Interstate Water Allocation: the Tri-State Water Wars

Water Law
Senior College
Jonathan Carlson

The problem

- Future water shortages
 - **Supply side** challenges: climate variability
 - **Demand side** challenges: changes in use and demand
- State laws and administrative structures can probably manage in-state conflicts
- But what about conflicts **between sovereigns**

Select a Water Resources Region.





Major Rivers and Lakes Used for Migration in the United States



Figure 6. The principal aquifers of the United States are in six types of rocks and deposits. The colored areas show the extent of each principal aquifer at or near the land surface.

Who Controls Our Water Resources?

- Water resources do not respect state boundaries
- Yet states have primary responsibility for their management
- **A consequence of the federal structure created by our Constitution**
 - Sovereign authority belongs to the States,
 - Except insofar as power is expressly given to the federal government by the Constitution

Sovereign authority is in the States



. . . . Except insofar as the Constitution grants authority to the federal government

. . . As determined by the Supreme Court



A federal government of limited, enumerated powers

- To “provide for the . . . general welfare”
- To “regulate commerce with foreign nations, and among the several States,”
- To “dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States”

How far do those powers go with respect to water?

- Remember *Arizona v. California* (the Colorado River case):
- Congress has the power
 - to control navigable water for purposes of: flood control, navigation, power generation
 - To promote the general welfare through projects for reclamation, irrigation, or other internal improvements

How far?

- When Congress undertakes

“a comprehensive project for the improvement of a great river and for the orderly and beneficial distribution of water”

- “there is no room for inconsistent state laws”
 - state authority becomes “subject to the Federal Government’s right to regulate and develop the river.”

Federal reserved rights to water

- The national government's Constitutional powers also include
- The authority “to reserve water rights for [US] reservations and [US property.”

Some examples of federal power

- Congressional division of Colorado River system water
- State law cannot impose requirements (e.g. return flow or minimum flow) that restrict operation of federally-authorized hydropower facilities
- State cannot authorize water rights holders to use water from federal projects in excess of federal acreage limits
- Federal Endangered Species Act can restrict water withdrawals/development

But some important limits

- Federal authority over water allocation comes from
 - Development projects (reclamation, flood control, navigation, power generation, etc.)
 - Federal environmental laws
- Congress may require deference to state laws that do not expressly conflict with federal purposes (Reclamation Act)
- **No general federal authority over water allocation policy:** this is a matter for states

Balance of power – federal government versus the states

- Reclamation Act: deference to state law, unless clearly inconsistent with federal policy
- Power generation: federal agency prevails
- Navigation and other Army Corp projects: federal agency prevails
- Environmental protection: federal law controls (but perhaps a ‘taking’ of property rights?)

Resolving an interstate conflict?

- Does federal law resolve?
 - ESA
 - Federal projects: claims that purposes are being ignored or exceeded
- Can Congress be persuaded to act (and would its action be within its constitutional authority)?
- Interstate compact (with Congressional approval)
- Equitable apportionment by US Supreme Court

Equitable apportionment

- US Constitution, Article III, section 3:

“The judicial Power shall extend . . . to
Controversies between two or more States”

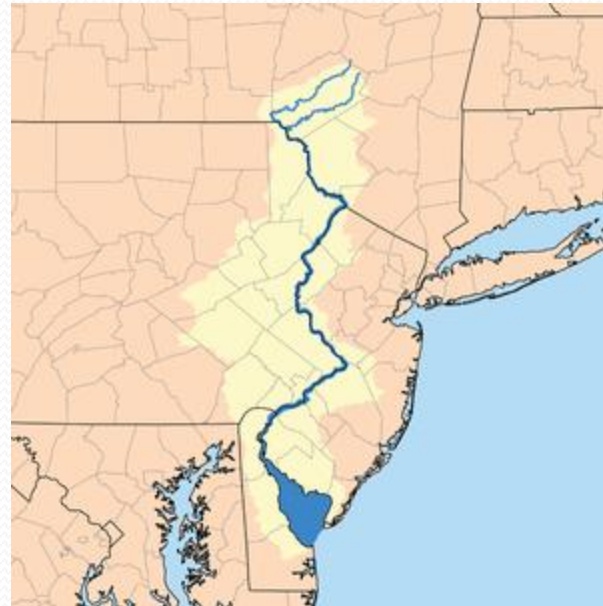
- What happens when the controversy is over water?

New Jersey v. City of New York

- New Jersey want to stop New York City from diverting water away from the Delaware River
- New Jersey invokes common law riparian rights doctrine
 - No diversions out of the watershed
 - No diversions that would diminish the flow



Delaware River



Delaware River watershed

The usual water rules don't apply

“Different considerations come in when we are dealing with *independent sovereigns* having to regard the *welfare of the whole population*, and when *the alternative to settlement is war*. In a less degree, perhaps, the same is true of the ***quasi-sovereignties bound together in the Union.***”



“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 the 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”

What rule, then?

- “Both states have real and substantial interests in the river that must be reconciled as best they may.”
- Local law matters (e.g. “the different traditions and practices in different parts of the country”)
- “but the effort always is to secure **an equitable apportionment.**”

The solution here?

- New York's plan to take 600 million gallons daily
 - No adverse effect on municipal supply, industrial use, agriculture or shad fisheries
 - Serious impact on recreation and oyster fishery (b/c of increased salinity due to decreased flow)
- To protect New Jersey,
 - *Limit to 440 mgd*
 - *Adequate* sewage treatment
 - *Mandatory releases* to maintain minimum flow

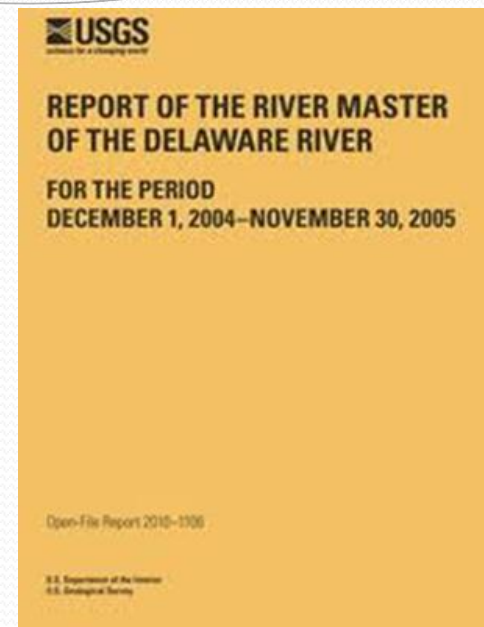
Subsequent history

- 1952 – NY petitioned court to increase diversion
- 1954 – NY, NJ, Pennsylvania, Delaware consented to amended decree
 - 800 Mgal/d
 - NY builds new reservoir and increases releases from upper reservoirs to increase streamflow in certain parts of river
 - A “River Master” was appointed:
<http://water.usgs.gov/osw/odrm/>

B. Duties. The **River Master** shall either in person or through his assistants possess, exercise and perform the following duties and functions:

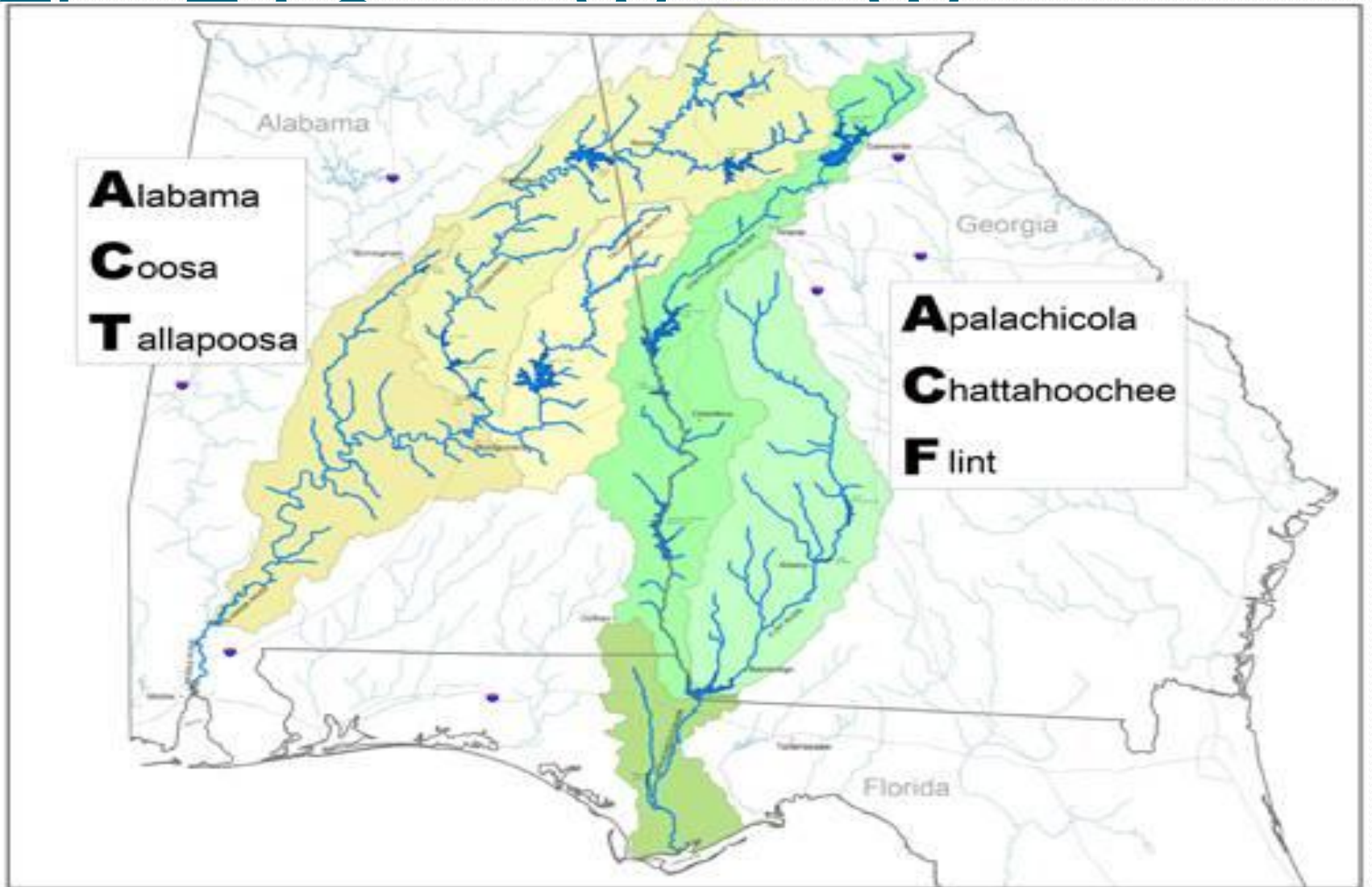
1. General Duties.

- (a) **Administer the provisions of this decree . . .** with the greatest possible accuracy;
- (b) **Conserve the waters in the river, . . . ;**
- (c) **Compile and correlate all available data . . . ;**
- (d) **Check and correlate the pertinent stream flow gagings** on the Delaware River and its tributaries;
- (e) **Observe, record and study the effect of developments . . . ; and**
- (f) **Make periodic reports to this Court,**



Methods of interstate management/interstate allocation

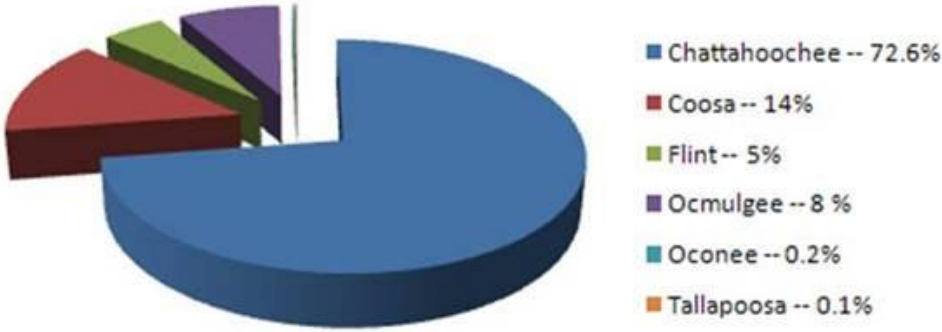
- Federal management of the waterway because of federal projects on the waterway
- Federal environmental regulations may limit state decisions
- Interstate compact
- Equitable apportionment by the Supreme Court



20 years of litigation

- What are the competing demands?
 - Water for metropolitan Atlanta (groundwater not an option)
 - Power generation
 - Recreation
 - River fisheries
 - Downstream irrigation
 - Apalachicola Bay oyster industry
- Why is there an issue?
 - Increasing use
 - Periodic drought

Sources of Water in the Metro Water District



Allocation efforts ???

- 1989 – Georgia persuades Army Corps to allocate Lake Lanier water to Atlanta
 - Despite adverse impact on power generation and downstream flows
- Alabama sued, joined by Florida
 - Allocation for municipal water supply not an authorized purpose of Buford Dam and Lake Lanier
- Other parties, additional lawsuits concerning other dams on the river

Allocation efforts ???

- Litigation put on hold for comprehensive study
- Interstate compacts negotiated and ratified in 1997
- But compacts were merely “agreements to agree”
- No allocation could be agreed upon, and compacts expired in 2003 and 2004

In the meantime

- Georgia submitted request to Corp to modify operations at Buford Dam



- Request would authorize extensive withdrawals from the lake to meet Atlanta's needs

Use of Lake Lanier

- Court of Appeals said:
 - Decision of Corps and lower court to deny Georgia's request was "arbitrary and capricious"
 - Water supply is an authorized purpose of the project (Buford Dam)
 - Corps must go back to the drawing board; reevaluate Atlanta's request

What did the decision turn on?

- Whether municipal water supply is an authorized purpose of Lake Lanier
- Detailed, and technical, reading of two federal statutes, 60 and 70 years old, respectively.
 - Statute authorizing dam construction
 - Subsequent statute on municipal water supply from federal projects

Is this any way to run a railroad?

- *On what basis will the Corps balance the interests of the parties in this case?*
 - Many say Georgia acted in bad faith and without regard to others throughout litigation
 - Georgia says:
 - The water comes from us; it belongs to us
 - Interests of others are relatively unimportant; all the people live in Atlanta
 - Corps says: Georgia's request will have major impacts on other project purposes (power, navigation, flood control)
 - But what about the oysters in Apalachicola Bay?

Meanwhile, downstream . . .



ESA litigation

- Several endangered species in the Apalachicola River:
 - 3 species of freshwater mussel
 - Gulf sturgeon
- Strategy: force Corps to maintain higher minimum flow from Woodruff dam
 - Which will also require maintaining higher flows from upstream sources (e.g. Lake Lanier)

Recent decision

- Corps new plan is consistent with ESA (or, at least, plaintiffs haven't proven otherwise)
 - Court must accept agency's views unless they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”
 - Court must defer to agency expertise

Is THIS any way to run a railroad, or a river???

- Are the mussels the real issue? Are they the only issue?
- What about oysters? Recreational uses? Water to support power plants? **Are these considerations relevant to this litigation?**
- Who can weigh ALL these considerations?

Can the Corps solve this problem?

- The Court's NEPA arguments:
 - Corps failed adequately to evaluate environmental impact of its actions
 - Its new Water Control Plan for ACF basin must include environmental impact statement
 - It should consider
 - the impact throughout the basin of Lake Lanier withdrawals, and
 - “reasonable alternatives” in the ACF Basin

Is there a better way?

- Litigation in the Supreme Court?
- Congressional action?
- Creation of some sort of interstate commission with regulatory authority?
- **What would you do?**