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Settlement of the ACF Controversy: Sisyphus at the Dawn of the 21st Century

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Robert Haskell Abrams[1]

The ancient Greek myth in which Sisyphus is condemned to perpetually roll a massive boulder up a hill only to have it fall back down now symbolizes repetitive, ultimately fruitless effort.[2] The Apalachicola-Chattahoochee-Flint (ACF) basin rapidly has become the emblem of Sisyphean water conflict in the eastern United States. It has the potential to rival some of the West's long-running water disputes, although it will never challenge the Colorado River in that regard.[3] Formal evidence of conflict over the use of the basin waters date back to the late 1980's, while the seeds of coming dispute were probably visible some years earlier. The ACF dispute has been through more than a decade of litigation that is on-going.[4] The dispute has seen an interstate compact come and go.[5] By the time this article appears, the dispute will be the subject of legislative proposals in Congress.[6] The dispute has been a topic of negotiations among many of the key parties on numerous occasions, some broken off as recently as the time this paragraph was being written.[7] The dispute has spawned considerable literature![8]

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[1] Professor of Law, Florida A & M University, College of Law. The author wishes to thank the Florida A & M University, College of Law for research support for this effort.

[2] *See generally* ELLIOTT M. SIMON, THE MYTH OF SISYPHUS: RENAISSANCE THEORIES OF HUMAN PERFECTABILITY (2007).

[3] The legal history of the Colorado River is quite voluminous and gave rise to the phrase, "the law of the river." *See* COLO. RIVER COMM'N OF NEV., LAWS OF THE RIVERS: THE LEGAL REGIMES OF MAJOR INTERSTATE RIVER SYSTEMS OF THE UNITED STATES 67-97 (2006). The ACF commands a surpringly large entry as well. *Id.* at 177-89. The history on the Colorado River is also colorful, including the commissioning of the "Arizona Navy" in the effort to prevent construction of Hoover Dam. *See, e.g.*, Jon Kyl & Ryan A. Smith, *Foreward to Water Law and Policy Symposium*, 49 ARIZ. L. REV. 209, 209, 210-216 (2007).

[4] *See infra* text accompanying notes 9-22 (discussing the sources and history of the conflict).

[5] *See generally* Charles T. DuMars & David Seeley, *The Failure of the Apalachicola-Chattahoochee-Flint River Basin and Alabama-Coosa-Tallapoosa River Basin Compacts and a Guide to the Successful Establishment of Interstate Water Compacts*, 21 GA. ST. U. L. REV. 373 (2004).

[6] *See infra* note 22.

[7] *See* Letter from Dirk Kempthorne, Sec'y of the Interior, and Jim Connaughton, Chairman of the Council on Envtl. Quality, to the Governors of Ala., Ga., and Fla. (Mar. 1, 2008), http://www.doi.gov/news/08_News_Releases/080301.html.

[8] The following is only a partial list of ACF articles not cited elsewhere. *See, e.g.*, Robert Haskell Abrams, *Interstate Water Allocation: A Contemporary Primer for Eastern States*, 25 U. ARK. LITTLE ROCK L. REV. 155 (2002); Jessica A. Bielecki, *Managing Resources with Interstate Compacts: A Perspective from the Great Lakes*, 14 BUFF. ENVTL. L.J. 173 (2007); Josh Clemons, *Interstate Water Disputes: A Road Map for States*, 12 SE. ENVTL. L.J. 115 (2004); Carl Erhardt, *The Battle over "The Hooch:" The Federal-Interstate*

At the outset, it is important to recognize that there are many parties with an interest in the ACF basin. The most prominent in recent years are the three basin states, Georgia, Alabama, and Florida. The party with the greatest physical control in the basin is the United States Army Corps of Engineers (Corps). Other parties include both the active and passive users of the water. The uses range from municipal and industrial, to hydropower generation, to electric power cooling, to irrigation, to navigation, to fisheries, commercial and sport, riparian and estuarine, to recreation, and to ecosystem services. In short, the basin is a diverse and complex system.

There have long been two concurrent, and at times competing, efforts at long-term management. One effort is that of the states to negotiate a long-term agreement for managing and sharing the basin's waters. The other effort is that of the Corps, operating its dams in the basin, and that of those who seek to influence the Corps.[9] These latter efforts involve negotiation or litigation, the goal of which is to affect the Corps' operation of its controlling dams on the Chattahoochee in a manner that results in a favorable outcome for the party seeking that influence.[10] The two efforts do overlap since the states are among those who negotiate and litigate with the Corps. Importantly, the states' mutual negotiations are strongly influenced,

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Water Compact and the Resolution of Rights in the Chattahoochee River, 11 STAN. ENVTL. L.J. 200 (1992); Robert P. Fowler, Jeffrey H. Wood & Thomas L. Casey, III, *Maintaining the Navigability of America's Inland Waterways*, 21 NAT. RESOURCES & ENV'T 16 (2006); Douglas L. Grant, *Interstate Allocation of Rivers Before the United States Supreme Court: The Apalachicola-Chattahoochee-Flint River System*, 21 GA. ST. U. L. REV. 401 (2004); Arnall Golden Gregory, LLP, *Eleventh Circuit Allows Settlement on Lake Lanier Between Corps and Atlanta Area Governments*, 17 NO. 4 GA. ENVTL. L. LETTER 3 (2005); C. Grady Moore, *Water Wars: Interstate Water Allocation in the Southeast*, 14 NAT. RESOURCES & ENV'T 5 (1999); J.B. Ruhl, *Water Wars, Eastern Style: Divvying Up the Apalachicola-Chattahoochee-Flint River Basin*, 131 J. CONTEMP. WATER RES. & EDUC. 47 (2005); J.B. Ruhl, *Equitable Apportionment of Ecosystem Services: New Water Law for a New Water Age*, 19 J. LAND USE & ENVTL. L. 47 (2003); Dustin S. Stephenson, *The Tri-State Compact: Falling Waters and Fading Opportunities*, 16 J. LAND USE & ENVTL. L. 83 (2000); Jeffrey Uhlman Beaverstock, Comment, *Learning to Get Along: Alabama, Georgia, Florida and the Chattahoochee River Compact*, 49 ALA. L. REV. 993 (1998); Drew Melville, Comment, *"Whiskey is for Drinking": Recent Water Law Developments in Florida*, 20 J. LAND USE & ENVTL. L. 489 (2005); Natasha Meruelo, Note, *Considering a Cooperative Water Management Approach in Resolving the Apalachicola-Chattahoochee-Flint Basin Water War*, 18 FORDHAM ENVTL. L. REV. 335 (2007); C. Hansell Watt, IV, Comment, *Who Gets the Hooch?: Georgia, Florida, and Alabama Battle for Water from the Apalachicola-Chattahoochee-Flint River Basin*, 55 MERCER L. REV. 1453 (2003).

[9] The first action that precipitated "hostilities" was the determination of the Corps favoring a further increase in the amount of water it was allowing Atlanta region municipal water supply entities to store and withdraw. The litigation resulted in a stay order at that time, *see Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1123 (11th Cir. 2005), and the Corps did not go forward with permanent water reallocation.

[10] *See, e.g.*, Se. Fed. Power Customers, Inc. v. Caldera, 301 F. Supp. 2d 26, 27, 34 (D.D.C. 2004), *rev'd sub nom.* Se. Fed. Power Customers, Inc. v. Geren, 514 F.3d 1316, 1323 (D.C. Cir. 2008) (power companies asserting rights to water for hydropower resulted in a settlement including the Corps, Georgia, Atlanta water suppliers, and the hydropower interests; the agreement was nullified on appeal).

or even upset, as the litigation with the Corps gives one side or the other a partial victory or perceived advantage.[11]

Unless the three states and the other parties to the dispute embark on a markedly different approach, there is every reason to think that the ACF controversy has additional unfulfilling decades ahead of it. There are a number of key reasons behind this pessimistic view. Most have to do with the human actors who drive or influence the possibility of a settlement. Correlatively, there are factors that have to do with institutional arrangements, primarily the proliferation of *fora* that have decisional authority over some aspect of any management plan and their lack of a common set of governing laws and policies. Finally, there is inadequate knowledge of exactly how the ecosystem functions, what eventual pattern of water availability will need to be accommodated by the management options, and just what population and economic shifts will occur in the region.

Looking at the actors, the first and foremost obstacle to resolving the ACF dispute is that the states appear to believe that the existing law and precedents (when to their advantage), rather than sound judgment alone, should influence the outcome. Each time some advantage is gained in one of the many available venues (lawsuits, administrative actions, legislation) the winning parties treat that as a new strength in their negotiating position. Most recently, Florida and Alabama won a major victory in the D.C. Circuit[12] and talks described by all sides as promising rather quickly fizzled.[13] Even before the time to appeal had run, Georgia appears likely to move into an additional forum – Congress – in seeking to undo the narrow legal point on which the downstream states victory had hinged.[14] Second, the parties appear to believe that there is a static, presently articulable, final result that will adequately ensure and properly prioritize the region's most vital interests.[15] Taking these two points together and stating them in a different way, those key parties are

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[11] *See infra* text accompanying notes 12-20 (explaining how multiple forums and competing interests and powers impede resolution of the conflict).

[12] *Geren*, 514 F.3d at 1323.

[13] *See, e.g.*, Kevin Spear, *Talks Fail as 3 States Try to End Water War*, ORLANDO SENTINEL, Feb. 27, 2008, at B1. The failure of the talks came three weeks after the decision in the Southeastern Federal Power Customers case cited in the previous footnote. *See Caldera*, 301 F. Supp. 2d 26; *see also* text accompanying *supra* note 10.

[14] Proposals are anticipated to be submitted on behalf of Georgia and the Atlanta municipal water suppliers on Tuesday, March 11, 2008, before the Subcommittee on Water Resources and Environment of the House Transportation and Infrastructure Committee that will make municipal water supply an express purpose of the Buford Dam. *See, e.g.*, Testimony of Sam Hamilton on Water Resources and the Environment Regarding Drought Issues in the Southeast, Mar. 11, 2008, http://www.fws.gov/laws/Testimony/110th/2008/HamiltonSoutheastDrought.html.

[15] For example, the Apalachicola-Chattahoochee-Flint River Basin Compact was intended to provide a formulaic result: "It is the intent of the parties to this Compact to develop an allocation formula for equitably apportioning the surface waters of the ACF Basin among the states while protecting the water quality, ecology and biodiversity of the ACF . . . ." Apalachicola-Chattahooche-Flint River Basin Compact, Pub. L. 105-104, art. VII(a), 111 Stat 2219, 2222-23 (1997).

not willing to fashion and put their trust into a policy-driven mechanism that will manage the available water soundly based on the best information available now and in the future. The actions of the parties to date show little interest in "adaptive management,"[16] which is likely to be necessary to achieving a lasting result. The third factor is politics. The governors and legislatures are constantly trying to score political points by grandstanding[17] and taking aggressive, jingoistic public positions[18] that prevent candid, open-ended negotiations. Finally, there are well-coordinated vested interests that benefit from their current levels of use, for example the barge operators and irrigators in the Flint basin, who have the ability to frustrate a solution by objecting and each pushing their agenda in a forum that is particularly responsive to them.

There also is some emerging room for optimism. Almost everyone dependent on the waters of the basin believes there is not enough water to support uses on a sustainable level without modification of both their own practices and those of others. That implies there is room for give on all sides in a solution that will require more give than take. Similarly, all now seem to agree that the Corps' operation of the dams under its existing lawful and possibly *ultra vires*[19] authority is suboptimal.[20] These factors suggest that change in bargaining tactics is possible, although not inevitable.

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[16] Adaptive management is defined as:

> A type of natural resource management in which decisions are made as part of an ongoing science-based process. Adaptive management involves testing, monitoring, and evaluating applied strategies, and incorporating new knowledge into management approaches that are based on scientific findings and the needs of society. Results are used to modify management policy, strategies, and practices.

Cleanwater.gov, http://water.usgs.gov/owq/cleanwater/ufp/glossary.html (last visited May 11, 2008); *see generally* ADAPTIVE AND INTEGRATED WATER MANAGEMENT: COPING WITH COMPLEXITY AND UNCERTAINTY (Claudia Pahl-Wostl et al. eds., 2008) (discussing developments and current controversies regarding water management).

[17] *See, e.g.*, CNN.com, Georgia's Governor Prays for Rain on Capitol Steps, http://www.cnn.com/2007/US/11/13/southern.drought.ap/index.html (last visited May 11, 2008).

[18] *See, e.g.*, Sonny Perdue, Press Release of October 17, 2007, Governor Seeks Injunction to Protect Georgia's Water Resources, http://gov.georgia.gov/00/press/detail/0,2668,78006749_96092834_ 96286007,00.html (last visited May 11, 2008) (endagered species of fish are less important than Georgia citizens); Bob Riley, Press Release of October 22, 2007, Georgia's Drought Request a Danger to Alabama, http://governorpress.alabama.gov/pr/pr-2007-10-22-01-gadroughtreqdanger.asp (Alabama citizens would be hurt and nuclear power plant would close).

[19] *See infra* text accompanying notes 93-97 (explaining judicial interpretations of statutes governing the Corps' operation of the dam).

[20] For example, the Atlanta Regional Commission, whose governmental members have been the beneficiaries to date of water that the Corps may not have had the authority to allocate to them, are proposing improvements in the Corps modeling and reservoir operations of the Woodruff Lock and Dam that would, in turn, create additional flexibility in the operation of the Buford Dam and Lake Lanier. *See* DANIEL P. SHEER ET AL., PROPOSED REVISION TO THE INTERIM OPERATIONS PLAN FOR JIM WOODRUFF LOCK AND DAM FOR THE

The knowledge of basin characteristics needs to improve. One group, the Atlanta Regional Commission, has hired a consulting hydrology firm that has fashioned a more accurate model of the basin inflows and hydraulics. Using that model, the group has proposed a revised operating plan for the Corps at the Woodruff Dam and Lock lower in the system that achieves better results on every parameter of concern for almost every plausible rainfall scenario.[21] That improvement also opens the possibility of using more of Lake Lanier's water and storage capacity for municipal use. At the bottom of the basin, several groups led by the Apalachicola Riverkeeper are seeking funding for more thorough studies of the basin and estuary ecology.[22] These developments will make it easier to get a grounded assessment of what is possible for the basin and what real points of stress must be the subject of compromise or a federally imposed settlement. Negotiations also have a better chance of succeeding because the stakeholders in the basin are now identified, and most of the larger constituencies have organized themselves into functioning entities capable of discussing the problem in a comprehensive fashion. If the stakeholders are brought into the process, there is less chance that they will attempt to fragment efforts at a solution by seeking to erect impediments to a larger plan. This cornucopialistic scenario is still a long way off. Considerable mistrust remains among those groups, and of the states. Likewise, groups that have been excluded from the negotiations are frustrated and skeptical of the entire process. Should the process become more inclusive as a means of gathering broader support, there are entities to work with and they seem more accepting of the realization that the water is not theirs alone. Hopefully, they are farther along the road than the politicians in pursing solutions rather than victories.

I. THE BASIN, ITS WATER CONTROL STRUCTURES, AND THE COMPETING USES OF THE WATER

Geographically, the basin rises at the north in the Blue Ridge Mountains and extends southward 385 miles to the Gulf of Mexico. It is roughly fifty miles in width in most places and drains roughly 19,800 square

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IMPLEMENTATION OF "REASONABLE AND PRUDENT MEASURE #3" (2007), http://www.sam.usace.army.mil/ACF%20Water%20Resources%20Management/DroughtProvisionComments/ARCHydrologic_20070110WSPRPM3c.pdf. This stands as a marked contrast to the economic impact study of the commission undertaken in 2000, which showed no concern for other parts of the basin. *See generally* GEORGE F. MCMAHON ET AL., LAKE LANIER NATIONAL ECONOMIC DEVELOPMENT UPDATE: EVALUATION OF WATER SUPPLY, HYDROPOWER, AND RECREATION BENEFITS (2004) (on file with author).

[21] *See* SHEER ET AL., *supra* note 20.

[22] A proposal for funding and a time frame in which to undertake it are to be presented on Tuesday, March 11, 2008, before the Subcommittee on Water Resources and Environment of the House Transportation and Infrastructure Committee. Testimony of Sam Hamilton, *supra* note 14.

miles.[23] The Chattahoochee has it headwaters in north-eastern Georgia, somewhat east of Atlanta, and the Flint has its headwaters in the center of the state. They merge near the southern and western boundaries of Georgia to form the Apalachicola, which then flows south through the Florida panhandle into the Gulf of Mexico. On a river-by-river basis, the drainage is divided as follows: Apalachicola River – 2,680 square miles; Chattahoochee River – 8,770 square miles; Flint River – 8,460 square miles.[24]

A. Municipal Water for the Atlanta Region

The ACF basin encompasses several distinct regions, which relate to the kinds of human activities and populations that are present. The most prominent part of the region is the growing Atlanta metropolitan area at the very top of the basin. The ACF, and more specifically the upper Chattahoochee, currently supplies roughly 70% of the water that is delivered to homes and businesses there.[25] The growth in demand had been a function of growth in regional population, from about 1.5 million in 1960 to over 5 million at present.[26] The entire growth has been in the suburban areas where population density is somewhat lower, but the size of developed parcels tends to be larger.[27] Thus, while household municipal use is largely non-consumptive, a considerable portion of the Atlanta regional withdrawals of water from the ACF basin are for landscape and recreation-supporting plant and lawn irrigation. These uses are highly consumptive and increase the effect of the Atlanta withdrawal on the downstream users in the ACF basin. For its part, the Atlanta community is very concerned about the reservoir level in Lake Sidney Lanier. Groundwater in the region is limited and other sources, such as the nearby Alabama-Coosa-Tallapoosa basin, do not have large surpluses or additional available storage.[28] Lake Lanier is, effectively, Atlanta's largest source of current water, of new water to support growth, and of stored water that is needed to combat drought periods.[29]

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[23] U.S. ARMY CORPS OF ENG'RS, MOBILE DIST., WATER ALLOCATION FOR THE APALACHICOLA-CHATTAHOOCHEE-FLINT (ACF) RIVER BASIN 4-10 (1998), *available at* http://www.sam.usace.army.mil/pd/actacfeis/acfMain.pdf.

[24] *Id.* at 4-37.

[25] *See* Andrew Thomley, *A Tale of Two River Basins: The Southeast Finds Itself in a Rare Interstate Water Struggle*, 9 U. DENV. WATER L. REV. 97, 98 (2005).

[26] *See* Demographia, Atlanta Metropolitan Growth from 1960, http://www.demographia.com/db-atl1960.htm (last visited May 11, 2008).

[27] *Id.*

[28] Atlanta has tried to obtain additional water from Lake Allatoona (another Corps reservoir) in the ACT basin and encountered similar reactions as with expansion of Lake Lanier withdrawals.

[29] Lake Lanier supports approximately three million people in the Atlanta region, and Lake Allatoona in the ACT basin supports about 800,000 people in the Atlanta region. *See* Tim Eberly & Stacy Shelton, *WATER WARS: Feds Tell Three States: We'll Fix This Feud*, ATLANTA J.-CONST., Mar. 2, 2008, *available at* http://www.ajc.com/search/content/metro/stories/2008/03/02/drought0302b.html.

For obvious reasons, Atlanta, generally speaking, has an interest in having as much water stored in Lake Lanier as is possible, consistent with dam safety and flood control concerns. The Buford Dam that impounds the water for Lake Lanier was constructed by, and is operated by, the United States Army Corps of Engineers. Buford Dam originally was authorized by the Rivers and Harbors Act of 1945,[30] and the authorization was amended the following year[31] to include reference to a Corps report, the Wheeler Report,[32] that had formed the rationale for constructing the dam. The Wheeler Report authorized and allocated costs exclusively for two purposes, flood control and hydroelectric generation.[33] According to Professor Sherk, "[t]he Wheeler Report suggested that the waters stored in Lake Lanier could be utilized to provide water for Atlanta. This was not included as an authorized project purpose, however, and no portion of the costs of the project were allocated to water supply benefits."[34] Finally, it is apparent that the Buford Dam can permissibly be managed by the Corps to provide flows in aid of navigation which is a primary purpose of the downstream dams.[35]

Although municipal supply is absent from the specific authorized purposes of Buford Dam, section 301 of the Water Supply Act of 1958,[36] after acknowledging the primary responsibility of the states and localities over their water supply, permitted the Corps or Bureau of Reclamation to allocate storage in "any reservoir project" to domestic, municipal, or industrial water supply, so long as the related costs are adequately shared by the beneficiaries.[37] The Corps' discretion to allocate storage to municipal use is, however, limited by the Water Supply Act to amounts that do not require major structural or operational changes.[38]

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[30] Rivers and Harbors Act of 1945, ch. 19, 59 Stat. 10, 17, *amended by* Rivers and Harbors Act of 1946, ch. 595, 60 Stat. 634, 635.

[31] Rivers and Harbors Act of 1946, ch. 595, 60 Stat. 634, 635.

[32] *See, e.g.*, George William Sherk, *The Corps' Conundrum: Reconciling Conflicting Statutory Requirements in the ACF River Basin*, *in* PROCEEDINGS OF 2005 GEORGIA WATER RESOURCES CONFERENCE (Kathryn J. Hatcher ed. 2005), *available at* http://www.uga.edu/water/GWRC/Papers/SherkJ%20Corps%20Conundrum.pdf (The Rivers and Harbors Act of 1946 "adopted by reference a report of Lt. Gen. R.A. Wheeler, Chief of Engineers. The purposes for which Buford Dam and Lake Lanier were authorized are referenced in Lt. Gen. Wheeler's report.").

[33] This is a debated point. Professor Sherk has researched this point extensively, and I adopt his conclusions. He points out that the Corps takes a different and somewhat malleable view of the matter. *See* George William Sherk, *The Management of Interstate Water Conflicts in the 21st Century: Is it Time to Call Uncle?*, 12 N.Y.U. ENVTL. L.J. 764, 771 n.21, 781 n.46 (2005).

[34] *Id.* at 782; *see also* Sherk, *supra* note 32 (noting the two purposes for which the Dam was authorized: flood control and hydroelectric generation).

[35] Sherk, *supra* note 33, at 781.

[36] 43 U.S.C. § 390b(b),(d) (2000).

[37] *Id.* § 390b(d). For a more extended discussion of this provision, see *infra* text accompanying notes 86, 89-95 (discussing a D.C. Court of Appeals decision applying the Water Supply Act of 1958).

[38] See *id.*

Beginning in the 1970's, when drought and growth of water use in the basin had not been so great, the Corps had allocated "temporary" storage for water supply in the Atlanta metro region. After a series of single-year droughts in the 1980's, regional metro Atlanta water suppliers approached the Corps seeking to obtain a secure water supply that would ensure their ability to serve their citizenry and continue to grow in population and economic activity.[39] As described more fully below, that request touched off full-fledged interstate hostilities over the ACF's waters and the operation of the Buford Dam.[40]

B. Hydropower at Lake Lanier

Hydropower generation is a major element in Buford Dam operations. The electric power wholesalers who resell power purchased from the Corps have a significant financial interest in the Corps' operation of the Buford Dam which is reflected and given legal force by contractual arrangements. The hydropower interests frequently are at variance with those of other users, most notably the Atlanta region municipal users. The power firms buy electricity from the Corps and resell it quite profitably. Since Congress authorized operation of Buford Dam to provide base load, not solely peaking power, the power resellers had come to rely on a pattern of dam operations that ensured regular discharges of the stored water through the turbines. In times of drought or other shortage, releases for power (that simultaneously serve as releases for downstream flow) undercut the municipal users' desires for maximum continued storage as a hedge against continuing drought or other shortage. Water released through the turbines reduces the amount of water available for immediate municipal use, and vice versa. As more fully described below, the power resellers sued the Corps to ensure that their operation of Buford Dam would conform to authorized purposes and to ensure that their contracts for power would be honored.[41] It was in that context that the State of Georgia, the Atlanta municipal water suppliers, and the hydropower interests agreed on a management regime for Buford Dam that was not acceptable to Alabama and Florida.[42]

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[39] *See* Benjamin L. Snowden, *Bargaining in the Shadow of Uncertainty: Understanding the Failure of the ACF and ACT Compacts*, 13 N.Y.U. ENVTL. L.J. 134, 139 (2005).

[40] *See infra* text accompanying notes 70-76 (listing highlights of the conflict).

[41] *See infra* text accompanying note 73.

[42] *See infra* text accompanying notes 76-83 (discussing the settlement and Alabama and Florida's response).

C. Recreation, Navigation, and Alabama Uses of the Chattahoochee Mainstem

After the Chattahoochee is released from Buford Dam, there are four more Corps-operated dams that control the river's flow. These are, from north to south, the West Point Dam, the W.F. George Dam, the G.W. Andrews Lock and Dam, and the Jim Woodruff Lock and Dam.[43] Another prominent dam, Georgia Power's Morgan Falls Dam, lies between Buford and West Point,[44] but its generating operations have not played any role in the overall dispute, which has focused on the Corps' dam operations. As with Buford Dam, all of the other Corps dams were constructed with specific authorizations. These may be summarized as follows:

Table 1 Authorized Purposes of Corps' Dams[45]

Name of Dam	Congressionally Authorized Purposes
West Point	Hydro-electric power, flood control, fish and wildlife recreation, general recreation, and navigation.
George	Flood control, navigation, and hydropower project (peaking only).
Andrews	Navigation.
Woodruff	Navigation and hydropower production.

These several dams have left the Chattahoochee with no free-flowing stretches below Lake Lanier and Buford Dam. Thus, any resemblance of the flows to the natural hydrograph of the river derives from one of two factors. First, in wetter years the volume of water is so great that releases are required as the natural rainfall events occur. Second, due to recreation purposes, including support of fisheries and legal requirements such as the Endangered Species Act,[46] the Corps may opt to manage the releases to mimic natural conditions that are favorable to increasing fish and mussel populations.

Physically, the most significant of the lower dams on the Chattahoochee is the George Lock and Dam. Its maximum water level differential is eighty-eight feet[47] which is enough to create a vast recreationally important lake that is over eighty-five miles in length, offers 640 miles of shoreline and over 45,000 acres of flatwater surface.[48] The lake

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[43] For a schematic of the basin with links to recent hydrologic data for the dams and gauging stations, see Apalachicolah-Chattahoochee-Flint River, http://water.sam.usace.army.mil/acff rame.htm (last visited May 11, 2008).

[44] *Id.*

[45] The list of purposes is derived from Sherk, *supra* note 33, at 782-86; *see also* Sherk, *supra* note 32.

[46] Endangered Species Act of 1973, 16 U.S.C.A. § 1531 (2000 & Supp. IV 2004).

[47] *See* W.F. George Dam Pertinent Data, http://water.sam.usace.army.mil/ wfg-pert.htm (last visited May 11, 2008).

[48] *See* Walter F. George Lake and Lake George W. Andrews, http://www.sam.usace.army.mil/op/rec/wfg/ (last visited May 11, 2008).

and its surrounding areas draw 4.5 million visitors per year. The lake forms the Alabama-Georgia border throughout its length. The powerhouse in the dam has four operating units each rated at 32,500 kW.[49]

The various locks and dams provide an upstream navigation channel 100 feet wide with a nine foot depth that is maintained in some reaches by dredging. The upstream terminus of the navigation is Columbus, Georgia on the Chattahoochee and Bainbridge, Georgia on the Flint. These channels support barge traffic that connects to the Intracoastal Waterway. Alabama and Georgia are both vociferous in their support for maintaining navigation, claiming that it is essential to the economic well-being of Alabama's industrial development as well as farming communities in both states.[50] The extensive dredging to accommodate a relatively small number of barges is problematic for the Apalachicola River ecology.[51] The dredging disturbs the riparian habitat and the spoils, mostly sand that is piled on the banks, form barriers to the river.

D. Flint River Irrigation

If the main event in the ACF is Lake Lanier's operation and the clash between water for Atlanta and releases for downstream flows, then buried on the undercard is the increased use of tributary groundwater for irrigation in the lower Flint basin. The flow of the Flint is largely free, with the only major structure being the Woodruff Dam and Lock at the very confluence of the Flint with the Chattahoochee.

It is quite important to compare the Flint's contribution to the water that will subsequently become the Apalachicola with the contribution flowing in from the Chattahoochee. Essentially, whatever water flows into Lake Seminole, the lake created by the Woodruff Lock and Dam at the confluence of the Chattahoochee and Flint Rivers, is water that the Corps can manage and release into the Apalachicola River. The United States Geological Survey has for almost a century maintained a gauge at Newton, Georgia, which is about forty miles upstream from Woodruff Dam. Newton is also about twenty-five miles upstream from a recently established gauge at Bainbridge, Georgia, which is the head of navigation on the Flint and the furthest upstream reach of the waters impounded at Woodruff. Using the long-term comparison based on monthly averages compiled over many years based on the Newton data alone, the Flint accounts for almost 40% of the inflow at Woodruff.[52] Since the Flint gains substantially in the stream stretch

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[49] *See* Apalachicolah-Chattahoochee-Flint River, *supra* note 43.

[50] Snowden, *supra* note 38, at 139 and sources cited therein.

[51] Christine A. Klein, *On Integrity: Some Considerations for Water Law*, 56 ALA. L. REV. 1009, 1053 (2005).

[52] *See* Robert Abrams, *Broadening Narrow Perspectives and Nuisance Law: Protecting Ecosystem Services in the ACF Basin*, 22 J. LAND USE & ENVTL. L. 243, 298 (2007).

between Newton and Bainbridge, the contribution of the Flint is closer to half of the water stored behind the Woodruff Dam.[53]

The dominant consumptive use of water in the Flint basin is irrigation.[54] Some irrigators draw water directly from the river, but the bulk of the irrigation is done by tapping groundwater that is hydrologically linked to the river and therefore depletes the flow.[55] Most of the irrigation has been commenced during or after the droughts of the 1980's, in which many farmers who did not irrigate lost their entire crop.[56] The total acreage under irrigation in 2004, while the basin was still under a four-year-old moratorium on additional permitting,[57] exceeded 1.5 million acres.[58] That moratorium has since been lifted, after which additional permit applications that were queued during the moratorium were granted, and permitting has continued thereafter based upon the determinations made in the 2006 Flint River Conservation and Development Plan.[59] The average irrigation depth varied by crop as follows: "cotton, peanuts, and corn received 6 to 8 inches of water; vegetables and pecans, 8 to 10 inches; and athletic areas, sod, and nursery plants, greater than 15 inches."[60] The irrigation depletions to the flow come in the dry summer months when flows are at their lowest, averaging little more than 3000 cubic feet per second (cfs) at Newton in the first few years of this century.[61] The amount of irrigation, now somewhere around 350 million gallons per day *on average*, is expected to reach 569 mgd by 2050.[62] Summer drought adds a double whammy in terms of reducing river flows –

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[53] For the first four years of operation beginning in 2001, the flows at Bainbridge averaged 129% of the flows at Newton. *Id.* at 298.

[54] The Georgia DNR put it this way:

> Permitted municipal and industrial (M&I) water withdrawals throughout the FRB [Flint River Basin] total approximately 120 mgd on a monthly average from surface-water sources (mostly north of the fall line), 88 mgd from aquifers other than the Floridan aquifer, and 30 mgd from the Floridan aquifer in Subarea 4. Actual surface water use in 2004 was approximately 50 mgd (Table 5.3). M&I withdrawals from the Floridan are equivalent to 3% of the agricultural ground-water use, and thus will not be discussed in any further detail in this report.

Ga. Dep't of Natural Res. Envtl. Prot. Div., Flint River Basin Regional Water Development Conservation Plan 15 (2006), http://www1.gadnr.org/frbp/Assets/Documents/Plan22.pdf [hereinafter Flint Plan].

[55] *See generally id.* Professor Glennon puts the reduction in flow at 60% of the amount pumped. ROBERT GLENNON, WATER FOLLIES: GROUNDWATER PUMPING AND THE FATE OF AMERICA'S FRESH WATERS 189-90 (2002) (discussing the use of groundwater for farming irrigation in the ACF basin).

[56] *See* Thomley, *supra* note 25, at 100.

[57] Abrams, *supra* note 52, at 256.

[58] Flint Plan, *supra* note 54, at 80 (citing Georgia Cooperative Extension Service Surveys).

[59] Abrams, *supra* note 52, at 256.

[60] Flint Plan, *supra* note 54, at 81.

[61] Abrams, *supra* note 52, at 298.

[62] *See* GLENNON, *supra* note 55, at 189.

there is less natural inflow from surface runoff and the amount of irrigation water applied to the crops increases.

Despite failing to check growth in surface and groundwater permits, the Flint basin does have a drought management plan that is designed to fallow land in drought years. The Flint River Drought Protection Act[63] permits the state to purchase forbearance from permit-holding agricultural users to maintain critical stream flow. Apart from being a bit of a fiscal albatross,[64] the Flint River Drought Protection Act is unfunded and thus requires explicit legislative action to appropriate the money. Moreover, there is a chance that the statute will be inoperative in any year in which the severity of the drought is not foreseen before March first, the date that marks the beginning of the spring planting season. On the positive side, Flint basin permits issued after 2006 will require farmers to use conservation measures during periods of water shortage, but most of the water is allocated under older permits that, together, already over-allocate water in times of shortage.[65]

The current operation of the Drought Protection Act is a grim reminder of the disconnect in Georgia regarding the waters of the ACF basin. For Georgia purposes the Chattahoochee and the Flint are unconnected because their confluence is virtually at the border with Alabama and Florida. Thus, while Atlanta on March 1, 2008, is still wondering what water from Lake Lanier will be available in summer, on March 1, 2008, the Georgia Department of Environmental Protection issued an announcement that there would be no severe drought declaration that would trigger the purchase of forbearance under that drought protection program.[66] The exclusive one-basin, Flint-only approach is manifested in the consulted criteria: "[s]treamflow, groundwater levels, winter precipitation and the ninety-day precipitation outlooks *within the lower Flint River Basin* are the factors that determine whether a severe drought is declared."[67] The Georgia decision-makers are not considering the possibility that the Flint's water might contribute to the solution of the larger ACF problem.

E. Apalachicola River and Bay, Fisheries, and Habitat

As with most rivers, the ecologically richest part of the ACF basin is the estuary. The Apalachicola River and Apalachicola Bay are very diverse systems. A multi-year Department of the Interior Fish and Wildlife Service study published in 1984 provides a baseline from which the changes

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63 GA. CODE ANN. § 12-5-540 (2006).

64 Abrams, *supra* note 52, at 258.

65 *Id.*

66 Georgia Department of Natural Resources, http://www.gaepd.org/Files_PDF/news/Flint_River_news_release_2008.pdf (last visited May 11, 2008).

67 *Id.* (emphasis added).

associated with the present water conflict can be measured.[68] The most obvious changes in the river and bay are those affecting species – those that are commercially valuable – the famous Apalachicola Bay oysters, and those that are endangered – the sturgeon and a small number of varieties of freshwater mussels.

The cause and effect can briefly be described on a species-by-species basis. The easiest to understand is the mussels, who can survive in narrowly defined conditions of water depth. The main cause of their demise is the dewatering of their habitat by irrigation in the lower Flint. The sturgeon's case is somewhat more complicated. Like many ocean fish that come into freshwater for breeding and sheltering, they are adversely affected by the dredging that affects both channels and streambed areas. More importantly, they have evolved and adapted to the natural habitat and historic hydrograph of the river. These species demand a particular flow regime that tends to mimic the historic flow pattern to ensure successful breeding and the passage of the young to the ocean. The sturgeon, as a listed endangered species, impose a direct requirement on the Corps to fashion an operating schedule that ensures adequate flow at the needed times. In this instance, the needed accommodation is relatively high flows in the spring that work in opposition to the desire to hold water in storage for possible summer drought.

Finally there are the oysters of the bay, which live in the estuary's mixing zone where freshwater and salt water come together. These creatures, as do the sturgeon, have a life cycle that was evolved over eons of adaptation to the historic water and shore conditions. Two variables of particular significance for the oysters are salinity and temperature. Comparatively speaking, those variables are controlled by the freshwater flows which are highly variable in comparison to the ocean. With the radical decrease in outflow during the recurrent ACF droughts, the salinity levels in the Bay also have changed radically. The oystermen, who represent a $134 million per year industry, fear that the storage and consumption of water upstream is the cause of the increased salinity that reduced the 2007 oyster harvest by almost half.[69]

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[68] ROBERT J. LIVINGSTON ET AL., THE ECOLOGY OF THE APALACHICOLA BAY SYSTEM: AN ESTUARINE PROFILE (1984), *available at* http://ia360635.us.archive.org/2/items/ecologyofapalach00livi/ecologyofapalach00livi.pdf.

[69] *See Florida's Oyster Industry Drying Up?* (CBS Evening News television broadcast Nov. 20, 2007), *available at* http://www.cbsnews.com/stories/2007/11/20/eveningnews/main3528550.shtml?source=search_ story. Interestingly, the oystermen quoted in the news report identify Atlanta as the source of the reduced flows and do not mention the irrigators in the Flint basin.

II. CONFLICT, MORE DROUGHT, AND MAJOR JUDICIAL DECISIONS

The Seemingly Endless Conflict (Short Version)

To prevent a Sisyphean reading experience, the high points in the history of the ACF water dispute will be canvassed as a series of bullet points that are amply described in a host of published materials.[70] The only items that will be discussed more fully are the most recent court decisions, one of which invalidates the Corps' planned increases in deliveries for municipal use in the Atlanta region, and calls into question the legality of current diversions for that purpose.

- Regional droughts in the southeast in 1981, 1986, and 1988 lead to increased competition for the available water.[71]
- Prior to 1989 the Corps had provided water to Atlanta area municipal suppliers pursuant to five-year interim contracts.
- In 1989, the Corps proposes to Congress that it authorize a large, long-term allocation of Lake Lanier water to the Atlanta municipalities.
- In response, Alabama sued the Corps in the United States District Court for the Northern District of Alabama; Florida attempted to intervene in support of Alabama, Georgia attempted to intervene in support of the Corps.[72]
- Interim deliveries continued and the parties stayed the case to undertake negotiations.
- No agreement was reached, but in 1997, the negotiations led to the formation of the time-limited ACF Compact that was intended to reach an overall settlement and water allocation.
- In December 2000, Southeastern Federal Power Customers, Inc., a nonprofit corporate consortium of rural electric cooperatives, sued the Corps in the United States District Court for the District of Columbia,[73] arguing that the withdrawals being allowed for the Atlanta municipal suppliers illegally decreased the amount of hydropower generated at the Buford Dam that was available to their customers.
- In 2001, Georgia filed its own "local" lawsuit in the United States District Court for the Northern District of Georgia which was abated in 2004.[74]

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70 *See supra* note 8 (listing some of those many sources).

71 *See, e.g.*, Snowden, *supra* note 38, at 139.

72 *See* Alabama v. U.S. Army Corps of Eng'rs, 424 F.3d 1117, 1123 (11th Cir. 2005).

73 Se. Fed. Power Customers, Inc. v. U.S. Army Corps of Engineers, 00-CV-2975 (D.D.C.).

74 Georgia v. U.S. Army Corps of Eng'rs, 223 F.R.D. 691, 699 (N.D. Ga. 2004).

- In 2001, Georgia and the Atlanta municipal suppliers intervened in the D.C. lawsuit and the parties were remitted to mediation.
- In early 2003, the D.C. lawsuit parties reached an agreement and submitted it to the court for approval.
- Alabama and Florida intervened in the D.C. suit to object to the settlement.
- Alabama and Florida successfully moved to dissolve the stay in the long-pending Alabama suit.
- After previous agreed extensions, on August 31, 2003, the ACF Compact was allowed to expire.
- On October 15, 2003, the Alabama court ruled that the D.C. settlement was void because it was in violation of the 1990 stay order and barred the Corps and Georgia from executing or implementing the settlement agreement or entering into any other agreement.
- In 2004, the D.C. court went ahead and approved the settlement in its pending litigation, subject to the preparation of an Environmental Impact Statement (EIS) under the National Environmental Policy Act, a process in which Alabama and Florida would be free to comment. The D.C. court also held that the settlement could not be implemented until the parties were able to have the injunction of the Alabama court dissolved.[75]
- Both the D.C. and Alabama decisions were appealed, setting the scene for the appellate decisions of the 11th Circuit and the District of Columbia Circuit. Fortunes were about to change and change again.
- 2006 was a mild drought year that did not ease tensions.
- 2007 was among the most severe drought years on record and led to litigation in the Alabama district court resulting in temporary required releases needed to support endangered species.

1. The 11th Circuit Ruling in Alabama v. U.S. Army Corps of Engineers[76]

This decision begins with a very clear exposition of the legal wrangling over the ACF basins' waters that had transpired in the three separate lawsuits.[77] The court was reviewing orders of the District Court for the Northern District of Georgia that, in essence, forbade the Corps and Georgia from executing the District of Columbia agreement that would allow

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[75] *See* Se. Fed. Power Customers, Inc. v. Caldera, 301 F. Supp. 2d 26 (D.D.C. 2004)

[76] 424 F.3d 1117 (11th Cir. 2005).

[77] *Id.* at 1122-27.

increased diversions for Atlanta municipal supply. The court set out and applied the traditional test for appellate review of preliminary injunctions:

> a district court may grant preliminary injunctive relief when the moving party shows that: (1) it has a substantial likelihood of success on the merits of the underlying case when the case is ultimately tried; (2) irreparable injury during the pendency of the suit will be suffered unless the injunction issues immediately; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.[78]

Under that standard, the 11th Circuit found that the injunction was an abuse of discretion. To the extent that the Corps had breached obligations under the 1990 stay order in the case, the proper remedy was via a show cause hearing seeking a contempt citation.[79] More substantively, the court found the D.C. settlement, because it required NEPA compliance, ameliorated any claims of irreparable injury to Alabama and Florida – the NEPA process was thought sufficient to protect their ecological interests in preventing future harm.[80] Finally, the court ruled that the plaintiffs had not shown likelihood of success on the merits because the preliminary injunction was based solely upon alleged violations of the 1990 stay order and that ground appeared likely to be decided against the plaintiffs.[81] What the ruling left open, however, was the possibility of the filing of both an amended complaint clarifying their claims and, possibly, adding counts under a variety of statutes.[82] The possibility of an amended complaint also created the possibility of seeking a new preliminary injunction on grounds related to the clarified or new claims.[83]

At the time it was rendered, the decision of the 11th Circuit appeared to be a significant victory for Georgia and the Atlanta municipal suppliers. Although they had to undertake an EIS, and would face a renewed challenge in the remanded proceedings in the litigation, they and the Corps were, for the moment, free to proceed to implement the agreement that would bring more water to Atlanta.

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78 *Id.* at 1128-31.

79 *Id.* at 1133-34, n.7.

80 *Id.* at 1134.

81 *Id.* at 1134-35.

82 *Alabama*, 424 F.3d at 1135-36.

83 *See id.* at 1134-35. The appellate court found the lower court's findings on those issues to be insufficiently thorough and grounded in the record presented.

2. *The D.C. Circuit Ruling in* Southeastern Federal Power Customers, Inc. v. Geren[84]

Alabama and Florida, who had intervened in the District of Columbia proceedings to object to the settlement, appealed the adverse decision of the district court.[85] The approved settlement granted the power generators "credit to be reflected in hydropower rates" in place of water that was diverted for continuation of current use and any enlargement of Atlanta municipal use.[86] While the appellants had mounted challenges under three separate federal statutes, the Water Supply Act (WSA),[87] the Flood Control Act,[88] and the National Environmental Protection Act,[89] the court of appeals majority limited its consideration to the WSA claim.[90] The panel reversed the approval of the settlement, even while applying an abuse of discretion standard of review.[91]

The decision turned on the magnitude of the Atlanta municipal supply withdrawals in relation to the storage capacity of Lake Lanier. The court noted that the agreement itself had set out the proportions:

> The Agreement specifies that Lake Lanier's storage space is 1,049,400 acre-feet. It requires the Corps to allocate between 210,858 and 240,858 acre-feet of Lake Lanier's water storage to local municipal and industrial uses for a once-renewable period of ten years; the exact amount of space allocated depends on whether Gwinnett County chooses to purchase all of the storage space to which it is entitled. If, under the Agreement, all of the storage space that may be officially dedicated to local consumption is, then the reallocation constitutes more than twenty-two percent (22%) of the total storage space in Lake Lanier and approximately nine percent (9%) more of the total storage space than was being allocated for local use in 2002.[92]

The court then laid those figures alongside the WSA limitations on releases in favor of municipal supply that are not expressly authorized purposes of the reservoir in question. The court first acknowledged the WSA puts primary responsibility for municipal supply on the states and local

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[84] Se. Fed. Power Customers, Inc. v. Geren, 514 F.3d 1316 (D.C. Cir. 2008).

[85] Se. Fed. Power Customers, Inc. v. Caldera, 301 F. Supp. 2d 26, 35 (D.D.C. 2004). The case took an extra trip to the court of appeals to determine a mootness issue before returning in *Geren*. *See* Se. Fed. Power Customers, Inc. v. Harvey, 400 F.3d 1 (D.C. Cir. 2005).

[86] *Geren*, 514 F.3d at 1320.

[87] 43 U.S.C. § 390b(d) (2000).

[88] 33 U.S.C. § 708.

[89] 42 U.S.C. §§ 4321-4370f.

[90] *Geren*, 514 F.3d at 1318.

[91] *Id.* at 1321-25.

[92] *Id.* at 1319-20.

governments, but allows federal reservoirs to help serve that function subject to a proviso:

> Modifications of a reservoir project heretofore authorized, surveyed, planned, or constructed to include storage as provided in subsection (b) of this section which would seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or which would involve *major* structural or *operational changes* shall be made only upon the approval of Congress as now provided by law.[93]

Although the court invoked the *Chevron*[94] doctrine, it did not rely exclusively on *de novo* review of the statutory interpretation to invalidate the settlement agreement.[95] While finding the statute was clear on its face that congressional authorization was needed for major operational changes, the crux of the holding was that the Corps abused its discretion in holding the reallocation in this case to be non-major.

> On its face, then, reallocating more than twenty-two percent (22%, approximately 241,000 acre feet) of Lake Lanier's storage capacity to local consumption uses constitutes the type of major operational change referenced by the WSA; the reallocation's limitation to a "temporary" period of twenty years does not change this fact. Even a nine percent (9%, approximately 95,000 acre feet) increase over 2002 levels for twenty years is significant. Appellees' contrary arguments are unpersuasive.[96]

The court specifically addressed and rejected all of the appellees' arguments, including the claim that this was a continuation of the status quo, not a change; that 22% was not major; that the specific authorized purpose (hydropower) had been held harmless by the financial credits given; and that the agreement is "temporary." The court further hoisted the Corps on its own petard when it recounted the 1989 Corps proposal that found it necessary and appropriate to seek congressional authorization for the reallocation of Lake Lanier's storage.[97]

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[93] *Id.* at 1321-22 (emphasis supplied by the court).

[94] The Court stated that:

> [Where] Congress has directly spoken to the . . . issue . . . that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress . . . . [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

[95] *Geren*, 514 F.3d at 1321.

[96] *Id.* at 1324 (citations omitted).

[97] *Id.* at 1325. The opinion of Judge Silberman concurring in the result was a bit more hopeful for Atlanta. He criticized the majority as employing as a WSA baseline in

III. NEXT UP

Now that Alabama and Florida have won the latest victory, but not a permanent solution, the question becomes, "What next?" The three states seem to be heading for more conflict in a variety of places, with the next three stops being in the pending United States District Court litigation, in Congress, and within the federal bureaucracy. In the courts, both the D.C. Circuit and the 11th Circuit opinions do not end the litigation, they just give direction about what cannot be done. In Congress, Georgia will undoubtedly try to get congressional authorization for allocating Lake Lanier storage to municipal supply and Alabama and Florida will be in vigorous opposition. Finally, in the meantime, the Corps still has to run the river by deciding how it will operate the dams.[98] Everyone will be watching for the news *de jour*.[99]

The remanded litigation will continue to play out on two fronts. As a prediction, the District of Columbia suit is going to recede into the background with the repudiation of the "not-quite-global" settlement that would have given more water to Atlanta and valuable credits to the power wholesalers. The power wholesalers still have viable claims that the Corps is not operating Buford Dam in accordance with their rights, and some monetary/credit settlement of the narrow hydropower claim, divorced from a long-term operating plan, seems to be the most likely direction for that litigation. The other ongoing litigation in which the three states are engaged has been consolidated into a single action that is now pending in the federal court in Jacksonville, Florida, and being heard by Judge Magnuson, sitting by designation of the Panel on Multidistrict Litigation. That litigation will now come to the fore.

After remand from the 11th Circuit, Alabama and Florida were, in essence, told to amend their original complaint, which has been done. Among the claims now very clearly stated is a claim against the Corps of Engineers under the Water Supply Act of 1959, the precise claim that led to vacatur of the settlement agreement in the D.C. Circuit litigation. Although the D.C. Circuit case is not binding precedent in this litigation,[100] its persuasive force will make it a valuable precedent in arguing for a like result.

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defining major reallocation, the starting point that no water should be allocated to municipal supply. *Id.* at 1327-28 (Silberman, J., concurring).

[98] Spear, *supra* note 13.

[99] One website that has been doing a good job of keeping abreast of that news is Water Webster, http://www.waterwebster.com/FloridaAlabamaGeorgia.htm (last visited May 11, 2008). In an almost comical response to the setback in the D.C. litigation, Georgia revisited an old, old grievance dating back to 1818, relating to a flawed survey of its northern border. If the survey had been accurate, Georgia's border with Tennessee would be placed one mile farther north and make Georgia a riparian on the Tennessee River, which could then be tapped for water supply. *See, e.g.*, Greg Bluestein, *Thirsty Georgia Wants Big Gulp of Tennessee*, ORLANDO SENTINEL, Feb. 9, 2008, at A-5.

[100] There is room for Alabama and Florida to argue for preclusive effect. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) (concerning issue preclusion).

While the D.C. Circuit only specifically addressed the settlement agreement and the increases in diversions for Atlanta, it certainly called into question the legality of continuation of the current level of diversions. A judgment in that litigation that invalidates the current level of diversions would force the Corps, if it has not already done so, to alter operations at Buford Dam.

In Congress, on March 11, 2008, the Committee on Transportation and Infrastructure, Subcommittee on Water Resources and Environment, held a hearing on the ACF controversy.[101] The members of the House on the panel and those offering statements and the non-federal witnesses called for a negotiated settlement protecting all interests and most of those speakers chided the three state governors for declining to send representatives to the hearing. The stakeholder speakers made it clear that the drought was causing real economic consequences in many sectors, from thousands of job losses in the Atlanta-area landscape sector, to lost agricultural productivity in the Flint basin, to tourism, fishery, and oystering losses in the Apalachicola River and Bay. The officials of the Corps reiterated their mandate and described their process for designing a revised operating manual for the Chattahoochee dams – they would do what was required under the myriad of laws that influence their actions. The Georgia legislators and stakeholders who appeared declined to make specific calls for Corps authorization to substantially increase the amount of water allocated to municipal supply. Nevertheless, legislative proposals doing exactly that are almost certain to be introduced. In general, such one-sided water allocation bills seldom win approval absent agreement by all of the affected states or their congressional delegations.[102]

In the third ring of the circus, the federal government was moving forward on its own, and vowed to do so with or without the States' participation in the process. Interior Secretary Kempthorne made that much clear in his letter to the governors when the most recent round of negotiations failed:

> We will now begin a process to review interim operations that will replace the current program before it expires on June 1, 2008. Federal agencies may subsequently issue further revisions as may be warranted by Federal law, changing hydrological conditions, and new information. Any future changes in interim operations will be necessary only until the water control plans and manuals are revised. That revision process is now beginning and will be organized by

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[101] Transportation and Infrastructure Committee, Subcommittee on Water Resources and Environment – Comprehensive Watershed Management and Planning – Drought Related Issues in the Southeastern U.S., http://transportation.house.gov/hearings/hearingDetail.aspx?NewsID=423 (last visited May 11, 2008). The site has a video of the entire hearing. *Id.*

[102] *See* JOSEPH SAX, BARTON THOMPSON, JR., JOHN LESHY & ROBERT ABRAMS, LEGAL CONTROL OF WATER RESOURCES 835-36 (4th ed. 2006).

> the Army Corps of Engineers with support from the other Federal agencies with relevant expertise and jurisdiction.[103]

The likely meaning of that exemplar of bureaucrat speak is, in this case, rather easy to predict. The Corps is going to continue its current management regime until June 1st and then make whatever changes it is compelled to make by the governing laws. In particular, the Endangered Species Act has the potential to require a change in operations if the drought continues or worsens. That, in turn, means the states and interest groups will try and lobby not only the Corps, but that they will try very hard to influence the current revision of the Fish and Wildlife Service biological opinion and other studies of the basin to their advantage. The battle goes on, even if its endpoint may not be the best resolution of the problem.[104]

As the conflict continues, with small interim victories and losses, the image of Sisyphus looms larger. As long as the parties employ a process they believe can lead to a decisive victory, there is always the likelihood of a decisive loss that cannot be tolerated by the losing side. The losers do not remain quiescent . . . and so the conflict continues or resumes. With that in mind, it is worthwhile to offer a prescription for better results and a quicker resolution of the long-term controversy.

The first step is to pick the low-hanging water-use fruit. All users must seriously conserve and plan for greater water conservation in the future. Upper basin watering restrictions must be in place in every dry year and must be imposed early in the year whenever the reservoirs are not as full as desirable. Drought-resistant landscaping must be encouraged or required. Georgia must significantly limit dry-year Flint basin irrigation and insist on conservation by all permit holders. Non-zero sum storage projects have to be designed and constructed. Impounding water that is tributary to the Chattahoochee is mostly useless because that water would find its way into the existing reservoir system anyway.[105] In contrast, increasing the Atlanta region's maximum water storage is not fruitless if it time-shifts the water availability in a way that supplements Lanier's storage and management flexibility. Bigger gains are available elsewhere in the system. In particular, Flint basin water storage, if feasible, would be a very important management tool. Even small micro projects, such as on farm ponds in the Flint basin, can make a valuable contribution to meeting all of the regional water needs simultaneously.

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[103] Letter from Secretary Kempthorne, Chairman Connaughton to Governors (Mar. 1, 2008), http://www.doi.gov/news/08_News_Releases/080301.html.

[104] *Cf.* Robert H. Abrams, *The Big Horn Indian Water Rights Adjudication: A Battle for the Legal Imagination*, 43 OKLA. L. REV. 71, 86 (1990) (criticizing the effort to "win" a decisive victory in reserved rights cases).

[105] For example, a state-operated dam on a Chattahoochee tributary, upstream of Lake Lanier, impounds water that Georgia can control, rather than the Corps, but the dam may not add to the total water available in the top of the system.

The second step is that a better model of how the basin functions hydrologically and ecologically must be created and used as the shared basis for evaluating water management outcomes. Maximizing strategies for managing the reservoirs under a range of hydrologic conditions must be comprehensively modeled and assessed. Agreeing on a common model is an immensely important first step. Having a single model ensures that there is a consistent data set that everyone is using. From that shared ground, all of the stakeholders can evaluate the management options and then discuss the pros and cons of different strategies. Eventually, for long-term management, the parties have to agree on measures of success/harm, which will further enlighten the discussion of management options. The eventual series of operating policies that emerges needs to have been framed across a wide variety of flow regimes. The most controversial will be how to set extreme low flow priorities. Importantly, the policies must anticipate the need and process for amendment. There is no guarantee, and little likelihood, that the system and the relative importance of uses will remain static.

The final steps lie in recognizing that the nature of the negotiations must change. The users must unite and push the States and politicians to seek real solutions. Pure posturing and pandering to voters must end. Public statements have to reflect the reality that the future will not be the same as the past, and over-generous expectations about water availability and use are a historic curiosity. The states have to make the negotiations more inclusive and transparent. Groups not included in the process have an incentive to try to derail it with actions taken in a satellite forum. Including a broader array of interests improves the chances of a maximizing outcome. The states do not always fully understand the economic and ecological realities of the water users, whereas the users virtually always do.

The negotiations need to become less adversarial. All parties must understand there may be some "win-win" opportunities, but that the total solution will require substantial "lose-lose" compromise. The parties need to resist the urge to redraw the contours of the playing field by moving parts of the dispute to what may seem to be a more favorable forum.

The Corps should function as a technical facilitator, not as a policymaker. Dam operations must, of course, conform to the strict requirements of federal law, but after that, resource management and policy should emanate from the states and the users. Where non-essential federal laws place an impediment to a good solution, amendments need to be considered and enacted.

There are no sacred cows. Water use of all kinds will cost more, directly or indirectly. Atlanta must have a substantial allocation of Lake Lanier water, but Atlanta must accept and embrace permanent and severe water conservation. The buy-out of the Lake Lanier hydropower interests must be allowed. Additional storage opportunities must be found. Flint basin management and restriction of irrigation must be part of the ACF basin solution. Navigation cannot be a full year, every year, proposition, or it may

have to be abandoned. Flatwater recreation opportunities must be curtailed somewhat in dry years. The estuary will not be as productive as it was under optimal flow conditions. Species recovery plans will be affected.

Even then, Sisyphus will not rest until the reoriented negotiations are successfully cast into a binding, yet dynamic management agreement.