Mediating the Use of Lake Michigan's Waters

The Dispute

For most of this century, other Great Lakes states and the federal government have been in a recurrent dispute with Illinois over the use of Lake Michigan's waters. The lake is Chicago's primary source of water, and many of the region's sanitary sewer systems use its waters.

Various studies over the years show that taking too much water from Lake Michigan in the Chicago area could lower water levels on all the Great Lakes, affecting navigation, locks, ports, and hydroelectric power development at Niagara Falls.

Between 1906 and 1979, the Great Lakes states were a part of at least four Supreme Court suits against Illinois on the matter. In the 1920s, for example, the states brought an action challenging the right of Illinois and Chicago to take any water out of Lake Michigan. At about the same time, the federal government filed suit to stop Chicago from obtaining more water from Lake Michigan than allowed under limits established by the U.S.Corps of Engineers.

Interstate suits go directly to the Supreme Court. The high court eventually limited the amount of water that Chicago could take from Lake Michigan after 1938 to 1,500 cubic feet per second (CFS) in addition to domestic pumpage.

The case was reopened in 1959 on questions of municipal use and in 1967 the limit was raised to 3,200 CFS for all purposes—municipal use, navigation of Illinois waterways, and water quality matters. In the 1970s, Wisconsin reopened the case, seeking a new way to account for Illinois' diversions of the lake's waters. A decree amendment in 1980 set in motion new accounting procedures that gave the Corps of Engineers some responsibilities for measuring diversions.

By the 1990s, the new accounting procedures showed that Illinois was exceeding the set limitation of 3,200 CFS. In 1995, Michigan spearheaded new legal action. It wrote the clerk of Supreme Court that it would soon reopen the case. Michigan's attorney general asserted that Illinois, Chicago, and Metropolitan Water Reclamation District of Chicago had been diverting more than 3,200 CFS. The stage was set again for years of litigation and the expenditure of millions of taxpayer's dollars.

The Process

At this point, a U.S. Justice Department lawyer, Andrew F. Walch, contacted the states about the possibility of mediating the latest incarnation of the dispute. Officials in charge of alternative dispute resolution at the Justice Department and from the Solicitor General's office convened meetings of attorneys representing the Great Lakes states. Besides Illinois, Michigan, and Wisconsin, Indiana, Minnesota, Ohio, New York, and Pennsylvania had an interest in the negotiations. Some of the initial meetings were described as acrimonious.

Eventually the eight states agreed to try mediation and they and the U.S. government agreed to share the cost of the mediator.

The mediator later summed up what happened: Initially, several parties expressed skepticism that a non-binding, voluntary mediation would produce a durable solution that had previously defied resolution. Nonetheless, they all agreed to try. In less than a year, they produced a framework to permanently settle the dispute.

During my eight years as governor of Wyoming, working with state policy issues and with other Governors, I became a true believer in the necessity of governors, their staffs, and other public officials operating as consensus builders. Given the complexity of the issues, the speed of change, and the diversity of the many constituencies, new tools and skills are required to forge lasting agreements on public policy. What PCI is about, therefore, is essential to enhancing government effectiveness and efficiency.

Former Governor Mike Sullivan of Wyoming
Chair, Board of Directors
Policy Consensus Initiative

Representatives from Canada and the Province of Ontario observed the negotiations and took part in discussions.

The Result

In the mediator's words, the solution the eight states devised "affirms Illinois' right to use Lake Michigan water, but within bounds acceptable to the other Great Lakes states."

The agreement, in the form of a memorandum of understanding signed by the eight states, was announced on Oct. 9, 1996. "By choosing to mediate instead of litigate, these states did the right thing," said then-Associate Attorney General John R. Schmidt, who oversaw the Justice Department's ADR program. "This agreement will save millions of taxpayer dollars. Another trip to the Supreme Court wouldn't have done anybody any good."

The Memorandum of Understanding created a process and set key benchmarks for the states to achieve over a three-year period during which no litigation is to be initiated. Among other things, Illinois agreed to comply with earlier court decrees limiting the amount of water it can take from Lake Michigan and to restore excess water that it took. The system for measuring diversion is to provide almost instantaneous estimates. Illinois is to take steps to prevent leakage.

If Illinois makes clear progress in meeting its obligations and an independent panel accepts the lakefront measuring system, the parties are to ask the Supreme Court to incorporate their agreement in a final decree.

State government needs to take the lead in the use of creative problem solving and dispute resolution. These tools, used appropriately, have proven to be more effective and efficient ways to address many of the difficult issues that citizens and government face.

Attorney General Christine O. Gregoire of Washington