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Not Just a Western Issue Anymore: Water Disputes in the Eastern United States

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ADDRESS

NOT JUST A WESTERN ISSUE ANYMORE: WATER DISPUTES IN THE EASTERN UNITED STATES

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One of the things that those who move to the Western United States come to appreciate is the importance of water. In the East, where one is surrounded by streams, ponds, lakes, and rivers, it is easy to take water for granted. Rainfall is abundant and water-related problems tend to take the form of too much water, for example in the form of flooding and wet basements, rather than too little.

By contrast, too little water is one of the hallmarks of Western life. In fact, the first Eastern settlers referred to the semi-arid grasslands west of the Missouri River as the "Great American Desert," a sobriquet that those who sought to increase settlement in that region had to work hard to overcome. Rainfall tends to be sparse, and when it does come, it tends to come in storms or cloudbursts that quickly run off the land rather than being absorbed. Many of the archetypal images of the West grow out of this lack of water – the cactus- and sagebrush-studded landscapes, cowboys riding off in the dust, the bleached cow skull at the side of the trail.

This lack of water also means that disputes over water – in particular, who gets it and how much – are endemic to the region. Mark Twain reputedly said that "Whiskey is for drinking, water is for fighting over," and that tradition continues in the West. States such as Colorado and Montana have "water courts," which are devoted to adjudicating water rights within entire stream basins.[2] Fights over water have even featured prominently in Hollywood movies such as "Chinatown," which concerned in part Los Angeles' efforts to obtain water to support its growth.

However, as this article will explain, disputes over water are not just a Western issue anymore. The same forces that motivated Los Angeles' appropriation of water from the Owens Valley and an epic, ongoing Supreme Court battle over the Colorado River – increasing

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[2]*See, e.g., http://www.courts.state.co.us/supct/supctwaterctindex.htm* for a description of Colorado's water courts. New Mexico is also planning to establish water courts. *See http://albuquerque.bizjournals.com/albuquerque/stories/2004/01/26/daily18.html.*

demands for water – are giving rise to controversy and litigation in the East. We will discuss three cases that demonstrate that Rudyard Kipling's line about "East is East, and West is West, and never the twain shall meet" no longer applies, at least when it comes to disputes over water.[3]

THE BATTLE FOR WATER IN THE SOUTHEAST

The Southwest has been a hot spot for many years when it comes to fights over water. In one of the longest running cases in the Supreme Court, *Arizona v. California*, the State of Arizona has invoked the Court's original jurisdiction to settle a dispute with California over how much water each State could draw from the Colorado River.[4] Nevada and the United States intervened to protect their interests in the Colorado's water, seeking a determination of their water rights, and Utah and New Mexico were also joined as defendants.[5] Writing for the Court in the 1963 culmination of the first round of this litigation, Justice Black described the fear of the other Colorado River basin states that the Colorado's water would "be gobbled up in perpetuity" by faster growing areas such as California before the other States could appropriate what they believed to be their fair share.[6] Justice Black traced this fear to the legal regime that applies to water rights in most Western states, the law of prior appropriation, which holds that "the one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time."[7]

Although the battle over who will get how much from the Colorado and its tributaries continues,[8] fights over water between upstream and downstream states are no longer confined to areas of the nation where the law of prior appropriation applies. A prime example today concerns two river basins in the Southeast that find their headwaters in the mountains of north Georgia. The Chattahoochee River flows southeast from these mountains to form the border between Alabama and Georgia, and then joins the Flint River at the Florida-Georgia border to form the Apalachicola River, thence flowing into the Gulf

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[3]RUDYARD KIPLING, *The Ballad of East and West* in BARRACK-ROOM BALLADS (1892).

[4]A brief summary of this case's history, which began in 1952, may be found at Arizona v. California, 530 U.S. 392, 397-98 (2000).

[5]The United States sought water rights with regard to various federal interests, including on behalf of several Indian reservations. *Id.* at 397.

[6]Arizona v. California, 373 U.S. 546, 555 (1963).

[7]*Id.*

[8]*See, e.g.*, Arizona v. California, 530 U.S. 392, 397 (2000) (concerning the Quechan Tribe's claims to the Colorado).

of Mexico.[9] Those three rivers, their tributaries, and the associated drainage area form the Apalachicola-Chattahoochee-Flint ("ACF") Basin.[10] West of the Chattahoochee River lie the Coosa and Tallapoosa Rivers, which flow southeast into Alabama, where they join to form the Alabama River, emptying into the Gulf near Mobile. This second set of rivers and their tributaries form the Alabama-Coosa-Tallapoosa River ("ACT") Basin.

The United States Army Corps of Engineers operates various dams and flow control structures in both basins, including a dam on the Chattahoochee northeast of Atlanta.[11] The resulting reservoir, known as Lake Lanier, is used to store water for municipal and industrial purposes. Accordingly, throughout the 1970s and 1980s, the Corps entered into interim withdrawal contracts allowing local governmental entities in Georgia such as the Atlanta Regional Commission to withdraw water from Lake Lanier.[12] As the metropolitan Atlanta area grew, the Corps faced demands from these local water supply providers to allow more water withdrawals from the system. In 1989 the Corps announced plans to seek congressional authorization to enter into permanent water storage contracts with these water supply providers that would have ensured sufficient water was stored in Lake Lanier to meet their municipal and industrial needs.[13]

Like the upstream and downstream states in the Colorado River basin, increasing demands on the water in the system due to rapid growth created tension between the downstream states in the river basins and Georgia. In June 1990, Alabama sued the Corps to enjoin it from approving the proposed water supply contracts.[14] Alabama asserted that the contracts would violate the Corps' authority for managing the reservoirs equitably and that the contracts would violate the National Environmental Policy Act for failure to prepare an environmental impact statement. Florida moved to intervene on the side of Alabama, and Georgia moved to intervene on the side of the Corps.[15] Before the court decided either motion, the parties and the proposed intervenors began to negotiate and in September 1990, Alabama and the Corps, with the consent of the proposed intervenors, filed a joint motion to stay the litigation so that negotiations could proceed.[16]

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[9]Georgia v. U.S. Army Corps of Eng'rs, 302 F.3d 1242, 1246 (11th Cir. 2002).
[10]*Id.*
[11]*Id.* at 1247.
[12]*See id.*; S. Fed. Power Customers, Inc. v. Caldera, 301 F. Supp. 2d 26, 28-29 (D.D.C. 2004).
[13]*Caldera*, 301 F. Supp. 2d at 29.
[14]*Id.*
[15]*Id.*
[16]*Id.*

In January 1992, Alabama, Florida, Georgia and the Corps entered into a Memorandum of Agreement that restricted new contracts in the two basins while the MOA parties undertook a "Comprehensive Study" of the water resource needs of the two river basins. After further negotiations, Florida, Georgia, and Alabama entered into the ACF Compact, which established a process for resolving the water allocation issues in the ACF river basins.[17] Georgia and Alabama also entered into the ACT Compact, which similarly provided for development and implementation of a water allocation formula for each basin under the direction of a commission, comprised of voting commissioners from each State within the basin and a nonvoting federal commissioner.[18]

In the years since the States entered into these compacts, the parties have attempted to develop water allocation formulas for each basin. Although the ACT basin negotiations continue with a deadline of July 31, 2004, the ACF Compact expired last August without a solution to the water allocation dispute among Florida, Georgia, and Alabama.[19] The States and the federal government are now back in active litigation in federal courts in Alabama, Georgia, and the District of Columbia courts regarding the ACF's water issues.[20] This protracted litigation is just one more way in which the battle over the ACF's water resembles the fight over the Colorado River's water.

VIRGINIA V. MARYLAND – POSSIBLY THE LONGEST-RUNNING PROPERTY LINE DISPUTE IN THE UNITED STATES

As described, there has been and continues to be considerable litigation over the Colorado, ACF, and ACT River basins. But none of these disputes holds a candle to Virginia and Maryland's running battle over the Potomac River, which started even before they existed as states, back when the river was still known as the "Potowmack."

The Potomac begins in the Appalachians and flows some four hundred miles before emptying into the Chesapeake Bay. Approximately the last hundred miles constitutes the border between Maryland and the District of Columbia on the north and east and Virginia to the south and west.[21] Virginia's claim for control over the river grew out of a 1609 royal charter from King James I to the London Company and a 1688 royal patent from King James II to Lord Tho-

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

[18] Alabama-Coosa-Tallapoosa River Basin Compact, Pub. L. No. 105-105, 111 Stat. 2233 (1997).

[19] *See Caldera*, 301 F. Supp. 2d at 29; *see also http://www.actcompact.alabama.gov/.*

[20] *See Caldera*, 301 F. Supp. 2d at 30; *http://www.actcompact.alabama.gov/.*

[21] Virginia v. Maryland, 124 S.Ct. 598, 601 (2003).

mas Culpeper, both of which included the entire Potomac River.[22] Maryland based its claim on a 1632 royal charter from King Charles I to Lord Baltimore, which also included the Potomac.[23] The dispute loomed large enough for the two States to make it a subject of their constitutional proceedings in 1776, with Virginia acknowledging Maryland's claim in her constitution and Maryland's constitutional convention rejecting Virginia's reservation of "'the free navigation and use of the rivers Potowmack and Pocomoke.'"[24]

Both Virginians and Marylanders suffered considerable inconvenience because of the uncertainty over jurisdiction and regulation of the Potomac.[25] In an attempt to resolve these problems, the two States appointed commissioners who then met at Mount Vernon at the invitation of its owner, George Washington, to address them.[26] The commissioners were almost as illustrious as their host – George Mason and Alexander Hamilton on behalf of Virginia and Samuel Chase, Thomas Stone, and Daniel of St. Thomas Jenifer on behalf of Virginia.[27] All except Jenifer had signed the Declaration of Independence, and Jenifer had been a member of the Continental Congress and would be involved in the Constitutional Convention in Philadelphia.

The product of their meeting was the 1785 Mount Vernon Compact, which resolved many of the issues dividing Virginia and Maryland, but did not resolve the question of where the boundary itself lay between the two states.[28] One hundred years later, the States submitted the question to binding arbitration before a panel of "eminent lawyers," who placed the boundary at the low-water mark on the Virginia shore of the Potomac.[29] Virginia and Maryland ratified the panel's decision in 1878, and the United States Congress approved it in 1879.

However, this effort did not spell the end of the dispute. In the spring of 1894, the States were back at it again, this time arguing before the Supreme Court in *Wharton v. Wise*.[30] In *Wharton*, Mr. Wharton, a Maryland citizen, had been convicted of taking oysters from Virginia waters, specifically Pocomoke Sound, in violation of a Virginia law prohibiting non-residents from oyster fishing in Virginia waters.[31] Wharton applied for a writ of habeas corpus, arguing that

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[22] *Id.* at 601-02.
[23] *Id.* at 602.
[24] *Id.* at 602 (quoting VA. CONST., Art. XXI).
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.* at 602-03.
[29] *Id.* at 603.
[30] 153 U.S. 155 (1984).
[31] *Id.* at 156, 173.

the 1785 Compact barred his prosecution, with support from Maryland's Attorney General.[32] The Supreme Court rejected Wharton and Maryland's arguments, and affirmed the lower court's decision to remand Wharton into custody of Accomack County in Virginia.[33]

There was a period of relative quiet after the decision in *Wharton*. In 1933, Maryland established a permitting system for water withdrawal from and waterway construction in the Potomac, and in 1956, Virginia's Fairfax County, a growing Washington suburb, became the first Virginia entity to apply to Maryland for a water withdrawal permit.[34] Maryland granted Fairfax County the right to withdraw up to 15 million gallons of water per day, and subsequently granted 29 more water withdrawal permits, as well as numerous waterway construction permits, to Virginia entities.[35]

But trouble was brewing once again. The catalyst this time was a much more modern concern, one that should sound familiar by now – the growth of a major metropolitan area, in this case, Washington, D.C. and its suburbs in Maryland and Virginia. Maryland and Virginia had been skirmishing over their riparian rights and apportioning the Potomac during low flow periods since the 1970's, when Maryland proposed federal legislation giving it the exclusive authority to allocate the River's water.[36] Matters came to a head in 1997, however, when Maryland refused to grant a permit to the Fairfax County Water Authority to construct a 725-foot water intake structure into the Potomac from the Virginia shore.[37] The purpose of the structure was to improve water quality for Fairfax County residents, but Maryland officials opposed it on the grounds "that it would harm Maryland's interests by facilitating urban sprawl in Virginia."[38]

As a result of Maryland's decision, Virginia filed an action of original jurisdiction in the Supreme Court, seeking a declaratory judgment that its citizens and governmental subdivisions need not obtain a Maryland permit in order to construct improvements appurtenant to Virginia's shore or to withdraw water from the River.[39] The

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[32]*Id.* at 157, 174.

[33]*Id.* at 177.

[34]*Virginia*, 124 S.Ct. at 603.

[35]*Id.*

[36]Ultimately, section 181 of the Water Resources Development Act of 1976 made construction of a water diversion structure for the Washington Suburban Sanitary Commission's water filtration plant on the Maryland side of the Potomac subject to the States and the United States Army Corps of Engineers entering into a written agreement providing an enforceable schedule for allocation of water during low flow periods among the parties. *See Virginia*, 124 S.Ct. at 611.

[37]*Id.* at 603.

[38]*Id.*

[39]*Id.* at 604. Although Maryland ultimately granted the permit in 2001, the Maryland Legislature conditioned the permit on Fairfax County placing a permanent flow restrictor on the intake pipe. *Id.*

Court appointed a Special Master, who after reviewing the historical record, concluded that Virginians had "the right to construct improvements from their riparian property into the River" and gave Virginia "the right to use the River beyond the low-water mark as necessary to the full enjoyment of her riparian rights."[40] The Supreme Court overruled Maryland's objections to the Special Master's conclusions, and granted the relief that Virginia sought.[41]

Although the Supreme Court's holding ends for now this modern Eastern dispute over apportionment of a river's water, it remains to be seen whether the Court has brought to a close what may be the longest-running property line dispute in the nation.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT V. MICCOSUKEE TRIBE OF INDIANS

Virginia and Maryland's dispute over the Potomac's waters and the battles over the ACF and ACT River basins in the Southeast demonstrate that the East is not immune to the prolonged fights and litigation over water that have plagued the West. The last case that we will discuss is another recently decided Supreme Court case, *South Florida Water Management District v. Miccosukee Tribe of Indians,* concerning the South Florida Water Management District's pumping of stormwater runoff into the Everglades.[42] At first glance, this case appears to revert to the stereotype of Eastern water problems being ones of too much water rather than too little, but closer examination reveals that South Florida and the West are not so far apart after all.

The Everglades have been described as a "river of grass" flowing from Lake Okeechobee in Florida to the Gulf of Mexico, with a width of as much as seventy miles.[43] Historically, water flowed in a slow, unimpeded sheet from central Florida and Lake Okeechobee down through the Everglades into the sea at the southern tip of Florida, but the construction of drainage canals, levees, and related structures, first by the State of Florida and subsequently by the United States Army Corps of Engineers, altered this flow pattern and compartmentalized the Everglades.[44] The network of canals and levees ultimately became part of the Central and South Florida Project, which was intended to promote flood control, drainage, preservation of fish and wildlife, regional groundwater control, and salinity control in South Florida.[45]

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[40] *Id.* at 604.
[41] *Id.* at 612.
[42] S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 124 S.Ct. 1537 (2004).
[43] MARJORY STONEMAN DOUGLAS, THE EVERGLADES: RIVER OF GRASS 10 (1947).
[44] *Miccosukee*, 124 S.Ct. at 1540.
[45] Flood Control Act of 1948 Section 203, Pub. L. No. 80-858, 62 Stat. 1175.

The South Florida Water Management District now operates the Project, including the C-11 Canal, a canal running from east to west which collects groundwater and rainwater to drain a developed area in south central Broward County.[46] At its western end, the Canal terminates where two north-south trending levees meet.[47] The levees form the western boundary of the C-11 Basin and the eastern boundary of Water Conservation Area-3A (WCA-3A), which is an undeveloped wetland remnant of the original Everglades.[48] Between the two levees and the Canal's western terminus is a pumping station operated by the District, which pumps the water from the canal into WCA-3A.[49]

In 1998, the Miccosukee Tribe of Indians, which has a reservation in the Everglades, and the Friends of the Everglades brought a citizen suit against the District alleging that the District violated the Clean Water Act by failing to obtain an National Pollution Discharge Elimination System (NPDES) permit in connection with the pumping station's operation.[50] The water that the Canal collects and that the pumping station conveys contains elevated levels of phosphorus in levels, altering WCA-3A's ecoystem, which is naturally low in phosphorus, by inducing growth of alien algae and plants.[51] On summary judgment, the district court held that the District should have obtained an NPDES permit and that its operation of the pumping station violated the CWA.[52] The court of appeals affirmed the district court.[53] The Supreme Court vacated and remanded the case for further development of the factual record with regard to whether the Canal and the WCA-3A were one waterbody or two for purposes of determining whether an NPDES permit was necessary.[54]

At one level, this case appears to be about too much water. The drainage canals and levees were built to dry out portions of the Everglades to make them suitable for cultivation and habitation. Turning off the District's pumping station would result in flooding as the water that the C-11 Canal normally collects and carries away would flow back toward the Fort Lauderdale suburbs.[55]

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[46]Miccosukee, 124 S.Ct. at 1540-41.
[47]*Id.* at 1541.
[48]*Id.*
[49]*Id.*
[50]*Id.* at 1542.
[51]*Id.*
[52]*Id.* at 1540.
[53]*Id.*
[54]*Id.* The Court also left open the option of the "unitary waters" theory advanced by the Government in its *amicus* brief. *Id.*
[55]*Id.* at 1541.

But as the Supreme Court explained, the matter is not so simple. The Everglades also suffer from a lack of water, and the project levees are used to impound fresh water in water conservation basins such as WCA-3A in order to preserve wetlands habitat.[56] In fact, Congress required the Secretary of the Army, in coordination with the District, to develop a "comprehensive plan for the purpose of restoring, preserving, and protecting the South Florida ecosystem."[57] Congress specified that the plan "provide for the protection of water quality in, and the reduction of the loss of fresh water from, the Everglades," and include features as "necessary to provide for the water-related needs of the region, including flood control, the enhancement of water supplies, and other objectives served by the Central and Southern Florida Project."[58]

Some media accounts also attempted to portray the case as a clash between the East and the West over water because eleven "arid" Western states filed amicus briefs in support of the District, while fourteen states that "have an abundance of water" in the East and Midwest filed amicus briefs in support of the Tribe.[59] But this ignores the fact that the City of New York joined the Western states in supporting the District. It also ignores that the District itself is located in the East.

What these seemingly strange bedfellows all have in common is clear once one looks beyond conventional notions of East v. West in the world of water. They all must manage and transfer large quantities of water, whether for municipal, agricultural, industrial, or, in some cases, environmental purposes. Thus, *South Florida Water Management District* does not epitomize a conflict between Eastern and Western concerns about water. Instead, like the other cases discussed in this article, it is just one more example of how the East and the West are closer than ever in the problems that they face in addressing water-related concerns.

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[56] *Id* at 1544-45.

[57] Water Resources Development Act of 1996, Pub. L. No. 104-303, §§ 528(b)(1)(A)(i), 528(f) 110 Stat. 3767.

[58] *Id.*

[59] Felicity Barringer, *Water Pump Case Tests Federal Law*, N.Y. TIMES, Jan. 15, 2004 at A11.