METRO ATLANTA’S WATER WOES: IS THERE REALLY A SOLUTION IN SIGHT?

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On March 9, 2011, a three-judge panel from the United States Eleventh Circuit Court of Appeals heard oral arguments in an appeal by Georgia in the latest round of what has become known as the tri-state water wars involving Alabama, Florida, and Georgia along with the U.S. Army Corps of Engineers (Corps) and various other interested parties. In that proceeding, Georgia appealed the 2009 ruling by U.S. District Court Judge Paul A. Magnuson, which held that the Corps had violated the Water Supply Act of 1958\(^1\) (WSA) by allocating storage in Lake Lanier to support municipal and industrial water supply.\(^2\) Judge Magnuson stayed his order disallowing the Corps’ operation of the lake for water supply for three years to provide time for the parties to obtain Congress’ approval for this change in use.\(^3\) Absent such authorization or some other resolution of the dispute, he ordered the operation of Buford Dam be returned to its mid-1970s use, which included limited water withdrawals for the cities of Gainesville and Buford, both of which had received prior congressional authorization to withdraw from the lake.\(^4\)

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2. *In re Tri-State Water Rights Litigation*, 639 F.Supp.2d 1308, 1350 (M.D. Fla. 2009) (holding held that the purpose of Buford Dam and Lake Lanier did not involve water supply for the region and that the Corps required congressional approval to adopt such a major change in operation of the facility).
3. *Id.* at 1355.
4. *Id.* at 1350, 1355.
Should it stand, this admittedly “draconian” ruling would mean that the Atlanta metro region would lose access to most of its municipal and commercial water supply. Currently, the Atlanta region is permitted to withdraw approximately 882 million gallons per day (mgd) from surface water, nearly seventy-three percent (roughly 640 mgd) of which comes from the Chattahoochee basin (including Lake Lanier, but also directly from the river downstream of Buford Dam).

In its appeal, attorneys for Georgia argued that Congress had recognized during its authorization that Lake Lanier would be used, in part, as a source of water for the Atlanta area, and asked that the court send the issue back to the Corps for review with the instruction that water supply is an allowable use of Lanier. They also noted that Judge Magnuson failed to recognize that this is a draconian result. It is, however, the only result that recognizes how far the operation of the Buford project has strayed from the original authorization.” Id. at 1355.

“Today, the City of Atlanta, Atlanta-Fulton County Water Resources Commission (a joint venture between the City of Atlanta and Fulton County), DeKalb County, and the Cobb-Marietta Water Authority withdraw water from the Chattahoochee River below Buford Dam, while Gwinnett County, the City of Gainesville, the City of Buford, and the City of Cumming withdraw water directly from Lake Lanier. Brief for Georgia Parties’ Motion for Summary Judgment on Phase 1 Claims and Memorandum of Law in Support at 7–9, In re Tri State Water Rights Litigation, 639 F.Supp.2d 1308 (M.D. Fla. 2009).

consider the harm that would result from his order, a sentiment echoed by one of the judges on the three-judge panel.  

Since the 2009 ruling, little obvious progress has been made to resolve the tri-state water wars. This paper explores the status of the disagreement, specifically for the Apalachicola-Chattahoochee-Flint river basin, and examines possible paths to resolution.

**Background on Tri-state Water Litigation**

In 1946, Congress authorized construction of Buford Dam, and in 1959 the Corps completed the project, which impounded the Chattahoochee River forming Lake Lanier. The precise historical development of Lake Lanier’s use as a water supply for the Atlanta metro area is unclear, but by the 1970s the Corps allowed the reservoir to be used as a source of water for the City of Buford, City of Gainesville, and Gwinnett County. By 1988, the Corps had entered into additional contracts with the Atlanta Regional Commission (ARC), the City of Cumming, and the State of Georgia as well. Most of these water contracts, however, were considered “interim” and expired in 1989, at which point the Corps initiated plans to seek congressional authorization for permanent water storage contracts. However, the Corps’ plans were almost

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12 Id. Portions of the water storage and withdrawn for use by Buford (two million gallons per day) and Gainesville (eight million gallons per day) were authorized by Congress. In re Tri-State Water Rights Litigation, 639 F.Supp.2d 1308, 1335 (M.D. Fla. 2009).
immediately challenged by the State of Alabama, which in 1990 filed suit in the Northern District of Alabama to stop the Corps from making such contracts permanent (Alabama case).\textsuperscript{13}

Alabama’s 1990 suit began what would become a long and complicated series of lawsuits over water in both the Apalachicola-Chattahoochee-Flint (ACF) and Alabama-Coosa-Tallapoosa (ACT) river basins. Beginning soon after the Alabama case was initiated, a number of entities moved to intervene in the case, including Florida (which is downstream within the ACF basin and sought to intervene as a plaintiff), Georgia (as a defendant), and the ARC (as a defendant).\textsuperscript{14} In September 1990, the Corps and plaintiff parties agreed to a stay of the proceedings to allow time to negotiate a settlement, with the agreement that the Corps would not execute any water contracts or agreements without the written approval of Alabama and Florida.\textsuperscript{15}

After years of negotiations, Alabama, Florida, and Georgia entered into two interstate compacts (one for the ACT and one for the ACF) in 1997, which were enacted by the respective state legislatures, signed by the governors, passed by Congress, and signed by the President.\textsuperscript{16} The purpose of the compacts was to allow the states to define a water sharing approach agreeable

\begin{itemize}
\item[\textsuperscript{15}] U.S. Army Corps of Eng’rs, 382 F. Supp. 2d at 1304.
\item[\textsuperscript{16}] Id. at 1304–5.
\end{itemize}
to all. The original compacts were to expire in 1998, but were extended twelve times and eventually expired without any agreement in 2003 (ACT) and 2004 (ACF).\textsuperscript{17}

These negotiations, however, did not preclude other lawsuits. In 2000, Georgia made a written request to the Corps asking it to commit to making increased releases of water from Buford Dam until the year 2030 in order to assure a reliable water supply to the Atlanta region.\textsuperscript{18} Georgia requested that the Army Corps take the following specific actions:

1. Allow municipal and industrial withdrawals from Lake Lanier to increase as necessary to the projected annual need of 297 mgd [million gallons per day] in 2030;

2. Increase the water released from Buford Dam sufficiently to permit municipal and industrial withdrawals in the Chattahoochee River south of the dam to be increased as necessary to the projected annual need of 408 mgd in 2030;

3. Enter into long-term contracts with Georgia or municipal and industrial water users in order to provide certainty for the requested releases;

4. Ensure that sufficient flow is maintained south of the Buford Dam to provide the requisite environmental quality—that is, assimilate discharged wastewater; and

5. Assess fees on the municipal and industrial water users in order to recoup any losses incurred by a reduction in the amount of hydropower generated by the dam as a result of the increased withdrawals or releases.\textsuperscript{19}

After no action by the Corps, in 2001 Georgia filed a lawsuit (\textit{Georgia I}) against the Corps.\textsuperscript{20} In the meantime, the Corps continued to allow increasing withdrawals for water supply

\textsuperscript{17} Georgia v. U.S. Army Corps of Eng’rs, 302 F.3d 1242, 1247 (11th Cir. 2002).
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} \textit{Id.} at 1247–8.
providers in the Atlanta area under \textit{ad hoc} agreements, spawning another lawsuit by a hydro-
power industry group, Southeastern Federal Power Customers (SeFPC) in 2000 (\textit{SeFPC case}).\textsuperscript{21} In its suit, SeFPC argued that the cumulative withdrawals permitted by the Corps had reduced the flow by which hydropower is generated—contrary to one of the explicitly stated purposes of Buford Dam and Lake Lanier—requiring its members to purchase more expensive power elsewhere.\textsuperscript{22}

A settlement agreement was reached in the case involving SeFPC, the Corps, Georgia, and the various water supply providers in the Atlanta metro area in 2003 in the \textit{SeFPC case}, providing for interim ten-year contracts that would allocate water storage space in Lake Lanier to the various Atlanta area water supply providers.\textsuperscript{23} In return, these water supply providers would pay higher fees for the storage to compensate SeFPC for lost hydropower.\textsuperscript{24} Each interim contract was renewable for an additional ten years and was to “rollover” into a permanent contract if such were authorized by the Congress or by court order.\textsuperscript{25} Within a month’s time, Alabama and Florida moved to intervene, and also filed a motion in the \textit{Alabama} case claiming the \textit{SeFPC} settlement violated the injunction in place from that case precluding the Corps from entering into any water contracts or agreement without these states’ approval.\textsuperscript{26}

\begin{itemize}
\item \textit{Id.} at 1248.
\item \textit{Id.} at 30.
\item Se. Fed Power Customers, Inc. v. Harvey, 400 F.3d 1, 3 (D.C. Cir 2005).
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\end{itemize}
In October 2003, the Northern District of Alabama granted Alabama’s and Florida’s motion for a preliminary injunction in the *Alabama* case and enjoined the Corps and Georgia from executing or implementing the *SeFPC* agreement, and also barred them from entering into any other new storage or withdrawal contracts affecting the ACF basin without approval of that court.\(^{27}\) Meanwhile, the D.C. District ruled that the *SeFPC* agreement did not violate the 1990 stay,\(^{28}\) but the court did not disturb the Northern District of Alabama court’s stay in the *Alabama* case.\(^{29}\) Alabama and Florida then filed an appeal of the D.C. District Court’s approval of the *SeFPC* settlement agreement.\(^{30}\)

Ultimately, the D.C. District’s ruling approving the *SeFPC* was overturned. In 2008, the D.C. Circuit held that the settlement agreement constituted a major operational change by the Corps of Lake Lanier, and that under the WSA, the Corps was required to first obtain prior approval by Congress.\(^{31}\) Georgia petitioned the U.S. Supreme Court for a writ of certiorari, but the Court denied the petition.\(^{32}\)


\(^{28}\) *Id.* at 35 (“it appears that stay was vacated by the unilateral notice to that effect filed by the Corps in September, 2003”).

\(^{29}\) *Id.* (“Unlike the 1990 stay order, however, Judge Bowdre’s preliminary injunction of October 15, 2003, remains in force. Comity, and respect for the orders of other co-equal courts are important public policy objectives and this Court may not disregard a valid and operative injunction of another federal district court so long as it remains so.”).

\(^{30}\) *Se. Fed Power Customers, Inc. v. Harvey*, 400 F.3d 1, 3 (D.C. Cir 2005). (“Because the Agreement’s reallocation of Lake Lanier’s storage space constitutes a major operational change on its face and has not been authorized by Congress, we reverse the district court’s approval of the Agreement.”)

\(^{31}\) *Se. Fed Power Customers, Inc. v Green*, 514 F.3d 1316, 1318 (D.C. Cir. 2008).

With the 2003 injunction in place in the *Alabama* case, that same year Georgia, the Corps, and the ARC appealed that injunction order, but the Alabama court refused to remove the injunction. The plaintiffs filed an appeal with the Eleventh Circuit, which vacated the injunction.\(^{33}\)

In 2006, Florida filed a motion in the Alabama court for a temporary restraining order, claiming that the Corps was violating the Endangered Species Act\(^ {34}\) (ESA) “by killing the threatened and endangered mussels living in the Apalachicola River downstream of Woodruff Dam.”\(^ {35}\) Four federally-listed threatened and endangered species are present in the Apalachicola River downstream from Woodruff Dam, including Gulf sturgeon, the fat threeridge mussel, the purple bankclimber mussel, and the Chipola slabshell mussel.\(^ {36}\) The court rejected Florida’s motion, finding “that Florida’s proof falls short of establishing that the actions by the Corps in implementing the IOP [Interim Operations Plan] have caused or will cause a take of the protected mussels in the Apalachicola River basin.”\(^ {37}\) Also in 2006, Georgia filed another suit against the Corps (*Georgia II*), challenging the Corp’s IOP and water releases designed to support threatened and endangered species in the Apalachicola River, arguing that the releases were too extensive and exceeded the Corps’ authority.\(^ {38}\)

Given the complex, interrelated suite of lawsuits, the Judicial Panel on Multidistrict Litigation in 2007 transferred the *Alabama* case, the *Georgia I* and *Georgia II* cases, and a suit

\(^{33}\) *Alabama v. U.S. Army Corps of Eng’rs*, 424 F.3d 1117, 1126 (11th Cir. 2005).


\(^{36}\) *Id.*

\(^{37}\) *Id.* at 1137.

\(^{38}\) O’Day et al., *supra* note 13 at 246–7.
brought by Florida against the U.S. Fish and Wildlife Service to the Middle District of Florida, and appointed Judge Paul A. Magnuson to hear the consolidated cases. A number of related cases also were later added, including the SeFPC case.

Judge Magnuson’s ruling in July 2009 dealt with the basic question of the Corps’ authority to allow the Atlanta metro area access to water from Corps operations under the WSA, which was considered Phase I of the litigation. Phase II of the case, which he ruled upon in July 2010, focused on Florida’s concerns regarding the adverse impact the Corps’ operations along the ACF were having on threatened and endangered species under the ESA and the Corps’ failure to comply with the National Environmental Policy Act in assessing its IOP. He dismissed the ESA claims, and held that there was little point in the Corps undertaking an environmental analysis now of a temporary plan that will be changed within the next two years.

What Do the Parties Want?

As the parties await a ruling by the Eleventh Circuit, it is worth revisiting briefly what the three key parties, Alabama, Florida, and Georgia, want from the lawsuits. Alabama’s interests in

39 Florida v. U.S. Fish & Wildlife Serv., No. 4:06-410 (N.D. Fla. filed Sept. 6, 2006).

After the initial transfer of cases, the following were added: City of Columbus, Ga. v. U.S. Army Corps of Eng’rs, No. 4:07-125 (M.D. Ga. filed Aug. 13, 2007); City of Apalachicola, Fla. v. U.S. Army Corps of Eng’rs, No. 4:08-23, 2008 WL 460750 (N.D. Fla. filed Jan. 15, 2008); and finally, after the D.C. Circuit remanded the case to the district court, Se. Fed. Power Customers, Inc. v. Caldera, No. 1:00-2975 (D.D.C. filed Dec. 20, 2000). Id.
41 In re Tri-State Water Rights Litigation, 639 F.Supp.2d at 1310.
the ACF are more limited than their interests in the ACT, which runs through 190 miles of the state and empties into the Mobile Bay.\textsuperscript{44} The litigation, however, does not explicitly state Alabama’s needs, since it primarily seeks to block Georgia from accessing unlimited amounts of water from Lake Lanier and the Chattahoochee River. Newspaper accounts suggest Alabama fears the loss of industry and power generation caused by reduced flows within the ACF, including Alabama Power’s Joseph M. Farley Nuclear Plant, which provides approximately nineteen percent of Alabama Power’s electrical generation.\textsuperscript{45} Publicly, the argument from Alabama has more to do with painting Georgia—specifically the Atlanta area—as greedy and unconcerned about downstream users, a sentiment that is not limited exclusively to those outside of Georgia.\textsuperscript{46} While not a legal position in the litigation, the general downstream concern is that Atlanta is trying to grow at others’ expense, while those in the Atlanta area view the litigation as

\textsuperscript{44} ACT Basin, U.S. Army Corps of Engineers, \textit{available at} http://www.sam.usace.army.mil/pd/actacfeis/ACT-HOME.HTM.


sour grapes—believing that Alabama, and even southern Georgia, wants to shift future growth from Atlanta to their own back yards.⁴⁷

![Figure 1. Common public perception of Georgia’s position on water vis-à-vis its neighbors.](image)

Florida’s interests are much more easily defined, and have been portrayed in the context of a “man versus mussels” battle.⁴⁸ The Apalachicola Bay estuary is home to a rich and diverse array of seafood, and harvesting shrimp, oysters, and fish is a major component of the economy for that region. It is also a critically important area for the overall Gulf of Mexico, “as over ninety-five percent of all species harvested commercially and eighty-five percent of all species

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harvested recreationally in the open Gulf have to spend a portion of their life in estuarine waters.\textsuperscript{49} Therefore, maintaining an adequate flow regime, including seasonal variation in that flow, is of utmost importance to Florida.

When one considers Georgia in the context of the tri-state water wars, the litigants and the interests are primarily the Atlanta metro region. Accordingly, the first question to ask is what does the Atlanta metro region want out of the tri-state water wars? The simple answer is growth, both residential and commercial, that is not constrained by lack of a reliable water supply. The ARC, for example, explicitly recognizes the need for water to sustain growth. “The long term economic success of the Atlanta region is directly related to the availability of water. . . . The ambiguity associated with future operations poses a challenge in planning for a long-term, adequate water supply to support the region’s existing and forecasted population.”\textsuperscript{50}

Most estimates assume that the rapid growth experienced in the Atlanta region is likely to continue into the future, if not at quite the same breakneck pace as in the last decade. ARC estimates a population increase of approximately 3 million residents over the next 30 years for the 20-county metro region, an increase of over 57 percent from the current population, with an increase of nearly 1.5 million jobs.\textsuperscript{51}

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\textsuperscript{49} Apalachicola Bay Aquatic Preserve, Fla. Dept. of State, \textit{available at} \url{http://www.dep.state.fl.us/coastal/sites/apalachicola-ap/Apalachicola_Bay_AP_Flyer.pdf}.

\textsuperscript{50} ATLANTA REGIONAL COUNCIL, PLAN 2040 FRAMEWORK 6 (2011), \textit{available at} \url{http://www.atlantaregional.com/File%20Library/Land%20Use/Plan2040/PLAN2040%20Mar2011/lu_plan2040_framework_03-23-2011.pdf}

\textsuperscript{51} ARC’s County and Small-Area Forecasts: What the Future Holds in the Atlanta Region, REGIONAL FORECAST 2, 4 (Feb. 2011), \textit{available at} \url{http://www.atlantaregional.com/File%20Library/Info%20Center/Newsletters/Regional%20Snaps/hots/Forecasts/RS_Feb2011_Forecasts.pdf}.
\end{flushleft}
Along with the projected population increase, of course, will come more demand on the region’s limited water supply. The Metropolitan North Georgia Water Planning District (Metro Water District) was created in 2001\textsuperscript{52} to “to establish policy, create plans and promote intergovernmental coordination of all water issues in the District from a regional perspective.”\textsuperscript{53} The Metro Water District includes 15 counties within the metro Atlanta region,\textsuperscript{54} and was tasked with developing comprehensive water plans covering storm water management, wastewater treatment, and water supply and conservation. These plans were first created in 2003 and were updated in 2009.

Currently, the Metro Water District has approximately 882 mgd (based on an average annual daily basis) of permitted surface water supply.\textsuperscript{55} By 2035, the Metro Water District’s projected water use will approach 1,011 mgd, and even those plans call for “aggressive” water conservation methods, although the extent to which largely voluntary conservation approaches can be considered aggressive is a debatable topic.\textsuperscript{56}

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\item \textsuperscript{52} O.C.G.A. §12-5-572.
\item \textsuperscript{54} The Metro Water District covers Bartow, Cherokee, Clayton, Cobb, Coweta, DeKalb, Douglas, Fayette, Fulton, Forsyth, Gwinnett, Hall, Henry, Paulding, and Rockdale counties.
\item \textsuperscript{55} Metro District, Water Plan, supra note 6 at 1-1.
\end{itemize}
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While important, talk about conservation is not enough to quell the fears of downstream communities, and the Atlanta region’s future growth and water needs frighten more than just Alabama and Florida. There is, in fact, a long-running concern among downstreamers in Georgia over Atlanta’s desire for ever increasing amounts of water. As early as 1884, for example, Atlanta city planners recognized the precarious nature of water supply for the city and the impacts it could have on limiting the city’s growth.\(^{57}\) The *New York Times* reported that Atlanta considered digging a canal from the Chattahoochee River to divert water for Atlanta’s growing needs. “One of the most perplexing questions by which Atlanta is met in her progress is the water supply,” noted the article, asserting that the canal “would give the city such a supply of water as no contingency could exhaust.”\(^{58}\) However, opposition came almost immediately from Columbus, a downstream city that had invested millions of dollars on water-powered cotton mills.\(^{59}\)

It is safe to say that the views from other parts of Georgia regarding the water wars do not comfortably side with Atlanta, and state leaders in Georgia—including its Governor—have found it necessary to convince the rest of Georgia that the water wars are not just about Atlanta.\(^{60}\)

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\(^{58}\) *Not Enough Water*, supra note 57.

\(^{59}\) *Not Enough Water*, supra note 57.

To find further evidence of these tensions, one needs to look no further than at discussions of interbasin transfers in this state. There is perhaps no better way to raise the hackles of non-metro Atlanta state legislators than to mention the words “interbasin transfer.” The notion that Atlanta is after everyone else’s water is accepted as gospel around the state. 61 “The interbasin water transfer controversy has been so intense that the Georgia Legislature decided that water planning for the metro Atlanta area ‘shall neither study nor include in any plan any interbasin transfer of water from outside the district area.’” 62


How Can Atlanta Fulfill Its Needs?

Whether the Atlanta region can withdraw water from Lake Lanier and the Chattahoochee, and if so how much, is at the core of the legal battle in the tri-state water wars. However, the Corps’ approach to calculating water usage for the region differs from how a layman might understand it. Lake Lanier’s “total storage of the reservoir is 2,554,000 acre-feet, with 637,000 acre-feet of flood-control storage and 1,049,400 acre-feet of power storage.” When the Corps and Georgia parties entered into water supply contracts, it is based on millions of gallons a day of water, but that figure is then converted into acre-feet. Therefore, the Corps does not think about water usage in terms of gallons per day leaving the reservoir; instead, it calculates how much storage capacity it must retain in the lake to accommodate the amount of water to be withdrawn, with one million gallons per day equal to 1,547 cubic feet per second (cfs) of flow, and (during normal operations) 1,600 cfs equals one acre-foot of storage during normal operations, and 1,485 cfs equals one acre-foot of storage during drought conditions.

In the 2003 SeFPC settlement agreement, the proposed storage to be purchased in Lake Lanier amounted to 240,858 acre-feet of Lake Lanier’s storage, an increase from the equivalent of 145,460 acre-feet of storage in 2002. In 2008, when the D.C. Circuit invalidated this

64 Id. at footnote 14.
65 Id. at 1327 (“Under the terms of the Settlement Agreement, Gwinnett County would purchase 175,000 acre-feet of storage, which would provide a withdrawal of 152.4 million gallons per day from the lake. . . . Gainesville would purchase 20,675 acre-feet, or 18 million gallons per day, also from the lake. . . . ARC would purchase 45,183 acre-feet of storage, which would allow ARC to withdraw 367 million gallons per day from the Chattahoochee.”). See also Memorandum from the Deputy General Counsel of the Army for Civil Works and Environment
agreement, it characterized this storage amount as constituting approximately 22 percent of the “total storage” of the lake, although the Corps has subsequently argued that number is misleading, since the entire useable storage is much higher, meaning that 240,858 acre-feet actually constitutes only 14 percent of usable storage.  

How much water the Atlanta region needs and is authorized to take is more than just a game of math calculations. The notion that Atlanta is taking 14 or 22 percent of the available storage of the lake has political consequences, and belies the fact of what is actually used in a consumptive manner and the impact of withdrawals on the reservoir levels. The Corps concluded that:

. . . impacts to recreation as a result of water supply use at Lake Lanier beyond the water supply withdrawals incidentally available from operations under the project authority are insignificant. During periods of high or normal flow in the ACF basin, modeling results indicate that the additional withdrawals associated with present water supply use have no significant effect on pool elevations at Lake Lanier, reducing average elevations by approximately 1 foot. Under drought conditions, when low natural inflows cause reduced pool elevations, additional water supply withdrawals may accelerate the depletion of storage and delay the refilling of the reservoir, reducing pool elevations under such circumstances by up to 3.5 feet. By comparison, the Mobile District found in the 1989 Draft PAC Report that the recreation impacts from a larger reallocation of storage to accommodate greater withdrawals, resulting in lower pool elevations by as much

as 8.5 feet, would be “minor and acceptable.” Although the Corps has not quantified the effects of reduced pool levels by up to approximately 3.5 feet during drought conditions, such effects would clearly be less than the impact of a much larger reduction in the 1989 study, which was considered minor.\textsuperscript{67}

None of these calculations, however, accounts for water that is returned to the ACF after it is used and treated. Gwinnett County, for example, withdraws approximately 70–80 mgd from Lake Lanier, but since 2009 it has returned approximately 40 mgd of highly treated water back into the lake.\textsuperscript{68} As of 2009, the total rate of return in the Chattahoochee basin for metro Atlanta was 58 percent, while the revised plan calls for a rate of 78 percent by 2035.\textsuperscript{69}

Absent a favorable resolution to the on-going litigation, it is difficult to see how Georgia and the Atlanta metro area in particular can hope to meet even current water needs, much less future needs. Immediately after the 2009 ruling by Judge Magnuson, the Governor of Georgia appointed a Water Contingency Planning Task Force, which analyzed the potential water shortfall in Georgia in light of that ruling and was tasked to develop a contingency plan containing a prioritized set of recommendations on water conservation and supply options.\textsuperscript{70} The Task Force concluded that the region could not meet its water needs by 2012 if the ruling were to take effect, and developed two contingencies for 2015 and 2020 should the litigation not resolve.

\textsuperscript{67} Corps Memorandum, \textit{supra} note 66 at 29.


\textsuperscript{69} METRO DISTRICT, \textit{WATER PLAN}, \textit{supra} note 6 at 6-9.

the use of Lake Lanier in Georgia’s favor.\textsuperscript{71} While Georgia has taken other steps such as state-
wide water conservation measures and reservoir planning (e.g., the Water Stewardship Act of
2010),\textsuperscript{72} replacing Lake Lanier as a source of water for the Atlanta metro area is—at least in the
short term—is unfeasible.

**Possible Pathways to Resolution: Apportionment of Waters**

Assuming the controversy among Alabama, Florida, and Georgia continues,
apportionment of the waters in the ACF is a possible pathway to resolving the conflict. There are
generally three ways to apportion interstate rivers: 1) the states may negotiate an interstate
compact that Congress must pass; 2) Congress may allocate the waters under the Commerce
Clause or its powers over navigation; or 3) the states may seek relief in the U. S. Supreme Court,
relying on the Court’s original jurisdiction under the Constitution to apportion the river
equitably.\textsuperscript{73} The second, little-used approach to interstate water allocation—direct Congressional
action—is exceedingly unlikely. This approach has been used only twice\textsuperscript{74} and there is little
chance that Congress will attempt to intervene, given the lack of agreement already evident in

\textsuperscript{71} \textit{Id.}


However, there is certainly more public relations value in this law than substance. For example,
most provisions do not go into effect until 2012, and like other state laws (e.g., Florida’s 1973
Water Resources Act) the promise is likely to far exceed the execution. Robert H. “Bo” Abrams,
*Correcting Mismatched Authorities: Erecting a New “Water Federalism,”* 25 NAT. RESOURCES

\textsuperscript{73} D\textsc{an} S\textsc{eligman}, *Col. River Comm’n of Nev., “Laws of the Rivers:” The Legal
Regimes of Major Interstate River Systems of the United States* 23 (2006), available at

\textsuperscript{74} S\textsc{eligman}, \textit{supra} note 73 at 25.
the three states’ perspectives (which are simply mirrored by their Congressional representation). Thus, realistically, apportionment—if it is to be at all viable—is only possible through interstate compact or action by the Supreme Court.

**Interstate Compacts**

Interstate compacts are by far the most common method for resolving interstate water allocation disputes. There are 38 interstate river compacts in the United States, most of them in the Western states.\(^75\) Of these, 22 are expressly for water allocation, and another 5 include water allocation as part of a multi-purpose compact.\(^76\)

Interstate compacts have a long history in this country. The legal authority for them derives from the Compact Clause of the U.S. Constitution (Article I, Section 10), which states, in part, that “[n]o state shall, without the consent of Congress . . . enter into any agreement or compact with another state.”\(^77\) Interstate compacts are formal agreements between states, but are unique in that they have the characteristics of both statutory law and contractual agreements.\(^78\) To be accepted, compacts require that each state legislature adopt them as statutes that mirror one another, but they also entail the basic requirements of contracts, including an offer (the presentation of a reciprocal law to state legislatures), acceptance (the actual enactment of the law) and consideration (the settlement of a dispute or creation of a regulatory scheme).\(^79\)

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\(^75\) SELIGMAN, *supra* note 73 at 28.


\(^77\) U.S. CONST. art. I § 10, cl. 3.


\(^79\) *Id.* at 2. See Green v. Biddle, 21 U.S. (8 Wheat.) 1, 92 (1823) (holding the terms “compact” and “contract” to be synonyms). American Public Human Services Association, Understanding Interstate Compacts, *available at* http://www.aphsa.org/Policy/ICPC-
impetus for such compacts was a recognition by the drafters of the Constitution that some issues impacted only a few states and did not merit federal resolution; however, at the same time, federal power needed to be ensured (hence, the congressional consent requirement).  

Congressional consent is not required for all arrangements between states, however—only those that affect a federal power or alter the political balance within the federal system. Consequently, approval by Congress is not required for minor arrangements between states, including, in some cases minor water allocation or management agreements. Once a compact is established and authorized by Congress, however, it becomes and therefore carries the weight of a federal statute. Accordingly, it cannot be repealed by any of the states that are party to it and this status “severely limits the powers of even federal courts to reform the compact.” Compacts are treated as contracts among the states, so any breach by parties that are states (rather than private entities that may be party to the compact) would be heard by the Supreme Court.

Given the history of failed efforts at establishing an interstate compact for the ACF, a formal interstate compact seems unlikely in the near term. Although the compact itself has expired, the three states have continued to have discussions to address the dispute. However,

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82 Dellapenna, supra note 80 at 835–5.
83 *Id.* at 833.
84 SELIGMAN, supra note 73 at 34.
there has been little information made known publicly to suggest any meaningful progress is being made in these negotiations since the 2009 ruling by Judge Magnuson.\textsuperscript{85}

The third pathway for allocation would involve action by the Supreme Court, with one or more states directly suing the other(s) and seeking equitable apportionment by the Court. This process is, however, fraught with uncertainty and is one that is unlikely to lead to a speedy resolution to the dispute.

\textbf{The Supreme Court and Equitable Apportionment}

Few scholars commenting on the tri-state water wars believe the states involved in the ACF dispute would find equitable apportionment attractive, although some maintain its likelihood nonetheless.\textsuperscript{86} The Court has only approved final decrees for equitable apportionment of water in three of the eight petitions it has considered, and only one of those cases—a 1931

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case, *New Jersey v. New York*—has been in the eastern U.S. where riparian water law is applicable. Therefore, there are precious few reasons to believe the outcome is at all knowable.

Given the current posture of litigation, it is difficult to see an avenue for any of the parties to successfully petition the Court to hear a case in the near term. First and foremost, there must exist a controversy between states for the Court to assert original jurisdiction. Currently, there appears to be no grounds for any party to make such a claim, given that the legal battles currently pit the states against the Corps.

In *South Dakota v. Ubbelohde*, the Eighth Circuit drew a distinction between cases where states have adverse interests and where there exists a controversy between states. In *Ubbelohde*, the State of South Dakota initiated a preliminary injunction action against the Corps to prevent it from releasing water into the Missouri River from Lake Oane in South Dakota to protect fish spawning. The Missouri River was in the midst of a prolonged drought, and the Corps planned to release water from Lake Oane to maintain downstream flow. The District Court for South Dakota entered a temporary restraining order preventing the Corps from

88 SELIGMAN, supra note 73 at 25. (“To date, the Supreme Court has considered equitable apportionment petitions on eight rivers but approved a final apportionment decree for only three: the Delaware; the Laramie; and the North Platte. In the other five petitions, the Court held that the complaining state did not provide sufficient evidence to obtain an apportionment decree.”)
89 “The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.” 28 U.S.C.A. § 1251(a).
90 South Dakota v. Ubbelohde, 330 F.3d 1014, 1025–6 (8th Cir. 2003).
92 South Dakota, 330 F.3d at 1018.
lowering Lake Oane’s water level and set a preliminary injunction hearing, and the State of Nebraska moved to intervene in the case.\textsuperscript{93} However, the district court denied Nebraska’s motion to intervene, concluding that if it allowed Nebraska to intervene “it would put Nebraska and South Dakota on opposite sides of the dispute, thus bringing the case within the exclusive jurisdiction of the Supreme Court.”\textsuperscript{94} Nebraska then filed its own suit seeking an injunction requiring the Corps to maintain downstream river flow.\textsuperscript{95}

Upon appeal, the Eighth Circuit rejected the district court’s argument denying Nebraska’s motion to intervene, noting that “[t]he Supreme Court’s exclusive jurisdiction under 28 U.S.C. § 1251(a) applies only when one state seeks relief from another state. . . . In this case, the controversy is between each of the states and the Corps. Although the states would have had adverse interests, each state would be seeking relief from the Court against the Corps. Thus, allowing intervention by Nebraska would not strip the District Court of jurisdiction.”\textsuperscript{96}

As in the \textit{South Dakota} case, the current controversy in the ACF is between the states and the Corps. While the states certainly have adverse interests, they all are seeking relief from the Corps. In fact, the court in the \textit{Alabama} case made this point explicitly, noting that “original jurisdiction [is] based on the \textit{identity of the parties} to a dispute, not based on the \textit{subject} of the dispute between the parties.”\textsuperscript{97} The court went on to explain that:

\begin{quote}
\textbf{The Supreme Court will only exercise jurisdiction in cases where the issue is first of all “serious.”} “‘The model case for invocation of this Court’s original jurisdiction is a dispute between States of such seriousness that it would amount}
\end{quote}

\textsuperscript{93} \textit{Id.} at 1021.
\textsuperscript{94} \textit{Id.} at 1024.
\textsuperscript{95} \textit{Id.} at 1022.
\textsuperscript{96} \textit{South Dakota}, 330 F.3d at 1026.
\textsuperscript{97} \textit{Alabama v. U.S. Army Corps of Eng’rs}, 382 F. Supp. 2d 1301, 1309 (N.D. Ala. 2005).
to *casus belli* if the States were fully sovereign.”’” *Mississippi v. Louisiana*, 506 U.S. 73, 77, (1992) (quoting *Texas v. New Mexico*, 462 U.S. 554 (1983)). Second, the Court considers “the availability of an alternative forum in which the issue tendered can be resolved.” *Id.*

Among the litigants, it is most intuitive that Florida would be the state to first seek the Court’s involvement.99 From Florida’s perspective, “forty percent of the summer flows into the Apalachicola Bay come from the Flint River, and there are no Corps dams to sue over on the Flint River.”100 Therefore, lawsuits against the Corps are unlikely to resolve Florida’s needs and concerns about water flows into the Apalachicola Bay.

However, equitable apportionment has many disadvantages generally, including the fact that the Court lacks the necessary expertise and the process is expensive, time consuming, and leads to uncertain outcomes.101 Furthermore, there are a number of obstacles that make a case by Florida challenging. Florida would have to first prove that “the threatened invasion of its rights was of serious magnitude,” something the Court has always required for an apportionment.102 Assuming Florida can surpass that hurdle to the satisfaction of the Court, there remain other

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98 *Id.* at 1310.
99 Abrams, *supra* note 86 at 13; see generally Lathrop, *supra* note 86.
101 *Id.* at 880.
102 Grant, *supra* note 86 at 411 (“Colorado v. Kansas, 320 U.S. 383, 400 (1943) (holding that Kansas did not prove “serious detriment to [its] substantial interests” in the Arkansas River); Washington v. Oregon, 297 U.S. 517, 522–23, 529 (1936) (concluding that Washington produced only “uncertain evidence of damage” to its interests in the Walla Walla River); Connecticut v. Massachusetts, 282 U.S. 660, 666–67 (1931) (finding that Connecticut failed to show harm to navigation, agriculture, or fish or water quality in the Connecticut River and that harm to a future hydropower project was too speculative”). *Id.* at note 62.
concerns. For example, should the Court take the case, there is uncertainty about which factors it would use in weighing the competing claims. Among the factors likely to be considered are conservation of resources, environmental statutes, and the application of the relevant states’ water law (in this case, riparian water rights). The Court also is likely to consider protection of existing economies dependent on water, including population and economic demand.

While some of these factors may weigh in Florida’s favor (e.g., environmental statutes), others clearly favor Georgia. Complicating a possible case even further is the fact that “[u]nlike the typical equitable apportionment case, Florida and Georgia are seeking different uses for the water. Florida seeks to leave water in the ACF River Basin to maintain a more natural flow regime for the protection of its oyster industry as well as the ecological integrity of the Apalachicola Bay. Georgia seeks to divert water for domestic uses, mainly water supply for drinking and agricultural purposes.”

In *Colorado v. New Mexico*, the Court came down solidly on the side of existing economic uses of water: “The harm that may result from disrupting established uses is typically certain and immediate, whereas the potential benefits from a

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103 Lathrop, *supra* note 100 at 890–1. The Court is obligated to use “all the factors which create equities in favor of one state or the other” (Colorado v. Kansas, 320 U.S. 383, 394 (1943), *quoted in* Nebraska v. Wyoming, 325 U.S. 589, 618 (1945)), but which factors would be applicable is uncertain.

104 *Id.* (citing Colorado v. New Mexico I, 459 U.S. 176, 185 (1982)).

105 *Id.* at 896.


107 *Id.*
proposed diversion may be speculative and remote.”\textsuperscript{108} Thus, there are few certainties for Florida or any other parties in an equitable apportionment decree.

The unpredictability of such litigation is a clear drawback, but there are others as well. The proceedings are expensive and tend take a very long time. The controversy between Nebraska and Wyoming,\textsuperscript{109} for example, started in 1934 when Nebraska brought suit, and the original decree of equitable apportionment was issued in 1945.\textsuperscript{110} Furthermore, “members of the public—almost regardless of their separate interests—are effectively barred from direct participation in the proceedings.”\textsuperscript{111}

\textbf{Conclusion}

The unfortunate truth remains that, for the foreseeable future, the Corps remains in the driver’s seat in this on-going drama. Although Georgia has state authority over water withdrawal permits and controls this activity separately, the storage of the water that is withdrawn remains within the Corps’ jurisdiction. Accordingly, Georgia will likely pay lip service to negotiations with its neighbors while focusing on the Corps. As Professor Robert Haskell Abrams has aptly noted:

\begin{quote}
    With the focus here on the Corps and its role in managing the water, one thing stands out almost immediately—the Corps is the entity with the greatest physical control in the [ACT] basin. Thus, at least as long as the ongoing interstate wrangling among the basin states persists, and possibly thereafter, the real world results are being dictated by the Corps as a function of its dam operations.
\end{quote}

\textsuperscript{108} Grant, \textit{supra} note 86 at 420 (citing Colorado v. New Mexico, 459 U.S. 176, 187 (1982)).
\textsuperscript{109} Nebraska v. Wyoming, 325 U.S. 589, 591 (1945).
\textsuperscript{110} Lathrop, \textit{supra} note 100 at 898.
\textsuperscript{111} Dellapenna, \textit{supra} note 80 at 888.
Correspondingly, the most effective method of altering present water allocation decisions is to influence the Corps, whether through negotiation or litigation. \(^{112}\)

This method does appear to be the one adopted by Georgia in the tri-state water wars. Although Judge Magnuson’s 2009 ruling was clearly a defeat for Georgia, the Eleventh Circuit certainly suggested that it is unlikely to stand in its currently form. Instead, it is likely that the Eleventh Circuit will overturn the lower court and direct the Corps to develop an approach in its current process of updating its Operations Plan that would address municipal water storage as an authorized use for Lake Lanier. Doing so will not, of course, end the tri-state water wars. Instead, there is likely to be extensive litigation well into the future as the three states seek to ensure that their interests are being addressed by the Corps’ management of the ACT.