



The Star-Ledger

Seeking detente on the Delaware

Friday, December 14, 2007

BY LINDA STAMATO AND SANFORD M. JAFFE

The United States Supreme Court has just finished hearing arguments in the case between New Jersey and Delaware over New Jersey's attempt to use its riverbank for a natural gas storage and processing plant and Delaware's resistance to it. While we await the decision, which is likely to be several months away, let's consider a better alternative than the win/lose outcome it will produce. Both states do, after all, have the opportunity to settle their dispute before the Court renders its decision.

A negotiated solution is only likely, though, if the tug of war over the river is framed in a different way than it has been so far. Delaware thinks it owns the river by virtue of a land grant from King Charles II to Quaker William Penn in 1682. Accordingly, "property ownership" assertions dominate. It claims the natural gas project would violate its Coastal Zone Act and refuses to issue a permit for it. New Jersey argues that a decision by the Supreme Court in 1934, recognizing "riparian rights" (the use of water by those who own land around it), would allow it to build a pier to make its property accessible, an exercise of "traditional riparian authority." Accordingly, it claims it needs to build a 2,000 foot long pier in order to reach from the New Jersey shore to the navigable part of the river so tankers can dock and unload at the plant.

Reconciling these positions, framed this way, is unlikely in an adversarial process. Indeed, a win-lose outcome is all but assured. What is needed, instead, is to take an interest-based approach and frame the dispute, not as contentions over who owns what, but, rather, how the natural asset--the river and its banks--can be managed in a way to benefit the economic and

environmental needs of both states and the region as a whole.

By the way, the natural gas that would arrive at the proposed terminal would be distributed around the region that needs it—enough to satisfy the energy needs of every home in New Jersey, Delaware and the four counties of Pennsylvania, or so asserts a spokesman for BP, the corporation that proposes to build the terminal.

Disputes of this kind occur often enough, the most recent include the contending claims of New York and New Jersey over ownership of Liberty Island and the dust-up between Pennsylvania and New Jersey over the dredging of the Delaware. It is unsettling to witness government at its least effective. Regional collaboration is essential. And, it's not as though we don't have some good examples of its efficacy. New York and New Jersey, through the Port of New York and New Jersey Authority, effectively manage common assets, don't they? New Jersey and Delaware cooperate, for the most part, through the Delaware River Port Authority for the most part, right? So, why a controversy here?

Because when boundary or border disputes are framed in property ownership terms, as they are in this case, they are almost impossible to settle. They do not need to be determined at all, in our view, if a settlement can be achieved; in the case of a river dividing two states it is clearly preferable to negotiate. In fact, as if to underscore the point, federal officials and several states, including California, Arizona, and Nevada, just reached an unprecedented agreement on allocating water from the Colorado River that also puts in place measures to conserve and manage the two primary reservoirs--and provides financing for a third--that store water for the region. In effect through 2026, the negotiated agreement forestalls the litigation that was anticipated by all involved (and, unlike a litigated result, provides for review and modification if circumstances and needs change over time).

National experience confirms the efficacy of regional collaboration for dealing with difficult, complex and costly public issues where legitimate positions are in contention and a resolution must be secured. It has worked with such cross-border issues as highway location, rail freight operations, watershed protection and restoration, port development and power-generating plants.

Courts decide constitutional matters, clarify legal principles and establish precedent; by adjudicating "right or wrong" the matter ends. But formal court proceedings that can limit the involvement of all the various interests, are often not the most efficient or effective way to resolve disputes or to produce decisions that can work. The appearance of New Jersey and

Delaware three times before the Supreme Court—over fishing rights, oyster beds, and now a natural gas plant, all variations on a border theme—suggests to us that a process other than litigation ought to be given a serious try.

Enough talk about economic sanctions, battleship diplomacy and military action. What is needed is a combination of good faith and a conviction to work out an equitable and environmentally sound result. The governors of both states ought to create a framework for negotiation, appoint representatives, and, since disputes over the Delaware River have had such a protracted and emotionally fraught history, appoint a mediator to help frame the issue and keep the discussions constructively focused.

In a twist of irony, it may well be that an opportunity not taken now may come later anyway. Reports from the Supreme Court's hearing indicate that the justices found neither state's argument fully persuasive. Justice Breyer has recused himself (he owns BP stock) and there is, thus, the possibility of a 4-4 vote. A tie at the Supreme Court means that the lower court judgment is affirmed. In this instance, though, there is no lower court judgment but only the report of a special master to investigate and recommend an action to the Court. (He 'ruled' for Delaware.) There is no precedent, evidently, for dealing with a tie vote in cases of original jurisdiction (matters between states), which suggests that the states may have to find a political solution.

Why not reach for it now, and, find a way to treat the river as the regional resource that it is?

© 2008 The Star Ledger

© 2008 NJ.com All Rights Reserved.