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“Scope Creep” and Other Illegal Activities

There are days when it seems to be dangerous to be in business (although the alternatives are scary in a different way). We need to track our work in so many ways, including compliance with contractual arrangements and paying attention to the ultimate impact of our work. The Army Corps of Engineers recently was caught in a similar maze, with an outcome that points to the hazards of scope creep and of ignoring the consequences of our actions. Recent and devastating southeastern drought in the United States makes the lesson a particularly pointed one.

A federal judicial panel on multi-district litigation combined four suits involving the Army Corps of Engineers and the states of Georgia, Alabama, and Florida in 2007 (*481 F. Supp. 2d 1351*) regarding water flow in a river basin affected by certain Corps facilities. The United States District Court for the Middle District of Florida published its 97-page decision on July 17, 2009 as “*In re Tri-State Water Rights Litigation*” (no further citation yet available).

The full history begins back in 1925 when a dam was first considered on the Chattahoochee River north of Atlanta, Georgia, supplemented by the Rivers and Harbors Acts of 1945 and 1946 authorizing the Army Corps of Engineers to begin construction of such a dam and reservoir, ultimately named Buford Dam and Lake Sidney Lanier in 1960 after their completion. (Yes, this reads like the passage of geologic time.) At the time of construction, only

the Georgia cities of Gainesville and Buford were to be permitted to draw water from Lake Lanier, because the reservoir flooded their pre-existing water intake structures on the Chattahoochee River. This arrangement, set forth in the congressional legislation authorizing the project’s construction, allowed only water withdrawals at levels approximating their prior use.

The Army Corps of Engineers characterized this project from its inception as serving three purposes: generation of hydroelectric power, flood control through controlled release of water, and improved navigation downstream by

expenses from anyone seeking to tap into that benefit.

During many years of growth, Atlanta continued to increase its draw from Lake Lanier without paying for it, while other areas downstream were deprived of water that would otherwise have flowed through them. The court describes interesting mathematical magic in Atlanta’s claims that its ever-increasing requests for water withdrawals would only cause a 1% reduction in hydropower generation, while failing to account for cumulative effects of increasing requests over time. Meanwhile, the Chattahoochee River and Lake Lanier supply more than 90% of the total water

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regulation of river flows. Even in the early 1950s, Atlanta was inquiring as to use of the water for “municipal and industrial requirements”. But the Corps did not consider asking Atlanta or any other entity for its fair contribution toward the project’s expense as the Corps believed water supply was merely an “incidental benefit” of the project that did not cost the government a cent. If the project had been planned to store water in order to fulfill municipal supplies, that would have been a different matter, requiring assessment of a portion of construction and operational

supply for the greater metropolitan Atlanta area, despite the project not originally being meant for water supply purposes. Furthermore, its 2007 use was more than 22% of Lake Lanier’s total storage, or 9% more than the Corps had allocated to total water supply storage in 2002. Two years of severe and extreme drought in the southeast worsened matters.

While Atlanta claimed that its increasing requests were minor, opponents stated that (1) cumulatively these requests were far from minor, and (2) the original 0% allocation to water supply purposes should be the baseline establishing allowable

withdrawals (with any percentage of zero being zero). Of course, since the project originally only supplied water as part of releases meant for flood control and power generation, the “incidental” and free benefit to Atlanta infuriates others.

The Corps had, at various points, noted that Atlanta should seek congressional approval prior to the Corps’ release of water for supply purposes, but never required that approval, merely allowing the purpose of its facilities to drift into municipal water supply rather than the original three finite goals. The court has set a three-year time frame for Atlanta to win congressional authorization for its withdrawals from Lake Lanier or to find some other resolution to the tri-state dispute. In the absence of a resolution, the management of Lake Lanier will return to its “baseline” operations established in the mid-1970s.

Take Away Lessons

- Verify the purpose and full extent of any contract into which you enter. If anyone, including your client,

requests changes to the scope of work or modifications of purpose that would result in changes to the scope of work, make sure you get approval in writing and keep it in your files through completion of the project and the applicable statute of limitations.

- When working on development projects, recognize that water is a finite resource. Proximity to a possible source of municipal water does not ensure unlimited (or any) access to tap into it. The cumulative effect of all demands for a resource is to deplete it rapidly, even if individual requests may seem small.
- Within your own community, become a proponent for Smart Growth, and accept that balancing demands for both public and private uses of water (and other limited resources) probably will not result in everyone walking away with a smile. Successful negotiation results in some amount of compromise on everyone’s part, so that no single entity ends up being the “loser”.

As the court so bluntly stated in Section G of its opinion, entitled “Operations Going Forward”: “The blame for the current situation cannot be placed solely on the Corps’s shoulders, however. Too often, state, local, and even national government actors do not consider the long-term consequences of their decisions. Local governments allow unchecked growth because it increases tax revenue, but these same governments do not sufficiently plan for the resources such unchecked growth will require. Nor do individual citizens consider frequently enough their consumption of our scarce resources, absent a crisis situation such as that experienced in the ACF [Apalachicola-Chattahoochee-Flint river] basin in the last few years. The problems faced in the ACF basin will continue to be repeated throughout this country, as the population grows and more undeveloped land is developed. Only by cooperating, planning, and conserving can we avoid the situations that gave rise to this litigation.” *AS*

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