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The Virginia Beach Quest for Water: Drowning in a Sea of Litigation*

"There's always an easy solution to every human problem—neat, plausible, and wrong."¹

—H.L. Mencken

I. INTRODUCTION

The negotiated settlement in a then 12-year interstate water dispute between North Carolina and Virginia Beach fizzled at midnight June 30, 1995 when unresolved issues extended past the deadline. This long-running dispute bears similarities to other interstate and intrastate water disputes. However, it does not yet rival the continuing Arizona-California dispute over the division of Colorado River water, nor does it reveal the extensive litigation to win approval for building the Central Arizona Project.² Nevertheless, this dispute on the opposite end of the country began when Virginia Beach recognized that its water resources would not meet the demands caused by the growth in population and industry. With minimal water supplies of its own, Virginia Beach initiated a 20-year agreement in 1973 with neighboring Norfolk to purchase excess Norfolk water. Shortly after the 1981 drought, Norfolk notified Virginia Beach that increasing demand for water within Norfolk created a shortage for Virginia Beach's increasing water needs. (In a dramatic about face in June 1996, Norfolk released a comprehensive water study showing that Norfolk has the potential to produce an additional 18 million gallons per day (mgd) that could be sold to Virginia Beach.³ The impact of this study on Virginia Beach's plan to complete the pipeline will be discussed later.)

At this point, Virginia Beach formulated a bold plan for resolving its projected water deficit: Virginia Beach would arrange to divert 60 million gallons per day (mgd) from the Roanoke River Basin via a 76-mile pipeline connecting Lake Gaston and Virginia Beach. The failure to obtain approval of the mediated agreement by the stipulated deadline reopened

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1. James R. Adams, *Freedom of the Skies for Private Airplanes*, LOS-ANGELES TIMES, Oct. 18, 1986, at 2.

2. JOSEPH L. SAX ET AL., *LEGAL CONTROL OF WATER RESOURCES CASES AND MATERIALS* 703-709 (2d ed. 1991).

3. Karen Weintraub, *Water Study May Affect Pipeline Battle*, VIRGINIAN-PILOT, June 16, 1996, at A1.

the doors to expensive, complicated, and time consuming litigation between Virginia Beach and numerous opposition groups to block the entire project.

II. SHOWING THE NEED

Once the need for water became apparent, Virginia Beach researched the feasibility of several different possibilities such as the reuse of wastewater and the digging of wells.⁴ The first alternative failed, however, the cost-effective reuse of wastewater requires a large amount of industrial and irrigation water, while service-oriented Virginia Beach is generally limited to potable water. Indeed, the costs for wastewater reuse would have rivaled those for desalinization without providing Virginia Beach with any additional supplies of water. When Virginia Beach tried digging test wells, it discovered that large wells would quickly become contaminated by saltwater intrusion, and many shallow wells for single houses would go dry. The remaining alternatives included the desalinization of ocean water and/or purchasing water from another municipality. Believing that the desalinization of large quantities of water was too expensive, Virginia Beach opted for the latter alternative.

In the meantime, due to the length of the litigation, Virginia Beach has been forced to place restrictions on the use of city water. Prohibited water uses include commercial car washing facilities, the filling of personal swimming pools with publically supplied water, serving water at restaurants when not requested by customers, and using a hose rather than a bucket to wash personal vehicles. Besides these restrictions, the city government has also provided economic incentives to encourage builders and home owners to use water saving toilets, taps, and shower faucets.⁵ Currently the city uses 32 mgd on average, which is four mgd less than it would use on a restriction-free basis. Several years ago, the city of Portsmouth offered to sell five mgd to Virginia Beach on three conditions: 1) that the water quantity was not guaranteed, 2) that the payment would equal \$2 per 1,000 gallons of untreated and unguaranteed water, and 3) that Virginia Beach would reverse itself and support Portsmouth on an unrelated issue.⁶ Those conditions were unacceptable to Virginia Beach which would have to build a pipeline to Norfolk, and pay Norfolk to treat the additional water that might cease to be available after a couple of years. For these reasons Virginia Beach sought a guaranteed supply of water from a nearby basin that had a large water surplus.

4. Telephone Interview with Thomas Leahy, Lake Gaston Project Manager for the City of Virginia Beach, Va. (Aug. 28, 1995).

5. *Id.*

6. *Id.*

III. VIRGINIA BEACH'S PROPOSED SOLUTION

At the outset, Virginia Beach authorities noted that there was enough surplus water in the Roanoke River Basin to meet the city's needs. The city administrators estimated that its proposed withdrawal of 60 mgd amounted to an average of less than two percent of the average total river flow.⁷ If Virginia Beach could acquire the requisite water rights, it would build a pipeline to bring water to the city from Lake Gaston—a large manmade lake that holds the Roanoke River water on the Virginia-North Carolina border. The proposal for a two percent diversion of Roanoke River water has invoked a spirited response from at least three pipeline opponents. Mr. Barr, President of the Roanoke River Basin Association (RRBA), explained that the two percent figure is based on an average flow figure of five billion gallons a day (bgd), when in reality the river's daily flow can drop as low as two bgd. At two bgd the percentage of Virginia Beach's diverted water would rise to eight percent, thereby increasing the chances of detrimental environmental impact.⁸ Mr. Gerald Lovelace, Assistant County Administrator, Halifax County, asserts that a two percent diversion would mean that much growth and money would go elsewhere—in this case to Virginia Beach.⁹ Mr. G. Morris Wells, Jr., Town Manager of South Hill, Virginia, fears that a withdrawal by Virginia Beach would set a precedent for other cities also take water.¹⁰ Nevertheless, Mr. T. Keister Greer stated in a recent interview that if Virginia Beach could guarantee that this would be a one-time allocation of Roanoke River Basin water, then he, as legal counsel for Virginia's Southside Legislators, would be satisfied with the result of the litigation.¹¹ North Carolina's opposition to the pipeline reflects determination to preserve what it considers a priceless resource to be preserved for the future.

The fact that the supplemental water would come from an interbasin water transfer using a 76-mile pipeline connecting Lake Gaston and Virginia Beach further complicates the proposed water acquisition. Lake Gaston is on the North Carolina-Virginia border. Two-thirds of Lake Gaston lies in North Carolina, though about 70 percent of the lake water originates in Virginia. Because the lake is mostly in North Carolina, that state also has an interest in the proposed water transfer. Under general

7. *Id.*

8. Interview with William E. Barr, President of the Roanoke River Basin Association, in Danville, Va. (Aug. 18, 1995).

9. Interview with Gerald Lovelace, Assistant Administrator of Halifax County, Virginia, in Halifax, Va. (Aug. 18, 1995).

10. Interview with G. Morris Wells, Jr., Town Manager of South Hill, Va. (Aug. 25, 1995).

11. Interview with T. Keister Greer, Water Rights Attorney Representing Southside Legislators, in Rocky Mount, Va. (July 26, 1996).

riparian water law, interbasin transfers are not permitted. The State of Virginia has not intervened in the litigation because the proposed project involves an intrastate interbasin water transfer, and therefore governmental leaders did not want to take sides in what has become a political hot potato. Because the Army Corps of Engineers directs dam projects along the Roanoke River, and because the Federal Energy Regulatory Commission (FERC) regulates Virginia Electric and Power Company (VEPCO) which manages Lake Gaston for hydroelectric power along the Roanoke River Basin, approval from both agencies was necessary in order to begin construction on the project.

Virginia Beach began the approval process by approaching VEPCO, which used Lake Gaston for generating hydroelectric power. VEPCO created Lake Gaston after it received a 50-year permit from FERC to dam the Roanoke River to generate power. Completed in 1963, Lake Gaston is located in rural Virginia and North Carolina counties,¹² and is surrounded by countless homes of vacationers, retirees, and others who enjoy the water-skiing, fishing, swimming, and boating the lake offers. VEPCO agreed to provide Virginia Beach with the land easements to make water withdrawals on the condition that Virginia Beach reimburse VEPCO for the power losses resulting from the decreased river flow turning the hydroelectric generators. Upon reaching agreement with the City of Virginia Beach, VEPCO sought FERC's approval to modify its license for Virginia Beach's intended withdrawals in order for the project to begin.

On July 15, 1983, Virginia Beach applied for final approval with the Army Corps of Engineers (the Corps) to begin construction on the project.¹³ Virginia Beach also sought to contract with the Corps to release water in the Kerr Reservoir to supplement the lowered river flow caused by the proposed withdrawal. In December 1983, the Corps issued an environmental assessment (EA) containing a finding of no significant impact (FONSI). A FONSI meant that no Environmental Impact Statement (EIS) would have to be completed for the project's approval. The Corps decided that river flow (approximately five bgd) as compared to the proposed withdrawal (60 mgd) would not significantly impact the Roanoke River Basin.¹⁴ The yearly water levels at Kerr Reservoir above Lake Gaston already fluctuated 22 feet because of VEPCO's withdrawals.

12. Karen Weintraub, *Gaston Deal at Hand; N.C., Beach to Sign Pact Friday; Both Sides to End Legal Fight; Legislatures Must Sign by July; Beach to OK Norfolk Water Plant*, VIRGINIAN-PILOT, Apr. 27, 1995, at A1.

13. *North Carolina v. Hudson*, 665 F. Supp. 428, 432 (E.D.N.C. 1987), *further appeal* 731 F. Supp. 1261 (E.D.N.C. 1990), *aff'd* 940 F.2d 58 (4th Cir. 1991).

14. *Id.* at 433.

According to the Corps, the Lake Gaston withdrawals would cause an almost imperceptible impact.

The Corps also looked at the environmental impact of the withdrawals and found that the most significant impact on wildlife would be to the striped bass or rockfish.¹⁵ The Roanoke River Basin's concern for the striped bass was that the lowered stream flow at the dams would not allow the bass to spawn properly. Bass lay their eggs on the water's surface and as a result of the water's rapid flow, the eggs remain on the surface to hatch.¹⁶ The Corps was aware of problems with low bass populations in recent years. However, the Corps concluded that the main reason for the low bass populations was over-fishing rather than a low river flow.¹⁷ The Corps determined that new fishing regulations would significantly stabilize the bass population.¹⁸

Although the Corps' main interest was investigating the repercussions of water withdrawals from the lake, the Corps also looked at the environmental impact of the 76-mile pipeline and decided that the impact would be insignificant—thus an EIS would not be required.¹⁹

IV. THE LITIGATION PROCESS BEGINS

On January 9, 1984, the City of Virginia Beach filed a federal action in the "Eastern District of Virginia against the RRBA and the Governor of North Carolina seeking a declaratory judgment that the permit and contract were valid."²⁰ However, the U.S. Fourth Circuit Court of Appeals ruled that the Virginia statute did not give Virginia Beach jurisdiction over the Governor of North Carolina. On January 12, 1984, Virginia Beach signed the contract for approving the project with the Corps. That same day the State of North Carolina, "alleg(ing) that issuance of the pipeline construction permit was arbitrary and capricious and in violation of NEPA, the Clean Water Act, the Rivers and Harbors Act, the Coastal Zone Management Act, the Water Supply Act, and the federal regulations implementing

15. Norfolk District, Corps of Engineers, United States Dept. of the Army, Supplement Environmental Assessment of a permit application for construction of a water supply pipeline and appurtenant structures in Lake Gaston and crossing several rivers, at 2 (Dec. 21, 1988).

16. *Hudson*, 731 F. Supp. at 1264.

17. *Id.*

18. Norfolk District, *supra* note 15, at 2.

19. Norfolk District, Corps of Engineers, United States Dept. of the Army, Supplement Statement of Findings, Permit No. 83-0747-06, at 10 (Dec. 21, 1988). According to federal regulations, an EIS need only be completed when there is a finding of significant impact to the environment. It is also important to note here that the National Marine Fisheries Services (NMFS), a division within the U.S. Department of Commerce, provided its support for the Lake Gaston project and provided significant scientific data supporting the proposed project to the Corps.

20. *See Hudson*, 665 F. Supp. at 433.

those acts," filed suit against the Army Corps of Engineers.²¹ However, the permit to go ahead with the project was signed by the Assistant Secretary of the Army for Civil Works on January 30, 1984.

At the same time, fearing that the Virginia Beach proposal to take water from their basin would be approved, the Roanoke River Basin Association (RRBA), which represents a group of communities surrounding Lake Gaston, sought to intervene in the North Carolina lawsuit. They were admitted on June 20, 1984. The RRBA complaint mirrored the original complaint and added a challenge to the water storage reallocation contract.²² Meanwhile, Virginia Beach was given the opportunity to remove its suit against the Governor of North Carolina to the Eastern District of North Carolina. The City of Virginia Beach's motion to combine the two cases was denied because Virginia Beach had already been received as an intervener in the State of North Carolina case. In December 1985, discovery ended and all facts concerning the cases were agreed to on March 28, 1986.²³ The district court issued two opinions which said that the Corps was not required to issue an EIS, but remanded the case for further findings on two issues. First, to be sure that the Corps decision to approve the permit was not "arbitrary and capricious"²⁴ the court required the Corps to make an independent assessment of the effect of the proposed withdrawal on the spawning of the striped bass and to determine whether an EIS would be necessary. Second, the Corps was to make a determination of the extent of Virginia Beach's water needs. The case returned to district court after the Corps had completed a Supplemental EA, which was a revised finding of no significant impact (RFONSI), and determined how much water Virginia Beach would need.²⁵ The court was satisfied at the hearing on the matters for remand with both findings—that there would be no significant impact and that Virginia Beach would indeed need the water. The Corps permit was reissued with a modification ensuring that a sufficient flow would be maintained in the Roanoke River during the bass spawning season. North Carolina appealed the final decision to reissue the permit.

Meanwhile, Virginia Beach did not want to be delayed by litigation and announced plans to begin construction of the parts of the pipeline not under FERC's jurisdiction on December 10, 1990. On November 30, 1990, North Carolina filed an injunction to stop the construction until FERC had

21. *See Id.*

22. *See Id.*

23. *See Id.* at 434.

24. *See Id.* at 437.

25. *Hudson*, 731 F. Supp. at 1263.

made a final decision.²⁶ The injunction was granted ten days later. Virginia Beach then sought to amend the injunction to permit it to build portions of the proposed pipeline that involved six river crossings and parts of the pump station.

While Virginia Beach awaited a hearing on the proposed modification to the injunction granted to North Carolina, the appeal of the court's decision to uphold the Corps permit was heard on February 7, 1991.²⁷ The Fourth Circuit Court stated that the main issue in this appeal is whether the Corp's decision is "arbitrary and capricious." The RRBA argued that withdrawals of such magnitude would affect the environment and that the Corps had failed to fully consider the effects of a year-round withdrawal of water on the future water needs of Virginia Beach, on water quality, on the striped bass population, and on all users during times of drought. Although the court recognized that the City of Virginia Beach was growing faster than earlier projections from 1984,²⁸ it refused to overturn the 1984 and 1987 *Hudson* decisions for being either "arbitrary or capricious" on the grounds that the Corps had not considered the future water needs of downstream water users.²⁹

When its appeals failed, North Carolina continued to object to Virginia Beach's proposal to modify the injunction that blocked construction of any segment of the proposed pipeline until FERC had given its final approval. North Carolina argued that to approve construction on a part of the pipeline outside of FERC's jurisdiction would interfere with FERC's decisions elsewhere. The interference, North Carolina argued, would result from Virginia Beach's significant expenditures of money and the fact that Virginia Beach had already built several portions of the pipeline. Virginia Beach said that it was willing to take the risk even though the expenditure may be lost if FERC denied the city's request to build the pipeline. The appellate court reversed the decision of the district court saying that:

[C]onstruction which lies beyond the boundaries of FERC's jurisdiction can be enjoined only when it has a direct and substantial probability of influencing FERC's decision. Against that standard, the reach of the injunction entered here, in prohibiting the two relatively minor phases of construction sought in Virginia Beach's motion to alter or amend, cannot as a matter of law be justified.³⁰

26. *North Carolina v. City of Virginia Beach*, 951 F.2d 596, 600 (4th Cir. 1991).

27. *RRBA v. Hudson*, 940 F.2d 58 (4th Cir. 1991), *cert. den.*, 112 S. Ct. 1164 (1992).

28. *Hudson*, 731 F. Supp. at 1272.

29. *Hudson*, 940 F.2d at 65.

30. *City of Virginia Beach*, 951 F.2d at 603.

In dissent, however, Judge Murnaghan made a statement that has in a sense become a self-fulfilling prophecy. He said that the appeals court had reviewed the case *de novo* instead of using the court's own "clearly erroneous" standard.³¹ He further stated that by permitting the modification and allowing an additional \$8.4 million to be spent in excess of the \$18.1 million already spent would result in more than \$26.5 million spent out of a \$218 million project.³² He also wondered whether any further work on the project would unduly influence the decision-making agencies as they seek independently to review project applications. Now, five years later, Virginia Beach has taken the risk to begin building the pipeline before the litigation has ended, and has spent more than \$36 million on the pipeline project, not including the currently accruing expense of approximately \$1 million per week in building the pipeline.³³

In 1991, North Carolina moved to block the project by invoking the Coastal Zone Management Act (CZMA) which requires the approval of an application for a project by the state in which the project is planned.³⁴ North Carolina argued that it had the right to review the project to see if it coincided with its own comprehensive plan to manage its coastal environments. The state was given reviewing power and blocked the Virginia Beach project characterizing it as contrary to North Carolina's coastal environmental management plans. Virginia Beach objected and sued. However, on December 3, 1992, upon the recommendation of the Justice Department, Secretary of Commerce Barbara Franklin reversed the decision to grant North Carolina the right to review the Virginia Beach project, saying that it would be wrong to permit North Carolina to review the project.³⁵ In early 1993, Ron Brown, the new Secretary of Commerce, upheld that decision. However, the Department of Justice withdrew its previous opinion which gave North Carolina the power under CZMA to review the planned pipeline. Following the Justice Department's reversal of opinions, on December 14, 1993, Secretary Brown reversed his decision and permitted the review by North Carolina.³⁶ On December 23, 1993, Virginia Beach sued the Department of Commerce and on January 12, 1994, North Carolina intervened in the lawsuit.³⁷

In order to obtain FERC approval for the entire project the National Marine Fisheries Service (NMFS) again had to sign off on the project.

31. *Id.* at 606.

32. *Id.* at 613.

33. Toni Whitt, *The Cost of Supplying Beach with Water from Gaston: \$242 million*, VIRGINIAN-PILOT, Apr. 27, 1995, at A11.

34. *City of Virginia Beach v. Brown*, 858 F. Supp. 585, 587 (E.D. Va. 1994).

35. *Id.* at 587.

36. *Id.*

37. *Id.*

Even though NMFS had already given its approval for the project once, the service refused to grant its further approval, explaining that an EIS must be completed for categorical NMFS approval. Meanwhile, Virginia Beach tried to show that although the State of North Carolina and the NMFS had already participated in the Corps' approval of the proposed pipeline in 1983. Nevertheless, the NMFS had withdrawn its consent and support for the project on December 7, 1987 in a notice to FERC.³⁸ Dr. William W. Fox, Jr., then head of NMFS explained that its reversal came after it had transferred approval authority for the pipeline to a different NMFS division more familiar with the project's area.³⁹ Virginia Beach believed NMFS's reversal was arbitrarily reached because of influence gained through a close working relationship between that particular NMFS division and North Carolina's division of natural resources which had developed because an NMFS scientist was serving concurrently as the head of an environmental group opposed to the project. Virginia Beach filed suit April 9, 1991, invoking the Freedom of Information Act to obtain documents that would implicate the decision to reverse the NMFS' position and thereby effectively block the proposed pipeline.⁴⁰ North Carolina and NMFS argued that releasing most of the documents would violate the "work product" privilege, though the district court judge refused to extend the work product exception to most of the documents. North Carolina and NMFS appealed. Although some documents were granted privileged status, the court ordered that documents requested under FOIA to be released to Virginia Beach.⁴¹ Despite the suspicious NMFS turnabout in recommending denial of the permit until a complete EIS was completed, FERC went forward with plans to complete an EIS.

On December 27, 1994, the State of North Carolina and Virginia Beach announced that they would seek a federally mediated agreement before continuing their legal battle over the Lake Gaston Project.⁴² Just four months later on April 28, 1995, the parties reached a mediated agreement through the good offices of John G. Bickerman.⁴³

38. See *City of Virginia Beach v. United States Dep't of Commer.*, 805 F. Supp. 1323, 1325 (E.D. Va. 1992), 995 F.2d 1247 (4th Cir. 1993).

39. *Id.* at 1326.

40. *Id.* at 1324.

41. *Id.*

42. *N.C., Beach OK Mediation for 1 Gaston Issue*, VIRGINIAN-PILOT, Dec. 28, 1994, at B2.

43. *Va. Beach to Draw Water from N.C.*, WASHINGTON POST, Apr. 29, 1995, at B5. See also Mason Peters et al., *Gaston Breakthrough; Possible Truce in 15-Year VA.-N.C. Battle is at Hand; The Deal, Far from Final, Could End Tangle of Litigation*, VIRGINIAN-PILOT, Apr. 7, 1995, at A1.

Among other stipulations, the mediated agreement⁴⁴ contained the following provisions:

— Virginia Beach and surrounding communities could withdraw up to 60 million gallons of water a day. (This withdrawal rate will not be reached until long after the year 2030 if long-term estimates are correct.)⁴⁵

— North Carolina may connect to the pipeline and take 35 mgd—15 mgd for the Outer Banks and 20 mgd for unnamed northern North Carolina communities.

— Project costs are to be paid by Virginia Beach.

— Lake Gaston water cannot be sold outside of Southside, Virginia.

— Virginia Beach will purchase some water in Kerr Reservoir to be used to supplement a minimum river flow in times of drought and during the bass spawning season.

— Virginia Beach will continue to employ conservation measures.

— Virginia agrees to expand two roads (Route 17 and 168) to accommodate traffic to and from the Outer Banks of North Carolina.

— A Bi-State Water Commission will be created. (The RRBA, however, calls this commission biased because the Roanoke River Basin has no direct representation.)

— Virginia Beach will pay \$200,000 annually to maintain the Lake Gaston reservoir and suppress algae growth.

— Virginia Beach will not interfere with Lake Gaston's current recreational uses.

— The agreement is subject to FERC's approval which is expected by the end of Summer 1995, and FERC may not substantially change the proposed settlement, or the deal is annulled.

— The parties agree to drop all attempts to litigate the Lake Gaston matter. (At this time the agreeing parties did not include the members and towns of the RRBA, and this complicates the ratification and implementation of the agreement.)

— A 60-day time limit was set for ratification by both state legislatures, the governors, senators, congress, Virginia Beach, and Norfolk.⁴⁶

— Virginia Beach, Chesapeake, and North Carolina agreed to attempt legislation of a North Carolina-Virginia interstate compact "which would provide that no new or increased out-of-basin transfers of water . . . [may

44. Tom Holden, *No Longer A Pipe Dream, Lake Gaston Project Now Seems A Certainty, But Beach Residents Will Have to Maintain One of The Nation's Best Conservation Habits*, *The VIRGINIAN-PILOT*, May 3, 1995, at 12.

45. Reply Brief of Petitioner at 22, *State of North Carolina v. Federal Energy Regulatory Commission*, Nos. 95-1494 and 95-1599 (9th Cir. 1996).

46. Again the 60-day deadline for ratification is viewed as a fatal flaw by the author because politicians are notoriously slow decision-makers, and each level of government must wait for lower-level ratification before taking real steps to resolve any final disagreements over details.

occur] from the Roanoke River Basin at any point above the Roanoke Rapids Dam without the consent of each state."⁴⁷

Additional modifications⁴⁸ were announced on June 26, 1995:

— Virginia Beach promises not to interfere with upstream uses of water from Lake Gaston. (It may be unrealistic to expect an entity to refrain from future actions to support its 12-year quest and stand idly by while the plan crumbled.)

— Virginia Beach will assure Norfolk that it will purchase Norfolk's surplus water before withdrawing water from Lake Gaston as long as the Norfolk water is not more expensive than that of Lake Gaston. This assures Norfolk of a continued demand for its excess water.

— South-central Virginia will have a role in the Bi-State Water Commission⁴⁹

— Virginia Beach will pay Lake Gaston communities five cents per 1,000 gallons for the water, but no less than \$200,000 per year and an additional \$300,000 per year to fight the hydrilla that grows in Lake Gaston.⁵⁰

There was a strong reaction to the mediated agreement from the Roanoke River Basin, which had been excluded from the mediation process. President Barr of the RRBA said that the agreement was outrageous because it took control of Roanoke River Basin waters from surrounding communities and gave it to eastern Virginia and North Carolina.⁵¹ He claimed that it started with a 60 mgd proposed withdrawal and ended with another 35 mgd withdrawal for North Carolina—all of which exemplifies the future plan to slowly take more water from the Roanoke River Basin. Mr. Lovelace of Halifax County was bothered by the constitutionality of the city of Virginia Beach negotiating an interstate compact with another state—namely North Carolina.⁵² He further stated that the agreement also

47. Keister Greer is a leading water-rights attorney who consulted with the RRBA. Greer wanted a stipulation preventing further interbasin water transfers to allay the concerns of Roanoke River Basin citizens who feared that this project would set a precedent for other water-poor regions of the two states to take water from Lake Gaston. In this case, water-poor cities would then only need to apply for permits to take water from another basin. Such a policy is contrary to riparian common law. See Todd Jackson, *Pipeline Foes' Lawyer Opts to Change Plan, Not Fight It*, ROANOKE TIMES & WORLD NEWS, May 6, 1995, at C1. See also Interview with T.K. Greer, *supra*, note 11.

48. Mason Peters et al., *Gaston Breakthrough; Possible Truce in 15-Year VA.-N.C. Battle is at Hand; The Deal, Far from Final, Could End Tangle of Litigation*, VIRGINIAN-PILOT, APR. 7, 1995, at A1; Christopher Kirkpatrick, *Governor Bashing Popular Sport around Lake Gaston*, HERALD-SUN, July 3, 1995, at A1; Karen Weintraub & Richard Little, *Lake Gaston Deal Awaits; Allen's Call for Session*, ROANOKE TIMES & WORLD NEWS, June 27, 1995, at C1.

49. The author hesitates to speculate as to what this role will be—and whether this action is too little too late.

50. Cynically speaking, this is, perhaps, a last-minute token gesture.

51. Interview with William E. Barr, *supra* note 8.

52. Interview with Gerald Lovelace, *supra* note 9.

provided for Virginia taxpayers to pay to widen roads to North Carolina's Outer Banks which means that some state money will go to benefit citizens of another state. Mr. Wells of South Hill's echoed Mr. Lovelace's argument on the constitutionality of the agreement and added that the mediated agreement was a sellout by Virginia Beach so it did not have to consult with the Roanoke River Basin communities.⁵³ One source close to the mediation stated that Virginia Beach was the party that blocked the participation of Norfolk or Southside Virginia in the mediated agreement. On the other hand, North Carolina favored the inclusion of all parties to find a more acceptable agreement.

In May 1995, the communities of south-central Virginia began to band together, with each community or county donating \$5,000 to \$10,000 dollars to file suit against the proposed pipeline.⁵⁴ Just previously, the City of Virginia Beach authorized the expansion of Norfolk water treatment facilities in expectation of Lake Gaston water.⁵⁵ Virginia Beach had to authorize the expansion of Norfolk facilities, or the water contract it had spent four years negotiating with Norfolk would lapse. Meanwhile, Norfolk and Virginia Beach scrambled to negotiate a settlement over provisions of the separate interstate compact.

Under the original agreement, Norfolk's ability to sell its excess water was restricted, even though it was not guaranteed that its surplus water would continue to be purchased by Virginia Beach. Virginia Beach agreed to modify the agreement to purchase Norfolk water as long as it was as cheap as Lake Gaston water. Furthermore, Norfolk would only be obligated to sell excess water until the year 2010 when it was assumed that growth would require Norfolk to use the water for its own population.⁵⁶ The agreement was ratified on June 26, 1995. At that point, however, because the Virginia Legislature had ended its 1995 session, Governor George Allen would need to call a special legislative session to permit the ratification of the mediated agreement between Virginia Beach and North Carolina by June 30, 1995. Although Governor Allen had indicated that he would call a special session of the legislature, he did not, blaming his decision on Democratic Party politics⁵⁷ despite the fact that the decision was ultimately Governor Allen's. Newspapers said that the Governor

53. Interview with W. Morris Wells, Jr., *supra* note 10.

54. Richard Foster, *Bedford Votes to Block Pipeline; County Pays \$5,000 to Join Lawsuit*, ROANOKE TIMES & WORLD NEWS, May 23, 1995, at C3; see also Interview with W. Morris Wells, Town Manager of South Hill, Va., in South Hill, Va. (Aug. 25, 1995).

55. Karen Weintraub, *Gaston Pipeline Runs Hot, Cold*, VIRGINIAN-PILOT, Dec. 31, 1995, at 7.

56. Karen Weintraub & David M. Poole, *Terms of Gaston Deal Disclosed; Still Up in the Air: Approval of Both States' Assemblies by Month's End*, VIRGINIAN-PILOT, June 21, 1995, at B1.

57. Peter Baker, *Va. Feuding Sends Pact on Water Down Drain; Allen Refuses to Convene Special Session, Sinking Deal with N.C. in Works Since '82*, WASH. POST, June 29, 1995, at C3.

did not call a special session because he was afraid that the Democratically controlled state legislature would not only ratify the mediated agreement, but attempt to legislate pork barrel projects to gain reelection and retain control of the legislature. When Democratic Party leaders refused to guarantee that they would only have the legislature consider the Lake Gaston project, Allen assumed the worst and refused to call the special session.⁵⁸ However, according to Virginia Assemblyman Ted Bennett, Governor Allen did not call a special legislative session because of the bipartisan opposition to the pipeline and the precedent a negative vote would establish.⁵⁹ However, Mr. Bennett, who was on the special subcommittee to investigate and make a recommendation concerning the Lake Gaston Project, said that the Governor had such an interest in the passage of the mediated agreement that his chief of staff (Mr. Frank Atkinson) was at almost all of the subcommittee hearings.⁶⁰ As one of the committee's minority in opposing the pipeline, Mr. Bennett felt like he was trying to "fight a train," because of the powerful interests which wanted the agreement ratified.⁶¹ In one of the subcommittee's public hearings in a south-central Virginia community, the citizens claimed that the Roanoke River Basin had been left out of the mediation and had been given only token representation on the special subcommittee.⁶² North Carolina believed the agreement to be fair at the time, and was a compromise, however, that met the basic requirements North Carolina was seeking.⁶³ Governor Allen did not call the special legislative session because he did not want the pipeline's opponents to gain strength from a failure of the state legislature to ratify the mediated agreement. This fear was compounded in 1992 when the legislature passed the Groundwater Management Act which said "[t]hat certain amounts of water shall be withdrawn from the Roanoke River at Lake Gaston for additional public water supply by the city of Virginia Beach."⁶⁴ Even the appearance of an opinion reversal in the legislature by the failure to ratify the mediated agreement would strengthen pipeline opponents. Because it was apparent that the pipeline agreement lacked support in the legislature, the June 30, 1995, deadline came and went without the necessary ratifications.

58. *Id.*

59. Interview with W.W. "Ted" Bennett, Jr., Virginia State Legislator in Halifax, Virginia (Aug. 25, 1995).

60. *Id.*

61. *Id.*

62. *Id.*

63. Interview with source close to North Carolina, name withheld, in N.C. (July 1996).

64. Groundwater Management Act of 1992, VA. CODE ANN. 62.1-254 (1995).

V. SETTING NEW PRECEDENT

Until recently, the eastern United States had no water shortages. Eastern states were usually more worried about too much rainfall which saturated the ground and caused massive flooding. Beginning in the 1940's the number of flood control projects began to mushroom as communities—including those in the Roanoke River Basin—developed plans to prevent the seemingly yearly deluge. Since then, a number of large eastern cities have begun to announce that their freshwater supplies are inadequate to meet water demand. Water shortages are relatively new to the east coast, as are the accompanying legal precedents necessary for jurisdictions with inadequate water supplies. Eastern states have developed a legal foundation based on the common law's riparian system for water distribution. Riparian law granted water rights to anyone with land abutting a river. If land did not have a stream or river, usually a well could provide drinking water while rain provided the necessary irrigation for crops, lawns, and gardens. Under the common law, interbasin transfers of water were both illegal and impractical because there was no way to transfer the water from one river basin to another. However, with the development of new technologies to transfer water, interbasin transfers began in the West to solve local water shortages. The Lake Gaston compact could set precedent in permitting the large-scale interbasin transfer of water under a riparian legal system for water management. Mr. T. Keister Greer has pointed out the necessity of limiting interbasin water transfers so the mistakes of the past are not repeated.⁶⁵ Specifically, Mr. Greer cited the example of California's Owens Valley. Once a green valley, it is now a desert due to the extraction of most of its water by Los Angeles.⁶⁶ However, Mr. Greer believes that the settlement of the Lake Gaston water dispute will have important precedential effects in the eastern states and in other water-hungry jurisdictions in riparian localities that seek water from other basins.⁶⁷

As a state legislator, Mr. Bennett advocates the development of a reasonable water policy in Virginia. Such a water policy would not permit interbasin withdrawals if there is excess water in the basin.⁶⁸ RRBA President Barr advocates a policy that also includes a stipulation that those initiating interbasin transfers would not have the right to limit or regulate upstream water uses from the point of withdrawal.⁶⁹ Mr. Bennett would

65. Interview with T.K. Greer, *supra* note 11.

66. Richard Steele & John Barnes, *CALIFORNIA: War over Water*, NEWSWEEK, Oct. 4, 1976, at 47.

67. Interview with T.K. Greer, *supra* note 11.

68. Interview with W.W. "Ted" Bennett, *supra* note 59.

69. Interview with William E. Barr, *supra* note 8.

also add the requirement of the consent from the host jurisdiction before an interbasin transfer would be permitted.⁷⁰ He pointed out that although other interbasin transfers do take place in Virginia, this would be the first large-scale transfer and the first transfer in which the host jurisdiction objected to the transfer. Mr. Wells of South Hill added that a good water policy would include the development of an agreement concerning what portion of the Roanoke River would be allocated to each state.⁷¹ This suggestion is similar to the current Colorado River Compact which actually specifies the amount of water each state may withdraw from the Colorado River. The Lake Gaston dispute could be a blessing in disguise if the resulting agreement concerning the water rights were resolved and a good foundational water policy developed which is sensitive to the needs of both water-poor and water-rich jurisdictions.

VI. THE WEST HAS NECESSARY PRECEDENT

In the West, water shortages are a way of life. It has been common for land to be farmed using the existing water until the often unreplenished or inconsistent water sources dried up and the land was abandoned. In the absence of rain, irrigation projects were built to support agriculture. From the day of their arrival in Utah, Mormon Pioneers devised community irrigation districts that allocated the water among the citizens. Utah water legislation passed in 1903 adopted the appropriation doctrine that "subordinated citizens rights to the rights of the state and required permits to use water for irrigation—as the basis for acquisition of water rights."⁷² Colorado water law was established by miners who would stake claims to river water, the same way they claimed mines. This doctrine of prior appropriation has been called the "First in time, first in right" rule.⁷³ When western states became aware in the early 1900's that the Colorado River was insufficient to meet the needs of the growing populations of the several states in that river basin, an interstate compact became necessary.

In 1922, the United States Supreme Court in *Wyoming v. Colorado*, stated that the doctrine of prior appropriation would govern western water rights in interstate disputes.⁷⁴ The Colorado River was divided into an upper basin (Colorado, New Mexico, Utah, and Wyoming) and lower basin (Arizona, California, and Nevada) in the 1922 interstate compact.

70. Interview with W.W. "Ted" Bennett, *supra* note 59.

71. Interview with G. Morris Wells, Jr., *supra* note 10.

72. Richard T. Probst, *The Origins of Groundwater Laws in Arizona, Colorado, and Utah*, B.Y.U. PRE-LAW REV. (Winter 1993).

73. *Southeastern Colorado Water Conservancy Dist. v. Shelton Farms, Inc.*, 529 P.2d 1321, 1324 (Colo. 1974).

74. *SAX*, *supra* note 2, at 703.

Most of the states ratified the compact. Arizona refused to ratify the compact until 1944 when it realized that until it ratified the Colorado River Compact, Congress would not approve funding for the Central Arizona Project (CAP). A continuing dispute with California over project details delayed the project for years. The project was not approved by Congress until 1968, and the first CAP water was delivered in 1985. The Colorado River Compact was negotiated (but not ratified) in a short period of time. However, details delayed construction of projects in Arizona for decades. The compact involved multiple states and interests, but there were really no national environmental laws, no clean water acts, no large or well-funded pro-environment groups, no Endangered Species Act, no real consideration given to Indian water rights, and no required environmental impact statements. Moreover, United States society at that time was less litigious, and Nevada was not seeking a large quantity of water, because it did not foresee the explosive growth in Las Vegas. It is improbable that an interstate compact for the Colorado River could ever be negotiated on a timely basis in the 1990's among so many states and interests even though the foundational legal doctrine of prior appropriation easily lends itself to interbasin water transfers. Despite a good legal foundation for interbasin transfers in the west, interbasin water disputes continued to rage in Arizona through the 1970's.

The water shortage in Tucson, Arizona is instructive for Virginia Beach and many other cities elsewhere who face a serious shortage of water. Tucson receives an average of seven inches of rain each year as compared to 46-48 inches in Virginia Beach.⁷⁵ Tucson's climate requires extensive irrigation to produce a green landscape, whereas Virginia Beach's grows naturally. Both cities have growing populations, too little freshwater, and growing demands for water. Both have conservation programs as well.

When Tucson attempted to make an interbasin transfer from the town of Prescott, Arizona it met fierce opposition similar to that faced by Virginia Beach when it attempted to make an interbasin withdrawal from Lake Gaston. In the end, Tucson was permitted to make an interbasin withdrawal under Arizona's water law. The law stated that the doctrine of prior appropriation was limited by the principle of reasonable use.⁷⁶ When Tucson purchased farmland, the city received the farmer's rights to withdraw groundwater. However, the court determined that the reasonable use doctrine required Tucson to take only the same amount of water each year that the farmer would have withdrawn to grow crops. In Virginia Beach's

75. FRITZ VAN DER LEEDEN, WATER ATLAS OF VIRGINIA PLATE 2-3 (1993).

76. Probst, *supra* note 72.

situation, however, the city is dealing with original riparian laws with some modern alterations.

The communities in the Roanoke River Basin have a property interest in the Lake Gaston water. For Virginia Beach to claim some of this water just because it is not now being used does not generate a right to the water. Although Virginia Beach may be larger and growing more rapidly, the Roanoke River Basin communities should have first right to the use of this natural resource. Any limitation which that action by Virginia Beach would impose on the growth of Roanoke River Basin communities would be reflected in future losses of revenue and jobs throughout the region. If Virginia laws were similar to Arizona's, then Virginia Beach could simply acquire land on the Roanoke River and reasonably use the water. The city would have to acquire the same amount of land as a large company to use the 65 mgd it desires. Because Virginia's laws differ from Arizona's, Virginia Beach will be forced to devise a solution that is practical and will satisfy future needs without generating excessive legal costs and open opposition from powerful and highly cohesive opponents. Virginia Beach also has to meet the strict requirements of many burdensome environmental laws which either did not exist at the time of western interstate compacts or were just being developed during the settlements of the Arizona dispute.

VII. WHERE DOES VIRGINIA BEACH GO FROM HERE?

July 1995 brought the promised lawsuit by the south-central Virginia communities. The bickering and finger pointing between Democrats and Republicans, the legislature, and the governor continued apace.⁷⁷ Ironically, Virginia Beach received FERC's final approval of the pipeline on July 26, 1995. The final EIS is a very intimidating document, including several hundred pages of text with an appendix that is larger than the statement. Twenty persons who were experts in the environmental sciences—i.e., chemistry and biology; economics; mechanical, electrical, and civil engineering; and public administration were involved in the creation of the document which examined the issues and drew conclusions as to the best solution to Virginia Beach's water shortage. The EIS confirmed Virginia Beach's need for another water source.⁷⁸ After considering the alternatives of desalinization and imported water to meet Virginia Beach's

77. Todd Jackson, *Franklin Joins Lawsuit; County Enters Fray Over Lake Gaston*, ROANOKE TIMES & WORLD NEWS, May 17, 1995, at C1.

78. Office of Hydro power Licensing, Federal Energy Regulatory Commission, *Nonproject Use of Project Lands and Water for the City of Virginia Beach Water Supply Project*, FERC No. 2009-003 (July 26, 1995).

needs, the EIS favored the second option by a small margin.⁷⁹ Despite the length of the EIS and the credentials of the persons preparing it, pipeline opponents still claim that the data used and the conclusions flowing from it are biased.⁸⁰

FERC completed its EIS within one year. One anonymous source said that Senators Robb and Warner had unduly influenced FERC, as the Senators initially met with the head of FERC and even sat in on the reconfirmation hearings although they were not on the committee overseeing the reconfirmation.⁸¹ In interrogatories submitted by Senators Robb and Warner to Ms. Elizabeth Moler, Chair of FERC, the Senators asked questions that were connected to the Lake Gaston issue. Each time Ms. Moler responded by reminding the Senators that it is inappropriate to answer questions regarding the specifics of the currently disputed water project.⁸² Did the Senators hope to unethically persuade Ms. Moler to see the issue their way after grilling Ms. Moler and delaying her reconfirmation? The events following the reconfirmation in a very real sense speak for themselves.

Although Chairwoman Moler testified that an EIS takes at least a year and usually more in a disputed case. FERC produced an EIS in less than a year. The steps and date of completion for FERC's EIS are as follows:

- 1) Issuance of a Notice of Intent to Draft an EIS. June, 1995.
- 2) Preparation of Scoping Documents—detailing the scope of the EIS. October, 1994.
- 3) Research and Draft of the EIS (DEIS). January, 1995.
- 4) Public Notice asking for comments on DEIS, and preparation of Final EIS. July, 1995.

After the tenuous reconfirmation hearing Ms. Moler had promised that FERC would complete the EIS on an accelerated basis. Was the EIS accelerated or rushed? How does the EIS stand up against criticism? North Carolina's brief filed in appeal of FERC's EIS alleges that FERC utilized outdated data in the EIS.⁸³ For example the projected growth of Virginia Beach had been five percent a year. However, in 1990, the growth rate dropped to one percent where it has stayed for several years. Virginia Beach's slower growth rate has reduced the city's projected need for water

79. *Id.* at 6-10.

80. Reply Brief of Petitioner, *supra* note 45, at 21.

81. *Hearing on the nomination of Elizabeth Anne Moler, nominee for reappointment as a member of the Federal Energy Regulatory Commission before the Senate Committee on Energy and Natural Resources*, 102d Cong., 2d Sess. 30 (1994) (statement of Senator Chuck Robb, Va.).

82. Letter from Elizabeth A. Moler, Chair, Federal Energy Regulatory Commission, to Senator J. Bennett Johnston, Chairman, Senate Committee on Energy and Natural Resources 19 (Aug. 1, 1994).

83. Reply Brief of Petitioner, *supra* note 45, at 21.

by 15.2 mgd. When this number is combined with the excess 18 mgd Norfolk claims to have available, Virginia Beach would not need water from other sources for many years.

Although Mr. Leahy, project manager for the proposed pipeline is frustrated by the opponents' accusations of bias, he is equally committed to obtaining the pipeline's approval. He stated that no other project has been put through a similar gambit of legal tests and government regulation. Virginia Beach has won every time, but opponents continue to be able to raise old arguments and put Virginia Beach through the "mill." Mr. Leahy believes that by bending over backwards for the pipeline's opponents, the courts and federal government are wasting taxpayer money and permitting these parochial attempts to delay the pipeline's construction. Leahy remains committed to the Lake Gaston project to alleviate the current water shortage in Virginia Beach, but building the pipeline was blocked by Federal Court Judge Thomas F. Hogan subject to his ruling in the case pending September 22, 1995.

Judge Hogan stated that he would rule as to "whether Commerce Secretary Ronald H. Brown acted appropriately when he overruled North Carolina's opposition to the pipeline."⁸⁴ After receiving FERC's approval, Virginia Beach decided that it wanted no part of the mediated agreement and declared victory, claiming that the FERC decision means that North Carolina's opposition to the pipeline has failed. Virginia Beach also showed a degree of arrogance by approving the expenditure of more money to seek bids for the construction of the pipeline and the pumphouse. Still, the city risks losing more money if North Carolina and the RRBA continue their efforts to bring suit to delay or block the construction.⁸⁵

For its part North Carolina has not repudiated the mediated agreement, though not relying on conciliation with Virginia Beach. The North Carolina Legislature passed a bill on July 27, 1995, making it illegal to take water from Lake Gaston without state approval.⁸⁶ Virginia Beach says that while two-thirds of Lake Gaston is in North Carolina, 75 percent of the water in the lake originates in Virginia. North Carolina Governor Jim Hunt urged Virginia Beach not to be premature in declaring victory in the 12-year interstate battle.⁸⁷ He further stated that North Carolina would, if necessary, appeal the Commerce Department decision of two years ago, and also seek to block construction using newly enacted North Carolina

84. Karen Weintraub, *Last Agency OK's Gaston Pipeline: But FERC's Permit Awaits the Lifting of a Judge's Stay*, VIRGINIAN-PILOT, July 27, 1995, at B1.

85. Karen Weintraub, *Once Again, Pipeline Bids Sought: Beach Takes a Risk, Opts to Advertise to Save Some Time*, VIRGINIAN-PILOT, Aug. 9, 1995, at B1.

86. *Carolina Counters on Gaston*, VIRGINIAN-PILOT, July 28, 1995, at B3.

87. Estes Thompson, *Hunt: Pipeline May Go Back to Court*, HERALD-SUN, Apr. 24, 1995, at C2.

legislation. If necessary, North Carolina may try to block the renewal of FERC's 50-year lease to VEPCO which was let in 1951 for the construction of the Lake Gaston Dam, but will expire in the year 2001. North Carolina's objection to renewal may be based on the fact that Lake Gaston would no longer be used exclusively for generating electric power. On August 25, 1995, the RRBA and the State of North Carolina filed an appeal of the FERC decision asking FERC to rescind its approval. On September 25, 1995, the commission released a 16-page decision saying that North Carolina "had failed to unearth any new evidence or arguments that would cause the commissioners to reconsider their approval of the project issued in July."⁸⁸ However, an injunction still blocked the commencement of pipeline construction until Judge Hogan ruled on September 28, 1996, upholding Secretary of Commerce Ron Brown's decision to overrule North Carolina's concern that the water project would violate the Coastal Zone Management Act was not "arbitrary and capricious."⁸⁹ The Judge stated that he was not ruling on the merits of the pipeline, but deciding whether the Secretary's decision was reasonable.

With the injunction lifted, Virginia Beach began the process of reviewing bids it had received from contractors to build the pipeline. In November Senators Faircloth and Helms introduced a bill which would require the approval of their governor for the Lake Gaston project to proceed. However, Virginia legislators quickly announced that they would block the legislation.⁹⁰ Later that month Mr. T. Keister Greer filed a lawsuit against the pipeline on behalf of some Southside legislators.⁹¹ The lawsuit seeks a declaratory judgment that a permit for interbasin withdrawal is unconstitutional in Virginia because the state law prohibits any interbasin water transfers. In order for the state to permit the transfer, it would require a two-thirds majority in the legislature to pass a special act. Because the state passed the law with only a simple majority, the lawsuit argues that the permit is invalid. Then, in December Governor Hunt of North Carolina ordered the state Department of Environmental Health and Natural Resources to hire the nation's best experts to reexamine the pipeline's effects on the environment this study would be used to challenge the relicensing of the Lake Gaston hydroelectric project in the year 2001.⁹²

88. Alex Marshall, *Beach Wins a Round of Gaston: Agency Refuses N.C. Request*, VIRGINIAN PILOT, Sept. 26, 1995, at B3.

89. Beth Barber, *On the Gaston Pipeline, Victory and Vindication for Virginia Beach*, VIRGINIAN-PILOT, Oct. 1, 1995, at 6.

90. Karen Weintraub, *N.C. Bill Aims to Plug Gaston; Robb, Warner, Pickett Say Effort Has Little Chance*, VIRGINIAN-PILOT, Nov. 16, 1995, at B1.

91. Interview with T.K. Greer, *supra* note 11.

92. Karen Weintraub, *North Carolina Flexes Its Muscles Against Gaston Pipeline; Gov. Hunt Wants a National Expert to Study Its Impact*, VIRGINIAN-PILOT, Dec. 5, 1995, at B3.

While pipe for the project was being produced in Maryland, Virginia Beach began in 1996 to request that a case begun in 1984 against landowners along the Roanoke Rapids resume.⁹³ The city is seeking a declaratory judgment that landowners have no right to the water that would be used by the proposed pipeline. Despite recognition that there was little chance of passing legislation because of the power of Virginia Beach in the Virginia General Assembly, pipeline opponents from southside Virginia submitted a bill with 20 co-sponsors to defeat the project.⁹⁴ The final piece of significant news related to the Gaston project was a study released at the end of January that called for the development of five high quality golf courses in Virginia Beach. A news article said the courses would transform the city into another "golf mecca."⁹⁵ For a city hurting for water, a study recommending the development of golf courses needing additional amounts of water for irrigation may appear presumptuous to opponents of the project.

Near the beginning of March, Virginia Beach officials announced that they had reached an agreement with Virginia's Brunswick County to begin the construction of the pipeline.⁹⁶ Then, on March 11, 1996 after almost five years of delays, construction of the pipeline began in Southhampton County.⁹⁷ The contractors plan to lay 800 to 1,000 feet of pipeline a day at a cost of \$1 million per week. On May 16, 1996, Virginia Beach received more good news when the Isle of Wight County supervisors approved pipeline construction in their county.⁹⁸ Once again, the approval came after Virginia Beach provided an incentive—in this case a \$3-million dollar contribution.

However, the good news was short-lived. In June, pipeline opponents filed briefs appealing Judge Hogan's decision that lifted the injunction on pipeline construction.⁹⁹ The case was scheduled to be argued September 9, 1996 before the D.C. Circuit Court of Appeals. Also unsettling was Nor-

93. *The Week in Review: VA. Beach Seeks to Restart Case*, RICHMOND TIMES DISPATCH, Jan. 14, 1996, at C4.

94. Robert Little & David M. Poole, *Legislators Try to Halt Pipeline; Bill Would Stop Up Va. Beach Water Source*, ROANOKE TIMES & WORLD NEWS, Jan. 20, 1996, at C3.

95. Bill Reed, *Rough Lie Ahead?; Golf Course Development Looms Large, but Zoning Rules Could Be the Bogyman*, VIRGINIAN-PILOT, Jan. 26, 1996, at 10.

96. Before the agreement was reached, Virginia Beach had claimed that Brunswick County had already given its approval for pipeline construction. It is also important to note that Virginia Beach, in its zeal to begin pipeline construction, engineered Brunswick County's approval only after accepting "numerous conditions designed to minimize the impact on nearby homes." *Va. Beach, Brunswick Reach Deal on Pipeline; The Agreement Allows the City to Build a Pumping Operation and 20 Miles of Pipe*, VIRGINIAN-PILOT, Mar. 9, 1996, at B1.

97. Karen Weintraub, *Beach Begins Laying Pipeline; After a Five-Year Halt, Construction Resumes on the \$150 Million Project*, VIRGINIAN-PILOT, March 13, 1996, at B1.

98. Bob Piazza, *Final Barrier Removed to Virginia Beach Pipeline*, THE RICHMOND TIMES DISPATCH, May 17, 1996, at B3.

99. *Gaston Pipeline Opponents File New Challenges*, VIRGINIAN-PILOT, June 15, 1996, at B5.

folk's release of a comprehensive five-year water study that reported capacity of 18 mgd more than formerly thought possible.¹⁰⁰ Ironically, North Carolina had just previously filed briefs arguing that Virginia Beach will need only 16 mgd more in the year 2030.

Virginia Beach officials held several "executive sessions" to discuss the issue. One article reported that Virginia Beach's Vice Mayor W.D. Sessoms Jr. had to be flown in a police helicopter to and from his vacation in Duck, North Carolina.¹⁰¹ Virginia Beach officials wanted to know why the city had been charged so much for extra Norfolk water if there were such an available excess, and Virginia Beach consultants were directed to look at information used to compile the study.¹⁰² Not surprisingly, the consultants found that the data were different from the numbers used to determine Norfolk's developmental capacity. Although Norfolk maintained its support for the pipeline and eliminated the surcharge for extra water it was selling Virginia Beach, it was apparent that there were renewed tensions between the two cities.¹⁰³ In Virginia Beach, votes on a planned light rail and arena being developed by the two cities were delayed as a result of the fallout from the release of the water study.¹⁰⁴

The arguments before the D.C. Circuit court on September 9, 1996, were inconclusive. The court ruled that FERC needed to issue an opinion deciding whether the Clean Water Act gives North Carolina veto power over the Lake Gaston project before the court would issue a decision regarding North Carolina's appeal of the FERC permit issued to Virginia Beach to build the pipeline.¹⁰⁵ FERC was given 60 days to make their decision.

Meanwhile in October 1996, the city of Suffolk threw another wrench into completion of the Lake Gaston project by withholding approval for the expansion of the Norfolk pumping station in preparation to increase the capacity of the station in order to handle the

100. Karen Weintraub, *Water Study May Affect Pipeline Battle*, VIRGINIAN-PILOT, June 16, 1996, at A1.

101. Ironically he was vacationing at a rival beach in one of the jurisdictions fighting the pipeline just to the south of his own beach. Karen Weintraub, *Anger at Norfolk over Water Study Persists*, VIRGINIAN-PILOT, June 19, 1996, at B3.

102. Bill Reed, *Norfolk Lobs Yet Another Water Bomb At Virginia Beach*, VIRGINIAN-PILOT, June 23, 1996, at 7. See also James K. Spore, *For The Record*, VIRGINIAN-PILOT, June 23, 1996, at J4.

103. Karen Weintraub, *Doubts Persist, but Beach Takes Norfolk Offer to Pay less for Water*, VIRGINIAN-PILOT, July 3, 1996, at A1.

104. Karen Weintraub, *Beach Delays Vote on Rail; Council Calls for Routes to Norfolk Airport, Naval Base*, VIRGINIAN-PILOT, July 10, 1996, at B1.

105. Karen Weintraub, *The Pipeline to Lake Gaston; Gaston hits a "short detour"; Court won't rule yet: It wants an agency's view on whether N.C. can veto the pipeline*, The Virginian-Pilot, September 14, 1996, at B1.

Lake Gaston project water.¹⁰⁶ Suffolk officials said they need time to study the environmental impacts of the proposed project. It is ironic that Suffolk has chosen to delay granting its approval at the same time that it is negotiating for a new water purchasing agreement with Norfolk. Suffolk city officials are probably using the permit approval process to gain price and contract concessions from Norfolk.

Then on October 24, 1996, the EPA issued an opinion to FERC stating that the agency agrees with North Carolina's argument that the state should have veto authority over the Lake Gaston project.¹⁰⁷ FERC issued its opinion November 7, 1996, stating that North Carolina should not have veto power over the Lake Gaston pipeline.¹⁰⁸ While, Suffolk continued to delay its approval for the Conditional Use Permits with Norfolk, North Carolina began to garner support for its position from other states.¹⁰⁹ On December 9, 1996, an amicus brief was filed with the D.C. Circuit Court by 26 state attorneys general in behalf of North Carolina.¹¹⁰ Four days later another 14 state attorneys general filed an amicus brief also in behalf of North Carolina.¹¹¹ To further muddy the waters, the Justice Department filed a brief saying that North Carolina should only be able to veto the Lake Gaston project if the withdrawal significantly affects water quality downstream.¹¹² Virginia Attorney General James Gilmore then sent a letter to the attorneys general of the forty states suggesting that the states had been misled concerning the legal issues.¹¹³ In response to this inquiry the Vermont attorney general

106. Karen Weintraub and Terri Williams, *Suffolk Delays Approval of Pipeline Pumping Station*, The Virginian-Pilot, October 18, 1996, at B3.

107. Karen Weintraub, *EPA: N.C. has right to review pipeline*, The Virginian-Pilot, October 25, 1996, at A1.

108. Karen Weintraub, *Agency backs VA. on pipeline*, The Virginian-Pilot, November 8, 1996, at B1.

109. *Planning Commission tries to sink water permit*, The Virginian-Pilot, November 23, 1996, at A14.

110. Karen Weintraub, *26 States side with N.C. to block pipeline; permit for Virginia threatens "sovereign rights," they say*, The Virginian-Pilot, December 11, 1996, at A1.

111. Karen Weintraub, *40 States now support N.C.; the backing might not sway judges, but it can't hurt, say legal experts*, The Virginian-Pilot, December 14, 1996, at A1.

112. Karen Weintraub, *Gaston Adversaries both see positive aspects in report by Justice Dept.*, The Virginian-Pilot, December 24, 1996, at B1.

113. Karen Weintraub, *Gilmore asks states to rethink Gaston; the states signed a brief backing North Carolina's challenge to the pipeline. A court is set to hear it Feb. 4, and may decide in the spring.*, The Virginian-Pilot, December 31, 1996, at B1.

wrote a letter saying he understood the issues and stood by his position.¹¹⁴

Misery loves company, because Virginia Beach filed a formal protest with FERC stating that if North Carolina has the right to review the Lake Gaston withdrawal, that South Carolina should have veto authority over a proposed water withdrawal North Carolina sought for the city of Charlotte—the difference between the two withdrawals is that Charlotte's withdrawal is from a lake completely within North Carolina.¹¹⁵ On January 10, 1997, in a rare showing of state of Virginia's official position concerning the Lake Gaston project that Southside Virginians despise, Virginia Attorney General James Gilmore filed an amicus brief with the D.C. Circuit Court in behalf of Virginia Beach.¹¹⁶ In the last of the amicus briefs filed before the February 4, 1997, court hearing regarding the FERC opinion, the American Public Power Association, the Edison Electric Institute and the National Hydropower Association also filed briefs in behalf of Virginia Beach.¹¹⁷ These three groups represent hydroelectric projects that serve three-fourths of the nation's "electric consumers." Reports of the court hearing said that the judges grilled all sides about "inconsistencies in their arguments" and accused the FERC attorneys of "trying to say two contradictory things at once."¹¹⁸ A judgment from the hearing is expected in two to six months. Until that time the future of the Lake Gaston project continues to be uncertain.

Suffolk continued to balk at granting the necessary permit to Norfolk until February 24, 1997, when the city voted to approve the conditional permit on the condition that Norfolk give up its right to use four wells within the city of Suffolk.¹¹⁹ Norfolk protested the decision by Suffolk to tie its approval to Norfolk's at-will use of the

114. Karen Weintraub, *Vermont official stands by position on Gaston Project; North Carolina didn't mislead him, as Virginia official charged, he says.*, The Virginian-Pilot, January 3, 1997, at B3.

115. Karen Weintraub, *Beach files protest against Charlotte water project*, The Virginian-Pilot, January 10, 1997, at B1.

116. *Gilmore files court papers opposing N.C. on pipeline*, The Virginian-Pilot, January 11, 1997, at B4.

117. Karen Weintraub, *Beach wins Gaston support of 3 energy trade groups*, The Virginian-Pilot, January 16, 1997, at B5.

118. Karen Weintraub, *Judges hear views on pipeline; The U.S. Court of Appeals will now take as long as half a year to reach a decision*, The Virginian-Pilot, February 5, 1997, at B1.

119. *Suffolk Vote; water woes; Suffolk City Council dives into the water fight*, The Virginian-Pilot, February 25, 1997, at A14.

four wells. After weeks of trying to negotiate a settlement behind the scenes, the cities of Norfolk, Chesapeake, and Virginia Beach filed suit against the city of Suffolk arguing that the conditions on the permit were arbitrary and capricious.¹²⁰

Meanwhile, a legislator led lawsuit against the pipeline was decided in Virginia Beach's favor.¹²¹ A Richmond judge ruled that a Virginia Law supporting the pipeline would not cause irreparable harm to landowners around Lake Gaston. FERC also announced plans to go ahead with the beginning stages of relicensing the Lake Gaston hydroelectric project. North Carolina has stated from the beginning that they will use their approval authority to veto the relicensing of the hydroelectric project to block the Lake Gaston project.¹²²

Although Virginia Beach remains optimistic about a January 1998 completion date of the pipeline and wants to avoid renegotiating a new contract to purchase Norfolk's surplus water, 13 years of legal battles and over \$50 million in expenditures have brought the Lake Gaston project no closer to fruition. Indeed the many remaining legal barriers may turn the pipeline project into a pipe dream.¹²³

What caused the stalemate in the Lake Gaston water deal? Was it partisan politics? The answer is a resounding no! The Lake Gaston proposal was precedent setting and divisive to both Democrats and Republicans. Although Governor George Allen did not call a special legislative session, many legislators from both parties were on record as opposing the mediated Lake Gaston agreement.

Did the stalemate result from the parochial actions of selfish riparian landowners along the Roanoke River, or did it stem from the machinations of a relatively wealthy but water-poor city with a high population who wanted to take water without proper consultation and adequate compensation? Just as Virginia Beach had not planned for sufficient water to meet future demand, the city also failed to anticipate the opposition for each step of the proposed pipeline's approval and construction. Where might

120. Karen Weintraub and Terri Williams, *Suffolk hit with "angrier" suit; Suffolk rejects Gaston compromise, takes on lawsuit.*, *The Virginian-Pilot*, March 21, 1997, at B1.

121. Karen Weintraub, *Beach scores another legal win in fight over Lake Gaston water.*, *The Virginian-Pilot*, February 15, 1997, at B3.

122. Karen Weintraub, *North Carolina wants to tie power company license to pipeline; new skirmish brews in 14-year war over Virginia's thirst for Lake Gaston water.*, *The Virginian-Pilot*, March 13, 1997, at B7.

123. Tom Holden, *No Longer A Pipe Dream, Lake Gaston Project Now Seems a Certainty, But Beach Residents Will Have to Maintain One of The Nation's Best Conservation Habits.*, *VIRGINIAN-PILOT*, May 3, 1995, at 12.

the city have been if it had more amicably spent its effort and resources toward obtaining agreements permitting the pipeline rather than displaying an "I'm taking it because you are not using it" attitude? Opposition to the pipeline has succeeded in effectively blocking completion of the project for 13 years. Southside Virginia in the Roanoke River Basin has 700,000 people and currently accounts for 23 percent of the manufacturing jobs in the state.¹²⁴ Admittedly, manufacturing jobs are not the state's biggest employers. Still, \$4.6 billion in salaries a year are paid in those jobs. First the RRBA intervened in behalf of south-central Virginia, because this group had originally been instrumental in building reservoirs throughout south-central Virginia including Kerr, Roanoke Rapids, Smith Mountain Lake, Philpott. Also, the group helped designate a state park on land surrounding Smith Mountain Lake.¹²⁵ The RRBA, lastly started the regional planning system used by the State of Virginia in state planning districts. However, the last 10 to 12 years have been spent fighting proposed interbasin transfers by North Carolina and Virginia Beach. A group of manufacturers from south-central Virginia calling themselves Fair Play for all Virginia has also helped represent south-central Virginia. Indeed, this group participated in negotiations modifying the original mediated agreement. Thus, while these manufacturers are mostly interested in their needs and preserving their current uses of the water, their actions also benefit Roanoke River Basin citizens. Still, many citizens of this region feel they will be steamrolled by the powerful political clout of cities like Virginia Beach; therefore, they have worked to gain more time to plan each appeal and lawsuit to thwart Virginia Beach's attempts to take Lake Gaston water. Virginia Beach Senator Kenneth Stolle was right when he said that the agreement reached at the end of April 1995 between North Carolina and Virginia Beach was far from being a done deal.¹²⁶

Although the concessions were made on paper for south-central Virginia, the citizens remain underrepresented in the agreement. Why didn't Virginia Beach want Southside or Norfolk involved in the mediated agreement? Perhaps the greatest example of Virginia Beach's intentions to interfere with south-central Virginia's water uses was shown in 1994 when South Hill applied for a permit to withdraw 10 mgd more water from a Lake Gaston tributary while Virginia Beach filed a document with the state in opposition to the proposed withdrawal.¹²⁷ South Hill was eventu-

124. W.W. "Ted" Bennett, Jr., *The Lake Gaston Pipeline: Let's Have Fair Play for All Virginians*, VIRGINIAN-PILOT, June 8, 1995, at A10.

125. Interview with William E. Barr, *supra* note 8.

126. Karen Weintraub, *Gaston Deal At Hand; N.C., Beach to Sign Pact Friday; Both Sides to End Legal Fight; Legislatures Must Sign by July; Beach to OK Norfolk Water Plant*, VIRGINIAN-PILOT, APR. 27, 1995, at A1.

127. Bennett, *supra* note 124, at A10.

ally granted 7 mgd. While critics argue that south-central Virginia is claiming an ownership interest in something that is not theirs and are themselves in danger of becoming too involved in expensive court battles, what right under common law did Virginia Beach (which lies in a different water basin) have to block South Hill's application? The involvement of federal agencies permitted Virginia Beach to bypass traditional common law precedent and appeal to the federal government which granted the Army Corps of Engineers the right to decide the use of the navigable waters involved in Corps projects. In opposing the South Hill request, Virginia Beach was probably trying to signal that it did not support the principle of allowing everyone including Roanoke River Basin communities to withdraw water from Lake Gaston, especially when the proposed withdrawal might interfere with its own withdrawal.

Most pipeline supporters, including Virginia Legislator Clarence Holland say that south-central Virginia is complaining about possible but unlikely restrictions of the use of Roanoke River Basin water.¹²⁸ Based on the fact that five billion gallons of water a day flow unused down the Roanoke River, Virginia Beach authorities point out that they are asking for less than two percent of the daily water flow or 60 mgd for Virginia Beach and 35 mgd for North Carolina. FERC determined that 200 mgd above current uses could be withdrawn before any detrimental environmental impacts, i.e., drops in water nutrient levels, would occur. The mediated agreement contained a provision allocating Virginia Beach money to fight the algae that grows in the reservoirs. However, as south-central communities increase their current withdrawals, they worry about the 95 mgd to be withdrawn by Virginia Beach and North Carolina. Mr. Ewell Barr, President of the RRBA, stated that to open the door to withdrawals, is to open a floodgate of water-hungry jurisdictions who will seek water from outside their basins.¹²⁹ Mr. Gerald Lovelace, Halifax County Assistant Administrator, echoed Mr. Barr when he said that the primary reason his county decided to oppose the Virginia Beach withdrawal was that the pipeline would be adverse to the growth of their county—whether real or perceived.¹³⁰ Mr. Lovelace also said that water is the lifeblood of the county. Mr. G. Morris Wells Jr., Town Manager of South Hill, said that if the 60 mgd were all that were ever withdrawn, it would be okay. However, upstream of Virginia Beach would equate to the camel getting its nose under the tent, which doesn't give South Hill great consolation.¹³¹

128. Clarence Holland, *Refuting Ruff's Tale of Water Torture*, VIRGINIAN-PILOT, Aug. 8, 1995, at A14.

129. Interview with William E. Barr, *supra* note 8.

130. Interview with Gerald Lovelace, *supra* note 9.

131. Interview with G. Morris Wells, Jr., *supra* note 10.

At the time North Carolina was satisfied with the negotiated agreement and has informally offered (as late as last December) to settle the dispute with Virginia Beach through ratification.¹³²

Pipeline opponents do not believe FERC or Corps analyses of the Roanoke River are accurate. This concern is exacerbated when one considers that the combined 95 mgd withdrawal for Virginia Beach and North Carolina is 47.5 percent of the 200 mgd rate FERC determined could be withdrawn before detrimental environmental impact occurred. South Hill has received state approval for 7 mgd and Henderson, N.C. is seeking another 10 mgd which effectively raises the total withdrawal to 56 percent of the available water. However, the proposed Virginia Beach withdrawal is the total water necessary for the city until the year 2030. Thus, permitting this initial withdrawal does not appear to be a real threat to south-central Virginia communities. According to one source, Virginia Beach is having the pipeline built under the assumption that no person, legislator, or judge can stop a completed pipeline.

Complicating these matters for Virginia Beach are the issues of whether the resolution of the Lake Gaston proposal hinges on resolving state vs. federal rights, state vs. state, intrastate city vs. city rights, or an amalgamation of the three. The original basis of the Lake Gaston dispute involved Virginia Beach's efforts to use federal regulations to induce the Army Corps of Engineers to reallocate water from the Roanoke River Basin. The State of North Carolina has invoked federal law, specifically the Coastal Zone Management Act and section 401 of the Clean Water Act, to compel the Department of Commerce to grant the state reviewing authority in the approval process for the Lake Gaston Project. Virginia Beach wants a declaratory judgment averring that the RRBA communities and counties had no ownership interest in the Lake Gaston water. However, many south-central Virginia counties have raised legal blocks to the project, which these counties see as a threat to their control of water over which they have ownership interests.

To understand the issues, one must consider many other questions. Is the RRBA's anti-Lake Gaston sentiment a knee-jerk reaction to environmental concerns? Does this opposition rise from a baseless fear of extreme scenarios invoking provisions of environmental laws? Could the RRBA be assured that the withdrawal of water for Virginia Beach will never affect the current uses of Roanoke River Basin water?

Environmental law is a relatively new area of law. Until the National Environmental Policy Act (NEPA) was instituted in the United States in

132. Karen Weintraub, *Gaston Pipeline Runs Hot, Cold*, VIRGINIAN-PILOT, Dec. 31, 1995, at 7.

1969 and the Environmental Protection Agency was created by President Nixon's Executive Order, in 1970, environmental issues were rarely a focus of the American public. Nonetheless, during the decade that followed, many laws were passed to protect the environment. In the 1980's many of the acts from the 70's were used as shields for pro-environment interests, thereby spurring public debate over the necessity and extent of governmental intervention in the environment. An example of such shielding is seen in invoking legislation to protect the spotted owl in Oregon against the logging industry.

In the case of the Lake Gaston project, current environmental laws are being cited under future scenarios. In one scenario, Virginia Beach is given approval from the RRBA to build the pipeline. Several years after it is built, Virginia Beach complains to the RRBA that the water it is receiving is being contaminated by all of the recreational, community, and industrial uses of Lake Gaston and also other upstream users of Roanoke River water. If the RRBA communities repudiated the charge, Virginia Beach could invoke the Clean Water Act to obtain a federal mandate restricting recreational uses while also regulating community and industrial uses upstream from Virginia Beach's withdrawal facility.¹³³ A federal mandate would result in higher costs for RRBA communities and industries attempting to control water quality. Additionally, it would leave many citizens who have built homes along the Roanoke River and its lakes without recreational privileges. One unhappy result would be a devaluation of homes and property. Another powerful scenario has other water-hungry cities seeking Roanoke River water. This could result in a dry river bed in North Carolina similar to the Colorado River, which once roared, but now merely trickles into Mexico from California.

The above illustrations are only possibilities, and relatively few cases like the spotted owl occur. Still, anything less than complete assurance against attempts to limit current uses is unacceptable to the RRBA. Education is always a valuable tool in allaying unsubstantiated fears. However, no amount of education could allay the angst of Roanoke River Basin communities if the mediated agreement permits further withdrawals or restrictions on current uses of Lake Gaston water.

VIII. OPTIONS FOR VIRGINIA BEACH

How can Virginia Beach avoid further costly litigation that increases the frustration of implementing the proposed project? Are there other

133. Christopher Kirkpatrick, *Governor Bashing Popular Sport Around Lake Gaston*, HERALD-SUN, July 3, 1995, at A1.

viable alternatives to a continuation of the 12-year legal struggle for water? There are indeed some that are worthy of consideration.

First, the city could seek a quasi-governmental negotiation to mediate behind closed doors with all sides politically represented. Such an agreement would involve the RRBA, the Tidewater Virginia communities, and the two states. Subsequent approval by state and federal legislatures should be pro forma because of the amalgamation of bipartisan and private interests. Virginia Beach does need water, and south-central Virginia governments are willing to share. Sixty mgd is not an overwhelming amount of water even if another 35 mgd were allocated to North Carolina communities. A new agreement would permit Virginia Beach to meet its water needs for at least 35 more years, by which time technology would likely reduce the costs of developing other water sources. However, any new mediated agreement should permit no further withdrawals from Lake Gaston without express authorization from the Roanoke River Basin communities. Absent that stipulation, North Carolina and Virginia could agree to future interbasin withdrawals without including the Roanoke River Basin communities. Moreover, the Roanoke River Basin communities are insisting on, "dependable assurances,"¹³⁴ and more "safeguards"¹³⁵ for access to the water, i.e., "consent of the host jurisdiction,"¹³⁶ before approving the Lake Gaston project. Indeed, Mr. Gerald Lovelace of Halifax County says the opposition is not optimistic that an agreement could be reached that safeguards other interbasin transfers from the Roanoke River Basin.¹³⁷

Another prerequisite to a negotiated agreement should require any jurisdiction(s) seeking Lake Gaston water to maximize the use of available water in its basin. Virginia Beach could maximize its water resources by extending previous economic incentives, such as providing incentives for low-flush toilets in new homes. Demand can also be reduced by replacing aging water mains. Furthermore, by developing incremental water supplies Virginia Beach could delay its need for Lake Gaston water for years. Some people would say that Virginia Beach is being visionary in solving all of its water supply problems with the pipeline. However, opponents say that Virginia Beach is not willing to use incremental sources of water, something which other water-hungry jurisdictions find necessary. Also, the negotiated agreement should make sure that adequate payments for the upkeep of Lake Gaston to fight the algae that thrive in many reservoirs would be paid to the Corps which operates the lake. Some south-central

134. Interview with William E. Barr, *supra* note 8.

135. Interview with G. Morris Wells, Jr., *supra* note 10.

136. Interview with W.W. "Ted" Bennett, Jr., *supra* note 59.

137. Interview with Gerald Lovelace, *supra* note 9.

community leaders were concerned that the payments might be applied towards environmental studies for enlarging the Lake Gaston pipeline or other withdrawal proposals instead of fighting algae and other detrimental side effects.

A second alternative for Virginia Beach would be to spearhead the creation of a Tidewater Regional Water Authority involving the cities of Chesapeake, Hampton Roads, Portsmouth, Virginia Beach, and Norfolk. This Authority would correlate and pool available water resources and develop and plan for new sources in the future. Mr. Ewell Barr of the RRBA also supports a regional authority for Lake Gaston water.¹³⁸ However, a regional water authority is a new idea for eastern cities. Many western cities have water authorities or irrigation districts that work for the fair allocation of water among private citizens. Often citizens who had initial water rights do not pay, or else pay a substantially reduced water tax while owners of new homes pay a higher tax or a one-time fee. This water authority would have authority to mediate water disputes and approve or deny requests for water. Although this authority may have to deny some water requests, western water authorities have made similar tough decisions for years without jeopardizing the commissions' power. In the initial creation of a regional water authority, the greatest challenge is that of negotiating a partnership agreement.¹³⁹

A third option is desalination. In considering the economics of desalination, one must remember that to complete the Lake Gaston project, Virginia Beach will have to pay at least \$242 million and perhaps more if the disputing parties resume litigation. Would water desalination be cheaper than this? Mr. Bobby Owens of the Dare County Board of Supervisors states that his county currently desalinates brackish water for \$1.25 per 1,000 gallons—a quite reasonable rate for the reverse osmosis process.¹⁴⁰ He says it is so successful that a second desalination plant is planned for the city of Kill Devil Hills. Thomas M. Leahy, who is in charge of the Lake Gaston project, says that it would cost \$2 per 1,000 gallons for Lake Gaston water and \$6 dollars per 1,000 gallons to desalinate ocean water.¹⁴¹ The high cost, says Leahy, is due to the expense of building a desalination plant (approximately \$500 million). Although initial plant costs are high, new technology continues to lower the costs of desalination. Innovations such as using steam pressure for the desaliniza-

138. Interview with William E. Barr, *supra* note 8.

139. Karen Weintraub, *Gaston Q & A: What Remains to Be Done on Pipeline?*, VIRGINIAN-PILOT, Apr. 8, 1995, at A1.

140. Mason Peters, *Albemarle Voices Objections to Pipeline*, VIRGINIAN-PILOT, May 16, 1995, at B1.

141. Telephone interview with Thomas Leahy, *supra* note 4.

tion distillation process or high-pressured effluent from the reverse osmosis process to turn electric turbines to create electricity could permit Virginia Beach to meet greater power demands while providing much needed water. Moreover, because desalinated water would, at least initially, constitute only a small proportion of the total water consumed by Virginia Beach, the increase of cost to the consumers would be negligible.

Desalinization is supported by Messrs. Barr, Lovelace, and Bennett, and this option is even more reasonable if used in conjunction with a regional authority inasmuch as the initial costs can be shared by a larger customer base. A regional authority also delays the need to build desalinization plants, because Portsmouth and other cities within the Tidewater area currently have some excess water that could be used to meet the needs of water-poor water authority members.

Even if the Tidewater authority eventually needed to build desalinization plants, the costs will continue to drop as new technologies are developed besides, the plants can be built in stages that permit the deferral of high building costs. The available types of desalinization include distillation and reverse osmosis, and the more experimental solar powered and gel processes. Senator Warner could save enough money by cutting one B-1 bomber (which has the capacity to kill thousands) from the military budget to pay for the building of one desalinization plant that could provide water for thousands.

Many of the western states' Senators would likely favor the construction of a desalinization plant, because they know how difficult it is to supply water for their citizens and industries. For example, in Arizona and Utah the federal government has provided billions of dollars to build the Central Arizona Project and the Central Utah Project. The cost of these projects dwarfs any proposal by Virginia Beach to obtain water, whether it be by desalinization or other means. A well conceived water proposal by Virginia Beach would generate more empathy within the western states who have long fought for federal funds in order to build and maintain essential water projects. As the population of the United States grows and water becomes more scarce, our nation must be willing to pay for the installation and implementation of water projects. Each community must pay its share whether it is through a federal dollar-matching agreement or a percentage share.

In the author's view, the best alternative for Virginia Beach is an amalgamation of the three proposals. If a compromise could be reached legislating no further large-scale interbasin withdrawals from Lake Gaston, Virginia Beach would have an assured supply of low-cost water for a minimum of 35 years. Meanwhile, new technology should permit lower cost solutions for additional supplies of water. Creation of a Tidewater Regional Water Authority also would permit and require the maximization

of Tidewater water resources before using Lake Gaston water. Methods for desalinization are improving and even if the Tidewater region needed more water before the year 2030, the costs of developing a joint desalinization plant would reduce the costs of individual communities each trying to establish a separate desalinization operation. However, if a mediated agreement concerning Lake Gaston cannot be reached, a water authority in the Tidewater region would be advantageous to maximize available water sources and reduce the costs of developing a desalinization plant(s) or other water resources.

As a third alternative Virginia Beach could, with or without a Tidewater Regional Water Authority, provide financial assistance in the development of alternative water resources such as desalinization. Under such a gambit, Virginia Beach could seek the assistance of Governor Allen who is an advocate of bringing high technology to Virginia. Senators Warner and Robb also could contribute to obtaining federal government funding for any large-scale water projects. Such thinking is not unrealistic; Senator Paul Simon of Illinois and others have already proposed a bill: "S 811, to authorize research into the desalinization and reclamation of water and authorize a program for states, cities, or qualifying agencies desiring to own and operate a water desalinization or reclamation facility to develop such facilities."¹⁴² A government grant could help Virginia Beach study the feasibility of and build a massive desalinization plant similar to those in Saudi Arabia which can desalinate more than 264 mgd, which is roughly four times the total predicted need of Virginia Beach through the year 2030.

Regardless of the alternative(s) chosen, Virginia Beach needs to maintain its extremely effective water conservation program. Virginia Beach uses 80 gallons a day per person including water for commercial purposes, as compared to 137 gallons in Phoenix and 85 gallons in San Diego.¹⁴³ If there is a real fear of future water shortages in Virginia, the state legislature could mandate water-saving devices for new and refitted homes and other conservation measures less drastic than Virginia Beach's current conservation laws. The high level of conservation in Virginia Beach is a tribute to the efforts of a concerned administration and a motivated citizenry.

142. *Bills & Resolutions Introduced*, Daily Report For Executives, May 19, 1995, at F.

143. Tom Holden, *No Longer a Pipe Dream, Lake Gaston Project Now Seems a Certainty, but Beach Residents Will Have to Maintain One of the Nation's Best Conservation Habits*, VIRGINIAN-PILOT, May 3, 1995, at 12.

IX. CONCLUSION

What do we learn about the law from this case? One thing is certain, all sides disagree on what data to use. Each side claims its interpretation of the data is correct. A source close to North Carolina said that he believes that time will prove which data is right.¹⁴⁴ He believes it will show that Virginia Beach doesn't have a need. Litigation alone has cost over \$10 million. Virginia Beach made mistakes in not seeking serious negotiations with Roanoke River Basin communities. Poor public relations also hurt Virginia Beach. Although Virginia Beach had real water needs, opponents to the project used inflammatory scenarios of environmental laws gone awry to convince many Roanoke River Basin citizens that their whole lives would be turned upside down by this project. It has been easy but costly for opponents to use legal procedure to stall the approval and regulatory process. This has frustrated Virginia Beach which only sought to fulfill its water needs in a sensible fashion.

Although early colonization usually occurred in fertile areas that could support large populations, transfer and pumping technology can now supply water to support a growing population and industrial base. Unlike the western states whose water laws are mostly governed by the doctrine of prior appropriation, the eastern states need a firm water policy that coincides with riparian law. Virginia and North Carolina have the opportunity to show other eastern jurisdictions how large-scale interbasin transfers may help water-poor jurisdictions without destroying or overregulating the riparian rights of water-rich localities.

Virginia Senator John Warner was quoted as saying that, "My jubilation will await my first drink out of the end of the [Lake Gaston] pipeline."¹⁴⁵ Senator Warner's statement is a summarization of hope for interstate water agreements in the east. However, even if the pipeline agreement were ratified and construction continued, pipeline service could not commence before 1998.

If current views are correct, the pipeline proposal will continue to be plagued by litigation. Lake Gaston water is currently the least expensive of the alternatives. Implementing the Tidewater Regional Water Authority, maximizing the usage of water available within the authority, and seeking a negotiated agreement for Lake Gaston water with all affected parties would resolve Virginia Beach's water needs. Otherwise, Virginia Beach should reconsider desalinization. The final EIS by FERC shows that

144. Interview with source close to North Carolina's decisionmaking processes, name withheld, in N.C. (July 1996).

145. Mason Peters et al., *Gaston Breakthrough; Possible Truce in 15-Year VA.-N.C. Battle is at Hand; The Deal, Far From Final, Could End Tangle of Litigation*, VIRGINIAN-PILOT, Apr. 7, 1995, at A1.

although desalinization is costly, it, too, offers a feasible and reliable source of water.¹⁴⁶ Although Virginia Beach has recently cleared another barrier in receiving FERC's approval and has begun building the pipeline, pipeline opponents promise that they will not quit fighting. North Carolina has many options it may exercise in fighting the pipeline. Its option include a case of original jurisdiction in the United States Supreme Court or exercising its power to reject the reauthorization of the federal hydroelectric power project at Lake Gaston in 2002. After years of legal battles over the pipeline option, Virginia Beach authorities ought to seek reconciliation through mediated negotiations. At the same time, Southside, Virginia and North Carolina should not expect Virginia Beach to submit to excessive or arbitrary conditions unrelated to the use of Lake Gaston water.

As Susan J. Buck notes, the one thing that participants in the administrative and legal process must understand is that nothing is ever final.¹⁴⁷ If Virginia Beach wants a solution to its water needs that is indeed "final," it may wish to abandon the environmental and legal entanglements engulfing the pipeline proposal and turn to other options.

Appendix

WHY PIPELINE OPPONENTS REMAIN ADAMANT

Many opponents of the Virginia Beach water initiative remain unconvinced of the need to withdraw water from Lake Gaston. RRBA President Ewell Barr, believes that Virginia Beach is basically attempting to become independent from Norfolk water, and that Virginia Beach as the largest city in the state is merely flexing its muscle against southeastern Virginia.¹⁴⁸ Mr. Barr further asserts that the accompanying regulatory authority on upstream water uses would also subject south-central Virginia to the control of Virginia Beach.

For its part, Norfolk seems content with its role as the arbiter of water resources in southeastern Virginia. When questioned about the possibility of creating a regional water authority, Norfolk representatives have asserted that such an authority would only add an unnecessary layer of bureaucracy to the current system of water allocation, which Norfolk now controls. Norfolk's response appears to be crafted to parry the question of control and authority over water in southeastern Virginia. One expert on regionalism gave an example concerning two Michigan cities—one was

146. Office of Hydropower Licensing, *supra* at note 79.

147. SUSAN J. BUCK, UNDERSTANDING ENVIRONMENTAL ADMINISTRATION AND LAW (1991).

148. Barr, *supra* note 8.

water-poor and the other water-rich—who battled over water rights in the 1950's. Years later the water-poor jurisdiction has grown and the water-rich jurisdiction which refused to share has disappeared. This expert says that if jurisdictions would look at water issues as regional issues then they could see the purpose of helping one another. However, in this case Virginia Beach needs water and south-central does not want to share because it fears other water-poor jurisdictions will also seek large-scale interbasin water transfers. Complicating the matter is the issue of why Virginia Beach wants to sever its water dependency from Norfolk. Virginia Beach claims that it's only seeking a dependable water source. What will Norfolk do with the 30 mgd it currently supplies Virginia Beach once the city starts using Lake Gaston water? Obviously, Norfolk could market its water to other cities in the Tidewater region, but critics point out that it makes little sense to take water from Lake Gaston when there is excess water available within the Tidewater basin. A severe drought within the basin might change the opponents view. Also, as other cities and communities grow and the current 30 mgd provided to Virginia Beach by Norfolk is used by the growing needs of these jurisdictions, opponents might then concede that Virginia Beach should be permitted to use Lake Gaston water to meet its current consumption needs.

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