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Considering a Cooperative Water Management Approach in Resolving the Apalachicola-Chattahoochee-Flint River Basin Water War

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NOTES

CONSIDERING A COOPERATIVE WATER MANAGEMENT APPROACH IN RESOLVING THE APALACHICOLA-CHATTAHOOCHEE-FLINT RIVER BASIN WATER WAR

*Natasha Meruelo**

I. INTRODUCTION

Disputes in the United States regarding water supply and water management are nothing new. The interconnectedness of most states in the United States, and the resulting shared water sources, make water conflicts inevitable where water needs are greater than water supply.¹ Even in the southeast United States, a traditionally water-rich area, states are finding themselves embroiled in disputes regarding allocation and use of shared common water resources. These disputes have occurred between Alabama, Georgia, and Florida for over a decade. As cities and industries in these three states rapidly grow, the states are faced with the tasks of making sure they secure enough water to sustain growth, do not take too much out of com-

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1. One scholar writes:

Accordingly, with regard to conflicts over interstate water resources, the forty-eight contiguous states fall into one of two categories: those states that are (or have been) involved in an interstate water conflict or those states that are going to be involved in an interstate water conflict. In fact, very few states are included in the latter category.

George William Sherk, *The Management of Interstate Water Conflicts in the Twenty-First Century: Is It Time to Call Uncle?*, 12 N.Y.U. ENVTL. L.J. 764, 765 (2005).

mon water supply systems at the expense of the other states, and protect water sources from overuse. The real challenge for Alabama, Georgia, and Florida, however, is to balance accommodating growth in a fair manner while protecting natural water systems and surrounding ecosystems from destruction.

This Note analyzes the ongoing dispute concerning the Apalachicola-Chattahoochee-Flint ("ACF") River Basin, situated between Georgia, Alabama, and Florida, in light of the states' recent difficulties in negotiating an agreement regarding water allocation and management. Although the states reopened federal litigation after a failed effort to resolve the dispute amongst them, they have recently decided to return to the negotiating table. Despite this positive turn of events, the possibility that litigation may once again be restarted is still very real, and the dispute over the ACF could ultimately go before the Supreme Court. In light of the fact that the Supreme Court tends to advise states to resolve water conflicts on their own,² and that the negotiation process is an opportunity for the states to control the outcome of their situation, it is important that the states consider all the solutions that they have at their disposal.

This Note argues that a potential solution to the problem Georgia, Alabama, and Florida face may lie in mimicking the successful implementation of the Tampa Bay Water Authority in Florida, which ended years of fighting between local communities with competing interests in Florida's Tampa Bay region. In many ways, the situation these three states face is analogous to the water wars that north and south Florida were fighting several years ago. Both disputes, in their essence, are between governments representing competing interests over a shared water resource, and both disputes are preceded by a history of self-interest as opposed to a focus on a regional common good.

This Note argues that in the spirit of cooperation that Georgia, Alabama, and Florida have recently re-entered, the states should

2. *New York v. New Jersey*, 256 U.S. 296, 313 (1921) (suggesting that problems involving disputes over usage of common waterways "is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the states so vitally interested in it than by proceedings in any court however constituted."). "In exercising . . . jurisdiction, we are mindful of this Court's often expressed preference that, where possible, States settle their controversies by 'mutual accommodation and agreement.'" *Arizona v. California*, 373 U.S. 546, 564 (1963) (quoting *Colorado v. Kansas*, 320 U.S.383, 392 (1943) and *Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945)).

consider the example of Tampa Bay while at the negotiating table. The creation of an independent water authority, sustained by the cooperation of all three states, which would manage and allocate the resources of the ACF river basin outside of the politics of states' positions, is a viable and long-lasting solution to the ACF dispute. The ultimate success would be a management system that supplements the ACF with new sources of potable water, allocates enough water to satisfy each states' needs, and fosters a cooperative spirit among the states that prioritizes the preservation of the ACF.

This "ultimate success" is modeled on the very real success of Tampa Bay water management. Tampa Bay is an example of responsible management of a valuable natural resource while keeping the overall best interests of a community at large in mind when making water-related decisions. This should be the framework for any agency that is created to manage a common resource shared by many communities. The Tampa Bay model may provide much insight and knowledge that could help solve the problems posed by the ACF river basin dispute. A successful implementation of a similar model in the ACF water war could forever change the resolution of future interstate water wars.

II. BACKGROUND

The southeastern area of the United States has been typically considered free of the major water issues that have plagued the southwest and western states.³ But, as a result of accelerated urban growth and climate change,⁴ many states have started to find them-

3. Emily Yellin, *Alabama, Florida and Georgia Fight Crucial Water War*, N.Y. TIMES, Mar. 2, 2000, at A14; Andrew Ward, *Atlanta's Thirst Escalates Water War: Three States Feud over Supplies As the Population of Georgia's Capital Doubles Over 20 Years*, FIN. TIMES (ASIA ED.), Sept. 8, 2006.

4. Yellin, *supra* note 3, at A14. "According to the Drought Monitor, drought now extends from southeastern Mississippi eastward into southern Alabama and northwestern Florida and on into central and northeastern Georgia." *Drought Moves Into U.S. Southeast*, NOAA MAGAZINE, Apr. 22, 2004, available at <http://www.noaanews.noaa.gov/stories2004/s2213.htm>; see also National Drought Mitigation Center, *Percentage of the South Atlantic Gulf Basin Experiencing Severe to Extreme Drought (2004)*, <http://www.drought.unl.edu/whatis/palmer/satl-gulf.gif> (graph showing that since 1995 up to 55% of areas in the southeast have experienced severe to extreme drought depending on the year). Much of the area encompassing the ACF water basin is currently experiencing abnormally dry conditions, with some areas of Georgia and Florida experiencing moderate drought conditions. U.S. Drought Monitor Archives, <http://drought.unl.edu/dm/ar>

selves engaged in what is commonly referred to as “water wars”.⁵ One such war has been raging between Alabama, Georgia, and Florida for decades.⁶ This water war concerns the Apalachicola-Chattahoochee-Flint [ACF] River Basin, which is one of the largest in the southeast and flows through all three states.⁷

The three states are waging one of the bitterest water wars the nation has seen in decades. They are flailing away at one another for a guaranteed share – at least through the next 30 to 50 years – of the rivers in two major basins flowing across their common borders. The squabble’s outcome is crucial, because it could dictate the pace of future growth in the three states and be a preview for other water wars that surely will erupt in the South.⁸

The ACF river system is of vital importance to Alabama, Georgia, and Florida.⁹ Under the operation and control of the Army Corps of Engineers, it is used for flood control, hydropower, commercial navigation, potable water supply, recreation and a multitude of other purposes.¹⁰ Due to the fact that the system must meet so many needs for so many people, the water’s distribution and use by each

chive.html (to view data used in preparation for this Note, set webpage search settings to Region: Southwest and Date: Dec. 12, 2006).

5. Charles Seabrook, *Atlanta and Southeast*, in *ITT INDUSTRIES GUIDEBOOK TO GLOBAL WATER ISSUES* 16, 16-18 available at <http://www.itt.com/water-book/page16.pdf>.

6. Yellin, *supra* note 3, at A14.

7. The Chattahoochee and Flint Rivers merge in Lake Seminole, located in Georgia, where they form the Apalachicola River, which flows through the panhandle of Florida into the Apalachicola Bay, and ultimately flows out into the Gulf of Mexico. The river system runs along much of the Georgia-Alabama border on its way to Florida. Apalachicola-Chattahoochee-Flint River Basin NAWQA Study, Description of the ACF River Basin Study Area, <http://ga.water.usgs.gov/nawqa/main.description.html> (last visited Apr. 24, 2007).

8. Seabrook, *supra* note 5, at 16.

9. The ACF basin is used by the Army Corps of Engineers to support various projects such as “providing flood control, hydropower, navigation, water supply, water quality, recreation, and fish and wildlife conservation,” to each state which touches the river system. *Effect of Corps of Engineers Projects on Georgia Agricultural: Testimony before the Comm. on S. Agriculture, Nutrition, and Forestry*, 109th Cong. (2006) (statement of Commander Joseph Schroedel, U.S. Army Corps of Engineers).

10. *Id.*

state has led to fighting, especially when environmental conditions have been poor or water has been less plentiful.¹¹

The origins of the current dispute can be traced back to the actions resulting from the relationship between the US Army Engineer Corps and Georgia with respect to Lake Lanier, which was originally created by the construction of the Buford Dam.¹² Around 1989, after Georgia had suffered several droughts and water shortages, it asked the Army Engineer Corps to help it secure a more stable and guaranteed source of water that could support its rapid urban growth.¹³ The Army Engineer Corps concluded that water be taken out of storage in Lake Lanier as necessary to help Atlanta meet its growing water needs and initiated the contractual steps necessary to begin this proposed distribution.¹⁴ However, while Lake Lanier is the main source of drinking and municipal water for Georgia, it also affects the flow of the Chattahoochee River as it makes its way down south, becoming what is known as the ACF, to Alabama and Florida who need adequate flow to meet their own needs.¹⁵

Alabama objected to the Army Corp's proposed reallocation of water out of fear that Georgia's immense needs for water in the Atlanta metro area would severely impact Alabama's users downstream because less water would be left to release downstream and brought litigation against the Army Engineer Corps proposed actions to aid Georgia in 1990.¹⁶ Alabama argued that the Army Corp's recommended reallocation of water would unfairly favor Georgia's interests over Alabama's,¹⁷ which had equal riparian rights to the river basin. Alabama also argued that the Army Corp's reallocation plan violated the National Environmental Protection Act ("NEPA"),

11. "The Apalachicola-Chattahoochee-Flint Rivers system currently exists in two environments which make any and all operation and management decisions a challenge. First, as I have previously discussed, is the drought . . . [t]he second environment is a much greater challenge and that is the disagreement among the states over water allocation and best management of the system." *Id.*

12. Alabama Rivers Alliance, Water Wars Background, <http://www.alabama-rivers.org/tristatewarsbackground.htm> (last visited Apr. 24, 2007); Dusty Nix, *New General in Water Wars*, COLUMBUS LEDGER-ENQUIRER, Oct. 26, 2006.

13. *Southeast: Interstate Water Compacts Proposed Among Alabama, Florida, Georgia*, Daily Env't Rep. (BNA), Dec. 17, 1996.

14. Sherk, *supra* note 1, at 771; *see also*, Alabama Rivers Alliance, *supra* note 12.

15. Ward, *supra* note 3.

16. Sherk, *supra* note 1, at 771-72; Nix, *supra* note 12.

17. Alabama Rivers Alliance, *supra* note 12.

42 U.S.C. §4321,¹⁸ by failing to consider the serious environmental impacts the plan would have on Alabama as a downstream state¹⁹ and asked for a preliminary and permanent injunction that would require the Army Corps to fulfill requirements set out by NEPA and also halt its plans to withdraw or increase withdrawal of water from Lake Lanier to meet Georgia's needs.²⁰ Shortly after Alabama initiated this lawsuit, Florida and Georgia petitioned to intervene in the litigation.²¹ Florida joined due to its concern that diversions of water in the ACF river basin would also substantially affect its oyster industry in the Florida panhandle by changing the Apalachicola Bay's salinity balance and significantly diminish flow necessary to keep the industry thriving.²²

Subsequently, in 1990, the parties agreed to stay litigation and take steps to resolve the dispute over the ACF on their own.²³ The terms of the stay required that the Army Corps was "not to execute any contracts or agreements which are the subject of the complaint . . . unless expressly agreed to, in writing, by Alabama and Florida."²⁴ In 1996, all three states came together and agreed to develop an interstate compact to resolve their issues over the ACF river basin,

18. "The National Environmental Policy Act requires federal agencies to integrate environmental values into their decision making processes by considering the environmental impacts of their proposed actions and reasonable alternatives to those actions." Environmental Protection Agency, National Environmental Policy Act (NEPA), <http://www.epa.gov/compliance/nepa/index.html>.

19. Specifically, Alabama argued that the Army Corps violated NEPA for four reasons. First, the Corps failed to prepare a complete Environmental Impact Statement, as required by NEPA and failed to take into account what the overall impacts would be of withdrawing water from Lake Lanier for Georgia's needs. Second, the Corps failed to conduct an environmental review before entering into any preliminary agreements to withdraw more water from Lake Lanier. Third, the Corps failed to "utilize a systematic, interdisciplinary approach", as required by NEPA, in making any re-allocation decisions. *Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1123, n.5 (11th Cir. 2005). Finally, the Corps failed to come up with a way to make sure "presently unquantified environmental amenities and values", were not ignored in its re-allocation of water from Lake Lanier. *Id.*

20. *Id.* at 1122-23.

21. *Id.* at 1123.

22. Bill Kaczor, *White Sands and Shiny Sea Belie Gulf of Mexico's Troubled Waters*, L.A. TIMES, June 28, 1992, at A8.

23. *Alabama*, 424 F.3d at 1123.

24. *Id.*

particularly questions of apportionment.²⁵ The ACF River Basin Compact gave the States the authority to negotiate water allocation formulas for the river basin.²⁶ Although the ACF compact reflected the desire of the states to cooperate to find an agreeable solution to apportionment of the ACF river basin,²⁷ the compact itself provided the states with little guidance, functioning simply as the enabling document that approved the idea that the states should have the power to agree on an allocation formula for the basin's water.²⁸ The compact established the ACF Basin Commission,²⁹ which was composed of the governors of each state as well as one non-voting representative of the United States³⁰ who, in addition to possessing a broad range of general powers,³¹ were in charge of developing, adopting and modifying an allocation formula for equitably apportioning the surface waters of the ACF.³² However, the compact required unanimous approval of any allocation formula.³³ This requirement combined with a mandate for equitable apportionment that was viewed differently by each state proved to be fatal flaws of the compact and prevented the states from agreeing on any of the proposed formulas despite repeated extensions agreed to by the states until August 31, 2003 that exceeded the original deadline set by the Compact for needs,³⁴ the states remained rooted in promoting their own needs first, with Florida and Alabama remaining adverse to Georgia throughout the process.³⁵ Each proposed a different allo-

25. Sherk, *supra* note 1, at 772; Apalachicola-Chattahoochee-Flint River Basin Compact, H.R.J. Res. 91, 105th Cong. (1997) (codified at Pub. L. No. 105-104, 111 Stat. 2219 (1997)).

26. Apalachicola-Chattahoochee-Flint River Basin Compact, *supra* note 25, at art. VII(g)(12).

27. "This Compact among the States of Alabama, Florida and Georgia and the United States of America has been entered into for the purposes of promoting interstate comity, removing causes of present and future controversies, equitably apportioning the surface waters of the ACF, engaging in water planning, and developing and sharing common data bases." *Id.* at art. I.

28. *Id.*

29. *Id.* at art. VI(a).

30. *Id.*

31. *Id.* at art. VI(g).

32. *Id.* at art. VI(g)(12).

33. *Id.* at art. VI(d).

34. *Id.* at art. I.

35. See Harold D. Melton & R. Todd Silliman, *Reflections on the A.C.F. and A.C.T. Basin Compacts*, in PROCEEDINGS OF THE 2005 GEORGIA WATER

cation formula,³⁶ which reflected each state's particular interests at stake, and each failed to take the overall interests of the total river basin and the three surrounding states into account in formulating their proposals.³⁷ Florida's proposal emphasized the protection of its wildlife and its oyster industry³⁸ and insisted that any allocation formula would require any increases in water withdrawal from the basin to only proceed with the mutual consent of all states,³⁹ while Georgia's proposal espoused the view that the ACF water resources be prioritized for municipal and industrial uses, followed by agriculture and the environment.⁴⁰ While the states were able to negotiate a minimum flow level, Florida and Alabama wanted some level of assurance that the ACF would not always be maintained at a minimum flow.⁴¹ Georgia couldn't agree to a guarantee on the issue because it felt that the Army Corps would essentially be forced to operate upstream reservoirs in a way that might not maintain high enough levels from which Georgia could draw for its own needs.⁴² A further tension was Alabama's and Florida's desire to have some control over Georgia's use of water from the ACF by establishing a cap on how much water Georgia could consume.⁴³ Georgia was unwilling to make such a commitment because it wanted flexibility

RESOURCES CONFERENCE 189, 191 (2005), available at <http://www.uga.edu/water/GWRC/Papers/SillimanT-GWRCpaper.pdf>.

36. See, e.g., Letter from Alec L. Poitevint II, ACF Federal Commissioner, to Governor Bob Riley of Alabama, Governor Jeb Bush of Florida, and Governor Sonny Perdue of Georgia (Apr. 8, 2003), available at <http://www.sam.usace.army.mil/briefings/ACT-ACF/03-0417%20Concept%20update.pdf>.

37. See Josh Clemons, *Water-Sharing Compact Dissolves: States Fail to Agree before August 31 Deadline*, 23 WATER LOG 1, 11 (2003), available at <http://www.olemiss.edu/orgs/SGLC/MS-AL/Water%20Log%20PDF/23.3.pdf>.

38. *Georgia Officials Say Tri-State River Pact 'Closer Than Ever'*, U.S. WATER NEWS ONLINE, June 2001, <http://uswaternews.com/archives/arcrights/1geooff6.html>.

39. Press Release, Fla. Dep't of Env'tl. Prot., Statement of Intent to Accompany the Memorandum of Understanding Regarding Initial Allocation Formula for the ACF River Basins (July 22, 2003), available at http://www.dep.state.fl.us/secretary/news/2003/july/0722_acf.htm#intent.

40. NORTHWEST FLORIDA WATER MANAGEMENT DISTRICT, 2000 ANNUAL REPORT 10, available at www.nwfwmd.state.fl.us/pubs/annrpt/ar2000.pdf; see also *Florida to take Georgia, Alabama to Court Over Water Rights*, U.S. WATER NEWS ONLINE, Sept. 2003, <http://uswaternews.com/archives/arcrights/3floto9.html>.

41. Melton & Silliman, *supra* note 35, at 191.

42. *Id.*

43. *Id.*

to manage its water use as its needs shifted.⁴⁴ A final issue of contention was whether the final allocation formula could be suspended due to unanticipated issues such as drought, change in federal laws or regulations, or a mistake in the allocation formula.⁴⁵ While such a provision in the final allocation formula was desired by Georgia, Alabama and Florida ultimately would not agree to include the provision.⁴⁶

Although the states did their very best to work at achieving a compromise on which they could all agree, even agreeing to several key principles for a final allocation formula in July 2003,⁴⁷ the unanimous agreement required by the compact ultimately proved to be too great a hurdle to overcome.⁴⁸ Ultimately, the tension between the states' competing interests killed the preliminary agreement.⁴⁹ As a result, when Florida refused to agree to another extension after the August 31, 2003 deadline occurred because it felt it would not receive enough water under the proposed allocation formula⁵⁰ without a guarantee that the ACF level would usually exceed the minimum flow level agreed upon,⁵¹ the ACF Compact expired.⁵² Florida refused to agree to the proposed allocation formula primarily because it would mean that Florida would receive no more than a "minimum flow" on a day-to-day basis with no likely changes to the level of this flow once the formula went into effect.⁵³

When the compact expired, Florida revived the original litigation entered into in the early 1990s.⁵⁴ This litigation has subsequently

44. *Id.*

45. *Id.*

46. *Id.*

47. Press Release, Fla. Dep't of Env'tl. Prot., Statement by Governor Jeb Bush Regarding Apalachicola-Chattahoochee-Flint River Basin (July 22, 2003), http://www.dep.state.fl.us/secretary/news/2003/july/0722_acf.htm.

48. Clemmons, *supra* note 37, at 11.

49. See *Florida to take Georgia, Alabama to Court over Water Rights*, *supra* note 40.

50. *Id.*

51. Melton & Silliman, *supra* note 35, at 191.

52. Metro Atlanta Chamber of Commerce, Fact Sheet—Interstate Water Conflicts: Georgia-Alabama-Florida, www.metroatlantachamber.com/macoc/initiatives/img/tri-statefactsheet.pdf; 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, 148 (2005).

53. Clemmons, *supra* note 37, at 11.

54. See *Florida to take Georgia, Alabama to Court over Water Rights*, *supra* note 40.

developed into multiple interrelated lawsuits and appeals, which were mostly hashed out in 2005, that are ultimately connected to the main dispute over the ACF.⁵⁵

One lawsuit, the first of two major suits affecting the ACF in 2005, between Alabama, Florida, and the Army Corps of Engineers, requested that the Army Corps be barred from implementing a settlement agreement with hydroelectric power customers that had sued

55. A brief overview of the relationship of the various lawsuits and their parts most relevant to this paper is helpful. Georgia's 2002 lawsuit against the Army Corps resulted in a decision by the 11th Circuit that Florida was entitled to intervene in this lawsuit and that this intervention would not interfere with the 11th Circuit's jurisdiction over the suit. This decision caused the suit to be remanded to the Northern District of Georgia in 2004, which decided that Alabama was also entitled to intervene in this suit but that resolution of this suit would have to be stayed until a substantially similar suit in Alabama, in which Alabama was challenging the Army Corps' reallocation of stored water in the same basin, was resolved since the Alabama District Court had acquired jurisdiction over and spent a significant amount of time dealing with the related suit first. This decision to stay was affirmed by the 11th Circuit in 2005. With respect to the parallel suit going on in the Northern District of Alabama in 2005, the suit concerned Florida and Alabama's objection to a settlement with hydroelectric customers that the Army Corps had agreed to which had been approved by a District of Columbia District Court. The gist of the Alabama court's decision was that the Army Corps could not implement the settlement agreement because it would violate the prior stay order contained in the original 1990 suit over the ACF. In addition, in 2005 a suit still related to Florida's and Alabama's challenge of the Army Corps' management of the ACF and its reservoirs was brought in the Alabama District Court by Alabama and Florida against the Corps and Georgia in the Northern District of Alabama to try and move the dispute in its entirety out of the Alabama District Court and in the direction of being heard by the Supreme Court. The Alabama District Court denied this request and held it had subject matter jurisdiction over the dispute since it was not a controversy between the states but rather between the two states and a government agency. Both 2005 decisions by the Northern District of Alabama were challenged and ultimately decided upon in one decision by the 11th Circuit in 2005. The 11th Circuit held that the Alabama's decision to stop the Army Corps' implementation of the settlement agreement was an abuse of discretion and reversed and remanded this decision. In addition, the 11th Circuit confirmed that the Northern District of Alabama had jurisdiction over the dispute as opposed to the Supreme Court. Finally, in 2006, the Supreme Court denied review of the dispute. *See Alabama*, 424 F.3d 1117; *Alabama v. U.S. Army Corps of Eng'rs*, 357 F. Supp. 2d 1313, 1320 (N.D. Ala. 2005); *Alabama v. U.S. Army Corps of Eng'rs*, 382 F. Supp. 2d 1301 (N.D. Ala. 2005); *Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242 (11th Cir. 2002); *Georgia v. U.S. Army Corps of Eng'rs*, 223 F.R.D. 691 (N.D. Ga. 2004); *Georgia v. U.S. Army Corps of Eng'rs*, 144 Fed. App'x 850 (11th Cir. 2005); *Alabama and Florida v. U.S. Army Corps of Eng'rs*, 126 S. Ct. 2862 (2006).

the Army Corps since such an agreement would violate the agreement to stay litigation the states and the Corps had entered into in 1990, which had not yet been effectively terminated.⁵⁶ Since this case is ancillary to the main dispute at issue between the states, it will only be briefly discussed. The most important outcome of this case was that in a subsequent appeal that also considered the issue of which court had jurisdiction over the ACF dispute, the 11th Circuit affirmed a prior conclusion of the Alabama District Court that it has jurisdiction over the dispute between Alabama versus the Army Corps and the other intervening states regarding the ACF.⁵⁷ As the United States District Court for the Northern District of Alabama had originally stated, “[t]he dispute among the parties as to the allocation of water from Lake Lanier is now centered in this court . . . this case finally is in a posture to move forward with an orderly, legal resolution of this most contentious matter.”⁵⁸

In the second 2005 lawsuit connected to the ACF dispute, Florida and Alabama sued the Army Corps and Georgia as an intervening defendant, to prevent the Corps from implementing current or proposed water supply or withdrawal contracts to reallocate water located in Corps controlled reservoirs fed by the ACF system to fulfill Georgia’s increased water needs.⁵⁹ While the lawsuit is the first discussion of whether the Alabama District Court had jurisdiction over the dispute,⁶⁰ at the heart of Alabama and Florida’s complaints is a disagreement with and challenging of how the Corps intends to manage the reservoirs.⁶¹ While Alabama and Florida have made their feelings known, they have yet to articulate to the court their preferences for management and the court has yet to rule on anything beyond procedural issues.⁶²

56. *Alabama*, 424 F.3d at 1121, 1124-26.

57. *Id.* at 1129-30.

58. *Alabama*, 357 F. Supp. 2d at 1320; *see also Alabama*, 382 F. Supp. 2d at 1333 (concluding that this court may properly exercise jurisdiction over the dispute).

59. *Alabama*, 382 F. Supp. 2d at 1321.

60. *Id.* at 1311-1312 (“If this case someday evolves into a controversy between two states, then the court will have to dismiss for lack of jurisdiction . . . [t]hat day, however, has not arrived.”).

61. *Id.* at 1304.

62. *Id.* at 1333 (granting Florida’s intervention as plaintiff and Georgia intervention as defendant but requiring Alabama and Florida to clarify exactly which agency actions they are challenging).

In the third resulting lawsuit, which was initiated in 2002, Georgia sued the Corps to demanding that more water be drawn out of the reservoirs for the needs of Atlanta and Florida. Florida intervened in this lawsuit to seek this request denied and then Alabama followed suit in 2004 once the 11th Circuit Florida's held Florida was entitled to do so and the case was remanded back to the Northern District of Georgia at which point the Georgia court allowed Alabama to intervene.⁶³ This lawsuit was abated and administratively closed by the 11th Circuit in 2005, pending the outcome of a parallel case ongoing in the Northern Alabama District Court.⁶⁴ Due to that outcome, the Georgia case has not subsequently been reopened and all aspects of the legal battle between the states and the Army Corps will proceed in Alabama.⁶⁵

Thus, the litigation as it last stood had reached only a resolution regarding jurisdiction over the dispute.⁶⁶ Ultimately, the Northern District of Alabama ruled and the 11th Circuit affirmed that until the states are directly suing each other, it will retain jurisdiction over the matter and it will not be possible for the controversy over the ACF to go before the Supreme Court.⁶⁷ Furthermore, the United States Court of Appeals for the Eleventh Circuit denied the parties petition for United States Supreme Court certiorari.⁶⁸

Perhaps knowing that the Supreme Court will not⁶⁹ be making an allocation decision over the ACF for the states any time soon made the three states think twice about continuing to pursue litigation. Whatever the reason, this past summer, the situation has once again changed and the states decided to go back to the negotiating table and make one last attempt to try and work out an agreement amongst themselves regarding an allocation plan, freezing litigation once again.⁷⁰ Although the states had not yet reached an agreement via their court-ordered mediation as of late January 2007, they requested an extension from the Alabama District Court to continue working

63. *Georgia*, 302 F.3d 1242; *Georgia*, 223 F.R.D. 691.

64. *Georgia*, 144 Fed. App'x 850.

65. *Alabama* 357 F. Supp. 2d at 1320 ("The dispute among the parties as to the allocation of water from Lake Lanier is now centered in this court.").

66. *Alabama*, 424 F.3d at 1129-30; *Alabama*, 382 F.Supp.2d at 1311-12.

67. *Alabama*, 382 F. Supp. 2d at 1311-12.

68. *Alabama and Florida*, 126 S. Ct. 2862.

69. *Id.*

70. Stacy Shelton, *More Time Allowed For Water Pact*, ATLANTA J. & CONST., Aug. 30, 2006, at B5.

on formulating an agreement.⁷¹ Despite that this is the third extension since re-opening negotiations, it is nevertheless a positive sign that the states may be able to resolve this on their own after all.⁷²

The issues at play in the dispute today are very much the same issues that existed when the dispute arose.⁷³ Florida and Alabama both argue that because the Army Corps is holding back too much water in Lake Lanier in order to meet Atlanta's ever-growing need for water, they are suffering the consequences.⁷⁴ Namely, this "holding back" is drying up river flow for downstream users and destroying valuable wildlife.⁷⁵

In Alabama's case, a lack of sufficient water flowing down the Chattahoochee River prevents barges from using the river to transport goods for major Alabama cities.⁷⁶ Alabama is also concerned with issues of adequate flow because the water from this river system provides the necessary coolant for the Southern Nuclear Plant Farley in Dothan, Alabama.⁷⁷ Finally, because the ACF system basically creates a border for a significant portion of land between Alabama and Georgia, many cities near this border are growing rapidly and depend upon the ACF for their own water supply.

In Florida's case, there are two main concerns. First, Florida wants to protect its valuable oyster industry in Apalachicola Bay that depends on the freshwater ACF, which flows down into the bay, to maintain an optimal salinity balance integral to the health of the oysters.⁷⁸ In addition, the successful industry has created significant population growth in the area and these residents have also come to depend on the ACF system for some of their fresh water supply.⁷⁹ Second, Florida is concerned about two of its freshwater mussels that are considered endangered species, the Fat Threeridge and the Purple Bankclimber, as well as other threatened wildlife such as the

71. *States Ask for Extension on Water-Sharing Agreement*, ACCESS NORTH GA.COM, Feb. 1, 2007, available at <http://www.accessnorthga.com/news/hall/newfullstory.asp?ID=111209>.

72. *Id.*

73. David McLain, *State Wants Fair Deal On Apalachicola River*, PENSACOLA NEWS JOURNAL, Oct. 26, 2006, at 9A.

74. *See infra* notes 75-80.

75. Ward, *supra* note 3.

76. Stacy Shelton, *Few Water Police Guard Taps*, ATLANTA J. & CONST., June 23, 2006, at A1.

77. *Id.*

78. *Id.*

79. *Id.*

Gulf Sturgeon, which are threatened by diminished flow of the ACF.⁸⁰

Florida took these concerns to the Alabama District Court in 2006 as drought conditions overtook parts of the state. Florida argued that the Army Corps was managing the ACF in a way that endangered these downstream species.⁸¹ Florida specifically contended that the Corps failed to maintain an adequate downstream flow, which is necessary to satisfy the flow needs of the species during times of low flow, by holding back large amounts of water to satisfy the needs of Georgia.⁸² Florida argued that as a result of the Corps' actions, hundreds of thousands of mussels died, including the Fat Threeridge and the Purple Bankclimber, which are protected by the Endangered Species Act ("ESA").⁸³ As a result, Florida argued, the Corps were violating the ESA by failing to make sure its management of the ACF did not "jeopardize the continued existence" of species protected under the ESA or lead to the destruction of protected species' habitat.⁸⁴

On January 31, 2006, Florida moved for a preliminary injunction against the Corps' operation of the ACF River Basin and asked the court to require the agency to stop prioritizing Atlanta's use and release more water downstream and also compel the Corps to temporarily enact a "species protective flow regime."⁸⁵ This motion was denied by the court because the court felt "Florida did not show a substantial likelihood of success on the merits or an irreparable injury."⁸⁶ However, the court did caution the Corps that if it took any future actions that would lead to irreparable injury to the endangered species, Florida would be allowed to seek injunctive relief against the Corps.⁸⁷

80. Ward, *supra* note 3; Shelton, *supra* note 76; *see also*, Alabama v. U.S. Army Corps of Engineers, 441 F. Supp. 2d 1123, 1125 (N.D. Ala. 2006).

81. Alabama, 441 F. Supp. 2d at 1125.

82. *Id.*

83. *Id.*

84. *Id.*

85. *See* Alabama v. U.S. Army Corps of Eng'rs, Case No. 1:90-CV-1331 (Jan. 31, 2006); Alabama, 441 F. Supp. 2d at 1127; Tom Wilmoth, *Corps of Engineers Forced Into Section 7 Consultation on ACF Operations*, ABA ENDANGERED SPECIES COMMITTEE NEWSL., June 2006, at 6, available at <http://www.abanet.org/environ/committees/endangered/newsletter/jun06/endangeredspeciesjun06.pdf>.

86. Alabama, 441 F. Supp. 2d at 1128.

87. *Id.*

In June, Florida took a new tack by filing a motion for a temporary restraining order because it argued that the Corps' management of the ACF resulted in an unlawful take of the endangered species due to the fact that they were dying by the hundred thousand.⁸⁸ The court accepted this argument and granted Florida's motion and ordered that Corps increase flow downstream.⁸⁹ After this occurred, the parties negotiated their own interim agreement to deal with the danger posed to the mussels and the court vacated the temporary restraining order.⁹⁰ While all of this litigation was ongoing, Georgia asked the Northern District of Georgia to make the Corps slow the release of water,⁹¹ due to its concern that the water interests of 4.9 million people in the Atlanta area are more important than saving mussels.⁹² However, before much occurred in the Georgia case, the interim agreement that resulted out of the Alabama litigation expired in July and the Corps subsequently went back to managing the ACF in a way that resulted in inadequate flow to the downstream species.⁹³

Florida returned to the Alabama court and filed a renewed motion for a temporary restraining order.⁹⁴ However, this time, the District Court denied Florida's motion because Florida could not meet its burden that the Corps current operations plan with regard to the ACF resulted in an impermissible take of the endangered species and that such a take would result in irreparable harm before the Fish and

88. *Id.*

89. *Id.*

90. *Id.*

91. Shelton, *supra* note 76.

92. *See* Ward, *supra* note 3.

The IOP [Interim Operations at Jim Woodruff Dam and Release to the Apalachicola River In Support of Listed Mussels and Gulf Sturgeon] has already caused irreparable damage to the security of the ACF Reservoir System. After just three months of operations under the IOP, there is now a substantial risk that the Chattahoochee reservoir system will run completely dry of water, which is unacceptable for the millions of people who rely on the Chattahoochee reservoirs for drinking water and other needs, and is unacceptable to the endangered and threatened species that will be harmed or killed if the reservoirs run dry. The Corps must be ordered to cease releasing any more water than is necessary for the needs of the endangered species until the federal reservoirs can be refilled to safe and sustainable levels

Georgia v. U.S. Army Corps of Eng'rs, Case No. 1:06-CV-1473 (June 21, 2006).

93. *Alabama*, 441 F. Supp. 2d at 1128.

94. *Id.*

Wildlife Services planned to release its opinion on the environmental situation of the endangered species.⁹⁵

Ultimately the real problem has always been and continues to be Atlanta and its explosive growth.⁹⁶ Despite the reality that water shortages have become a fact of life in the southeast in recent years, Georgia wants a guaranteed larger share of the ACF system than the other states, which it may very feel is justified because the majority of the Chattahoochee River, which feeds the ACF system, is located in Georgia.⁹⁷ Without a little give and take, especially on Georgia's part, compromise seems unlikely.

III. DISCUSSION OF LAW

As discussed above, Georgia, Alabama and Florida sought to make use of a congressionally approved interstate compact to try and resolve their dispute over how the ACF river basin's water should be allocated.⁹⁸ Congressional approval of compacts is mandated by the "compact clause" of the United States Constitution⁹⁹ because such agreements between states necessarily implicate the sovereignty of the federal government, which has an interest in making sure states do not jeopardize its sovereignty by joining forces in a way that conflicts with federal interests via such compacts.¹⁰⁰ Interstate compacts have a rich tradition of being used as a way for states to resolve disputes with each other over shared water resources and over twenty such compacts have been overseen and approved by Con-

95. *Id.* at 1132, 1137.

96. Between 1990 and 2000, Atlanta's population grew from 2,959,950 to 4,112,198 people, the largest spike in growth in the years following 1960 (the period of 1980-1990 was the second largest spike in growth). Social Science Data Analysis Network, Analysis of Census 2000, Atlanta, GA, Population Growth, available at http://www.censusscope.org/us/s13/m520/chart_popl.html.

97. See Army Corps of Engineers, Map of ACF River Basin, <http://water.sam.usace.army.mil/acfmap.htm> (last visited Apr. 25, 2007). According to the Army Corps, approximately 74% of the ACF Basin is within Georgia. U.S. Army Corps of Eng'rs, Draft Environmental Impact Statement, Water Allocation for the Apalachicola-Chattahoochee-Flint (ACF) River Basin, 4.10 (Sept. 1998), available at <http://www.sam.usace.army.mil/pd/actacfeis/actMain.pdf>.

98. Apalachicola-Chattahoochee-Flint River Basin Compact, *supra* note 25. The states also passed the compact as law. ALA. CODE §33-19-1 (2002); FLA. STAT. §373.71 (2002); GA. CODE ANN. §12-10-100 (2002).

99. U.S. CONST. art. I § 10, cl. 3.

100. 72 AM. JUR. 2D *States, Territories and Dependencies* § 10 (2006).

gress.¹⁰¹ In addition, they have been expressly recommended by the Supreme Court as the best way for states to resolve water disputes.¹⁰²

With respect to water disputes, the purpose of interstate compacts is for the states to the compact to agree over an apportionment formula between them over the waters of an interstate river, stream or other body of water.¹⁰³ States may make decisions with regard to apportionment based on whatever factors they agree on and such apportionment can take the form of a wide variety of formulas that may aim to equally divide flows of water amongst the states or that apportion more water to some states than others.¹⁰⁴ Whatever the result, the goals of these compacts are to enable states to voluntarily apportion shared water resources in a way they deem most fair and useful.¹⁰⁵ Any apportionment of the waters that states agree upon through the compact is binding upon the citizens of each state and all water claimants, regardless of what water rights a state may have granted particular citizens before this decision and whether or not individual citizens were parties to the agreement.¹⁰⁶

Besides the usage of compacts, judicial resolution of water disputes is an option. However, as clarified in *Alabama v. U.S. Army Corps of Engineers*,

Even though the Supreme Court occasionally exercises original jurisdiction in interstate water disputes, 28 U.S.C. § 1251 circumscribes the Supreme Court's origi-

101. JAN G. LAITOS & JOSEPH P. TOMAIN, ENERGY AND NATURAL RESOURCES LAW IN A NUTSHELL 395 (West Publishing 1992).

102. The Supreme Court states:

The reason for judicial caution in adjudicating the relative rights of states in such cases is that, while we have jurisdiction of such disputes, they involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the Federal constitution. We say of this case, as the court has said of interstate differences of like nature, that such mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power.

Colorado v. Kansas, 320 U.S. 383, 392 (1943).

103. 78 AM. JUR. 2D *Waters* § 72 (2006).

104. *Id.*

105. *Id.*

106. *Id.*

nal jurisdiction based on the identity of the parties to a dispute, not based on the subject of the dispute between the parties The exclusive jurisdiction of the Supreme court [under 28 U.S.C. § 1251(a)] is limited to cases in which the states are and remain opponents in the controversy, regardless of their formal alignment.¹⁰⁷

A. The Alternative to Federal Litigation: Strict Apportionment and a Lack of Autonomy

Absent the states involved in the ACF dispute coming to a resolution on their own, the next step will have to be the states filing complaints against each other in order to get before the Supreme Court, which has traditionally decided water disputes where the dispute seems extreme and where the parties involved are the states themselves. Therefore, once the ACF dispute becomes an interstate dispute, the Supreme Court will have original jurisdiction over the issue.¹⁰⁸

The traditional mode of resolution under the Supreme Court with regard to such water disputes is what is known as “equitable apportionment” of interstate water courses,¹⁰⁹ which is not based on any particular doctrine of water rights but is rather its own federally created common law doctrine of water rights.¹¹⁰ Equitable apportionment is a way of sharing water resources among the states that may be influenced by but is not controlled by common law doctrines of riparian rights or prior appropriations.¹¹¹

Generally, in deciding interstate water disputes, the Court considers the interests of both states.¹¹² The main tenet of equitable appor-

107. 382 F. Supp. 2d at 1309-10.

108. “The judicial Power shall extend to all Cases, in Law and Equity... to Controversies between two or more States” U.S. CONST. art. III, § 2, cl. 1.

109. Jeffery Uhlman Beaverstock, *Learning to Get Along: Alabama, Georgia, Florida and the Chattahoochee River Compact*, 49 ALA. L. REV. 993, 1000-01 (1998).

110. LAITOS & TOMAIN, *supra* note 101, at 396.

111. Beaverstock, *supra* note 109, at 1001. Since most states east of the Missouri River follow the common law doctrine of riparian rights with regards to surface waters, the riparian doctrine is more likely to have influence in the ACF dispute than that of prior appropriation, although its influence may be limited. LAITOS & TOMAIN, *supra* note 101, at 358.

112. Eric Surett et al., *Adjudication and Enforcement*, 78 AM. JUR. 2D *Waters* § 73 (2006).

tionment is that all claims are decided "according to the equities,"¹¹³ which does not mean that the Court must divide the water of a disputed watercourse equally among the states that are entitled to use it. What it does mean is that "the principles of right and equity shall be applied, having regard to the equal level or plane on which all the states stand in point of power and right under the Constitution."¹¹⁴ In other words, the share to which a state is assigned may be based on factors such as what the equity of the situation requires regardless of how individual private rights within one of the states involved in the dispute may be affected by such a determination.¹¹⁵

Accordingly, in the determination of an equitable apportionment of water of an interstate river, the rule of priority is not the sole criterion . . . it is also appropriate to consider additional factors relevant to a just apportionment, such as conservation measures available to both states and a balance of the harm and benefit that might result from the diversion.¹¹⁶

The Supreme Court has decided only a limited number of disputes via the doctrine of equitable apportionment.¹¹⁷ The case that began it all was *Kansas v. Colorado*.¹¹⁸ While the Supreme Court ultimately did not make any apportionment and dismissed Kansas' claim against Colorado,¹¹⁹ the case did establish the way the Court would analyze future interstate water disputes.¹²⁰ In the lawsuit, Kansas argued Colorado was diverting the Arkansas River's flow to Kansas, who was a downstream riparian user with a right to an undiminished flow.¹²¹ In evaluating Kansas' complaint, the Supreme Court stated that it would approach "the dispute upon the basis of equality of rights as to secure as far as possible to Colorado the

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. Equitable apportionment has been used by the Supreme Court in *Wyoming v. Colorado*, 259 U.S. 419 (1922), *New York v. New Jersey*, 283 U.S. 336 (1931), *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017 (1983) and *Colorado v. New Mexico*, 467 U.S. 310 (1984). LAITOS & TOMAIN, *supra* note 101.

118. 206 U.S. 46 (1907).

119. *Id.* at 117-18.

120. *Id.*

121. *Id.* at 48-49.

benefits of irrigation without depriving Kansas of the like beneficial effects of a flowing stream.”¹²² It was in its decision to ignore common law doctrines of water rights and instead focus on balancing the interests of the parties, that the modern federal common law doctrine of equitable apportionment was born.¹²³

Ultimately, after considering the interests of Kansas and Colorado, the Court concluded that the overall injury caused to Kansas by Colorado’s diversion of the river in light of the great benefit of the diversion to the revitalization of thousands of acres of Colorado’s arid lands was not great enough to justify the Court from enjoining Colorado’s use of the water.¹²⁴ In the words of Justice Brewer, “[w]hen we compare the amount of this detriment with the great benefit which has obviously resulted to the counties in Colorado, it would seem that equality of right and equity between the two states forbids any interference with the present withdrawal of water in Colorado for purposes of irrigation.”¹²⁵ The Court dismissed the case because it felt that Kansas had not made a sufficiently compelling argument to demonstrate that the harm it suffered was great enough to outweigh the benefit Colorado gained from use of the river for irrigation.¹²⁶ However, the court did not rule out the possibility that Colorado’s depletion of the river could eventually lead to Kansas’ ability to justly argue that Colorado’s use was no longer an “equitable division of benefits” and would be able to call upon the Court to enjoin such inequitable use.¹²⁷ Scholars have pointed out that in the case of riparian states, there are some possible generalizations regarding the outcome of Supreme Court decisions.¹²⁸ In states that subscribe to the riparian doctrine,¹²⁹ this common law will be

122. *Id.* at 100.

123. *Id.*

124. *Id.* at 113-14.

125. *Id.* at 114.

126. *Id.* at 117.

127. *Id.* at 118.

128. Beaverstock, *supra* note 109, at 1002.

129. Under today’s understanding of the doctrine, riparian rights attach to land that touches a watercourse or where it is the land over which water flows and riparian right holders may “make reasonable use of a watercourse so long as such use doesn’t interfere with reasonable uses of the water by other riparians.” The requirement of reasonable use is important because under the doctrine, every riparian has an equal right of use of a watercourse. Therefore, a riparian may not interfere with the quality of water to the detriment of other riparians and a riparian may not significantly deplete the amount of water to which other riparians have access. Due to these basic rights granted by the doctrine, riparians have the right to access

likely be applied to disputes over river basins but the Court will modify the application of the doctrine as it deems necessary. In addition, the Court has the right to end, change or modify a state's existing uses of a watercourse but the Court rarely exercises this power.¹³⁰

It is helpful to consider the Court's application of equitable apportionment in the eastern water dispute of *New Jersey v. New York*, decided in 1931, to get an idea of what apportionment scenario is likely to befall the ACF river basin if the states manage to get before the Supreme Court.¹³¹ Here, New York wished to divert a large amount of water from the Delaware River and its tributaries to the Hudson River so as to increase New York City's water supply.¹³² New Jersey objected to this because of the negative impact it would have on its own use of the river and insisted the Court apply the common law of private riparian rights to the dispute, with New Jersey as holding a "sovereign" version of the private riparian right to the Delaware River.¹³³

The Court acknowledged that a significant question was to determine which rule regarding water rights should be applied.¹³⁴ The Court stated that in the situation of a water dispute between two states, there was no strict rule.¹³⁵ Instead, the court was bound to consider the interests of both states and balance their interests as best possible.¹³⁶ In this case, it meant allowing both states to use the water for the purposes they wished but with limitations on their use.¹³⁷

While New York's desired daily removal of 600 millions of gallons from the Delaware River wouldn't materially affect the river or its sanitary condition, or affect its ability to remain a source of water supply for New Jersey's people, industries, farmers, or fisheries, it

the watercourse, the right to expect that flow within the watercourse will not be significantly diminished, the right to use the water reasonably, and the right to good water quality. LAITOS & TOMAIN, *supra* note 101, at 359-60.

130. Beaverstock, *supra* note 109, at 1002.

131. *New Jersey v. New York*, 283 U.S. 336 (1931).

132. *Id.* at 342.

133. *Id.*

134. *Id.*

135. "Different considerations come in when we are dealing with independent sovereigns having to regard the welfare of the whole population and when the alternative to settlement is war." *Id.*

136. *Id.* at 342-43.

137. *Id.* at 345.

would still negatively affect New Jersey.¹³⁸ Less water would be available for New Jersey's recreational uses as well as destroy the salinity balance of the river upon which New Jersey oyster fisheries relied.¹³⁹ The balancing of New York City's interest in drinking water and New Jersey's recreational and oyster interests necessitated New York's daily removal from the river to be limited to 440 million gallons, for New York to construct a sewage treatment plant where water entering the Delaware from New York to reduce pollution and for New York to release water from its reservoirs when the Delaware River fell below a certain level, so as to restore flow to the river for New Jersey.¹⁴⁰

What this case reveals is that the Court may prioritize certain uses of water over others when equitably apportioning a shared water-course,¹⁴¹ and such determinations may or may not comport with what the states may actually want or find most important.¹⁴² Once states relinquish their control over how to divide water, they may find themselves unhappy with the decision the Court makes. This is likely why the Court has preferred states decide such disputes between themselves in lieu of having people far removed from the realities of a water dispute make the decisions for them.

In light of the fact that Alabama, Georgia and Florida have gone back to the negotiating table, this is a good opportunity for the states to take control of the apportionment process and make a decision that they feel is a compromise between meeting their collective needs and recognizing what each individual state feels are its most important interests with respect to the ACF river basin. This Note argues in favor of the three states adopting a cooperative water management approach that is modeled after the Tampa Bay example.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* (stating that although New Jersey would suffer damages, they could be balanced by reducing New York's water consumption as opposed to stopping it along with other modifications).

142. *Id.* at 346-48.

IV. ARGUMENT

A. Better Management: The Importance of Meeting Short-term and Long-term Water Goals

This Note argues that due to the diminishing availability of water in traditionally water plentiful regions, a new approach to management of common water sources is needed. In the case of Alabama, Georgia and Florida, this means meeting the short-term goals of sustaining urban growth and water-dependent industries and meeting the long-term goals of finding new sources of fresh water to enhance or supplement the current supply system and also prevent environmental damage that could be caused by overuse of the ACF. One way to do this is via the creation of a cooperative water management authority, which can implement an allotment plan for meeting each state's needs while also coming up with and implementing a plan to prevent overuse or "extinction" of the ACF water supply and its unique ecosystems.¹⁴³

While clarifying each states' interests and needs must be a part of the process of deciding to create a cooperative water management agency, states must also be willing to put their politics and grudges aside in an effort to create an effective water management apparatus. Such politicization and promotions of self-interest were the primary reasons that the compact failed to lead to any agreement.¹⁴⁴ However, the states' decision to go back to the negotiating table shows promise because it appears that all parties have realized that a cooperative process necessitates letting go of their "positions", political or personal, and realizing they share many common interests. Ultimately, a successful water resource management system is possible through effective cooperation, as the Tampa Bay Model discussed below illustrates.

V. THE TAMPA BAY MODEL

The dynamic and history of the Tampa Bay area water wars are very similar to the current water war between Alabama, Georgia and Florida. As a result, the Tampa Bay experience has much to offer in terms of guidance in ending a water war because except for the fact

143. See *infra* Section V.

144. See *supra* notes 35-50.

that this water war concerned ground water as opposed to surface water, it is analogous to the war over the ACF river basin.

A. History of the Tampa Bay Water War

For the past few decades the Florida Tampa Bay area, a western portion of the state that includes Pinellas, Hillsborough and Pasco Counties as well as major cities such as St. Petersburg, Clearwater and Tampa, were consumed by a political water war over the groundwater stored in the Floridian Aquifer.¹⁴⁵

The origins of the water war go back to when Pinellas County, which is nearly surrounded by the saltwater of Tampa Bay and the Gulf of Mexico, used up its potable supply of groundwater under its land and needed a new supply of potable water.¹⁴⁶ The problem was that most of the existing Pinellas County groundwater was unusable because salt from the sea and bay had seeped into the freshwater.¹⁴⁷ Its solution to the problem was partnering with St. Petersburg to buy land throughout neighboring water-rich Pasco and Hillsborough Counties so as to be able to have new access points from which to pump water back to Pinellas County and St. Petersburg.¹⁴⁸ However, this created a serious encroachment on its neighbors' own supply of potable ground water¹⁴⁹ because they too were growing at enormous rates.¹⁵⁰

These actions, coupled with recurring droughts, resulted in the inability of the Floridian Aquifer to replenish itself with enough water

145. Jean Heller, *Tampa Bay Region*, in ITT INDUSTRIES GUIDEBOOK TO GLOBAL WATER ISSUES 14, 14-15 available at <http://www.itt.com/waterbook/page14.pdf>.

146. *Id.*

147. Martin A. Rowland, *The Evolution of Two Water Resource Management Systems: Case Studies of Tampa Bay and the Middle East*, 11 COLO. J. INT'L ENVTL. L. & POL'Y 411, 417 (2000).

148. Heller, *supra* note 145.

149. *Id.*

150. Martin A. Rowland writes:

The Tampa Bay region is experiencing some of the largest increases in population in the state, with Pasco expected to increase 44% by 2010, growing from approximately 280,000 in 1990 to a projected 400,000 in 2010. Likewise, Hillsborough is expected to increase 31% by 2010, adding approximately 260,000 to their approximate 1.1 million in 1990 and Pinellas is expected to increase 17% by 2010, adding over 140,000 people to approximately 1.0 million in 1990.

Rowland, *supra* note 147.

to meet each county's growing water needs.¹⁵¹ The result was destruction of wetlands where pumping was occurring, the death of countless cypress trees and other plant life, the drying up of private wells, and the foundational collapse or damage to many homes where land underneath was suddenly empty.¹⁵²

For many people in this region, water became a political issue that divided them and created an air of distrust.¹⁵³ While the "usurpers" of water legitimately owned the rights to pump water from these areas they were also developing outside their jurisdictional boundaries at the expense of the people in these areas.¹⁵⁴ In addition, especially large owners controlled the main distributor of water in the region, known as the West Coast Regional Authority since they were entitled to more water being the owners of more sources of the water and consequently received this water at lower rates than their neighbors.¹⁵⁵ This only heightened the dislike and distrust many northern Floridians had for their southern neighbors.

B. Development of the Tampa Bay Water Authority

After realizing that the current water management system overseen by the West Coast Regional Water Supply Authority was creating fragmentation amongst the various parties rather than focusing on the long-term future of the region, the parties to the Tampa Bay water war decided to come together and address their problems by the creation of a politically independent water management agency.¹⁵⁶ This plan aimed to make differences in current and future populations and water use among the various jurisdictions involved in the dispute a non-issue by structuring a governance system that would replace West Coast's current system, which required unanimous consensus on all decisions, with a cooperative partnership.¹⁵⁷ The problem with the current system was that it was plagued by political

151. Heller, *supra* note 145.

152. Heller, *supra* note 145, at 14; *see also* KPMG GOVERNMENT STUDY FOR THE FLORIDA STATE LEGISLATURE, WEST COAST REGIONAL WATER SUPPLY AUTHORITY: TAPPING INTO THE FUTURE, EXECUTIVE SUMMARY (1997), available at <http://www.tampabaywater.org/documents/about/governance/ExSumm1997.pdf> (last visited Apr. 25, 2007) [hereinafter KPMG GOVERNMENT STUDY].

153. Heller, *supra* note 145.

154. *Id.*

155. *Id.*

156. KPMG GOVERNMENT STUDY, *supra* note 152, at 2.

157. *Id.*

divisions, which were difficult to overcome because any member could veto an action simply by withholding its support.¹⁵⁸ The result was that the Authority often couldn't make final decisions with regard to water distributions or developing new water sources.¹⁵⁹ Interestingly, this resembles the ACF compact and its requirement of unanimity, which proved to be an unworkable flaw in reaching a resolution and led to the expiration of the compact.¹⁶⁰

An additional issue was that West Coast did not control or own many of the well fields, which further restricted its ability to operate outside of political constraints.¹⁶¹ Finally, parties were in conflict because of the disparity in the amounts of water they received and because they each had to pay different prices for the water.¹⁶²

The parties felt that a new approach necessitated prioritizing the overall region's interests as opposed to individual interests and developed the Master Water Plan with this idea in mind.¹⁶³ They agreed that by allowing the Authority to function in a regional manner, it could supply water in a more efficient way and at equitable prices to all if the Authority, representing the region as a whole, took on and owned all the capital, assets, operations, and costs of maintaining the facilities and the services.¹⁶⁴ In addition, the plan specified that there should be no individual entitlements to water and each jurisdiction would take no more than it needed as opposed to the system before where individual acquisition of as much water as possible was the goal, irrespective of whether the party needed that much water at the time.¹⁶⁵ This meant that all members had equal access to all parts of the water system and none had more entitlement to it over another.¹⁶⁶ All parties would also share equally in the benefits and burdens of the system under the plan.¹⁶⁷ Another element of the regional plan was that each party would pay the same price for water and each party would guarantee project financing that

158. *Id.*

159. *Id.*

160. Apalachicola-Chattahoochee-Flint River Basin Compact, *supra* note 25, at VI(d).

161. KPMG GOVERNMENT STUDY, *supra* note 152, at 3-4.

162. *Id.*

163. *Id.* at 5.

164. *Id.* at 6-9.

165. *Id.* at 6.

166. *Id.* at 8.

167. *Id.* at 6-9.

was independent of its voting authority.¹⁶⁸ Finally, only a majority of votes would be required to allow the Authority to act and all representatives on the voting Board would be publicly elected to ensure public accountability.¹⁶⁹

Ultimately, the Master Water Plan, which had been developed under and recommended by the KPMG Governance Study, was implemented and came into being under the newly named Tampa Bay Water.¹⁷⁰ Above all, the goal was to promote regional cooperation,¹⁷¹ something that is often missing in the most serious disputes over water.

Tampa Bay Water ("TBW") was created via agreement of Hillsborough, Pasco and Pinellas Counties as well as the cities of St. Petersburg, New Port Richey and Tampa on October 1, 1998.¹⁷² In return for the six governments relinquishing their groundwater pumping wells and their rights to individually develop water supply facilities, the agency became the sole water provider for all six governments and took exclusive control of the previously independently owned groundwater sources.¹⁷³ The agency also pledged to lessen the governments' reliance on groundwater by developing new water sources.¹⁷⁴ Today it is a hugely successful water management system that controls the distribution of Tampa Bay area groundwater, water previously owned by the parties to the agreement, and provides it as wholesale water to member utilities that use the water to meet the needs of over 2 million people.¹⁷⁵ A unique feature of TBW is that it has created more water for its six constituent governments by investing in technologies to desalinate seawater and has created a larger pool of water from the government to draw their

168. *Id.*

169. *Id.* at 6-7.

170. GOVERNANCE REPORT FOR THE FLORIDA LEGISLATURE, WEST COAST REGIONAL SUPPLY AUTHORITY: CHARTING A POSITIVE COURSE TO REGIONAL WATER SOLUTIONS, EXECUTIVE SUMMARY 2 (1998), available at <http://www.tampabaywater.org/documents/about/governance/ExSumm1998.pdf> (last visited Apr. 25, 2007) [hereinafter GOVERNANCE REPORT FOR THE FLORIDA LEGISLATURE]; Tampa Bay Water, Governance Facts, <http://www.tampabaywater.org/about/governancefacts.aspx> (last visited Apr. 25, 2007).

171. *Id.*

172. Tampa Bay Water, Governance, <http://www.tampabaywater.org/about/governance.aspx> (last visited Apr. 25, 2007).

173. *Id.*

174. *Id.*

175. Tampa Bay Water, Welcome to Tampa Bay Water, <http://www.tampabaywater.org/index.aspx> (last visited Apr. 25, 2007).

supply by integrating desalinated water with groundwater pumps already in place as well as developing a growing pipeline system that delivers surface water to the “pool.”¹⁷⁶ The success of the agency ended the litigation that had been ongoing between the governments, gained the support of the Florida state government via increased funding and an alliance between six governments previously engaged in a bitter water war.¹⁷⁷

While the Tampa Bay example concerns the resolution of intrastate disputes over groundwater, rather than an interstate dispute over surface water at issue in the ACF water war, the TBW example is nevertheless an excellent and analogous situation from which Alabama, Georgia and Florida may learn in considering a new way to resolve their allocation problems.

The feature of TBW that has most contributed to the creation of agreement and harmony over groundwater allocation in the Tampa Bay region is its system of governance, which is based on a cooperative model, in which all members have an incentive to work towards a common goal as opposed to the previous model of governance which stressed individualistic behavior.¹⁷⁸ TBW is controlled by a Board of Directors, which is made up of representatives of each government constituent of the agency.¹⁷⁹ Today’s Board is made up of two elected representatives from each member county and one elected representative from each member city to ensure balanced voting power.¹⁸⁰ Only a simple majority is needed for the agency to take action.¹⁸¹ In addition, the agreement was made dependent on a water plan which guaranteed that all members would receive water that met quality parameters agreed on by the parties.¹⁸² In these

176. Tampa Bay Water, View Current Supplies, <http://www.tampabaywater.org/watersupply/currentsupplies.aspx> (last visited Apr. 25, 2007); GOVERNANCE REPORT FOR THE FLORIDA LEGISLATURE, *supra* note 170, at 4.

177. Tampa Bay Water, Partnership Agreement, <http://www.tampabaywater.org/about/partnership.aspx> (last visited Apr. 25, 2007).

178. Tampa Bay Water, Governance Facts, <http://www.tampabaywater.org/about/governancefacts.aspx> (last visited Apr. 25, 2007); GOVERNANCE REPORT FOR THE FLORIDA LEGISLATURE, *supra* note 170, at 5.

179. Tampa Bay Water, Board of Directors, <http://www.tampabaywater.org/board/boardofdirectors.aspx> (last visited Apr. 25, 2007).

180. *Id.*

181. GOVERNANCE REPORT FOR THE FLORIDA LEGISLATURE, *supra* note 170, at 10.

182. *Id.* at 11.

ways, the agency ensured that each government's interests would be considered in water allocation decisions made by the Board and that no recipient of water would receive higher quality water than another. In addition, the constituents agreed to avoid future litigation through the creation of the Interlocal Agreement, which requires Tampa Bay Water and member governments to resolve disputes regarding water management via alternative dispute resolution mechanisms.¹⁸³

Another key feature of TBW is its emphasis on finding or creating new sources of water to supplement current water supplies,¹⁸⁴ an idea that would be very valuable should it be implemented in the ACF dispute. Because pumping groundwater, the primary method by which the Tampa Bay region got its drinking water, was very damaging to the local environments, emphasis was on reducing pumping.¹⁸⁵ In order to achieve this goal, which would further an overall good each constituent could benefit from and increase overall water available to everyone involved, the six governments agreed to use local tax revenues to fund developing more costly alternative water supply projects.¹⁸⁶ The effect of making the cost of developing new water supplies a regional cost as opposed to a local one is that it is much easier for development of new sources of water to take place since all voting parties view any project as a cooperative effort which will have benefits they will all share.¹⁸⁷ Today, TBW supplies water from a complex mix of water sources including a surface water treatment plant and the three sources that supply it, six groundwater treatment plants, 13 regional well fields, a seawater

183. Tampa Bay Water, Governance Facts, <http://www.tampabaywater.org/about/governancefacts.aspx> (last visited Apr. 25, 2007).

184. Tampa Bay Water, Master Water Plan, <http://www.tampabaywater.org/watersupply/masterwaterplan.aspx> (last visited Apr. 25, 2007); GOVERNANCE REPORT FOR THE FLORIDA LEGISLATURE, *supra* note 170, at 13.

185. Tampa Bay Water, Governance, <http://www.tampabaywater.org/about/governance.aspx> (last visited Apr. 25, 2007).

186. TBW has coordinated with its mother water management district, the Southwest Florida Water Management District, which has the power to levy property taxes and also receives various sources of funding, to allocate tax revenues to help it develop new sources of water. Tampa Bay Water, Partnership Agreement, <http://www.tampabaywater.org/about/partnership.aspx> (last visited Apr. 25, 2007).

187. *See generally*, GOVERNANCE REPORT FOR THE FLORIDA LEGISLATURE, *supra* note 170.

desalination plant, and almost 200 miles of pipeline.¹⁸⁸ In addition, in recognition that the overall water needs will increase in the future, TBW continues to develop new ideas for increasing available water supplies to meet long-term needs.¹⁸⁹

C. Applying the Tampa Bay Water Model to the ACF Dispute

Before discussing how the Tampa Bay Water example can be applied to the water war between Alabama, Georgia and Florida, the differences between the two situations should be addressed. First, the dispute in Florida centered around connected groundwater sources underlying the land of all governments involved that was being guzzled up and bought up by large-volume consumers at the expense of smaller consumers,¹⁹⁰ while the dispute concerning the ACF river basin is over surface water and is not limited solely to dispute over its uses as a source of potable drinking water and for municipal purposes.¹⁹¹ Second, the dispute between Florida was intrastate while the ACF dispute is interstate.

However, while there are differences between the two water disputes, there are also similarities. Both disputes are between governments with conflicting interests over a shared limited water resource and both disputes are over who gets how much. However, while the parties in the Tampa Bay water dispute successfully resolved their conflicts with each other, the parties to the ACF dispute have so far failed to resolve their fight. The very reason that Tampa Bay is a success story makes it valuable in resolving the ACF river basin dispute: Tampa Bay area governments decided to stop focusing on their individual interests and start treating their shared water resource as a common pool system.¹⁹² When it became clear that a resolution could only be reached once the governments started making decisions that treated regional well-being as the primary goal, the governments were ultimately able to create a successful plan for managing their common water resource to meet the long-term future water needs of the area.¹⁹³

188. Tampa Bay Water, Current Supplies, <http://www.tampabaywater.org/watersupply/currentsupplies.aspx> (last visited Apr. 25, 2007).

189. Tampa Bay Water, Future Supplies, <http://www.tampabaywater.org/watersupply/futuresupplies.aspx> (last visited Apr. 25, 2007).

190. Heller, *supra* note 145.

191. Seabrook, *supra* note 5.

192. Rowland, *supra* note 147, at 456.

193. *See supra* notes 157-89.

The ACF dispute resembles the water-war days of the six Tampa Bay Water government constituents. Just as in Tampa Bay, politicization and individualism prevented resolution.

Groups with a vested interest in the outcome of the compact influenced the ACF river basin negotiations. Each tried to get more water allocated in its favor, irrespective of water's most productive uses. The influence of these groups introduced conflict, making a workable agreement difficult to achieve. Industrial, environmental, municipal, and political interests all made their voices heard . . . political and business leaders of metropolitan Atlanta, environmentalists, and Florida's shellfish and fishing industries as uncompromising interest groups who refused to yield to the demands of other users.¹⁹⁴

The states in the ACF dispute are in need of unification, which creation of an independent water management authority could provide, and, one would hope, lead to long-term results that are not hindered by interest groups or position-based behavior.

So the question becomes: how can the ACF dispute transform from a fight over state interests to a unified plan that treats the ACF river basin as a common pool and manages it in a way that all of its users find fair and satisfactory? This author argues a process similar to the one illustrated in Tampa Bay can be mimicked by the states in this dispute.

First and foremost, the states need to come together and articulate common goals and visions they share of what they hope for the future of the ACF river basin, much like the six governments in the Tampa Bay dispute had to do when they began designing a future water management strategy.¹⁹⁵ Before any plan can be implemented or even created, consensus building is key, and the states must come to see the importance of working together towards regional goals as opposed to individual ones, because the fate of the ACF is a fate that they will all share. As in the Tampa Bay model, consensus building

194. Jody W. Lipford, *Averting Water Disputes: A Southeastern Case Study*, PROP. AND ENV'T RES. CENTER POL'Y SERIES, Feb. 2004, at 11, available at <http://www.perc.org/pdf/ps30.pdf>.

195. KPMG GOVERNMENT STUDY, *supra* note 152, at 5.

could occur through workshops in which each state participates and in which common goals, problems, and issues are identified.¹⁹⁶

The next step will be deciding the logistics of the management system of the ACF. Because this is a dispute between states, certain questions about how an independent water management authority would be formed exist. For example, where would an entity that represents the ACF region and the states bordering it be located? How would funding work? Would the federal government play a role in its existence, or would it be purely the creation and creature of the states?

Any water management authority or system would have to take into account the unique nature of the ACF dispute, being that the water of the river basin would need to be distributed to meet a variety of uses and needs including industrial, municipal, agricultural and environmental as opposed to simply being distributed for drinking water purposes. The management authority would have to find a way to curb huge consumptive uses by Georgia while still finding a way to satisfy Atlanta's drinking water needs. In addition, it would have to ensure that Alabama and Florida receive more than minimum flows, to rectify threats to Florida's wildlife and oyster industry and Alabama's growing riverbank cities, and its ability to use its portion of the ACF for transportation and commerce.¹⁹⁷

This author proposes that an appropriate solution could be reducing how much Georgia takes from the river by supplementing the water that would be taken from the ACF with alternative sources of potable water developed through a management authority at the shared expense of all its government constituents. This would allow more water to flow downstream to satisfy Alabama and Florida's uses. The exact dynamics of what level of flow could be maintained would depend on how much alternative water sources could contribute to reduction of Georgia's withdrawal of water from the ACF and would be modified according to Florida and Alabama's actual needs or uses, which would likely fluctuate based on factors such as drought levels and population growth. Consequently, a water authority would have the task of closely monitoring these conditions as well as developing new sources of water.

In terms of how the management authority would function, it would appropriate for the basic governance of the authority to mimic

196. *Id.*

197. Lipford, *supra* note 194, at 8-9.

that of Tampa Bay Water, because such a structure would allow the concerns of the states party to the ACF dispute to be fairly and democratically weighed and disputed.¹⁹⁸ Therefore, creation of a Board of Directors made up of an equal number of voting members from each state would be ideal. The states should also consider including an equal number of impartial federal voting representatives to prevent factions from gaining control of the Board. This concern over factions is a possibility considering Florida and Alabama have consistently come together to oppose Georgia's proposals for the ACF in litigation¹⁹⁹ and may be persuaded to continue this tack where they both have interests adverse to Georgia in any voting decisions. One such possibility could be a scenario where both Alabama's and Florida's votes would be required to allow Georgia to increase its water withdrawal from a water management system. In such a case, without a fourth "party" in the form of the federal voting representatives, they could always overpower Georgia where a majority vote is required. In addition, an analogous voting and financing structure, where no one member could veto decisions with respect to the ACF by withdrawing financial support and where all decisions require a majority vote is desirable.

Finally, developing new sources of water to supplement the ACF, especially for the purpose of providing drinking water to growing cities in all states, should be a focus of the management authority's plans in the immediate future. The states, similar to the constituent governments of Tampa Bay Water, should consider implementing a water management system that incorporates some combination of desalinated water, groundwater pumping, surface water, and any other water creation technologies to supplement water being distributed from the ACF to the states.

D. Potential Problems with Implementing an Independent Water Management Agency

While this Note outlines a basic application of how the Tampa Bay Water model could be applied to the ACF dispute, there are still unanswered questions regarding whether it is a possible solution. For example, what the role of the Army Corps would be in regards to the

198. See GOVERNANCE REPORT FOR THE FLORIDA LEGISLATURE, *supra* note 170, at 5.

199. See, e.g., *Georgia*, 302 F.3d 1242; *Alabama*, 382 F. Supp. 2d at 1311-12, 1321, 1333; *Georgia*, 223 F.R.D. 691.

development of a regional independent water authority is unclear. Currently, the waters of the ACF river basin are controlled, owned and managed by the federal government through the Army Corps of Engineers.²⁰⁰ In addition, any change to how water is withdrawn or managed within the ACF must be consented to by the Corps.²⁰¹

The significance of the Corps in the ACF will no doubt impinge upon the ability of any jointly created regional water authority to be truly independent if it has to constantly consult with the Corps. This is an issue that the states will have to deal with should they decide that development of a regional water authority is desirable. One possible solution could be that the Corps continues to manage the reservoirs and dam system on the ACF but contract directly with the authority, as opposed to individual states, to provide and distribute water in accordance with the decisions made by its Board. In addition, the influence of the Corps over the ACF should not interfere with any decisions the authority could make with respect to developing and implementing new sources of water that are unrelated to the surface water of the ACF.

VI. CONCLUSION

The water war between Alabama, Georgia, and Florida is an example of where the creation of an improved management approach decided upon by the parties outside of the courts could have lasting benefits and value to each state. This Note proposes that while the states remain in a spirit of cooperation regarding their dispute over the ACF, they seriously consider implementing an independent regional water authority modeled after the Tampa Bay Water authority in lieu of trying to agree on a water allocation formula on their own. Such an approach can have benefits beyond ending the fight over who gets how much, for example, the creation of a permanent physical entity that will be able to make decisions outside of political positions, a concentration on interests that relate to the good of the region, or a focus on creating new sources of water to supplement the ACF and prevent it from drying out and effectively going extinct.

200. See *supra* notes 9-10 and accompanying text.

201. Lipford, *supra* note 194, at 4.