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William L. Andreen

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ALABAMA

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I. Using Surface Water in Alabama.

Like most eastern states, Alabama adheres to the doctrine of riparian rights. In the earliest reported Alabama case involving water law, the Alabama Supreme Court clearly rejected the notion of prior appropriation of water rights. Hendricks v. Johnson, 6 Port. 472 (Ala. 1838). While speaking in terms of riparian law, the court made no clear choice between the “natural flow” rule or the doctrine of “reasonable use.” In a subsequent pair of cases, Stein v. Burden, 24 Ala. 130 (1854) and Stein v. Burden, 29 Ala. 127 (1856), however, the court adopted the natural flow doctrine. The controversy in both cases involved the diversion of water from a creek near Mobile to serve various needs in that city some three to five miles away. This diversion injured a lower riparian owner who was operating a mill along the creek. The Supreme Court held that a riparian owner had the right to use and consume water for natural, domestic purposes, despite the harm that might occur to a lower riparian. Artificial uses, however—such as use by a city some miles distant—were severely restricted. Although landowners may divert water for artificial purposes, they must return the water to its natural channel—minus amounts used “in the gratification of ordinary wants”—before it reaches the lands of lower riparian owners. 29 Ala. at 133.

As was the case in many eastern states at that time, the natural flow doctrine was adopted because flowing waterways were a necessity for powering the grist, flour, and cotton mills of the day. Farmers and planters also depended on stream integrity, and adoption of the natural flow concept encouraged a more consistent flow of water.

Although the early Alabama cases reflect a preference for the natural flow approach to riparian rights, Ulbricht v. Eufaula Water Co., 86 Ala. 587, 6 So. 78 (1889), began a journey toward the reasonable use doctrine. The case involved another diversion of water for municipal purposes, but the lower riparian owner was unable to establish any special harm because he was not using the stream for any purpose. Although the court wrote that riparian owners were “entitled to a reasonable use of the water for domestic, agricultural and manufacturing purposes . . . .” (Id. at 591, 6 So. at 79), it held that a diversion for such “an extraordinary or artificial use” was unlawful, unless the water is “restored to its natural channel, where it is accustomed to flow.” Id. Nevertheless, the court refused to enjoin the diversion until such time as the plaintiff could show some actual injury and held that the lower riparian owner was only entitled to nominal damages. The award of damages, however, would prevent the loss of the plaintiff’s rights through adverse possession. [In 1993, the Alabama legislature enacted the regulatory scheme discussed in IV below.]

Not only were the rules governing the use of water gradually changing, but the
Alabama approach to water quality was also evolving as a result of the Industrial Revolution. The original principle was stated in *Lewis v. Stein*, 16 Ala. 214, 219 (1849): One may not use a stream “as to corrupt or impair its quality” to the detriment of lower riparian owners. The growing demands of mining and the needs of the iron and steel industry, however, pressed for some relaxation in the rule, and later cases appear to authorize much more water pollution. See Harry Cohen, *Water Law in Alabama—A Comparative Survey*, 24 Ala. L. Rev. 453, 460 (1972). In *Elmore v. Ingalls*, 245 Ala. 481, 17 So. 2d 674 (1944), for example, the court acknowledged that some loss in natural purity “must be submitted to, in order that the greater good of the public be conserved and promoted,” but added that there is a limit. *Id.* at 484, 17 So. 2d at 676. “The watercourse must not be . . . so corrupted and polluted, as practically to destroy or greatly impair its value to the lower riparian proprietor.” *Id.* In order to prevail, the riparian owner must still be able to show substantial injury, that the damages occurred within the preceding year, and that the defendant caused at least a portion of the injury. The riparian owner also must contend with the defenses of prescriptive right and estoppel. Harry Cohen, *Water Law in Alabama—A Comparative Survey*, 24 Ala. L. Rev. 453, 461 (1972). Even so, the lower riparian sometimes succeeded. Cities, for instance, have been enjoined from dumping sewage into a stream, *Howell v. City of Dothan*, 234 Ala. 158, 174 So. 624 (1937), and a paper mill was found to be creating a public nuisance, *Stone Container Corp. v. Stapier*, 263 Ala. 524, 83 So. 2d 283 (1955).

In the early 1900s, the Alabama legislature passed a number of statutes dealing specifically with “nuisances.” The statutes allow municipalities to abate or enjoin “public nuisances,” but manufacturing facilities may not become nuisances “by changed conditions in and about the locality” after they have been in operation for more than one year—unless they have been guilty of negligence or “improper operation.” Ala. Code §§ 6-5-122 to 127.

Aside from the pollution cases, the courts have consistently held that diversion of streams or the backing up of water to the detriment of neighboring riparians is actionable, regardless of how the act was accomplished. This is true whatever the identity of the diverter.

Although not a great deal is said about the question in Alabama, the cases assume that water can be used only on riparian lands and generally cannot be conveyed off the premises for use on non-riparian lands. Cases like *Ulbricht*, *supra*, however, allow it to happen with only the payment of nominal damages, as long as no injury can be shown by a lower riparian owner. But, a riparian landowner must convey the water; a stranger to the title has no right to take water, except by prescription. See Harry Cohen, *Water Law in Alabama—A Comparative Survey*, 24 Ala. L. Rev. 453, 462 (1972); Op. Ala. Att’y Gen. No. 226 (2000) (stating that non-riparian owners may not consume water from navigable watercourses).

As a consequence of these cases, a right to use water from various waterways is acquired by purchasing riparian land. The decisions on the transfer of water rights in Alabama imply that this can be accomplished only by riparian land transfer. There is no general permit system. If there is a diversion of water, a prescriptive right may be
acquired if the use was exclusive and notorious and was acquiesced to by the actual owner. While some older cases state that the prescriptive period is ten years (see Ala. Consolidated Coal & Iron Co. v. Turner, 145 Ala. 639, 39 So. 603 (1906), Sloss-Sheffield Steel & Iron Co. v. Morgan, 181 Ala. 587, 61 So. 283 (1913)), a much more recent case holds that the applicable period of time is twenty years. City of Mountain Brook v. Beatty, 292 Ala. 398, 295 So. 2d 388 (1974). The right acquired through prescription only extends to the amount of water actually used during the entire prescriptive period. Wright & Rice v. Moore, 38 Ala. 593 (1863). In 2005–2006, the legislature addressed the issue of interbasin transfers for the first time. In doing so, the legislature passed local laws pertaining to all seven counties located in the Tennessee River watershed. These local laws prohibit any additional transfers of water from the Tennessee River basin to any other river basin, although transfers from Morgan County in the Tennessee Valley to Cullman County and Blount County were permitted, subject to various conditions. 2005 Ala. Acts 176; 2006 Ala. Acts 115, 341, 373, 593, 603, 606.

The ownership of the land underlying a water body has generally turned on the concept of navigability. The State of Alabama holds title to the lands under all streams that were navigable at the time Alabama was admitted to the Union and to all lands covered by tidal waters. Pollard’s Lessee v. Hagan, 44 U.S. 212, 3 How. 212 (1845); Submerged Lands Act, 43 U.S.C. §§ 1301–1315. Submerged land owned by the state begins at the ordinary high water mark for nontidal waters and at mean high tide for tidal waters. 43 U.S.C. §§ 1301(a)(1), (2); cf. C.M.A. Rogers III, Comment, Title to Subaqueous Lands in Alabama, 11 Ala. L. Rev. 273, 280 (1959) (stating that the prior Alabama rule was that the state owned only up to the low water mark on navigable rivers). [See generally supra Treatise §§ 6.03, 30.01.] A recent Opinion of the Attorney General confirmed that the bottoms of all navigable waters are owned by the State of Alabama. Op. Ala. Att’y Gen. No. 226 (2000). The Alabama Department of Conservation and Natural Resources catalogs lands owned by the State, and this listing includes those lands located under navigable waters. Ala. Code § 9-15-6. According to the Alabama Supreme Court, the test for navigability for title purposes is a federal question based on whether a waterway was used, is used, or could be used as an avenue for travel or commerce. City of Irondale v. City of Leeds, 122 So. 3d 1244, 1248–50 (Ala. 2013); Wehby v. Turpin, 710 So. 2d 1243, 1250 (Ala. 1998) (citing The Daniel Ball, 77 U.S. 557, 563 (1870). Cf. Op. Ala. Att’y Gen. No. 341 (2002) (stating that the Department of Conservation and Natural Resources bases its determinations upon the navigability factors set forth in Rhodes v. Otis, 33 Ala. 578, 596 (1859), which include reference to the findings of the early nineteenth century surveys of the state).

The Alabama Supreme Court, however, has adopted a broader, more liberal interpretation of navigability when questions of state title, commerce power, or admiralty jurisdiction are not at stake. In a case considering whether a river segment should be deemed a public water for annexation purposes, the court held that a stream could be found navigable “if it has an aptitude for beneficial public servitude, capable of being traversed for valuable floatage for a considerable part of the year.” City of
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Irondale v. City of Leeds, 122 So. 3d 1244, 1249 (Ala. 2013) (quoting a portion of Wehby, which cites the Rhodes decision). Navigability for such public uses, as opposed to title purposes, can be found where a stream is used for recreation (e.g., canoe use) rather than used or capable of commercial use. City of Irondale, 122 So. 3d at 1250. In addition to questions of annexation, the broader definition of navigability could also perhaps be applied to questions of public access. It should be noted that the court relied in part upon a determination by the Alabama Department of Conservation and Natural Resources that this particular stretch of the Cahaba River was navigable. City of Irondale, 122 So. 3d at 1250. Occasional use by a fishing boat or canoe during some portions of the year, however, would not be adequate to establish the existence of navigability for a beneficial public use. Wehby v. Turpin, 710 So. 2d 1243, 1250 (Ala. 1998).

Although the Alabama Constitution states that navigable waterways are public highways and that no “toll” or “wharfage shall be demanded . . . for the use of the shores or any wharf erected . . .” (Ala. Const. art. 1, § 24 (1901)), and statutes regulate the use and kinds of structures that may be placed in navigable waterways (Ala. Code §§ 33-7-50 to -53), the courts have upheld conveyances of the beds of navigable streams to private owners with the condition that the rights of the public be continued. Rogers, supra, at 284–85. These cases are consistent with classic English decisions holding that navigable waterways are held in “trust” for the public good. No Alabama cases, however, mention the “public trust” doctrine as such, although a statute (Ala. Code § 9-11-80) declares that all waters of the state, including impoundments, are “public waters.” [See generally supra Treatise § 30.02.] On the other hand, the statute goes on to state that any non-navigable stream or impoundment located on land held by one person is a “private” water. Id.

While adverse possession and prescription do not run against the state, one Alabama case has held that the state was “estopped” to demand the end to a private use of a navigable waterway bed which had continued for a long period of time. Sullivan Timber Co. v. City of Mobile, 110 F. 186 (S.D. Ala. 1901). Estoppel, however, is only applied against the state in “rare circumstances.” West Dauphin Ltd. P’ship v. Callon Offshore Prod., 725 So. 2d 944, 955 (Ala. 1998). In fact, the payment of ad valorem taxes for nearly fifty years on a piece of disputed and valuable tideland was held not to have disturbed by virtue of estoppel the validity of the state’s title to its “sovereign trust land.” Id. at 955 (stating that “a tax clerk is not in a position to resolve weighty and complicated legal issues . . . involving title to particular property, and thus, a clerk’s erroneous decision to assess certain property in the name of a person claiming title does not represent a calculated decision by the State of Alabama in its sovereign capacity”).

A landowner through whose land a non-navigable stream runs possesses exclusive fishing rights and may, therefore, prohibit fishing on his/her land. Hood v. Murphy, 231 Ala. 408, 165 So. 219 (1936); United States v. Harrell, 926 F.2d 1036, 1044 (11th Cir. 1991). The state, nevertheless, retains authority to regulate fishing in such streams for the purpose of conservation. Hood v. Murphy, supra. A municipality is also entitled to bar fishing on a city-owned impoundment of a non-navigable water. City of
Birmingham v. Lake, 243 Ala. 367, 10 So. 2d 24 (1942).

The Alabama Supreme Court dealt with the question of who controls the surface waters of an impounded, nonnavigable lake, when the lake bed is owned by two neighboring riparians in Wehby v. Turpin, 710 So. 2d 1243 ( Ala. 1998). After discussing the civil law approach which would allow all riparian owners reasonable use and enjoyment of surface waters, regardless of who owns the underlying land, the court adopted the common law rule which is the majority rule in this country. As a result, “the owners of land extending beneath artificial or man-made lakes, not navigable as a matter of law, have surface water rights only in the surface waters above their land.” Id. at 1249. Accord, Purser v. Solid Ground Dev., 45 So. 3d 1249 (Ala. 2010).

In Huff v. Smith, 679 So. 2d 259 (1996), the Alabama Court of Civil Appeals held that any obstruction—whether natural like a beaver dam or artificial like a human structure—which unnaturally enlarges a stream to the detriment of an upper riparian owner gives the upper proprietor the right to seek abatement of a private nuisance. See Roberts v. Brewer, 290 Ala. 329, 276 So. 2d 574 (1973) (holding that a nuisance action would lie in such a situation and affirming a decree which authorized the upper riparian to remove a beaver dam at the upper riparian’s expense and which required all parties to trap the beavers). A trespass action, however, would depend upon proof that the beaver dam resulted from some intentional act by the downstream party, and the failure to remove a dam—even though the lower riparian had often done so prior to a boundary dispute between the two owners—would not support a verdict based on trespass. Huff at 261. Cases in other states, however, have refused to recognize a cause of action in similar circumstances. See Frank v. Garrison, 184 A.D.2d 852, 584 N.Y.S.2d 217 (1992) (holding that owners of rural land have no duty to remove beavers or beaver dams and are not liable to adjacent riparians who have been harmed by flooding); Bracey v. King, 199 Ga. App. 831, 406 S.E.2d 265 (1991) (to the same effect).


Riparian owners are entitled to build piers, docks, or other improvements in front of their riparian lands, subject, of course, to state and federal regulation and as long as the structure does not unreasonably obstruct navigation. Ex parte Cove Properties, Inc., 796 So. 2d 331 (Ala. 2000) (expressly limiting the holding to properties located along generally straight or convex shorelines); City of Orange Beach v. Benjamin, 821 So. 2d 193, 195 (Ala. 2001); Ala. Code §§ 33-7-50, 33-7-51. Equity will enjoin any direct interference with this right. Cove Properties v. Walter Trent Marina, 702 So. 2d 472,
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475 ( Ala. Civ. App. 1997). Such interference would include the construction of a pier by an adjoining landowner which encroaches in front of a party’s waterfront. See Ex parte Cove Properties, supra; see also Miller v. Mendenhall, 43 Minn. 95, 44 N.W. 1141 (1890) (holding that a riparian may recover in trespass and also enjoin a third party who places “an obstruction in the waters in front of his land”), cited with approval in Turner v. City of Mobile, 135 Ala. 73, 129, 33 So. 132, 148–49 (1902). The fact that the adjoining property owner leased the submerged land upon which the pier is built from the state does not alter the situation. See Ex parte Cove Properties, supra this paragraph. Under Alabama law, however, the common-law right of a riparian owner to “wharf out” ends when the owner reaches the point of navigability or “waters of a reasonable navigational depth,” since the right is derived from the right of access to navigable or deep water. Schramm v. Spottswood, 109 So. 3d 154, 161 (2012).

A riparian land owner has a right to land created in front of his or her property by artificial accretion if neither the landowner nor his or her predecessor in title was responsible for the accretion. On the other hand, the state has a superior claim where the landowner or his or her predecessor was responsible for the artificial accretion. Reid v. State, 373 So. 2d 1071 (Ala. 1979); State v. Gill, 259 Ala. 177, 66 So. 2d 141 (1953). In the case of naturally accreted land, the general rule is to divide the new shoreline among the riparian landowners in proportion to their respective rights in the old shoreline. Spottswood v. Reimer, 41 So. 3d 787 (Ala. Civ. App. 2009).

In 2002, the Alabama Supreme Court dealt with a First Amendment challenge to a city ordinance banning commercial advertising on the city’s navigable water in Ex Parte Walter v. City of Gulf Shores, 829 So. 2d 186 (Ala. 2002). The City of Gulf Shores had enacted the ordinance after a small tugboat equipped with a large electronic sign had begun to sail back and forth about 500 yards off of the city’s busy beaches advertising “adult novelties” and “sexy swimwear” for a Gulf Shores store. The court upheld the ban as a reasonable regulation of commercial speech because the ordinance was intended to preserve the natural beauty of the coastline and to prevent the creation of a carnival-type atmosphere, and because a narrower restriction could not achieve those ends. According to the court, it would be “difficult to envision a narrower ban on waterfront advertising that would effectively avoid the creation of the conduct condemned by the city as a ‘public nuisance.’” Id. at 195.

II. Underground Water.

Early Alabama cases concerning the use of groundwater arose from mining controversies. Many of the cases dealt with the drying up of water wells and subsidence or cracking of the surface caused by mining operations. It was said that a miner is not liable for any incidental damages necessarily occasioned by the ordinary and careful operation of a mine “not injurious to the surface, such as the loss of springs or wells fed by subterranean streams.” Corona Coal Co. v. Thomas, 212 Ala. 56, 59, 101 So. 573, 675 (1924). On the other hand, if the wells dried up because of surface subsidence, the miner would be absolutely liable. Id. Henderson v. Wade Sand & Gravel Co., 388 So. 2d 900 (Ala. 1980), overruled the earlier cases and held that where one diverts groundwater from adjoining property as an incident to some use of one’s own land, but does not utilize the water itself, the law of nuisance will apply.
Henderson seems to be saying that while competing beneficial uses of groundwater will be solved by utilizing the reasonable use doctrine, the draining of a mine or a quarry with resulting damage to underground water deposits will constitute the basis for a nuisance action. In 1989, the Alabama Supreme Court reiterated the idea that where there are competing beneficial uses of water (e.g., artesian wells to water cattle and pecan trees and to fill catfish ponds), the traditional American rule of reasonable use will apply. Adams v. Lang, 553 So. 2d 89 (Ala. 1989).

In 1995, the Alabama Supreme Court applied the American rule of “reasonable use” to yet another dispute concerning the use of underground water. In Martin v. City of Linden, 667 So. 2d 732 (Ala. 1995), the court held unlawful a proposal by one landowner, a municipality in this case, to pump water from an aquifer located beneath its property for off-site use where adjoining landowners would be damaged by such consumption.

Confronted with a public water supply contaminated by saltwater, the City of Linden purchased a one-acre tract of land fifteen miles outside its corporate limits in order to drill a deep-water well. The city proposed to extract 500,000 gallons of water per day from the well and pump it to the city for use by its consumers. The proposal was challenged by an adjacent landowner who feared that such a large withdrawal of freshwater could lead to the salinization of the groundwater supplies in that particular area thus leaving her farm without access to freshwater.

In ruling for the adjacent landowner, the court took pains to distinguish the case from the facts in Adams v. Lang, 553 So. 2d 89 (Ala. 1989), where the court had formally adopted the “reasonable use” rule in groundwater cases. In Adams, the use of underlying groundwater to fill commercial catfish ponds had been approved as “reasonable” even though that action periodically caused the neighbor’s wells to run dry. The crucial difference, according to the court, was the fact that in Adams the water was used on the property from which it was pumped, whereas in the current case the City of Linden intended to divert groundwater for use off-site. Such off-site use is impermissible where the withdrawal of groundwater will damage the interests of adjacent landowners. In reaching this conclusion, the Alabama court relied heavily upon the “reasonable use” doctrine as articulated by the Pennsylvania Supreme Court in Rothrauff v. Sinking Spring Water Co., 339 Pa. 129, 14 A.2d 87 (1940).

The Alabama Department of Environmental Management (ADEM) has primary enforcement authority over the Safe Drinking Water Act’s underground injection control (UIC) program. ADEM’s authority to regulate the underground injection of waste, however, derives not only from the Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-26, but also from the Alabama Water Pollution Control Act which defines state waters as including groundwater. Ala. Code § 22-22-9(i)(2). [See generally above Treatise § 55.03.] Pursuant to its authority, ADEM prohibits any person from injecting pollutants into subsurface locations or constructing wells for such a purpose without obtaining and complying with the terms of a permit. ADEM also prohibits “the operation of an injection well which causes or allows movement of a pollutant into [an underground source of drinking water].” Ala. Admin. Code r. 335-6-8-.07 (2)–(3).
III. Diffused Surface Water.

As a matter of history, but with little consistency in actual application, Alabama courts have applied the civil law rule (natural flow) where diffused water controversies arose in rural areas, while applying the common-law rule (common enemy) to incorporated towns and cities. Dekle v. Vann, 279 Ala. 153, 182 So. 2d 885 (1966); Harry Cohen, Water Law in Alabama—A Comparative Survey, 24 Ala. L. Rev. 453, 482–85 (1972); see also Antoine v. Oxmoor Preservation/One, LLC, 130 So. 3d 1204, 1213 (Ala. Civ. App. 2012) (common law rule applies in “urban or developed areas”). Under the civil law rule applicable to rural areas, “land is legally subservient to the natural flowage of surface water and the lower landowner may not disrupt the flow of [surface] water to the upper owner’s detriment.” City of Mountain Brook v. Beatty, 292 Ala. 398, 404, 295 So. 2d 388, 392 (1974). Under the common-law rule, however, “surface water is regarded as the common enemy, and every landowner [in an incorporated town or city] has the right, as a general rule, to take any measures necessary for the protection of his or her own property.” Id.

The common-law approach was significantly modified in 1950 when the Supreme Court held that an upper owner could not collect surface water in a channel and cast it in volume onto a lower owner, even though both lots are located in a city or town. Kay-Noojin Dev. Co. v. Hackett, 253 Ala. 588, 45 So. 2d 792 (1950). This modification continues to be recognized in Alabama. Johnson v. Washington, 474 So. 2d 651 (Ala. 1985). However, lower owners in incorporated towns and cities may construct retaining walls even though such a wall blocks the flow of rainwater and forces it to accumulate on higher land. Burson v. Saliba, 270 Ala. 212, 116 So. 2d 609 (1960). [See generally above Treatise § 10.03, ch. 59.]

The Supreme Court recently declared that a modified civil law rule—a reasonable use rule—should be applied where the burdened land is outside of a city and the upper land is within the municipality. While the upper landowner can change the flow of surface water to improve his property in such a case, he/she has a duty not to unduly burden the lower property by causing “substantial damage.” Street v. Tackett, 494 So. 2d 13, 15 (Ala. 1986); see also Holden v. Edwards Specialties, Inc., 62 So. 3d 1029, 1034 (Ala. Civ. App. 2009), cert. denied (Ala. 2010). At least one fairly recent case has also applied this modified civil law rule in a nonurban setting where the upper estate was developed for residential purposes. Mitchell v. Mackin, 376 So. 2d 684 (Ala. 1979). In cases alleging harm due to the failure to use best management practices to control surface water runoff, injured landowners may introduce evidence of damages occurring both before and after the complaint was filed. Peak v. Parks, 886 So. 2d 97 (Ala. Civ. App. 2003) (involving claims based on negligence, trespass, and wantonness by the owners of a lakefront home against the developer of a 50 acre subdivision).

On the other hand, a drainage easement can be acquired by prescription. The use must extend for 20 years, and must have been “adverse, peaceable, uninterrupted, and under a claim of right” as well as “apparent, open, visible, or notorious.” City of Mountain Brook v. Beatty, 292 Ala. 398, 403, 295 So. 2d 388, 391 (1974). Such an easement may arise either through the actual placement of a ditch or drain on the land of another or by locating a ditch or drainage pipe in such a way that it empties onto

Special rules apply to certain transportation companies. Where a railroad or other track-laying line has interfered with the flow of surface water and injured another, the courts have consistently imposed rather strict liability on the actor. Even if the work is done in a city, the common enemy rule does not apply because the change is not made for the purpose of improving or building on a city lot. *Southern Ry. v. Lewis*, 165 Ala. 555, 51 So. 746 (1910).

In the only Alabama case on the subject, the court held that a landowner has a right to contain seepage from the flow of subterranean waters or springs even though neighboring landowners are injured. *Shanan v. Brown*, 179 Ala. 425, 60 So. 891 (1913).

Although there are no comprehensive statutes on water drainage in Alabama, one statute states that when there is construction of a railroad, public highway “or other construction work,” “all borrow pits, cuts and fills likely to impound water” shall be drained if such an impoundment could endanger public health. Ala. Code § 22-20-10. Another statute authorizes cities and towns to make “all needful provisions” for drainage and sewers. Ala. Code § 11-50-50. Municipalities, however, are not required to maintain proper drainage. *Hendrix v. Creel*, 292 Ala. 541, 297 So. 2d 364 (1974). More specific storm water management legislation was enacted in 1995. Ala. Code §§ 11-89C-1 to 11-89C-14.

IV. Public Regulation of Water Use.

The water resources in the State of Alabama are prodigious, including some 77,000 miles of rivers and streams and 563,000 acres of standing water. After many years of neglect, Alabama has finally begun to address the management of this resource. Prompted by three droughts during the 1980s, falling groundwater levels around metropolitan areas, saltwater intrusion along the Gulf Coast, and a disagreement with the Army Corps of Engineers over proposed increases in Georgia’s withdrawal of water from the Chattahoochee and Coosa Rivers, the legislature passed the Alabama Water Resources Act in 1993. Ala. Code §§ 9-10B-1 to 9-10B-30. The Act recognizes that the welfare of the state depends “upon the dedication of the water resources of the State of Alabama to beneficial use to the fullest extent to which they are capable through the development and implementation of plans and programs to manage such quantitative water resources.” Ala. Code § 9-10B-2(4). The Act also created the Alabama Office of Water Resources as a division of the Department of Economic and Community Affairs, the Alabama Water Resources Commission, and the Alabama Water Resources Advisory Council.

To enable the Office of Water Resources to coordinate and manage the waters of the state, certain users of ground and surface waters must file a “Declaration of Beneficial Use” with the Office. These water users include public water systems, persons who divert, withdraw or consume more than 100,000 gallons of water on any day from
waters of the state, and persons who have the capacity to use 100,000 gallons of water on any day for purposes of irrigation. Ala. Code § 9-10B-20. Most existing users subject to this requirement had to file Declarations by May 23, 1994, although smaller public water systems had until August 22, 1994, and irrigators had until January 1, 1995. See id. The Declaration of Beneficial Use must (1) set forth the source of the water, (2) state the estimated quantity used on an annual average daily basis, (3) estimate the quantity of water potentially withdrawn or consumed on any given day, (4) state facts establishing that the use of this water constitutes a beneficial use (Ala. Code § 9-10B-3(8)), and (5) establish that the proposed use will not interfere with any existing legal use of such water (Ala. Code § 9-10B-20(e)). Beneficial use is defined as “[t]he diversion, withdrawal, or consumption of the waters of the state in such quantity as is necessary for economic and efficient utilization consistent with the interests of this state.” Ala. Code § 9-10B-3(2). [See generally above Treatise ch. 9.]

Declarations of Beneficial Use must also be submitted within 90 days of a substantial change in a user’s diversion, withdrawal, or consumption of water. Ala. Code § 9-10B-19(2). Persons who fail to submit a Declaration of Beneficial Use or who make a false statement are subject to administrative or civil enforcement actions brought by the Office of Water Resources. Ala. Code § 9-10B-5(18), (19).

Once a Declaration of Beneficial Use has been submitted, the Office of Water Resources must issue a Certificate of Use which requires the user to submit annual reports indicating the amount of water diverted, withdrawn or consumed on a monthly basis. Ala. Code § 9-10B-20(e), (f). The Certificates of Use expressly state that they do not confer or modify any permanent interests or rights in the holder to the continued use of state waters. Ala. Code § 9-10B-20(e). So while some commentators have suggested that Alabama is now a regulated riparian state, it must be stressed that the Certificates of Use are not permits. Nothing in the Water Resources Act, in fact, changes or modifies “existing common or statutory law with respect to the rights of existing or future riparian owners.” Ala. Code § 9-10B-27.

The Office of Water Resources is also authorized to conduct “critical use” studies to determine if areas in the state should be designated as “capacity stress areas.” Ala. Code § 9-10B-21. Such a study is an analysis of water availability and existing and future demands for water. If the Water Resources Commission concludes from the study that the implementation of water use restrictions will be necessary because demand exceeds or will exceed supply, then the Commission may designate the area a capacity stress area by means of a rulemaking. Id. Following such a designation, the Commission must initiate a rulemaking which will consider the establishment of “appropriate conditions or limitations” for all Certificates of Use within the area. Ala. Code § 9-10B-22(a). The Commission, in such cases, may also promulgate rules setting forth additional conservation measures and authorizing various water resource projects. Ala. Code § 9-10B-21. Any rules that limit or reduce the amount of water available to those who hold Certificates of Use are implemented and enforced by the Alabama Department of Environmental Management rather than the Office of Water Resources. Ala. Code § 9-10B-23.

The Alabama Water Resource Commission has promulgated regulations governing
the implementation of the Alabama Water Resources Act, Ala. Code §§ 9-10B-1 through 9-10B-30. The rules, published at Ala. Admin. Code (ADECA) r. 305-7-1 through 305-7-12, became effective on February 22, 1994, and set forth the general operating structure of both the Commission and the Alabama Office of Water Resources. More specifically, the rules provide for (1) administrative hearings and appeals, (2) rule making petitions, and (3) the administration of the “Water Use Reporting Program,” consisting of beneficial use declarations, use certificates, and water use reporting. The regulations, however, do not address the conduct of “critical use” studies or the designation of “capacity stress areas,” and no such designations have been made.

The Alabama Office of Water Resources (AOWR) has been primarily concerned with record-keeping and analysis, rather than enforcement. (It has, of course, also been involved with the negotiations concerning the water allocations under both the Alabama-Coosa-Tallapoosa River Basin Compact and the Apalachicola-Chattahoochee-Flint River Basin Compact.) In 2000, however, the state Attorney General issued an opinion in response to an inquiry from the AOWR concerning the issuance of certificates of use. Op. Ala. Att’y Gen. No. 226 (2000). The AOWR basically asked whether it could refuse to issue a certificate if it appeared that the person submitting a declaration of beneficial use was not legally entitled to use or consume the water source in question. The Attorney General replied that the AOWR is statutorily obligated to issue a certificate to any person as long as the declaration contains all of the information required to be submitted by statute and regulation, and establishes, in accordance with Ala. Code § 9-10B-20(e), that the proposed use will not interfere with any existing legal use and is consistent with the goals of the Act. “So, although the AOWR has no discretion regarding whether to issue a certificate of use once a proper declaration of beneficial use has been submitted, it has discretion in determining whether the declaration of beneficial use is, in fact, properly submitted.” Id. at 6.

Following a suggestion made by the Attorney General (id. at 7), the Water Resource Commission amended the regulations governing the content of declarations of beneficial use in 2002. Such declarations must now also set forth the “basis of legal right to use the water to be diverted” and “shall certify that the diversion is consistent with the objectives of the Act.” Ala. Admin. Code (ADECA) r. 305-7-10-.02(2)(a), (b). To be consistent with the objectives of the Act, the applicant must establish that the proposed use is “a lawful, reasonable and beneficial use of water,” is consistent with the “public interest,” and “does not interfere with any legal use of water existing at the time of the application.” Id. at r. 305-7-10-.02(2)(b). The AOWR may now begin to do more than just verify that all of the information is filled out on the application form; it may, in fact, begin to analyze the rights of the applicants to use the water they seek.

Two aspects of the regulatory procedures that apply to administrative hearings and appeals ought to be highlighted for the unsuspecting. First, a request for an administrative hearing must be filed by an aggrieved person within fifteen days after notice of agency action. Ala. Admin. Code (ADECA) r. 305-7-7-.04. Second, an out-of-state lawyer may only represent a party before an administrative agency
(defined to include commissions and other administrative offices) in Alabama if he or
she has complied with the rules governing the appearance of nonresident lawyers pro

Alabama also has a flood plain management act (Ala. Code §§ 11-19-1 to 11-19-24)
which was adopted to meet federal flood insurance requirements. The act is essentially
a zoning/land use planning statute for flood prone areas and does not, in and of itself,
create any authority over the use of water. [See generally above Treatise §§ 60.05,
60.06.]

In response to a drought that plagued much of the state between 2006 and the spring
of 2008, and the lack of an overall water management plan, the Alabama legislature
created the Alabama Permanent Joint Legislative Committee on Water Policy and
members of the state House and seven members of the state Senate, was charged with
developing a state water management plan. The plan was intended to expand the
availability of water in Alabama and to promote conservation. The committee’s
recommendations, including possible legislative and administrative actions, were to be
submitted to the legislature during each regular session. The committee’s initial report
was issued early in 2009, but limited funding has hamstrung its subsequent work. Later
in 2009, a comprehensive review of water use in Alabama was published by the U.S.
Geological Survey and the U.S. Department of the Interior in cooperation with the

In light of recurring droughts and the continuing conflict with Georgia over the river
systems shared by the two states, Governor Robert Bentley created the Alabama Water
Agencies Working Group in 2011 to assess Alabama’s water resource programs and to
make recommendations for updating those programs. The Working Group is composed
of five agencies: the Alabama Office of Water Resources, the Alabama Department of
Environmental Management, the Geological Survey of Alabama, the Alabama
Department of Conservation and Natural Resources, and the Alabama Department of
Agriculture and Industries. After reviewing the Working Group’s initial summary of
water issues in the state, Governor Bentley charged the Working Group with creating
a comprehensive database of the state’s water resources, holding stakeholder
meetings, and recommending a statewide water management plan.

After publishing an issue paper in August 2012 and taking public comment, the
Working Group issued a report, “Mapping the Future of Alabama Water Resources
Management: Policy Options and Recommendations,” in December 2013. Governor
Bentley released the report to the public in April 2014.

The report proposes a process for developing and implementing an initial statewide
water management plan, which would be followed by periodic review, updated
assessments, and, if necessary, revised management plans. Among other things, the
report recommended continued funding for scientific assessments and monitoring,
which would, among other things, establish base flows that could be used as a
component for analyzing instream flow options. The report also recommended the
creation of focus panels to study a number of discrete issues. For example, one focus
group would examine the issue of instream flow by looking at approaches taken by other states, recommending an approach for evaluating instream flow, and recommending implementation strategies. Another group would explore water conservation issues including the use of conservation and efficiency incentives, efficiency standards, and the possible role of water reuse. Yet another group would focus upon state water law and address, among other issues, whether the Regulated Riparian Model Water Code (RRMWC) should be used as a model for possible change in Alabama’s water law. In this respect, it is worth noting that Professor Heather Elliott recently suggested that Alabama adopt a comprehensive water management statute based upon the RRMWC. Such an approach would treat surface and groundwater as a unified resource under a comprehensive permitting scheme and would coordinate water quality regulation with the program for managing water quantity. Heather Elliott, Alabama’s Water Crisis, 63 Ala. Law Rev. 383 (2012).

During the summer of 2014, the legislature passed the Alabama Drought Planning and Response Act. Ala. Code §§ 9-10C-1 to 9-10C-10. The Act directs the Office of Water Resources to develop a drought plan for the state, including measures to encourage water conservation and efficiency. Ala. Code § 9-10C-3(a). In addition, each public water system must establish a drought conservation plan that provides for the implementation of specific conservation measures depending upon the severity of the particular drought. Ala. Code § 9-10C-6. The governor, moreover, is empowered to declare a drought emergency and in such an instance may issue executive orders limiting water withdrawals and allocating water on an equitable basis. Ala. Code § 9-10C-9.

V. Water Pollution and Aquatic Habitat Degradation.

In 1982, the Alabama legislature responded to the need for a comprehensive environmental program by creating the Alabama Department of Environmental Management (ADEM). Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 to -16. ADEM was formed by merging the Water Improvement Commission, the Air Pollution Commission, the Water Well Standards Board, and certain State Health Department functions into a new centralized state agency.

ADEM has been authorized by the U.S. Environmental Protection Agency (EPA) to administer the National Pollutant Discharge Elimination System (NPDES) permit program in Alabama. The Alabama Water Pollution Control Act (AWPCA) ( Ala. Code §§ 22-22-1 to -14), however, is somewhat wider in scope than the federal Clean Water Act, thus giving ADEM’s permit program broader ambit. Because AWPCA does not require that the discharge of a pollutant come from a “point source,” ADEM has substantial power to regulate non-point source discharges. ADEM, therefore, requires businesses to adopt Area Wide Waste Treatment Management Plans (Ala. Admin. Code r. 335-6-6-.04(c)) and holders of NPDES permits to adopt “best management practices.” In addition, the definition of state waters is extremely broad. It encompasses all ground and surface waters in the state regardless of contact with interstate commerce except in one instance. Ala. Code § 22-22-1(b)(2). The exception is for waters that are completely contained and retained upon the property of a single person; unless used in interstate commerce, such waters are not waters of the state. Id.
State-issued NPDES permits require compliance with uniform technology-based effluent limitations promulgated by the EPA. Dischargers, however, are also subject to more stringent permit conditions if necessary to achieve compliance with water quality standards established by ADEM. See William L. Andreen, Water Quality Today—Has the Clean Water Act Been a Success?, 55 Ala. L. Rev. 537, 548–49 (2004). In addition to NPDES permits for direct dischargers into state waters, ADEM requires that persons who discharge industrial pollutants into publicly owned treatment works obtain a State Indirect Discharge (SID) permit. Ala. Admin. Code r. § 335-6-5-.04.

To enforce compliance with NPDES permits, SID permits, and any other requirements of AWPCA, ADEM may issue administrative orders, levy administrative penalties, or institute civil suits seeking damages, injunctive relief, and/or penalties. Ala. Admin. Code r. § 335-6-5-.20(2), 335-6-6-.18(2). The Alabama Attorney General may criminally prosecute any person who willfully or with gross negligence violates AWPCA or any standard promulgated thereunder. Ala. Code § 22-22-14(a). AWPCA, however, does not authorize the filing of citizen suits to enforce its requirements.

ADEM’s administration of the NPDES program has received great criticism from the environmental community in recent years, and in December 2001, a draft U.S. EPA audit of ADEM’s program documented a number of serious problems. According to the audit, Alabama’s NPDES program is poorly funded and inadequately staffed for the number of permittees and facilities it must oversee. ADEM has also failed to develop a written policy for assessing penalties. In addition, EPA stated that ADEM relies too heavily on informal enforcement actions, such as warning letters and noncompliance letters, rather than making adequate use of formal enforcement mechanisms such as administrative orders and civil judicial referrals. EPA also identified two additional problems with ADEM enforcement: low penalty assessments and the use of numerous superseding administrative orders for continuing violations instead of resorting more quickly to civil enforcement actions. After receiving comments from ADEM, EPA’s final audit, issued in December 2002, admitted that it had been unable to document any instances of inadequate penalty assessments. The audit pointed out, however, that an independent evaluation of penalty assessments was impossible since ADEM’s enforcement files had no copies of the penalty calculations, including the calculation of the economic benefit enjoyed by the discharger as a result of its violation. In exasperation, a number of environmental groups petitioned the U.S. EPA in 2002 to take over the administration of the NPDES program in Alabama.

EPA’s 2006 audit of ADEM’s enforcement program indicated some improvement. First, ADEM had recognized the need for a written penalty policy and was in the process of drafting such a policy. EPA encouraged the state to finish this task and urged the state to develop a comprehensive policy, which would, among other things, address appropriate actions to assess and collect economic benefit and gravity portions of a penalty. Second, ADEM had developed a worksheet for NPDES penalty orders that would be placed in a facility’s file and made available for public review. EPA also noted the fact that ADEM had conducted inspections of 95 percent of the major facilities in the state during Fiscal Year (FY) 2005, well over the national average of 64 percent, and 20 percent of the minor facilities, twice the national average. On the
other hand, EPA indicated that ADEM had continued to rely too heavily on informal enforcement approaches. For example, even in cases where a letter of violation (LOV) had proven ineffective in returning minor facilities to compliance, ADEM continued to issue LOVs rather than escalating enforcement to a more formal level.

ADEM’s enforcement program continues to be controversial. In January 2010, a coalition of 14 environmental groups filed a new petition with U.S. EPA requesting the agency to withdraw approval of ADEM’s authority to issue NPDES permits. The 77-page petition cited systemic enforcement failures including insufficient funding, too few inspectors, declining rates of inspection (for example, only 20 percent of major facilities were inspected during FY 2009 and only 1 percent of minor facilities), falling levels of enforcement, and the failure to assess adequate penalties.

EPA Region 4 responded to the petitions to withdraw ADEM’s permitting authority on April 9, 2014. EPA determined that many of the issues raised by the environmental groups did not warrant the initiation of withdrawal proceedings, citing various improvements that ADEM had made at EPA’s behest over the last several years. However, EPA announced that it is holding a number of issues open in order to give ADEM a further opportunity to address concerns raised by the petitions. One such issue involves whether ADEM has sufficient funding, staff, and resources to sustain an adequate permit program. The other issues left open for additional scrutiny pertain more specifically to ADEM’s enforcement program. Although EPA found that ADEM was making good faith efforts to improve its procedures for calculating and recovering economic benefit in its penalty assessments, EPA indicated that it would continue to monitor ADEM’s progress in this respect and would consider the initiation of withdrawal proceedings if the recovery of economic benefit continues to be a weakness. In addition, EPA stated that, while ADEM was making efforts to better calculate and document penalty amounts, it would consider initiating withdrawal proceedings if ADEM’s penalty calculations continue to be inadequately documented and explained or if ADEM is found to be overemphasizing the goal of consistency at the expense of considering other appropriate penalty factors. Finally, EPA deferred making a determination regarding the general adequacy of ADEM’s penalty assessments, stating that it would continue to monitor ADEM’s progress in improving its procedures for calculating penalty amounts.

Currently, 231 waterbodies in Alabama fail to meet water quality standards. These waters have been listed as impaired under section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d) (2006). Water pollution and aquatic habitat degradation have had serious consequences in a state whose waters support a unique and diverse collection of aquatic and water-dependent species. The Mobile River basin, for instance, supports 175 endemic species; unfortunately, over 50 species of aquatic life that used to inhabit the basin are now considered extinct due to pollution and hydraulic modifications. Across the state, 73 aquatic and water-dependent species, which are listed as endangered or threatened under the Endangered Species Act, are considered to be vulnerable by the U.S. Fish and Wildlife Service to the adverse effects of degraded water quality. In 2013, American Rivers named the Black Warrior River as one of America’s most endangered rivers due to threats to fish and wildlife habitat and
drinking water quality posed by a proposed surface coal mine, which would be located along the river’s Mulberry Fork.

EPA has encouraged ADEM to consider the explicit expression of flow as part of Alabama’s water quality standards either through a numeric standard (for example, no more than a specific percentage change from the natural flow regime) or through a narrative standard (for instance, flow adequate to support the aquatic criteria). See Letter from Joanne Benante, Chief, Water Quality Plan. Branch, U.S. Envtl. Prot. Agency, Region 4, to James McIndoe, Chief, Water Division, Ala. Dept. of Envtl. Mgmt. (Aug. 20, 2010). The response from the state, however, was not encouraging, with the Attorney General’s Department objecting to what it termed federal “encroachment into issues of “water quantity [that] have been [traditionally] managed by the State.” See Letter from Jess Nix, Dep. Atty. Gen’l, State of Ala., to J. Brian Atkins, Div. Dir., Ala. Office of Water Resources (Nov. 1, 2012).

As the result of a lawsuit filed in 2000 by the Southern Appalachian Biodiversity Project, the U.S. Fish and Wildlife Service has designated 26 river and stream segments in the Mobile River Basin, covering a total of 1,093 channel miles, as critical habitat for eleven endangered and threatened mussel species. 69 Fed. Reg. 40,084 (July 1, 2004). This critical habitat includes portions of the Tombigbee River (in Mississippi and Alabama), Black Warrior River (in Alabama), Cahaba River (in Alabama), Alabama River (in Alabama), Coosa River (in Alabama, Georgia, and Tennessee), and Tallapoosa River (in Alabama and Georgia). These mussels primarily owe their threatened or endangered status to the construction of dams which have impounded more than 1100 miles of habitat in the Mobile River basin. None of the 11 species can survive in impounded waters. In addition, the Fish and Wildlife Service has designated 245 miles of the Alabama River and 81 miles of the Cahaba River as critical habitat for the endangered Alabama sturgeon (74 Fed. Reg. 26,488 (June 2, 2009)) and approximately 80 stream miles in North Alabama as critical habitat for the threatened rabbitsfoot mussel (80 Fed. Reg. 24,691 (April 30, 2015)).

In another effort to protect the state’s outstanding aquatic biodiversity, the Alabama Department of Conservation and Natural Resources opened the Alabama Aquatic Biodiversity Center in Marion, Alabama, in 2006. The Biodiversity Center houses the largest state aquatic wildlife restoration project in the country. The center has instituted a recovery program for 20 federally protected mussels, including those for which the Fish and Wildlife Service has established critical habitat in the Mobile River basin. Augmentation and re-introduction efforts have already taken place along the Cahaba River, the Coosa River, and Hatchet Creek. Further recovery efforts are planned for a number of other streams as well as additional efforts along the Cahaba and Coosa Rivers.

In 2006, the U.S. Fish and Wildlife Service, in cooperation with the Geological Survey of Alabama, the Alabama Department of Conservation and Natural Resources, and the Alabama Clean Water Partnership, undertook a plan to systematically prioritize Alabama’s designated critical habitats and watersheds of significant biodiversity to more effectively implement projects for the restoration and recovery of imperiled species, as well as to improve aquatic habitat and water quality. This Strategic Habitat
Unit initiative is working in several of 50 designated streams pursuant to a plan that includes resource assessment, restoration of habitat and water quality, recovery of species through propagation-stocking activities, and monitoring for success. Focused assessment activities, coupled with landowner participation and funding from federal, state, and business sources—all managed through a cooperative partnership approach—are producing tangible conservation benefits on those streams.

In a decision upholding the integrity of the water quality standards program, the Alabama Court of Civil Appeals in 2007 affirmed a lower court ruling that overturned an ADEM-issued NPDES permit to a new source because the new facility’s discharge would contribute to an existing violation of water quality standards. Alabama Dep’t Envtl. Mgmt. v. Alabama Rivers Alliance, Inc., 14 So. 3d 853 (Ala. Civ. App. 2007). Although ADEM argued that inclusion of a stream on the section 303(d) list of impaired waters did not prove that the stream was impaired, the court held that inclusion on the list was prima facie evidence of a stream’s impairment.

VI. Regional Water Strife and the Saga of the New and Now Aborted Interstate Water Compacts.

A. Introduction.

Although the Southeastern states have generally enjoyed an abundance of freshwater, growing population pressures, combined with occasional drought conditions, have led to a number of interstate disputes over the use of shared river resources. One such conflict arose during the late 1980s and early 1990s between Georgia, Alabama, and Florida over the water in the Apalachicola-Chattahoochee-Flint (ACF) River basin. A second dispute arose at the same time and involves Georgia and Alabama in a conflict over the Alabama-Coosa-Tallapoosa (ACT) River basin.

B. The Apalachicola-Chattahoochee-Flint System.

The Chattahoochee River rises in the mountains of Georgia, a mere 60 miles north of Atlanta. It then flows for some 434 miles passing by the City of Atlanta and later forming the boundary between Georgia and Alabama for approximately 150 miles. The Chattahoochee combines with the Flint River at Lake Seminole in the southwest corner of Georgia, and together they form the Apalachicola River. The Apalachicola heads south flowing for 106 miles through the Florida panhandle to the Gulf of Mexico where it helps to create and sustain one of the nation’s most productive marine estuaries, Apalachicola Bay. Historically, the Bay has produced approximately 10 percent of the oysters harvested in the United States. There are 16 dams on this system, five built and operated by the U.S. Corps of Engineers. Atlanta receives approximately 70 percent of its water from the Chattahoochee, primarily from Lake Lanier and the Morgan Falls Dam. Lake Lanier is also an important recreational amenity. It is, in fact, the most used Corps of Engineers’ lake in the country.

C. The Alabama-Coosa-Tallapoosa System.

The Coosa River basin starts with a number of small streams in the Blue Ridge Mountains of Georgia and Tennessee. Those tributaries join in Rome, Georgia, to form the Coosa River. The Coosa then flows for 286 miles—mostly through Alabama—to
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a point near Montgomery where it joins the Tallapoosa River and becomes the Alabama River. The Alabama River continues on for another 300 miles toward the Mobile River and Mobile Bay. There are nine dams located along the Coosa River and its tributaries, four dams along the Tallapoosa, and three dams along the Alabama River. Five of the dams are operated by the U.S. Army Corps of Engineers while the rest are owned and operated by the Alabama Power Company. The dams serve a number of purposes including power generation, flood control storage, and providing flows necessary for navigation on the Alabama River between Mobile and Montgomery. Lake Allatoona in Georgia, a Corps project located along a tributary to the Coosa River, is also a major source of water for a portion of suburban Atlanta (Marietta and Cobb County). Much of that water (14 million gallons per day), however, is lost to the Coosa watershed system since it is discharged as wastewater to the Chattahoochee. The Coosa watershed is the largest and most bio-diverse watershed within the Mobile River basin—which itself ranks third in the United States in terms of freshwater fish diversity. The Coosa, in fact, is regarded as one of the richest mussel habitats in the world.

D. The Beginning of the Water Wars.

Until the 1980s there had always been enough water in both basins to meet in-stream and out-of-stream needs. Serious droughts, however, occurred during the 1980s interrupting navigation, reducing hydroelectric production, and prompting the imposition of various conservation measures. Georgia had already been looking into the development of additional water supplies to satisfy the enormous growth which Atlanta was experiencing. Numbering under 500,000 in 1950, the population in the metropolitan Atlanta region reached the 3 million mark by 1990. Today, over 5.8 million people live in the Atlanta metropolitan area. This rapid growth is expected to continue with water demand in the Atlanta area rising from 718 million gallons per day (mgd) in 2010 to 1,202 mgd by mid-century. To meet Atlanta’s growing demands, the Metropolitan Atlanta Area Water Resources Management Study was commissioned in 1973. The study, conducted by the U.S. Army Corps of Engineers (Corps), the Atlanta Regional Commission, the State of Georgia, and the U.S. Environmental Protection Agency, identified a number of alternatives for meeting Atlanta’s long-term water needs in a final report that was issued in 1981. The alternative that received the most support from the federal and state agencies was to build yet another dam along the Chattahoochee, this time a re-regulation dam northeast of Atlanta between the Buford Dam (which created Lake Lanier) and Morgan Falls Dam. The new dam would store outflows released from the Buford Dam during peak hydroelectric operations and release them as needed for water supply. The proposed re-regulation dam produced a furor in the Georgia environmental community, and the President’s Office of Management and Budget declined to support the project.

So, in 1989, the Corps abandoned the proposal for the new dam and proposed instead to more than double the amount of water removed from Lake Lanier, an allocation of approximately 327 mgd for existing uses and 452 mgd for future uses (only about half of which would be returned to the Chattahoochee as wastewater). In addition, plans were being developed to withdraw more water from two Corps’
reservoirs in the Coosa basin, including Lake Allatoona, for use primarily in the northern suburbs of Atlanta (much of which would be discharged into the Chattahoochee basin as wastewater). Concerned about the impact of these additional withdrawals, the Governor of Alabama called on the Corps to suspend its reallocation activities.

Nevertheless, after further study, the Corps in May 1990 recommended additional water withdrawals from the Coosa River basin. Then, in June 1990, the State of Georgia applied for a permit under section 404 of the Clean Water Act, 33 U.S.C. § 1344, to build a new water supply reservoir on the Tallapoosa River—the West Georgia Reservoir—about 5 miles upstream from the Alabama-Georgia state line. It proved to be the proverbial straw. Three days later, the State of Alabama filed suit against the Corps in U.S. District Court for the Northern District of Alabama challenging the Corps' reallocation decisions as a violation of Alabama’s common law water rights and alleging that the Corps had violated NEPA by failing to produce a full Environmental Impact Statement on its reallocation plans. Alabama v. U.S. Army Corps of Eng’rs, No. CV-90-BE-1331-E (N.D. Ala. filed June 28, 1990).

Concerned about the negative impact that additional withdrawals from the Chattahoochee basin might have upon the oyster industry in Apalachicola Bay, Florida intervened in the suit, as did Georgia. The case was soon stayed, however, to give the parties an opportunity to settle the controversy. See Carl Erhardt, The Battle Over “The Hooch”: The Federal-Interstate Water Compact and the Resolution of Rights in the Chattahoochee River, 11 Stan. Envtl. L.J. 200 (1992). The ensuing negotiations proved fruitful. In 1992, the states agreed with the Corps to conduct a comprehensive study of regional water needs and resources. During the course of the study, the states began to recognize the advantages of a permanent mechanism for dealing with allocation issues.

E. The Interstate Compacts.

In 1997, following the completion of the comprehensive study, the states and the federal government reached an agreement on two interstate compacts—one to govern each river basin. The compacts, however, would not allocate water. They would merely create a process through which allocations could be developed based upon equitable apportionment and the protection of water quality and biodiversity. Both compacts were ratified by the respective states and enacted into law by Congress. Apalachicola-Chattahoochee-Flint River Basin Compact, Pub. L. No. 105-104, 111 Stat. 2219 (1997); Ga. Code Ann. § 12-10-100; Ala. Code § 33-19-1; Fla. Stat. Ann. § 373.71 (ACF compact); and the Alabama-Coosa-Tallapoosa River Basin Compact, Pub. L. No. 105-105, 111 Stat. 2223 (1997); Ga. Code Ann. § 12-10-110; Ala. Code § 33-18-1 (ACT compact).

After six years of negotiation, however, the three states were unable to reach an allocation agreement for the ACF river basin, and the ACF compact expired at the end of August 2003. According to the Secretary of the Florida Department of Environmental Protection, “Florida was unable to accept only minimum flows, plus whatever else the upstream states were not able to consume or store. This would place too great a risk on one of the most naturally productive rivers and bays in the United States.”

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Electronic copy available at: https://ssrn.com/abstract=2783962
Ron Word, *Florida To Take Georgia, Alabama To Court Over Water Rights*, Tuscaloosa News, Sept. 2, 2003, at B1. Instead, Florida wanted to create a natural flow regime to protect the delicate ecosystems of both Apalachicola Bay and the river. Georgia, in turn, accused Florida of trying to micromanage its neighbor to the north and declared that, as long as Georgia supplied Florida with certain minimum flows, Florida had to drop conditions that would limit additional withdrawals from Lake Lanier and require additional permits for irrigated agriculture.

While no agreement was reached on the ACF basin, it appeared for a while longer that an acceptable agreement could be forged for the ACT. Those hopes, however, were eventually dashed in part, at least, by the loss of trust engendered by Georgia’s attempts to obtain more water directly from the Corps of Engineers. *See* Stacy Shelton, *Water: Water Accord in Jeopardy, Governors Say*, Atlanta J.-Const., July 23, 2004, at D2. In the final analysis, however, Alabama refused to accept Georgia’s proposal to triple its withdrawals from Lake Allatoona in the Coosa Basin and send half of it, approximately 100 million gallons a day, as wastewater down the Chattahoochee River, unless Georgia agreed to a guaranteed minimum flow in the Coosa even during times of drought. As a result of the impasse, the ACT compact expired on July 31, 2004. According to Alabama’s chief negotiator, “Alabama had to make a choice not to sacrifice our water future just to satisfy Atlanta’s water needs.” *State, Georgia Fail in Bid to Forge Water Use Pact*, Birmingham News, Aug. 2, 2004, at 3B.

After 14 years of negotiation, both compacts had collapsed. Since Congress was not eager to step into the dispute, it appeared likely that the question would eventually find its way to the United States Supreme Court.

The ACT and ACF compacts, nevertheless, were notable in a number of respects. They were the first compacts to apply to Southeastern waters. While over twenty interstate and federal-interstate water apportionment compacts have been previously concluded, all involved Western river basins except for two Northeastern compacts—the Delaware River Basin Compact and the Susquehanna River Basin Compact. (For a discussion of existing water apportionment compacts, see generally above Treatise ch. 46; Joseph W. Dellapenna, *Delaware and Susquehanna River Basins*, Treatise pt. XI, subpt. A (River Basin Surveys)). Enactment of the compacts, unfortunately, was just the beginning of the effort, since the compacts left the toughest and most contentious work—the allocation decisions—to subsequent negotiation. The failure of both compacts may well make Congress reluctant to approve the use of such a framework approach again.

**F. The Struggle over Water Continues.**

In May 2000, Georgia petitioned the Corps to modify its allocation of water from the Buford Dam project (Lake Lanier) in order to increase the amount earmarked for water supply to 705 million gallons a day, requiring approximately 371,000 acre feet of storage. The request would have allocated 34 percent of Lake Lanier’s conservation storage to water supply. After the State of Georgia filed suit in 2001 seeking to compel the Corps to grant its request (*Georgia v. U.S. Army Corps of Engineers*, No. 01-00026-CV-RWS-2 (N.D. Ga. Filed Feb. 7, 2001)), the Corps responded. It denied the Georgia’s petition stating that it lacked authority to grant the request, absent

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congressional action, because water supply was not an authorized purpose of the Buford Dam, and even if it was, the magnitude of the reallocation would substantially impact the dam’s hydropower production.

Meanwhile, the Southeastern Federal Power Customers, a group of electrical cooperatives and municipal power authorities that purchase power produced at the Buford Dam, sued the Corps alleging that the Corps had already improperly allowed a number of water withdrawals from Lake Lanier without providing compensation for the resulting loss of hydropower generation. Southeastern Fed. Power Customers, Inc. v. Caldera, CV No. 2975-TPJ (D.D.C. filed Dec. 12, 2000). While Georgia and a number of Georgia water providers intervened in the case, neither Alabama nor Florida did. They contended that they were not informed about the pendency of the case. In January 2003, the Corps, the Southeastern Federal Power Customers and the Georgia parties announced that they had settled the case. Under the proposed settlement agreement, Georgia would have received an estimated 22 percent of the conservation storage in Lake Lanier (approximately 241,000 acre feet) for water supply pursuant to once-renewable 10-year interim contracts. The contracts would have increased the amount of water allocated to municipal and industrial use by 50 percent in return for a payment of approximately $2.5 million per year.

In October 2003, the U.S. District Court for the Northern District of Alabama found that the settlement agreement violated the terms of the 1990 stay order in its case, and enjoined the Corps from executing the agreement or entering into any new withdrawal contracts affecting the ACF basin without court approval. See Alabama v. U.S. Army Corps of Eng’rs, Preliminary Injunction (N.D. Ala. entered Oct. 15, 2003). In February 2004, however, the U.S. District Court for the District of Columbia, approved the settlement agreement finding that the settlement would not seriously affect the other authorized purposes of Lake Lanier—hydropower, navigation, and flood control—and noting that the question of water extraction from Lake Lanier was a matter of state law, governed solely by the Georgia permitting process. Southeastern Fed. Power Customers, Inc. v. Caldera, 301 F. Supp. 2d 26, 32 (D.D.C. 2004). Nevertheless, the court provided that the agreement could only be executed after the Alabama district court’s injunction was vacated. Id. at 35. In February 2005, the Alabama district court refused to dissolve the preliminary injunction. Alabama v. U.S. Army Corps of Eng’rs, 357 F. Supp. 2d 1313, 1320 (N.D. Ala. 2005).

After intervening in the case, Alabama and Florida appealed the D.C. district court’s approval of the agreement to the D.C. Circuit Court of Appeals. The D.C. Circuit subsequently dismissed the appeal holding that the lower court’s conditional approval of the agreement had not constituted a final order. Southeastern Fed. Power Customers, Inc. v. Harvey, 400 F.3d 1 (D.C. Cir. 2005). Following remand, the D.C. district court stayed the case pending the Eleventh Circuit’s ruling on Georgia’s appeal from the Alabama district court’s order enjoining the execution of the D.C. settlement agreement. The Eleventh Circuit then vacated the injunction. In doing so, however, the Eleventh Circuit did not call into question the Alabama district court’s finding that the Corps had violated the 1990 stay order by signing the agreement. It held rather that the injunction was an inappropriate sanction for a violation that had already occurred.
Alabama v. U.S. Army Corps of Eng’rs, 424 F.3d 1117, 1134 (11th Cir. 2005). The court noted that the lower court did possess civil contempt power and that the appropriate remedy for the asserted violation of the 1990 stay order was a proceeding for contempt of court. Id. at 1134 n.23.

The D.C. district court refused to modify its approval of the settlement agreement, and final judgment was entered. On appeal in the D.C. Circuit, Alabama and Florida asserted that the agreement violated the Flood Control Act of 1944 and the Water Supply Act of 1958 (WSA). They also argued that the Corps violated NEPA by signing the settlement agreement before completing an environmental impact statement (EIS) examining the impacts and alternatives to the agreement. While the agreement provided that the Corps would not implement the water reallocation if the NEPA process precluded it, Alabama and Florida pointed out that this proviso was no real limitation since NEPA merely prohibits uninformed rather than unwise action. Thus, they contended, the Corps made its decision before entering into the NEPA process.

In a major defeat for Georgia, the D.C. Circuit rejected the settlement agreement because it violated the WSA. Southeastern Fed. Power Customers, Inc. v. Geren, 514 F.3d 1316 (D.C. Cir. 2008). The court found that the reallocation of more than 22 percent of Lake Lanier’s storage capacity was a major operational change that required prior congressional approval under section 301 of the WSA. The fact that the reallocation was limited to a period of twenty years did not change that fact. And even if the baseline for reallocation was 2002, after years of incremental reallocations, the additional reallocation of 9 percent or 95,000 acre feet was still deemed significant. See Lara E. Benbenisty, Southeastern Federal Power Customers, Inc. v. Geren: Congress’s Expanding Role in Regulating Interstate Water Disputes, 22 Tul. Envtl. L.J. 123 (2008).

2006 was a dry year in the Apalachicola-Chattahoochee-Flint River (ACF) basin. Florida, consequently, filed a motion in the Alabama district court case in January 2006 seeking a preliminary injunction ordering the Corps to maintain flows in the Chattahoochee River to protect the threatened Gulf sturgeon and a number of threatened and endangered freshwater mussels. In response, in March of 2006, the Corps initiated formal consultation with the U.S. Fish and Wildlife Service (FWS) under § 7 of the Endangered Species Act. During that process, the Corps indicated that flows of less than 8,000 cubic feet per second (cfs) could have damaging impacts on the downstream mussels. As a result, the Corps stated that it would manage releases from its reservoirs in the ACF under an interim operations plan (IOP) until the FWS completed its biological opinion later in 2006. See Florida Fails to Prove Take of Endangered Species in On-Going ACF River System Battle, 1 E. Water L. 271 (Oct. 2006).

Judge Bowdre denied Florida’s motion for a preliminary injunction in April 2006 because Florida had not shown substantial likelihood of success on the merits or irreparable injury. See id. By June, 2006, however, basin inflow had dropped below the level that the Corps had used to support releases of 8,000 cfs. In fact, releases were now falling toward the minimum of 5,000 cfs permitted under the IOP, and mussel die-offs were occurring. Florida, therefore, filed a motion for a temporary restraining
order (TRO) to protect these threatened and endangered mussels, contending that the IOP was causing an unlawful take. The court granted the motion on June 22, 2006, and ordered the Corps to deviate from the IOP and maintain releases of 8,000 cfs from the Woodruff Dam on the Chattahoochee River. The court, subsequently, revised its TRO and lowered the required release to 7,000 cfs. As the parties worked on an agreement, the court lowered the required releases yet again, this time to 6,000 cfs, and in late June, the parties entered into an interim settlement agreement setting releases at an average of 6,000 cfs. See id. at 272.

The interim settlement agreement expired in late July 2006, and the Corps returned to its IOP and minimum releases of 5,000 cfs. See id. As a result, Florida filed another motion for a temporary restraining order, this time requesting a minimum flow of 6,300 cfs in the Apalachicola River. Judge Bowdre denied the motion finding that Florida had not established a causal link between the Corps’ action under the IOP and a take of the endangered mussels under § 9 of the Endangered Species Act. She wrote that she could not hold the Corps responsible for the lack of rain. In fact, the Corps had “taken affirmative action to provide more protection to the mussels than the natural flow of unhindered water would provide the mussels during this drought period.” Alabama v. U.S. Army Corps of Eng’rs, Memorandum Opinion at 20 (N.D. Ala. entered July 25, 2006).

In addition, in March 2006, Judge Bowdre had ordered the Corps and the three states to enter into confidential mediation over the management of the Alabama-Coosa-Tallapoosa (ACT) river basin, as well as the ACF. The effort to mediate the dispute, however, failed, and the parties are still litigating the portion of the case dealing with the ACT.

In June 2006, Georgia filed suit against the Corps in the U.S. District Court for the Northern District of Georgia. State of Georgia v. U.S. Army Corps of Eng’rs, 1:06-CV-1473 (N.D. Ga. Filed June 20, 2006). Georgia alleged that the IOP was arbitrary and capricious, in excess of statutory jurisdiction, and issued without prior notice, public participation or compliance with the requirements of NEPA. Alabama and Florida intervened in the case, and Alabama moved to have the case transferred to the Northern District of Alabama. (A 2001 action which Georgia had brought against the Corps in the same Georgia district court had been ordered abated in favor of the Alabama district court case. Georgia v. U.S. Army Corps of Eng’rs, 223 F.R.D. 691 (N.D. Ga. 2004), aff’d, 144 Fed. App’x. 850 (11th Cir. 2005)).

The FWS issued its biological opinion (BiOp) on the IOP in early September 2006. U.S. Fish and Wildlife Service, Biological Op. and Conf. Rpt. on the U.S. Army Corps of Eng’rs, Mobile Dist., Interim Operating Plan for Jim Woodruff Dam and the Associated Reaches to the Apalachicola River (Sept. 5, 2006). The BiOp stated that the IOP would not jeopardize the continued existence of the Gulf sturgeon or the three downstream species of freshwater mussels and would not adversely modify their critical habitat. The BiOp also found that the IOP would not result in any incidental take of the Gulf sturgeon or the Chipola slabshell mussel. However, the FWS did conclude that the proposed action could result in the taking of the fat three ridge mussel and the purple bank climber mussel. Id. at 139–140.
The BiOp, therefore, contained an incidental take statement (ITS) issued pursuant to §§ 7(b)(4), (o)(2) of the Endangered Species Act for these two downstream mussel species. Pursuant to the ITS, the Corps must replace the proposed 8,000 cfs threshold for June to February with the higher threshold of 10,000 cfs and undertake adaptive management to identify ways of minimizing harm as new information is collected. Id. at 142–144. With regard to minimum flows during drought conditions, the Corps was required to develop modifications to the IOP to provide higher minimum flows to the Apalachicola River when reservoir storage and hydrologic conditions permit. Id. In February 2007, the FWS approved a modified IOP that added a desired minimum release of 6,500 cfs to the required minimum release of 5,000 cfs during drought conditions. Letter from Gail A. Carmody, Field Supervisor, Panama City, Florida Field Office, FWS, to Curtis Flake, Mobile District, U.S. Army Corps of Engineers (Feb. 28, 2007).

In September 2006, Florida filed suit against the FWS in the U.S. District Court for the Northern District of Florida challenging the BiOp. Florida v. U.S. Fish and Wildlife Serv., Case No. 4:06-410 (N.D. Fla. Filed Sept. 6, 2006). Florida contended that the no-jeopardy and no-adverse modification findings, the no-take finding for the Gulf sturgeon, and the ITS violated the Endangered Species Act and were arbitrary and capricious.

In the autumn of 2006, the Atlanta Regional Commission and four other Georgia water supply providers all of which had intervened in the most recently filed Georgia action, filed a motion with the Judicial Panel on Multidistrict Litigation seeking consolidation of the four district court cases pending in Georgia, Alabama, and Florida. The moving parties from Georgia suggested that the cases should be transferred to the D.C. district court. On March 20, 2007, the panel directed that these four cases be centralized in the U.S. District Court for the Middle District of Florida since all four cases involved actions by the Corps of Engineers affecting water flows in the ACF. The panel excluded the D.C. district case from consolidation since it was then on appeal and such transfers exceed the panel’s authority. The aspects of the Alabama district court case involving the ACT claims were also excluded from the new consolidated Florida action. In re Tri-State Water Rights Litigation, Transfer Order, MDL-1824 (J.P.M.L. March 20, 2007).

The Judicial Panel also selected Judge Paul A. Magnuson from the District of Minnesota to serve as the transferee judge. Id. Judge Magnuson had served as the transferee judge in the recent Missouri River multidistrict litigation. See In re Operation of the Missouri River Sys. Litig., 277 F. Supp. 2d 1378 (J.P.M.L. 2003). Following the D.C. Circuit’s decision overturning the settlement agreement on water withdrawals from Lake Lanier in 2008, that case too was transferred to Judge Magnuson’s consolidated case.

Exceptionally dry conditions continued to plague the region during 2007 and well into 2008. Prompted by the resulting water shortage, the Secretary of the Interior, Dirk Kempthorne, initiated a series of meetings among the governors of the three states in yet another effort to forge a water sharing agreement. By March 1, 2008, however, Kempthorne acknowledged that the negotiations had failed and indicated that the...
federal agencies would begin to formulate their own plan. In April 2008, the Corps of Engineers proposed to modify the IOP to create a special drought contingency plan that would allow flows to dip below the minimum drought release of 5,000 cfs at the Woodruff Dam. Under the new plan, the minimum release would be 4,500 cfs during times of extreme drought. The Corps, in addition, proposed to allow more water to be stored at Lake Lanier, north of Atlanta, during particularly wet conditions in an effort to avoid triggering releases as low as 4,500 cfs. Florida officials roundly criticized the Corps’ proposal. Nevertheless, the FWS issued a BiOp in June 2008 approving the revised IOP for a period of five years. U.S. Fish and Wildlife Service, Biological Op. on the U.S. Army Corps of Eng’rs, Mobile Dist., Revised Interim Operating Plan for Jim Woodruff Dam and the Associated Reaches to the Apalachicola River (June 1, 2008). At this time, the Corps also began the process of updating the Master Water Control Manuals for both the ACF and ACT basins.

Meanwhile, in the consolidated case, Judge Magnuson divided the trial into two phases. The first phase would pertain to the water supply contracts involving Lake Lanier (the Buford Dam project), while the second phase would deal with the environmental claims such as whether the Corps’ operations in the ACF were violating the ESA.

Judge Magnuson ruled on the parties’ cross motions for summary judgment in phase one of the litigation in July 2009, holding in favor of Alabama and Florida. In re Tri-State Water Rights Litig., 639 F. Supp. 2d 1308 (M.D. Fla. 2009). In doing so, Judge Magnuson found that “[a]t the time the Buford Dam was authorized, planned, and constructed [from 1945–1960], the Corps did not anticipate any water-supply withdrawals from the reservoir itself, with the exception of the water withdrawn by the cities of Gainesville and Buford.” Id. at 1321. Those two cities had pre-existing rights to withdraw water since their intake structures on the Chattahoochee were inundated by the waters of Lake Lanier. The Corps, therefore, contracted with Gainesville for the right to withdraw eight million gallons per day and with Buford for two million gallons per day. Id. at 1315, 1319. No other portion of the lake’s storage was set aside for water supply.

Only “at some point” after the dam was constructed did the Corps and many cities in Atlanta area begin to see Lake Lanier as a significant source of water supply. Id. at 1321. By the 1980s, Gwinnett County was withdrawing 40 million gallons a day from Lake Lanier pursuant to an interim contract with the Corps entered into during the 1970s. Id. at 1326. Various other interim contracts were eventually signed by the Corps including one with the Atlanta Regional Commission to withdraw 377 million gallons per day from the Chattahoochee downstream from the dam. Id. at 1334-35. Although the “interim” contracts expired at the beginning of 1990, these municipal entities continued to withdraw water from the Corps project. Id. at 1335. In fact, by 2009, they were withdrawing amounts far in excess of the amounts authorized by the interim contracts. Id. at 1347. The D.C. settlement agreement, moreover, would have permitted Gwinnett County to purchase an additional 152 million gallons per day from the lake, Gainesville an additional 18 million gallons per day from the lake, and the Atlanta
Regional Commission 367 million gallons per day from the Chattahoochee River. *Id.* at 1337.

The court concluded, after reviewing the record and legislative history, that water supply in the form of withdrawals from Lake Lanier and large scale withdrawals from the Chattahoochee was not an authorized purpose of the Buford Dam project. *Id.* at 1347, 1354. Therefore, under the Water Supply Act, the Corps had to first seek congressional approval for those withdrawals if they constituted a major operational change or seriously affected the original purposes of the project (id. at 1347), including in this instance the generation of hydroelectricity, flood control, and navigation. *Id.* at 1347. Since the Corps had not received congressional approval (other than for the original authorized withdrawals by Gainesville and Buford) and since the de facto reallocation of 21.5 percent of Lake Lanier’s storage pursuant to the interim contracts and other withdrawals was deemed by the court to be a major operational change (id. at 1350), which had seriously affected hydropower generation, the court held that the Corps had violated the Water Supply Act. *Id.* at 1354; see also *Southeastern Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316, 1324–25 (D.C. Cir. 2008) (holding the reallocation of 22 percent of the lake’s storage to be a major operational change “on its face”). The court also affirmed the Corps’ rejection of Georgia’s 2000 request to reallocate 34 percent of Lake Lanier’s storage without congressional authorization. *In re Tri-State Water Rights Litig.*, 639 F. Supp. at 1352.

The court recognized that immediate enforcement of its order would be draconian. The municipal entities that had been withdrawing water from Lake Lanier and the Chattahoochee for many years could not suddenly halt their withdrawals without producing great hardship. The court, therefore, stayed enforcement for three years, until 2012, in order to give the parties time to settle or obtain congressional action.

Although then-Governor Sonny Perdue of Georgia initially indicated a preference for congressional action, federal legislators made it clear that they would prefer to act only after the governors of the three states have worked out the details of an agreement. The governors met for the first time in December 2009 at which time the states indicated that five more meetings were scheduled. The discussions, however, have been kept confidential, and little, if any progress, appears to have resulted.

Georgia, however, did not relying exclusively upon negotiations with Alabama and Florida. In April 2010, Georgia appealed Judge Magnuson’s order to the 11th Circuit. The new Georgia Governor, Nathan Deal, also proposed spending $300 million over four years to build new reservoirs in Georgia, a plan that drew opposition from environmentalists and Governor Robert Bentley of Alabama, who stated that no new reservoirs should be built until the states have settled the dispute. Georgia has also turned to conservation as part of the answer. In 2010, Georgia enacted the Water Stewardship Act. Ga. L. 2010, p. 732/SB370. The Act requires, for example, the installation of high-efficiency plumbing fixtures and cooling systems on all new construction after July 1, 2012; requires public water systems to perform audits and implement water loss detection programs; and restricts outdoor watering between 10.00 am and 4.00 pm, except for agriculture, golf courses, athletic fields, new landscapes, and hand watering. The Georgia legislature, moreover, has proposed legal
action against the State of Tennessee if Tennessee refuses to permit Georgia to move its boundary northward to a point Georgia believes represents the true boundary between the two states. See Ga. H. Res. 4 (2013) (as passed by both the House and the Senate). If successful, Georgia would possess a small strip of land along the Tennessee River, which could facilitate a huge interbasin transfer of water to the Atlanta metropolitan area. Tennessee, not surprisingly, does not appear keen on the idea, and it is unlikely that Alabama, into which the Tennessee River flows a few miles away, would give up its riparian rights without a struggle.

In June 2011, the Eleventh Circuit handed Georgia a victory in its appeal from Judge Magnuson’s order. In re: MDL-1824 Tri-State Water Rights Litig., 644 F.3d 1160 (2011). The court first held that the district court lacked jurisdiction to rule on the temporary allocations that the Corps had made over the years, allocations which had often taken the form of interim contracts. According to the Eleventh Circuit, the Corps had never taken final agency action on those allocations and therefore remanded those issues to the Corps for resolution. Id. at 1181–85. Second, the court held that the lower court and the Corps had erred in concluding that water supply was not an authorized purpose of the Buford project. The court based this on language found in a 1946 Corps report that the court asserted was fully incorporated into the 1946 congressional authorization for the project. Id. at 1186–87. The report indicated that the dam should be operated in such a way as to ensure a flow in the Chattahoochee River at Atlanta of at least 650 cfs in order to meet existing industrial, municipal, and utility needs. Id. at 1187–88. Furthermore, an additional flow of 150 cfs was projected as necessary to meet the needs of the area by 1965. Id. at 1188. Thus, according to the court, water supply was an authorized, rather than an incidental, use of the waters stored in Lake Lanier. Id. at 1188–89. Since the court found that the language was clear in the report referred to by Congress, it held that the Corps’ denial of Georgia’s 2000 water-supply request was not entitled to *Chevron* deference, and the request was remanded to the Corps for reconsideration. Id. at 1192–94. It seems odd, however, for the court to have conflated concern about maintaining flows downstream from the dam with authorization for water withdrawals from the lake.

The court provided the Corps with a long list of instructions to be followed on remand. It indicated, for example, that the Corps should recognize that the authorizing legislation gave it the authority to alter the operation of the dam in order to create a “balance between the water supply use and the power use.” Id. at 1200. The court also emphasized that the 1946 legislation contemplated that water supply allocations might have to increase over time as the Atlanta area grew. Id. After the Corps did that, the court indicated that the Corps would also have to take into consideration its authority under the Water Supply Act of 1958. Id. at 1201. The Corps, finally, was given one year to complete this review of its water supply authority and release its conclusions. Id. at 1205. Petitions seeking a writ of certiorari from the Supreme Court were later denied. *Alabama v. Georgia*, 133 S. Ct. 25 (2012). In response to the court’s order, the Chief Counsel of the Corps issued a legal opinion in June 2012 concluding that the Corps has the legal authority to exercise its discretion, should it eventually choose to do so, to adjust operations at the Buford Dam to accommodate the water supply.
withdrawals and return flows that Georgia has requested by 2030, assuming those withdrawals and returns occur as projected. Memorandum from Earl H. Stockdale, Chief Counsel, U.S. Army Corps of Engineers, to the Chief of Engineers, Authority to Provide for Municipal and Industrial Water Supply from the Buford Dam/Lake Lanier Project, Georgia (June 25, 2012).

On July 21, 2010, Judge Magnuson issued his decision in phase two of the consolidated case, which involves various environmental issues in the ACF. *In re Tri-State Water Rights Litig.*, Memorandum and Order, Case No. 3:07-md-01. Although Judge Magnuson found that the Corps of Engineers had violated NEPA in its issuance of the IOP, he declined to order the preparation of an Environmental Impact Statement (EIS) since the IOP is only a temporary plan of operations, which was slated to be replaced by a new water control plan in 2012. He also rejected Florida’s challenge to the FWS’ BiOp for the ACF basin. The Corps and the Fish and Wildlife Service are continuing to consult.

The Corps of Engineers had originally performed the NEPA scoping exercise for a new Master Water Control Manual for the ACF basin in 2008-2009. (Such manuals set forth the specifications for storage and releases from each federal dam in a particular basin and also contain protocols for drought contingency operations. The current manual for the ACF was completed in 1958.) The scoping process for a new manual, however, was reopened in October 2012 in light of the 11th Circuit’s decision and the subsequent legal opinion issued by the Corps’ Chief Counsel concluding that the Corps has the legal authority to accommodate both current and increased levels of water supply withdrawals from Lake Lanier and downstream at Atlanta. The Final Updated Scoping Report was issued by the Corps in March 2013. The updating process will address whether and to what extent Lake Lanier will be used to meet current and future water supply needs in the Atlanta metropolitan area and will also set minimum flow rates at the Woodruff Dam in order to meet project purposes and the requirements of the Endangered Species Act. The Corps anticipates that the draft Master Manual and a draft EIS will be published in September 2015 and that final approval should come in March 2017.

Meanwhile, the case in the Northern District of Alabama involving the ACT basin heated up again after having been stayed for quite some time to permit the parties to negotiate. Following the issuance of the Eleventh Circuit’s opinion in the Lake Lanier case, the State of Georgia and the Corps moved to dismiss contending that the Corps had not taken final agency action with regard to any water reallocation in Lake Allatoona. In July 2012, Judge Bowdre agreed and dismissed the complaint, except for one count relating to the issuance of a section 404 permit under the Clean Water Act for the Hickory Log Creek Reservoir. That count was subsequently dismissed with prejudice in September 2012.

The Corps of Engineers completed the scoping exercise for a new Master Water Control Manual for the ACT basin in 2009. The Updated Manual would replace the one which was written in 1951. The draft EIS and the draft Master Manual for the ACT were made available for public comment in February 2013. On November 7, 2014, the Corps issued the Final EIS (FEIS) for the Updated ACT Master Water Control Manual,
the second volume of which contained the Updated Master Manual and Updated Manuals for seven specific projects, including Lake Allatoona. Comments on the FEIS were taken until February 5, 2015.

The State of Georgia immediately filed suit in the U.S. District Court for the Northern District of Georgia challenging the Corps’ FEIS for failing to consider increased water supply withdrawals from Lake Allatoona. Georgia v. U.S. Army Corps of Engineers, No. 1:2014-cv-03593 (N.D. Ga. Filed Nov. 7, 2014). Despite the fact that Corps action on the Master Manual was not yet final, Georgia also challenged the Manual as set forth in the FEIS for failing to consider Georgia’s request for additional water from Lake Allatoona. The Corps had focused on current withdrawals in crafting the new Manual, deferring action on additional withdrawals until after the existing Manual was updated. The Cobb County-Marietta Water Authority and the Atlanta Regional Commission also filed their own cases against the Corps on the very same day. Atlanta Reg’l Comm’n and Cobb County-Marietta Water Auth. v. U.S. Army Corps of Engineers, No. 1:2014-cv-03594 (N.D. Ga. Filed Nov. 7, 2014). The two actions were consolidated in February, 2015.

On May 4, 2015, the Corps issued its Record of Decision responding to comments made on the FEIS and approving the Proposed Action Alternative identified in the FEIS as the new ACT Master Water Control Manual. The seven associated project Manuals were also approved. Whereupon, Georgia as well as the Atlanta Regional Commission and the Cobb County-Marietta Water Authority filed amended complaints in the consolidated action challenging the Corps’ final decision on the Manual, as well as the FEIS, and seeking an order compelling the Corps to evaluate Georgia’s request for more water withdrawals from Lake Allatoona.

Three days later, on May 7, 2015, the State of Alabama sued the Corps in U.S. District Court for the District of Columbia. Alabama v. U.S. Army Corps of Engineers, No. 1:15-cv-00696 (D.D.C. Filed May 7, 2015). Alabama specifically targeted an operational change found in the revised Master Manual and the project Manual pertaining to Lake Allatoona. Previously, the Corps could release water from Lake Allatoona’s conservation storage pool from October 1 through mid-November to generate power and benefit downstream uses. Under what is referred to as a phased drawdown, however, the Corps can now suspend that prior practice, creating a plateau in the lake’s guide curve, in order to benefit recreation on the lake. Alabama contends that this will reduce flows in the Coosa River in Alabama during what is generally a dry period of the year, harming both water quality and navigation. Alabama contends that this is contrary to the authorized congressional purposes for the Allatoona project. Therefore, the Corps’ action must be set aside. Alabama also asserts that another operational change, this one giving the Corps discretion not to generate hydropower even when the lake is in the upper portion of its conservation pool, was not adequately explained. In addition, Alabama also alleges violations of NEPA, the Clean Water Act, and the Corps’ own regulations that require its projects to comply with state water quality standards.

The Alabama Power Company also filed suit against the Corps in the same court on the same day. Ala. Power Co. v. U.S. Army Corps of Engineers, No. 1:15-cv-00699 (Rel. 7-1/2016 Pub.60748)
While similar in most respects to Alabama’s complaint, Alabama Power focused heavily upon the adverse impacts which the operational changes at Lake Allatoona would have upon power generation at its 11 hydroelectric projects in the ACT basin. Specifically, Alabama Power asserts that the changes will reduce flows out of Allatoona, especially during critical times of the year, resulting in lower reservoir levels at its Coosa River projects and thus less hydrogeneration and impaired water quality, especially at Weiss Lake and in the channel immediately below that dam. According to Alabama Power, these changes will also adversely affect its hydroelectric operations on the Tallapoosa River because the burden of meeting downstream flows for navigation on the Alabama River would be placed largely upon its Tallapoosa operations, primarily Lake Martin, due to lower flows on the Coosa.

Moving back to the ACF basin, the National Oceanic and Atmospheric Administration declared a commercial fishery failure for the oyster fishery in Apalachicola Bay in August 2013. This declaration resulted from drought conditions that absolutely devastated the oyster harvest during the 2012–2013 fishing season. The struggle over the ACF was about to escalate.

G. The Struggle over the ACT Goes to the Supreme Court.

In September 2013, the State of Florida filed a motion in the United States Supreme Court for leave to file a complaint seeking an equitable apportionment of the waters of the ACF basin. *Florida v. Georgia*, No. 142 Orig. (U.S. filed Sept. 25, 2013). Florida contends that the earlier litigation over the waters in the ACF basin had not and could not have addressed the fundamental problem confronting Florida, namely Georgia’s ever increasing use and storage of water that had historically nourished the Apalachicola River and Apalachicola Bay. Florida seeks to cap Georgia’s overall depletive water uses at the level that existed in January 1992. Georgia responded in late January 2014 asking the Supreme Court to reject the case. It asserts that Florida is attempting to bypass the process through which the Corps is updating its Master Manual for the ACF basin. Thus, Georgia argues that Florida’s case has been brought against the wrong party, at the wrong time, and in the wrong court. In March 2014, the Supreme Court invited the United States to express its views on the case. The Solicitor General responded by filing an *amicus* brief in September 2014. While declaring that Florida had pleaded an interstate water dispute of sufficient significance to warrant the exercise of the Court’s original jurisdiction, the Solicitor urged the Supreme Court to delay hearing the case until the Corps of Engineers had completed updating the Master Control Manual for the ACF basin. Thus, he suggested that the Court either deny Florida’s motion to file a complaint without prejudice or grant the motion but stay proceedings until the revised Manual was published.

The Court, however, took its own counsel and granted Florida’s motion to file a complaint in November 2014. Two weeks later, the Supreme Court appointed Ralph I. Lancaster Jr. of Portland, Maine as Special Master for the case. Mr. Lancaster has served as Special Master for the Court on three other occasions including *Virginia v. Maryland*, in which the two states were quarrelling over Virginia’s right to access the Potomac River.

At the invitation of the Court, the United States is participating in the case as amicus
curiae. In a Statement of Participation which the Solicitor General filed in January 2015, he indicated that the United States’ interest as amicus curiae is primarily related to the Corps’ efforts to complete its update to the Master Control Manual governing the operation of five federal dams located in the ACF basin. Through this participation, the United States intends to identify and hopefully avoid any conflicts with its statutory responsibilities governing the operation of those projects.

In February 2015, Georgia moved to dismiss Florida’s case for failure to join the United States as a party. Georgia contends that the Court could not grant Florida complete relief unless the United States as the operator of a number of significant projects in the basin was bound by the final judgment in the case. Further, Georgia asserts that the operation of those federal projects will, in fact, be impacted by the resolution of the case. In response, the United States argued that the case may proceed at this time because the Court can likely shape adequate relief without causing prejudice to the interests of the United States. However, should it appear at a later time that relief cannot be granted without harming the interests of the federal government (in the event, for example, of a conflict between the authorized purposes of the Corps’ dams and Florida’s right to flows), or that relief among the parties would be inadequate without the ability to bind the federal government, then the case would have to be dismissed. After all, the United States cannot be joined involuntarily due to the fact that it has not waived sovereign immunity to suit in this instance. See Arizona v. California, 298 U.S. 558, 571-72 (1936). Meanwhile, Florida, in its brief in opposition to Georgia’s motion to dismiss, emphasized that it is not seeking the establishment of a minimum flow at any federally operated dam. Instead, it is seeking to increase upstream inflows into the river system by halting or at least reducing Georgia’s increasing depletion of upstream flows. Thus, the United States is not a required party to this equitable apportionment case.

Discovery is now taking place. But on April 8, 2015, the Special Master ordered the parties to address the question of whether the State of Alabama should be a party to the case. Alabama and the United States were also invited to submit amicus curiae briefs on the question. Both Florida and Georgia have responded by indicating that Alabama is not a required party. On May 1, 2015, Alabama filed its amicus brief addressing the issue. In the brief, Alabama states that it does not believe that it is required party to the case nor does it wish to become involved in the litigation at this time. Neither Florida nor Georgia have made any claims against Alabama. Furthermore, if all Florida is seeking is a cap on Georgia’s overall depletive water uses at the level existing in January 1992 and not a minimum flow requirement, then Florida does not need Alabama in the case as a party in order to afford it relief. A cap on withdrawals in Georgia, moreover, would likely benefit, not harm, Alabama. Nevertheless, Alabama reserved its right to assert its interests at a later stage in the litigation should changing circumstances dictate a different course of action.

On June 19, 2015, the Special Master denied Georgia’s motion to dismiss. He concluded that it is possible that the Court could shape a remedy that would afford Florida adequate relief absent the United States by capping Georgia’s consumption of water from the ACF. Moreover, this could be done in a way that could likely avoid any
potential prejudice to the United States or to either of the parties. The Special Master also ruled that Alabama need not be joined involuntarily to the case. Finally, the Special Master has urged the parties to discuss settlement, and talks between Georgia and Florida are ongoing.

VII. Water Law Research.


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