

THREE’S A CROWD: EXAMINING GEORGIA’S OPTIONS IN THE TRI-STATE
WATER WARS UNDER PRINCIPLES OF INTERNATIONAL LAW

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I. INTRODUCTION

The United States has seen its fair share of water disputes between neighboring states. Prior to the 1980s, however, the southeastern U.S. had always been regarded as a region free of serious water issues.¹ Unlike other regions of the country, the southeastern region, comprised of Alabama, Florida, and Georgia, was perceived as rich with water.² Nonetheless, since the late 1980s, serious droughts have “exposed problems within the region’s water rights system,”³ resulting in one of the most infamous water disputes in U.S. history, the “Tri-State Water Wars.”⁴ These three states have since been involved in bitter litigation over the region’s water allocation.⁵ The biggest difficulties these states face are the competing ideals of supporting rapid growth within cities and industries, while protecting shared resources from overuse and potential destruction.⁶ The Tri-State Water Wars have been tied up in litigation for years, and Alabama, Florida, and Georgia have repeatedly failed to negotiate a workable solution.⁷

This Note analyzes the most recent decision in the ongoing dispute’s intricate web of litigation. The latest ruling, handed down by the U.S. District Court for the Middle District of Florida, has given Georgia a three-year window to “obtain approval from Congress for the operational changes that are necessary to allow water from Lake Lanier to continue to be used for water supply purposes.”⁸ As a result of this ruling, Georgia identified three viable strategies: (1) appealing the District Court’s ruling, (2) continuing negotiations with Alabama and Florida to create a water-sharing plan, and (3) convincing Congress to pass legislation that allows the Atlanta

¹ Michael Keene, Note, *The Failings of the Tri-State Water Negotiations: Lessons to be Learned from International Law*, 32 GA. J. INT’L & COMP. L. 473, 474 (2004) (“For more than two centuries, the southeastern United States was blessed with more than enough water for its needs.”).

² Stephen E. O’Day et al., *Wars Between the States in the 21st Century: Water Law in an Era of Scarcity*, 10 VT. J. ENVTL. L. 229, 230 (2009).

³ Keene, *supra* note 1, at 474.

⁴ Natasha Meruelo, Note, *Considering a Cooperative Water Management Approach in Resolving the Apalachicola-Chattahoochee-Flint River Basin Water War*, 18 FORDHAM ENVTL. L. REV. 335, 338 (2007); O’Day et al., *supra* note 2, at 230.

⁵ O’Day et al., *supra* note 2, at 236–37.

⁶ Meruelo, *supra* note 4, at 335–36.

⁷ See *Tri-State Water Wars*, ATLANTA REG’L COMM’N, <http://www.atlantaregional.com/environment/tri-state-water-wars> (last visited Nov. 20, 2010) (providing an overview of litigation, recent developments, statistics on water use, and links to articles that detail more information on the dispute).

⁸ *Id.*; see also *In re Tri-state Water Rights Litig.*, 639 F. Supp. 2d 1308, 1356 (M.D. Fla. 2009) (“Congressional approval of the reallocation of storage in Lake Lanier is required.”).

metropolitan area to withdraw extra water from Lake Lanier.⁹ Although Georgia is simultaneously pursuing all three strategies in a bid to keep its water withdrawal amounts high,¹⁰ it is unlikely that all three strategies will succeed. This Note analyzes the risks, benefits, and possibility of success for each of the three approaches.

After a quarter-century of fighting between these states over shared water resources, it is apparent that the methods being employed to resolve this dispute are ineffective. As such, this Note suggests an outcome based upon customary international legal rules and principles as a model for successful resolution. International law has helped to resolve several transboundary water conflicts in the past.¹¹ The International Law Association's Berlin Rules on Water Resources (Berlin Rules)¹² use the principle of equitable utilization,¹³ and balance it with the avoidance of transboundary harm rule.¹⁴ The international water law stated in the Berlin Rules is reflected in the resolutions of several international water dispute commissions.¹⁵ Efforts to incorporate international law principles could aid in resolving the Tri-State Water Wars, and may be particularly useful for Georgia in developing its preferred approach.

Part I of this Note contends that Georgia, in deciding its next step in the Tri-State Water Wars, should examine international water allocation principles. Part II recounts the history of the Tri-State Water Wars—the dispute between Alabama, Florida, and Georgia over Lake Lanier and the

⁹ See Bob Keefe, *War Over Water Expands*, ATLANTA J.-CONST., July 19, 2009, at B1 (outlining various approaches to a water allocation resolution available to Georgia following Judge Magnuson's July 17, 2009 ruling).

¹⁰ See *id.* (noting that representatives from cities like Los Angeles, San Diego, and Atlanta argue that they "need more water than their rural neighbors").

¹¹ Keene, *supra* note 1, at 474.

¹² International Law Association, *Berlin Rules on Water Resources*, Report of the 71st Conference (2004) [hereinafter *Berlin Rules*], available at http://www.internationalwaterlaw.org/documents/intldocs/ILA_Berlin_Rules-2004.pdf.

¹³ *Id.* art. 12 ("Basin States shall in their respective territories manage the waters of an international drainage basin in an equitable and reasonable manner having due regard for the obligation not to cause significant harm to other basin States.").

¹⁴ *Id.* art. 16 ("Basin States, in managing the waters of an international drainage basin, shall refrain from and prevent acts or omissions within their territory that cause significant harm to another basin State having due regard for the right of each basin State to make equitable and reasonable use of the waters.").

¹⁵ See, e.g., Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, Cambodia-Laos-Thai-Viet., ch. III, art. 5, Apr. 5, 1995, 34 I.L.M. 864, available at <http://www.mrcmekong.org/download/agreement95/agreementApr95.pdf> (applying the reasonable and equitable utilization principle to the Mekong River); Int'l Comm'n for the Prot. of the Danube River, Convention on Cooperation for the Protection and Sustainable Use of the Danube River, June 29, 1994 [hereinafter ICPDR], available at <http://www.icpdr.org/icpdr-files/6787> (discussing the role of sustainable and equitable management of the Danube River basin).

Chattahoochee River. Part II also analyzes where the three states failed in their negotiations and discusses Georgia's potential options moving forward. In Part III, this Note presents U.S. and international water allocation principles, emphasizing why international law serves as a better model for resolving this transboundary water dispute. Part IV evaluates the risks and benefits of Georgia's three strategies, which include allowing Congress to apportion the water, appealing the district court's latest ruling, and resuming negotiations with Alabama and Florida using principles of both U.S. and international law. Part V concludes this Note by describing the implications of these analyses and making recommendations on how the states can resolve the dispute equitably and efficiently.

II. THE DISPUTE

When analyzing the dispute over water resources between Alabama, Florida, and Georgia, it is necessary to first look at the origins of Lake Lanier. Lake Lanier was created in 1956,¹⁶ when the U.S. Army Corps of Engineers (the Corps) constructed the Buford Dam in Georgia "to provide flood control, hydropower and navigation."¹⁷

In 1989, the combination of water scarcity following a drought and rapid growth in the Atlanta metropolitan area motivated the Corps to allow Georgia to take additional water—almost 50% more¹⁸—from Lake Lanier to be used for drinking and municipal purposes.¹⁹ This supplementary withdrawal, however, significantly affected the flow of the Chattahoochee River, which, in turn, impacted its downstream users, Alabama and Florida,²⁰ and led to their immediate dissatisfaction with the new water allocation plan.

All three states heavily depend on water from the Apalachicola-Chattahoochee-Flint (ACF) River Basin, which is under the control of the

¹⁶ *In re Tri-State Water Rights Litig.*, 639 F. Supp. 2d 1308, 1319 (M.D. Fla. 2009).

¹⁷ Press Release, S. Envtl. L. Ctr., Tri-State Water Wars Judge Rules Atlanta Can't Take Water from Lake Lanier (July 17, 2009), <http://www.pitchengine.com/southernenvironmentallawcenter/tristate-water-wars-judge-rules-atlanta-cant-take-water-from-lake-lanier-an-selc-press-release/18661/>; *Lake Sidney Lanier*, U.S. ARMY CORPS OF ENG'RS, <http://lanier.sam.usace.army.mil/history.htm> (last visited Nov. 20, 2010).

¹⁸ Keene, *supra* note 1, at 476 n.19 (citing Greg Jaffe, *Water Deal May Settle Old Dispute*, WALL ST. J., Sept. 11, 1996, at F1).

¹⁹ Meruelo, *supra* note 4, at 339.

²⁰ See U.S. ARMY CORPS OF ENG'RS, THE ACF RIVER BASIN 1 (2009), available at http://www.sam.usace.army.mil/pa/acf-wcm/docs/Project_background.pdf (indicating that Alabama and Florida are downstream users because "[t]he Apalachicola-Chattahoochee-Flint (ACF) Rivers [sic] basin originates in north east Georgia, crosses the Georgia-Alabama border into central Alabama, and follows the state-line south until it terminates in Apalachicola Bay, Florida"); *ACF Basin Location Map*, GA. WATER SCI. CTR., <http://ga.water.usgs.gov/nawqa/graphics/map.basin.gif> (last visited Nov. 20, 2010).

Corps.²¹ Georgia is the upstream user and requires enough water to sustain the ever-growing metropolitan area of Atlanta;²² however, this water is also vital to the downstream users, Alabama and Florida. Alabama protested the Corps' reallocation plan because it was afraid that Georgia's substantial need for water would dramatically decrease the water level and hinder the ability of barges to transport goods to Alabamian cities along the Chattahoochee River.²³ Additionally, Alabama claimed that it requires sufficient water to support its own state growth and to maintain the Southern Nuclear Plant Farley in Dothan, Alabama, which supplies power to 1.5 million people.²⁴ Florida, on the other hand, focused its arguments on protecting "its valuable oyster industry in Apalachicola Bay that depends on the freshwater ACF, which flows down into the bay, to maintain an optimal salinity balance integral to the health of the oysters."²⁵ Florida also concerned itself with protecting its endangered species—specifically protecting the Fat Threeridge mussel, the Purple Bankclimber mussel, as well as the Gulf Sturgeon and others threatened by the decreased flow of the ACF.²⁶ Alabama and Georgia are also struggling over the shared water from the Alabama-Coosa-Tallapoosa (ACT) River Basin,²⁷ representing a small subset of the litigation, but one which poses many of the same problems as those seen in the greater dispute over ACF basin resources.²⁸

Alabama brought suit in 1990 against the Corps and sought a preliminary and permanent injunction to stop the implementation of the reallocation

²¹ *ACF Basin Location Map*, *supra* note 20, at 3 (explaining that the ACF River Basin is used by the Corps "for support of fish and wildlife conservation, hydroelectric power generation, navigation, water quality, water supply, and recreation" to Alabama, Florida, and Georgia).

²² *Tri-State Water Wars (AL, GA, FL), Advocating for the Long-Term Health of Two Major River Basins: Case Summary*, S. ENVTL. L. CTR., http://www.southernenvironment.org/cases/tri_state_water_wars_al_ga_fl (last visited Nov. 20, 2010) ("Georgia wants to have enough water to continue growing, particularly in booming metro Atlanta."); Kathy Lohr, *Tri-State Water Fight Spurs Questions On Growth*, NAT'L PUB. RADIO, Aug. 7, 2009, <http://www.npr.org/templates/story/story.php?storyId=111639702> ("[Three and a half] million Atlanta residents get their water [from Lake Lanier].").

²³ Meruelo, *supra* note 4, at 347.

²⁴ *Id.*; Lohr, *supra* note 22.

²⁵ Meruelo, *supra* note 4, at 347.

²⁶ *Id.* at 347–48.

²⁷ See *The ACT Basin*, U.S. ARMY CORPS OF ENG'RS, <http://www.sam.usace.army.mil/pd/ac tacfeis/ACT-HOME.HTM> (last visited Nov. 20, 2010) (describing how the basins of the Alabama, Coosa, and Tallapoosa Rivers extend from northwest Georgia to near the southwest corner of Alabama).

²⁸ See Dan Chapman, *Alabama's Water-War Role Puts Allatoona in Spotlight*, ATLANTA J.-CONST., Aug. 16, 2009, at B1 (discussing how Alabama claims mismanagement of ACT basin resources by the Corps, which is similar to the ACF dispute); see also *Tri-State Water Wars*, *supra* note 7 (stating that of the eight cases litigated in the Tri-State Water Wars, seven concern the ACF basin and one concerns the ACT basin).

plan.²⁹ Alabama and Florida collectively asserted that reallocating the water favored Georgia's interests at the expense of their own, and deprived them of their equal rights to the ACF River Basin.³⁰ Alabama and Florida also maintained that the Corps violated the National Environmental Policy Act³¹ by ignoring the environmental impact on the ACF River Basin's downstream users.³² Alabama also asserted, "[T]he Corps breached its duty to operate Lake Lanier and other federal reservoirs for the benefit of all downstream users in the ACF and ACT basins."³³ To protect their respective water allocation interests, Florida aligned with Alabama, and Georgia aligned with the Corps in the suit.³⁴

The following year, all three states agreed to stay the litigation, to suspend water levels at their current depth, and "to fund a five-year Army Corps of Engineers study of the current and future water use requirements of the three states."³⁵ While the study was pending, legislators from each of the three states decided to form an interstate water compact, the ACF Compact, while Alabama and Georgia representatives formed the ACT Compact,³⁶ in an attempt to create a solution to the water allocation problem themselves.³⁷ The ACF and ACT Compacts require the states to negotiate their own plan;³⁸

²⁹ Alabama v. U.S. Army Corps of Eng'rs, 424 F.3d 1117, 1122–23 (11th Cir. 2005).

³⁰ *Water Wars Background*, ALA. RIVERS ALLIANCE, <http://www.alabamarivers.org/current-work/water-wars> (last visited Nov. 20, 2010) ("[E]ndangered aquatic species in Florida and Alabama will suffer with reduced water quality and flow into their states.").

³¹ *Id.*; *National Environmental Policy Act (NEPA)*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/compliance/nepa/index.html> (last visited Nov. 20, 2010) ("The National Environmental Policy Act (NEPA) [42 U.S.C. § 4321] requires federal agencies to integrate environmental values into their decision making processes by considering the environmental impacts of their proposed actions and reasonable alternatives to those actions.").

³² Alabama, 424 F.3d at 1123 n.5; see Meruelo, *supra* note 4, at 339–40 (discussing Alabama's objections to the Corps' reallocation plan).

³³ *Tri-State Water Wars (AL, GA, FL), Advocating for the Long-Term Health of Two Major River Basins: Case Summary*, *supra* note 22.

³⁴ *Id.*

³⁵ Keene, *supra* note 1, at 476.

³⁶ Alabama-Coosa-Tallapoosa River Basin Compact, Pub. L. No. 105-105, 111 Stat. 2233 (1997) (codified at ALA. CODE § 33-18-1 (1997) and O.C.G.A. § 12-10-110 (1997)); Apalachicola-Chattahoochee-Flint River Basin Compact, Pub. L. No. 105-104, 111 Stat. 2219 (1997) (codified at ALA. CODE § 33-19-1 (1997), FLA. STAT. § 373.69 (2010), and O.C.G.A. § 12-10-100 (1997)).

³⁷ Benjamin L. Snowden, Note, *Bargaining in the Shadow of Uncertainty: Understanding the Failure of the ACF and ACT Compacts*, 13 N.Y.U. ENVTL. L.J. 134, 140 (2005) ("The parties pledged, via further informal negotiations, to seek 'a more formal relationship' that would facilitate a durable resolution of the conflict.").

³⁸ Alabama-Coosa-Tallapoosa River Basin Compact § 1, art. VI(g)(12) (defining the general powers of the ACT Compact to include "establish[ing] and modify[ing] an allocation formula for apportioning the surface waters of the ACF Basin among the States of Alabama and Georgia"); Apalachicola-Chattahoochee-Flint River Basin Compact § 1, art. VI(g)(12) (defining the general powers of the ACF Compact to include "establish[ing] and modify[ing]

however, they “provided the states with little guidance, functioning simply as the enabling document that approved the idea that the states should have the power to agree on an allocation formula for the basin’s water.”³⁹

The ACF Compact also established the ACF Basin Commission, while the ACT Compact established the ACT Basin Commission.⁴⁰ The ACF and ACT Basin Commissions were to be comprised of “one representative from each state (appointed by the state’s Governor), plus one [non-voting]⁴¹ federal representative (appointed by the President) to analyze the results of the comprehensive study and negotiate each state’s allocation accordingly.”⁴² Additionally, the members of the ACF and ACT Basin Commissions were responsible for “developing, adopting and modifying” a water allocation formula of equitable apportionment for the states.⁴³

Although the ACF and ACT Basin Commissions were supposed to unanimously agree on a water allocation plan,⁴⁴ this goal failed despite numerous deadline extensions over several years.⁴⁵ There are several explanations for the ACF and ACT Basin Commissions’ failure to realize a plan that fulfilled the requirement of unanimity. For one, the three states refused to compromise their individual interests for the sake of the interests of the other states, and the ACF and ACT River Basins themselves.⁴⁶ Additionally, gubernatorial elections took place in 1998, which resulted in three new governors, all with “new policies, less cooperation, and less

an allocation formula for apportioning the surface waters of the ACF Basin among the states of Alabama, Florida and Georgia”).

³⁹ Meruelo, *supra* note 4, at 341; *see also* Joseph W. Dellapenna, *Interstate Struggles over Rivers: The Southeastern States and the Struggle over the ‘Hooch,’* 12 N.Y.U. ENVTL. L.J. 828, 872 (2005) (“[T]he states did not agree on an allocation formula for the dispute. Instead, they agreed to negotiate a permanent solution to their dispute.”).

⁴⁰ Alabama-Coosa-Tallapoosa River Basin Compact § 1, art. VI(a); Apalachicola-Chattahoochee-Flint River Basin Compact § 1, art. VI(a).

⁴¹ Alabama-Coosa-Tallapoosa River Basin Compact § 1, art. VI(a); Apalachicola-Chattahoochee-Flint River Basin Compact § 1, art. VI(a).

⁴² Dustin S. Stephenson, *The Tri-State Compact: Falling Waters and Fading Opportunities*, 16 J. LAND USE & ENVTL. L. 83, 88 n.36 (2000) (citing Charles Seabrook, *Heading Off a Tri-State Water War*, ATLANTA J.-CONST., Feb. 19, 1998, at C1).

⁴³ *See* Meruelo, *supra* note 4, at 341 (describing the responsibilities of the ACF Compact that can also be applied to the ACT Compact since the relevant provisions that provide for these general powers and purpose in the ACF and ACT Compacts are identical).

⁴⁴ Alabama-Coosa-Tallapoosa River Basin Compact § 1, art. VI(d); Apalachicola-Chattahoochee-Flint River Basin Compact § 1, art. VI(d).

⁴⁵ DAVID LEWIS FELDMAN, *WATER POLICY FOR SUSTAINABLE DEVELOPMENT* 135 (2007); *see* Snowden, *supra* note 37, at 147 (stating that the ACF Basin Commission received “at least a dozen extensions over [] six years”).

⁴⁶ *See* Snowden, *supra* note 37, at 147 (discussing how the three states, and Florida in particular, uncompromisingly favored their own interests); *see also* Dellapenna, *supra* note 39, at 874 (“Florida demanded a ‘natural flow’ regime as best suited to preserving the ecological integrity of its part of the Apalachicola-Chattahoochee-Flint basin.”).

knowledge of the situation as a whole.”⁴⁷ Because none of the states would yield to the others, the dispute continued.⁴⁸ On August 31, 2003, the ACF Compact expired and litigation ensued once again.⁴⁹

Over the next six years, Alabama, Florida, Georgia, and the Corps were entangled in several federal lawsuits connected to the ACF and ACT disputes. The three Governors—Alabama Governor Bob Riley, Florida Governor Charlie Crist, and Georgia Governor Sonny Perdue—tried to negotiate, but to no avail.⁵⁰ Florida continued to protest the water levels because of reports that the low levels were killing mussels and harming the commercial fishing industry.⁵¹ Alabama argued that the water allocation was not conducive to barges transporting goods and that its local industries were suffering.⁵²

On February 5, 2008, the U.S. Court of Appeals invalidated⁵³ a 2003 settlement agreement between the Corps and Georgia whereby the Corps “committed to provide Georgia at least twenty years of ‘interim’ water supply storage contracts and to reallocate Lake Lanier’s storage to municipal and industrial uses.”⁵⁴ Georgia then appealed to the U.S. Supreme Court, which denied the petition for a writ of certiorari.⁵⁵

With seven interconnected cases still pending in various courts, the cases were consolidated before a federal court in Jacksonville, Florida, to be heard by Senior U.S. District Judge Paul Magnuson.⁵⁶ Judge Magnuson declared that Congress must approve the reallocation of water from Lake Lanier, and accordingly, the Corps’ agreement with Georgia was illegal.⁵⁷ Judge Magnuson also mandated that the only authorized purposes for Lake Lanier

⁴⁷ Stephenson, *supra* note 42, at 103.

⁴⁸ Meruelo, *supra* note 4, at 341–42.

⁴⁹ See Dellapenna, *supra* note 39, at 879 (providing that Florida voluntarily allowed the compact to lapse on August 31, 2003, and announced it would resume litigation).

⁵⁰ O’Day et al., *supra* note 2, at 257–58.

⁵¹ See *supra* p. 219 (“Florida [] concerned itself with . . . protecting the Fat Threeridge mussel, the Purple Bankclimber mussel, as well as the Gulf Sturgeon and others threatened by the decreased flow of the ACF.”). See generally *Apalachicola-Chattahoochee-Flint River System (ACF) Timeline of Action As of July 27, 2009*, FLA. DEP’T ENVTL. PROT., <http://www.dep.state.fl.us/mainpage/acf/timeline.htm> (last visited Nov. 20, 2010) (providing a timeline of the dispute and showing Florida’s continued complaints about the water level).

⁵² Snowden, *supra* note 37, at 165–66.

⁵³ See *Se. Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316, 1325 (D.C. Cir. 2008) (“[W]e [the U.S. Court of Appeals for the D.C. Circuit] hold that the district court erred in approving the Agreement [between Georgia and the Corps] and reverse.”).

⁵⁴ *Apalachicola-Chattahoochee-Flint River System (ACF) Timeline of Action As of July 27, 2009*, *supra* note 51.

⁵⁵ *Georgia v. Florida*, 129 S. Ct. 898, 898 (2009).

⁵⁶ *Apalachicola-Chattahoochee-Flint River System (ACF) Timeline of Action As of July 27, 2009*, *supra* note 51.

⁵⁷ *In re Tri-State Water Rights Litig.*, 639 F. Supp. 2d 1308, 1356 (M.D. Fla. 2009).

were hydropower, flood control, and navigation; it was not authorized to supply drinking water.⁵⁸ In addition, he ordered for all withdrawals from Lake Lanier to be stayed at their current level for the next three years, until either congressional authorization was designated or some other resolution was reached.⁵⁹ If congressional approval is not received within three years and no other resolution is reached, water withdrawals from Lake Lanier will revert to the “baseline” operation levels of the mid-1970s.⁶⁰ This ruling presents a challenge to Congress, as more than 500 congressional members, many of whom are not familiar with water issues, must agree on a reallocation plan.⁶¹

From the metropolitan perspective, the Atlanta Regional Commission’s⁶² position on this ruling is that “[r]eturning metro Atlanta’s water withdrawals in three years to mid-1970s levels would present a public health and safety threat to the 3 million people of metro Atlanta who depend on Lake Lanier for water supply.”⁶³ Moreover, the Atlanta Regional Commission claims that Judge Magnuson’s ruling impacts the economy of the entire southeastern U.S.⁶⁴ Accordingly, the Atlanta Regional Commission supports the equitable allocation of the water, stating, “There is enough water in the ACF basin to meet the reasonable needs of all users if the reservoirs are managed properly and if all users practice best-in-class conservation.”⁶⁵

However, it may be more difficult for Georgia to receive the amount of water that it needs to sustain the Atlanta metropolitan area after this ruling. Since the ruling would result in a drastic decrease from the level at which the ACF River Basin currently operates, restoration of the withdrawals to mid-1970s levels would be a positive outcome for Alabama and Florida.⁶⁶ While Alabama Governor Bob Riley says that he is “willing to talk,”⁶⁷ it is still

⁵⁸ *Id.* at 1345–46.

⁵⁹ *Id.* at 1355.

⁶⁰ *Id.*

⁶¹ See Keefe, *supra* note 9 (“Getting Congress involved in the dispute opens up a whole new can of worms. Representatives of Alaska or New Jersey, for instance, might ultimately have a vote in deciding how much water Atlanta gets from Lake Lanier.”).

⁶² “The Atlanta Regional Commission (ARC) is the regional planning and intergovernmental coordination agency . . . [that] is dedicated to unifying the region’s collective resources to prepare the metropolitan area for a prosperous future.” *About ARC*, ATLANTA REG’L COMM’N, <http://www.atlantaregional.com/about-us> (last visited Nov. 20, 2010).

⁶³ *Tri-State Water Wars*, *supra* note 7.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See Keefe, *supra* note 9 (noting that Judge Magnuson acknowledged that if Atlanta’s water withdrawals are cut to mid-1970s levels because congressional measures do not succeed within the next three years, this outcome would be “draconian”).

⁶⁷ Lohr, *supra* note 22.

unknown as to what extent Florida Governor Charlie Crist is amenable to negotiation.⁶⁸

Without a definitive water allocation policy in place, Georgia may consider different models and ideas.⁶⁹ This Note suggests that Georgia should consider an internationally based allocation model for the future. An allocation model founded on international legal principles can create the desired equitable water allocation, provide adequate amounts of water for the millions of residents in the metropolitan Atlanta area, and encompass substantial environmental and conservation standards to satisfy its downstream neighbors.

III. DISCUSSION OF THE LAW

A. *United States Law*

To date, the Tri-State Water Wars have been based on a U.S. system of water allocation—a method that has proven fruitless for the three states. Given that the ACF and ACT Basin Commissions failed to agree on water allocation terms acceptable to Alabama, Florida, and Georgia, it seems that a new approach to the conflict would be beneficial. First, the rigid, domestic, doctrinal water systems would have to be relaxed. Water appropriation law in the U.S. generally appears in two different forms: riparianism and prior appropriation.⁷⁰ Riparianism generally appears in the eastern U.S., whereas prior appropriation is popular in the western part of the country.⁷¹

Riparianism centers on the theory that owners of land adjacent to a water source may use as much water as is considered “reasonable use,” as long as they do not “unreasonably interfere” with other users.⁷² This form of water appropriation is useful and workable when water is plentiful, but becomes more complicated when water is suddenly in short supply.⁷³ Riparianism is not conducive to an area facing a water shortage.⁷⁴ The framework for riparianism is “not prepared to decide between ‘reasonable’ uses when there

⁶⁸ See *id.* (“‘We got a very good ruling that really benefits Florida, helps our oyster industry in Apalachicola, and helps us with our water,’ Crist says. ‘We’re very pleased by that, and we continue to support that ruling.’”).

⁶⁹ See Keefe, *supra* note 9 (quoting U.S. Sen. Johnny Isakson (R-Ga.) as stating, “We will look to precedent and look to people who have already done this . . .”).

⁷⁰ Keene, *supra* note 1, at 478.

⁷¹ *Id.* at 478–79.

⁷² *Id.*

⁷³ *Id.* at 479.

⁷⁴ See C. Grady Moore, *Water Wars: Interstate Water Allocation in the Southeast*, 14-SUM NAT. RESOURCES & ENV'T 5, 6 (1999) (“As water resources become scarce, however, the deficiencies of riparianism are exposed.”).

is not enough water available to accommodate all users.”⁷⁵ In other words, since Alabama, Florida, and Georgia all believe that they are requesting a “reasonable” amount of water to satisfy their respective needs and these needs cannot all be met by the available water supply, the riparianism theory is not likely to provide a workable standard for addressing this water crisis.

Prior appropriation, on the other hand, considers which user began using the water source first. In fact, the doctrine is typically referred to as “first in time, first in right.”⁷⁶ Under the prior appropriation theory, no matter how scarce water resources are, or whose use is the most beneficial, “the use that was established first will be first to be fulfilled.”⁷⁷ Even if it would better serve the public’s needs to reallocate the water distribution, the senior water user maintains first priority.⁷⁸ Under the rules of prior appropriation, the “right to the full volume of water ‘related back’ or had the priority date as of the time of first diverting the water and putting it to beneficial use.”⁷⁹ Hence, the states involved in the tri-state water wars will not be able to make any assertions that their anticipated water usage is more valuable than another states’ in order to gain priority, as the doctrine will not consider such factors.

Three requirements must be met under the prior appropriation system: “an intent to divert water for a beneficial use, an actual diversion of water, and application of the water to the beneficial use intended.”⁸⁰ Also, states often require the user to obtain a permit from an administrative agency or a decree from a court “before the right becomes fully vested.”⁸¹ At the same time, even if the right attaches, it is not absolute; the state may restrict the right in order to protect downstream users who may suffer from such a use.⁸²

However, the prior appropriation system would fail to resolve the southeastern water dispute for three reasons: (1) who was “first in time” is indeterminable among the states; (2) Georgia already sought a permit from the Corps, which the court rejected;⁸³ and (3) the court that issued the most recent ruling is concerned with protecting the downstream users.⁸⁴ Although the modern trend in prior appropriation systems is for a government to grant

⁷⁵ Keene, *supra* note 1, at 494.

⁷⁶ Moore, *supra* note 74, at 6.

⁷⁷ Keene, *supra* note 1, at 479.

⁷⁸ Moore, *supra* note 74, at 6.

⁷⁹ *Water Appropriation Systems*, U.S. DEP’T INTERIOR: BUREAU LAND MGMT., <http://www.blm.gov/nstc/WaterLaws/pdf/WaterApprSystems.pdf> (last visited Nov. 20, 2010).

⁸⁰ Stephenson, *supra* note 42, at 89 (citation omitted).

⁸¹ *Id.*

⁸² *Id.*

⁸³ See *In re Tri-State Water Rights Litig.*, 639 F. Supp. 2d 1308, 1356 (M.D. Fla. 2009) (stating that the agreement between Georgia and the Corps was illegal and not a designated use of Lake Lanier).

⁸⁴ *Id.* at 1355 (declaring that water levels will revert to baseline operations if no agreement is reached, thus placing value on Alabama and Florida’s positions).

water rights upon request,⁸⁵ this system has failed to adequately address the Tri-State Water Wars because the three states have already been in and out of court without having their water requests granted.

Some states have tried to remedy the dilemma of a rigid, domestic, water-sharing scheme by applying a hybrid of the two doctrines.⁸⁶ These hybrid schemes are designed to "recognize riparian rights, while also implementing an administrative permit mechanism for new demands placed on water resources."⁸⁷ When compared to the western model of prior appropriation, these hybrid systems do not place as much emphasis on the "first in time, first in right" principle.⁸⁸ Florida has adopted a hybrid water rights system, which is statutorily implemented through a three-prong test⁸⁹ that any submitted water use must pass in order to be accorded a permit. Georgia has also moved toward a hybrid water rights system by making significant modifications to the traditional riparian framework.⁹⁰ Both states have adopted these structures in an effort to depart from the traditional riparian rights system.⁹¹ Additionally, Alabama's law relaxes the riparian framework and caveats the scheme with a "reasonable use" qualifier. Alabama law provides that "landowners have 'a right to the reasonable use of the running water,' but the right is qualified, not absolute, and therefore 'must be enjoyed with reference to the similar rights of other riparian proprietors.'"⁹²

Despite their initial promise, like both the riparian rights and prior appropriation systems, the hybrid systems are still inadequate to handle the Tri-State Water Wars. The biggest problem under any of these doctrines is that "withdrawals in a neighboring state are undervalued."⁹³ Accordingly, it is likely that a state will always prioritize and serve its needs before the needs of its neighbors. Although variations of these systems may have successfully dealt with water disputes within the borders of their respective states, the negotiations of interstate water disputes require an allocation system that forces states to "look past their own internal water allocation

⁸⁵ Keene, *supra* note 1, at 479.

⁸⁶ *Id.* at 480 (quoting Stephenson, *supra* note 42, at 92) (discussing that Florida and Georgia both follow some kind of hybrid schemes that incorporates both riparianism and prior appropriation).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 480 n.55 (citing Stephenson, *supra* note 42, at 92) (providing that, to satisfy Florida's three-prong test, the proposed use "must be defined as a reasonable beneficial use, the use must not adversely affect other riparian users, and the use must be consistent with the public interest").

⁹⁰ *Id.* at 480; Moore, *supra* note 74, at 6.

⁹¹ Keene, *supra* note 1, at 480.

⁹² O'Day et al., *supra* note 2, at 251 (quoting *Cove Properties, Inc. v. Walter Trent Marina, Inc.*, 702 So. 2d 472, 475 (Ala. Civ. App. 1997)).

⁹³ Moore, *supra* note 74, at 6.

systems to find an approach that is more conducive to fluid negotiations between the states.”⁹⁴ Ultimately, this requires a more equitable approach than what is offered by riparian rights, prior appropriation, and hybrid systems. Since the initial negotiations of the ACF and ACT Commissions unsuccessfully used these rigid frameworks, this Note recommends for Alabama, Florida, and Georgia to adopt a more flexible framework if they chose to resume negotiations.

B. Customary International Law

Several sources address transboundary water allocation law. The International Law Association adopted the Berlin Rules on Water Resources (Berlin Rules) on August 21, 2004, which encapsulate modern international law that is customarily applied to freshwater resources, both within a jurisdiction or between jurisdictions.⁹⁵ The Berlin Rules replace the ILA’s previous Helsinki Rules on the Uses of the Waters of International Rivers (Helsinki Rules),⁹⁶ which “played a key role in formulating the rule of equitable and reasonable utilization as the basic rule of international law for the transboundary use and development of waters.”⁹⁷ The Helsinki Rules and the doctrine of equitable and reasonable utilization were codified in 1997 in the United Nations’ Convention on the Law of the Non-Navigational Uses of International Watercourses (UN Convention).⁹⁸ The UN Convention states that waters should be “used and developed . . . taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.”⁹⁹ The UN Convention also lists relevant factors used to determine when a shared water source is being equitably utilized.¹⁰⁰ This principle of adequate protection has been instrumental in resolving international water disputes because of its endorsement of resource

⁹⁴ Keene, *supra* note 1, at 495.

⁹⁵ *Berlin Rules*, *supra* note 12.

⁹⁶ Int’l L. Ass’n, *The Helsinki Rules on the Uses of the Waters of International Rivers*, Report of the 52nd Conference (1966) [hereinafter *Helsinki Rules*], available at http://www.unece.org/env/water/meetings/legal_board/2010/annexes_groundwater_paper/Annex_II_Helsinki_Rules_ILA.pdf.

⁹⁷ *Berlin Rules*, *supra* note 12, at 3; see also *Helsinki Rules*, *supra* note 96 (discussing equitable utilization of the waters of an international drainage basin).

⁹⁸ Convention on the Law of the Non-Navigational Uses of International Watercourses, G.A. Res. 51/229, U.N. GOAR, 51st Sess., U.N. Doc. A/RES/51/229 (May 21, 1997), available at <http://www.un.org/documents/ga/res/51/ares51-229.htm>.

⁹⁹ *Id.* art. 5, para. 1.

¹⁰⁰ See *id.* art. 6, para. 1(a)–(g) (listing “factors of a natural character . . . social and economic needs of the watercourse States . . . [t]he population dependent on the watercourse[s] . . . effects of the use or uses of the watercourses . . . [e]xisting and potential uses of the watercourse . . . availability of alternatives, of comparable value, to a particular planned or existing use”).

distribution that is beneficial to all the parties involved.¹⁰¹ Nearly all commentators now agree that the customary rule of equitable utilization revolves around the countless treaties relating to internationally shared waters.¹⁰²

The Berlin Rules, however, seek to update the equitable utilization principle, as well as the accompanying factors, to address the “progressive development of the law needed to cope with emerging problems of international or global water management for the twenty-first century.”¹⁰³ They also expand the equitable utilization doctrine to reflect modern problems of environmental law, human rights law, and humanitarian law.¹⁰⁴ Thus, the Berlin Rules, when compared to the Helsinki Rules or the UN Convention, embody a pronounced divergence in the expansion of the international law of water resources.¹⁰⁵ The doctrine posits that when cooperation, avoidance of transboundary harm, and equitable participation are combined, a clearer, more comprehensive model emerges that more accurately reflects the current international climate.¹⁰⁶

The Berlin Rules also serve as a model for uniting the doctrine of equitable utilization with the obligation not to cause significant harm.¹⁰⁷

¹⁰¹ See *Indus Waters Treaty* at pmbi., India-Pak., Sept. 19, 1960, 419 U.N.T.S. 125, available at <http://siteresources.worldbank.org/INTSOUTHASIA/Resources/223497-1105737253588/IndusWatersTreaty1960.pdf> (stating that both governments were “equally desirous of attaining the most complete and satisfactory utilisation of the waters of the Indus system of rivers”); see also *Treaty Between His Majesty’s Government of Nepal and the Government of India Concerning the Integrated Development of the Mahakali River Including Sarada Barrage, Tanakpur and Pancheshwar Project* art. 7, India-Nepal, Feb. 12, 1996, 36 I.L.M. 531, available at <http://www.pca-cpa.org/upload/files/16%20Mahakali.pdf> (stating that “each party undertakes not to use or obstruct or divert the waters of the Mahakali River adversely affecting its natural flow and level except by an agreement between the parties”). See generally Keene, *supra* note 1 (analyzing several successful international treaties based on principles of equitable utilization).

¹⁰² Joseph W. Dellapenna, *International Water Law in a Climate of Disruption*, 17 MICH. ST. J. INT’L L. 43, 70 (2008).

¹⁰³ *Berlin Rules*, *supra* note 12, at 4.

¹⁰⁴ See *id.* art. 13, para. 2(a)–(i) (discussing relevant factors to be considered in determining equitable and reasonable use, including “natural features[,] . . . social and economic needs of the basin States[,] . . . [t]he population dependent on the waters of the international drainage basin[,] . . . effects of the use or uses of the international drainage basin[,] . . . [e]xisting and potential uses of the international drainage basin[,] . . . economy of the use of the water resources of the international drainage basin and the costs of measures taken to achieve these purposes[,] . . . availability of alternatives, of comparable value, to a particular planned or existing use[,] . . . sustainability of proposed or existing uses[,] . . . [and] minimization of environmental harm.”).

¹⁰⁵ Joseph W. Dellapenna, *International Law’s Lessons for the Law of the Lakes*, 40 U. MICH. J.L. REFORM 747, 776 (2007).

¹⁰⁶ *Id.* at 776–77.

¹⁰⁷ Salman M.A. Salman, *The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law*, 23 WATER RESOURCES DEV. 625, 636 (2007),

This “no-harm” rule “requires the basin states, in managing the waters of an international drainage basin, to refrain from and prevent acts or omissions within their territory that cause significant harm to another basin state, ‘having due regard for the right of each basin State to make equitable and reasonable use of the waters.’”¹⁰⁸ The UN Convention was criticized for not prioritizing the obligation to refrain from causing harm, when put up against the principle of equitable and reasonable utilization, which effectively permitted states to inflict harm on each other.¹⁰⁹ Notably, under the scheme of the Berlin Rules, Georgia would be obligated to consider the harm its actions would cause to both Alabama and Florida. While the equitable utilization principle has been criticized for its vagueness in the past,¹¹⁰ “customary international law, whether expressed in the Berlin Rules or determined otherwise, is not simply an admonition to ‘do good and avoid evil.’ It provides a careful roadmap identifying the factors relevant to making the necessary decisions as well as (in the Berlin Rules) templates for the processing of assessing the relevant variables and establishing the necessary cooperative regimes.”¹¹¹

IV. DISCUSSION OF GEORGIA’S THREE OPTIONS

Based on Judge Magnuson’s latest ruling, Georgia has identified three options to foster the pursuit of its water allocation needs. All three options include risks and benefits based on the parties involved in the decision-making process and on the legal principles the parties apply to the decision-making process (or lack thereof).

A. Congressional Decision

Judge Magnuson ruled that Congress has three years to pass a water-sharing bill, without which Atlanta’s withdrawal levels would be drastically reduced.¹¹² Receiving congressional approval for an allocation of water that favors Georgia over Alabama and Florida may be difficult for many reasons.

available at <http://www.internationalwaterlaw.org/bibliography/articles/general/Salman-BerlinRules.pdf>.

¹⁰⁸ *Id.* (quoting *Berlin Rules*, *supra* note 12, art. 16).

¹⁰⁹ *Id.* at 638.

¹¹⁰ Keene, *supra* note 1, at 496.

¹¹¹ Dellapenna, *supra* note 102, at 85 (citations omitted).

¹¹² *In re Tri-State Water Rights Litig.*, 639 F. Supp. 2d 1308, 1355 (M.D. Fla. 2009) (stating that the “operation of Buford Dam will return to the ‘baseline’ operation of the mid-1970s” if congressional authorization or a resolution to the dispute does not occur in three years).

Congressional apportionment may be viewed as a blanket solution to the convoluted problems associated with interstate water disputes.¹¹³ Congress is authorized to resolve interstate water disputes based on its authority to regulate interstate commerce.¹¹⁴ At the same time, Congress is not tightly constrained by existing legal doctrine.¹¹⁵ However, it is unlikely Congress would want to settle the dispute if an agreement between the congressional delegates from Alabama, Florida, and Georgia cannot be reached.¹¹⁶ Members of Congress would probably be indifferent to the outcome and uneducated regarding the region's water issues.¹¹⁷

Congressional apportionment has been utilized in other water allocation disputes. For example, the Boulder Canyon Project Act,¹¹⁸ where interstate allocation stemmed from *Arizona v. California*,¹¹⁹ established the apportionment of Colorado River waters between Arizona, California, and Nevada.¹²⁰ In *Arizona*, after an interstate compact failed, Congress approved dams to be built by California that would effectively cut off a significant portion of Arizona's water supply as a lower basin state.¹²¹ Arizona fought "this apparent railroading by Congress," but all of its subsequent appeals of the Boulder Canyon Project Act were rejected.¹²² Not only is this type of outcome a danger that Georgia faces if it allows the Tri-State Water Wars to be solved by congressional apportionment, but the Boulder Canyon Project Act has also been criticized on other grounds. "The [congressional] power to intervene in an interstate water dispute, sponsor negotiations with conflicting

¹¹³ See Dellapenna, *supra* note 39, at 892 (citing Paul Bloom, *Law of the River: A Critique of an Extraordinary Legal System*, in NEW COURSES FOR THE COLORADO 139, 149–52 (Gary D. Weatherford & F. Lee Brown eds., 1986)) ("Some see in congressional apportionment a potentially general solution to the sometimes inextricable problems of interstate water disputes.").

¹¹⁴ U.S. CONST. art. I, § 8, cl. 3.

¹¹⁵ Dellapenna, *supra* note 39, at 892.

¹¹⁶ *Id.* at 894.

¹¹⁷ *Id.* at 893 ("Senators or Representatives from Montana are not even likely to care very much about how the waters of the 'Hooch are divided among the three states. . . . [O]ne might well question whether such disinterested Senators or Representatives will actually give any real attention to these inputs."); see Keefe, *supra* note 9 (illustrating the arbitrariness of a congressman from Alaska or New Jersey becoming involved in the dispute); see also 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, 212 (1992) ("Congress is, understandably, reluctant to impose a solution in a matter so sensitive as the distribution of interstate waters.").

¹¹⁸ Boulder Canyon Project Act, ch. 42, 45 Stat. 1057 (1928) (codified at 43 U.S.C. § 617(a)–(t) (1993)).

¹¹⁹ *Arizona v. California*, 373 U.S. 546, 546 (1963).

¹²⁰ E. Leif Reid, *Ripples from the Truckee: The Case for Congressional Apportionment of Disputed Interstate Water Rights*, 14 STAN. ENVTL. L.J. 145, 162–63 (1995).

¹²¹ *Id.* at 163.

¹²² *Id.*

parties, and divide the waters through legislative enactment makes congressional apportionment 'in fact a form of compact.' ¹²³ In other words, Georgia would be agreeing to allow disinterested parties to form a new quasi-compact on their behalf.

However, without an agreement between the three southeastern states, Congress is unlikely to act. The states "do not want to surrender control to the federal government and the federal government is not likely to act without the states' concurrence."¹²⁴ Thus, a solution to this catch-22 seems doubtful, and the deadlock will likely remain.

B. Further Appeals

The interested parties representing Georgia—the State, the city of Atlanta, and the Atlanta Regional Commission—are continuing to appeal Judge Magnuson's ruling that provided that it is illegal for the Corps to reallocate water in favor of Georgia. The State argues that this order is equivalent to an injunction, allowing Georgia to immediately appeal to the Court of Appeals for the Eleventh Circuit in Atlanta.¹²⁵ It is unlikely, however, that this appeal will succeed, since the ruling could enable the court to force the parties to settle, instead of encouraging further litigation.¹²⁶ Additionally, Judge Magnuson recently stated, "No injunctive relief was ordered or intended by the court's July 17, 2009, order."¹²⁷ It seems clear at this point that the court does not want the parties to continue the litigation and is attempting to coerce the three states to negotiate a quick settlement.¹²⁸

However, if the case were successfully appealed to the U.S. Supreme Court, it is likely that the water resources would be allocated based upon the doctrine of equitable apportionment. The Supreme Court has jurisdiction over controversies between states¹²⁹ and has judicially apportioned water

¹²³ *Id.* at 166 (citing Charles J. Meyers, *The Colorado River*, 19 STAN. L. REV. 1, 48 (1966)).

¹²⁴ Dellapenna, *supra* note 39, at 894.

¹²⁵ Bill Rankin, *Judge Again Rules Against Georgia in Water Fight*, ATLANTA J.-CONST. (Oct. 5, 2009, 10:03 PM), <http://www.ajc.com/news/atlanta/judge-again-rules-against-155401.html>.

¹²⁶ *See id.* (discussing how Judge Magnuson issued a three-page order on Oct. 5, 2009, which frowned upon Georgia's further appeals and quoted Judge Magnuson as saying this latest appeal "will only delay and further complicate the resolution of the important claims at issue").

¹²⁷ *Id.*

¹²⁸ *See id.* (quoting Gil Rogers, a Southern Environmental Law Center Senior Attorney who is involved in litigation, stating, "If the signal the judge [Judge Magnuson] sent in July wasn't clear enough, it's now become that much more clear . . . he's setting the framework for the parties to finally resolve this 20-year-old dispute.").

¹²⁹ U.S. CONST. art. III, § 2, cl. 1.

resources several times in the past.¹³⁰ In these cases, the Supreme Court abandoned common law principles of riparian rights and prior appropriation and applied the doctrine of equitable apportionment, whereby the Supreme Court attempted to divide the water fairly between the states.¹³¹ Generalizations that influence the Supreme Court's decisions on equitable apportionment include: applying the doctrine of prior appropriation presumptively to small and large river basins, applying the common law of riparian rights to large and small river basins, retaining the power to "displace existing uses," and planning efforts on the state level to "conserve existing supplies" when sharing duties are at stake.¹³² Thus, it is difficult to predict what a court-created apportionment would look like for the states.

While such an equitable resolution by the Supreme Court would be a step in the right direction toward solving the Tri-State Water Wars, judicial apportionment is not the best way to solve the Tri-State Water Wars for several reasons. For one, the states "have no way of predicting the outcome of such litigation."¹³³ There is no way to tell what the Court will deem an equitable apportionment.¹³⁴ Thus, once these states allow the Supreme Court to control the resolution, they may be very displeased with the result. Additionally, litigation involved is expensive and could drag out for a substantial period of time—possibly ten years or longer.¹³⁵ Lastly, the Court

¹³⁰ See *Arizona v. California*, 530 U.S. 392 (2000); *Nebraska v. Wyoming*, 515 U.S. 1 (1995); *Kansas v. Colorado*, 206 U.S. 46 (1907) (showing examples of the Court applying the doctrine of equitable apportionment).

¹³¹ See, e.g., *Kansas v. Colorado*, 206 U.S. 46, 103–04 (1907) (ruling that each state should enjoy equal benefits without harming other states).

¹³² Jeffrey Uhlman Beaverstock, Commentary, *Learning to Get Along: Alabama, Georgia, Florida, and the Chattahoochee River Compact*, 49 ALA. L. REV. 993, 1001–02 (1998) (citing WILLIAM GOLDFARB, *WATER LAW* 52–55 (1988)).

¹³³ Dellapenna, *supra* note 39, at 888; see also O'Day et al., *supra* note 2, at 255 (discussing how the Supreme Court generally does not follow the water law of the states and stating, "When, as in this case, both states recognize the doctrine of prior appropriation, priority becomes the 'guiding principle' in an allocation between competing states. But state law is not controlling. Rather, the just apportionment of interstate waters is a question of federal law that depends 'upon a consideration of the pertinent laws of the contending States and all other relevant facts.' " (quoting *Colorado v. New Mexico*, 459 U.S. 176, 183–84 (1982))).

¹³⁴ See Meruelo, *supra* note 4, at 355–56 (discussing the doctrine as applied in *New Jersey v. New York*, 283 U.S. 336 (1931), and stating that "the Court may prioritize certain uses of water over others when equitably apportioning a shared watercourse, and such determinations may or may not comport with what the states may actually want or find most important" (citations omitted)); see also Beaverstock, *supra* note 132, at 1003 ("Some commentators feel that the [Supreme] Court does not have the time, experience, or resources 'to cope with the complicated hydrologic, economic, and sociological questions involved.' ").

¹³⁵ Dellapenna, *supra* note 39, at 888 ("[T]he officials involved in the negotiations under the Chattahoochee Compact estimated the costs of original litigation before the Supreme Court as in the range of four to six million dollars per year, per state.").

has no way of overseeing the execution of its resolution.¹³⁶ Based on these factors, it is no surprise that the courts prefer that parties handle their own disputes.

C. Resume Negotiations

In analyzing the multiple options available to Georgia, this Note suggests that the most beneficial option for all three states would be to resume negotiations with Alabama and Florida. Returning to the negotiating table would help to ensure that (1) all parties involved have a say in the final solution, (2) water withdrawals would not be drastically reduced to 1970s levels, (3) negotiation and settlement costs would be kept low, (4) environmental harm would be minimized, and (5) the water resources would be equitably allocated between the three states.

Alabama and Florida have expressed their satisfaction regarding Judge Magnuson's July 17th ruling, which held that the Corps was illegally withdrawing water for Georgia.¹³⁷ This ruling gives Alabama and Florida more leverage if they resume negotiations; therefore, Georgia will need to compromise and act in good faith to guarantee the assent of Alabama and Florida to any potential water allocation agreement.

An application of the Berlin Rules would be helpful in resolving this dispute because the Berlin Rules focus on principles that are of great concern to Alabama and Florida: preventing adverse environmental impacts, causing no harm to neighbors, and cooperative transboundary management.¹³⁸ Indeed, the Berlin Rules were drafted out of a need to develop cooperative solutions necessary to protect scarce resources.¹³⁹

This Note makes two recommendations, since the U.S. common law water allocation systems of riparian rights and prior appropriation are unsuitable for solving the current dilemma in the southeastern U.S., and because the three states have already attempted to negotiate through interstate compacts and commissions for years unsuccessfully. First, the

¹³⁶ See Keene, *supra* note 1, at 482 (stating that "the Court has implicitly expressed its desire that future water rights disputes be handled between the states").

¹³⁷ Lohr, *supra* note 22.

¹³⁸ See *Berlin Rules*, *supra* note 12, arts. 5–8, 37, 42 (stating general principles, including the obligation to use best efforts to manage waters conjunctively and integrated with related aspects of the environment, sustainability and the minimization of environmental harm, basin states' rights to participate in the management of shared water, and the obligation to avoid transboundary harm).

¹³⁹ See Dellapenna, *supra* note 102, at 77 (discussing how, before the Berlin Rules were developed, there was a need for a "new paradigm" which would respond to the need for "cooperative solutions not only regarding the exploitation of the resource but also its protection").

states should look to the International Law Association's Berlin Rules as a framework for a settlement. Second, the states should consider the commission structures of successful international water resource settlements.

1. *Using the Berlin Rules as a Framework*

Compared with the doctrines of riparian rights and prior appropriation, the "equitable utilization principle does not allow for concrete, permanent rights to water use,"¹⁴⁰ as this principle focuses less on rigid rules, and more on sharing and sustainability. When considering the many factors to be taken into account in the negotiation process,¹⁴¹ the equitable utilization principle would allow all three states to stake a claim in the water resources, without regard to any inalienable rights the individual states may claim.¹⁴² Indeed, in negotiating possible solutions, the rule of equitable utilization is considered to be adaptable and versatile, even when working in conjunction with the obligation to avoid significant harm.¹⁴³

In the negotiation process, when the rule of equitable utilization is combined with the obligation to avoid significant harm, it does not limit flexibility in developing water resource sharing schemes so much as it simply integrates the requisite principles to ensure sustainability and an ecologically sound environment.¹⁴⁴ Hence, the Berlin Rules provides helpful guidance when trying to determine how to avoid injurious actions.¹⁴⁵ Additionally, the Berlin Rules mandate that there is a duty for the basin states to cooperate with each other; specifically, the Berlin Rules provide that "[b]asin States shall cooperate in good faith in the management of waters of an international drainage basin for the mutual benefit of the participating States."¹⁴⁶

¹⁴⁰ Keene, *supra* note 1, at 496.

¹⁴¹ See *Berlin Rules*, *supra* note 12, art. 13 (listing factors states should consider in the negotiation process over shared, transboundary water resources).

¹⁴² Keene, *supra* note 1, at 496.

¹⁴³ Dellapenna, *supra* note 102, at 85 (citations omitted); see also Keene, *supra* note 1, at 496 ("The equitable utilization principle provides for a more flexible negotiation process [between states].").

¹⁴⁴ Dellapenna, *supra* note 102, at 85.

¹⁴⁵ *Id.* at 86.

¹⁴⁶ *Berlin Rules*, *supra* note 12, art. 11; see also Nitza Shapiro-Libai, *Development of International River Basins: Regulation of Riparian Competition*, 45 IND. L.J. 20, 33 (1969) ("[E]very river system is naturally an indivisible physical unit, and . . . should be so developed as to render the greatest possible service to the whole human community which it serves . . . It is the positive duty of every government concerned to cooperate to the extent of its power in promoting this development." (citing H.A. SMITH, *THE ECONOMIC USES OF INTERNATIONAL RIVERS* 150-51 (1931))).

This is an ideal set of rules for the Tri-State Water Wars. Georgia, and in particular Atlanta, has been viewed as the villain based on allegations of negotiations made in bad faith and damage to Florida's endangered species, shellfish industry, and water quality.¹⁴⁷ However, although it seems like Alabama and Florida are jointly fighting Georgia, this does not mean that Georgia will have to acquiesce to all of their demands. The Berlin Rules state that "[i]n determining an equitable and reasonable use, States shall first allocate waters to satisfy vital human needs" and that "[n]o other use or category of uses shall have an inherent preference over any other use or category of uses."¹⁴⁸ Thus, although Florida and Alabama depend on water from the Chattahoochee for their industries, sustaining the health and safety needs of Atlanta residents would certainly take priority under the Berlin Rules. Accordingly, Georgia can certainly make a compelling argument that the Atlanta metropolitan area requires a greater share of water in order to satisfy the vital needs of its greater number of residents.

The Berlin Rules establish a framework for the negotiation process¹⁴⁹ encompassing all of these factors and concerns, helping to meet all of the states' needs, and ensuring that negotiations will be completed without the aid of congressional apportionment or further appeals to the U.S. Supreme Court.

2. *Adopting a New Commission Structure*

This Note also suggests that the states should consider adopting the commission structures from various successful international water resource settlements. In addition to adopting international water allocation frameworks, there are other ways in which Alabama, Florida, and Georgia can improve the productivity and success of the negotiation process. Specifically, the states can look to other successful treaty commissions as models for forming a successful negotiating body in transboundary disputes.

Although the commission established under the ACF Compact has been unproductive thus far, it is structurally sound.¹⁵⁰ Similar in many ways to successful predecessor commissions, the ACF Compact mandates enforcement of any agreement that is reached, permits experts to be involved in the decision-making process for guidance, and requires that negotiations

¹⁴⁷ Meruelo, *supra* note 4, at 347–48; Keene, *supra* note 1, at 478.

¹⁴⁸ *Berlin Rules*, *supra* note 12, art. 14.

¹⁴⁹ Dellapenna, *supra* note 102, at 94–95 (“[T]he Berlin Rules provide a template for the creation of a joint, basin-wide water management regime if states are prepared to go that far.”).

¹⁵⁰ Keene, *supra* note 1, at 497.

include a delegate from the federal government.¹⁵¹ Including such a delegate has been considered a “constructive step” as the delegate “hopefully could serve by facilitating negotiations, as well as indicating the desires of the national administration.”¹⁵²

Despite its solid foundation, the ACF Commission has been ineffective in realizing its goal. The ACF Commission’s structure too freely permits each state to pursue its individual goals, providing little incentive for the parties to refrain from self-interested and uncompromising behaviors. By examining various water rights negotiations, including both historical and modern negotiations, Georgia may find ways to improve its own commission structure.

The International Joint Commission (IJC), established under the 1909 Boundary Waters Treaty¹⁵³ between the United States and Canada, would serve as a useful model commission for Alabama, Florida, and Georgia as they resume negotiations. Under the Boundary Waters Treaty, the U.S. President, with the aid of Congress, appoints three commissioners who “must act impartially, in reviewing problems and deciding on issues, rather than representing the views of their respective governments.”¹⁵⁴ One of the main problems with the ACF Commission was that the representatives refused to modify their state’s interests, in the interest of the other states, or for the greater good of the Chattahoochee River. As such, it would be beneficial to have an impartial commission similar to that envisioned by the Boundary Waters Treaty.

The IJC facilitated efficiency and agreement in other ways, as well.¹⁵⁵ The Boundary Waters Treaty “requires that the Commission give all

¹⁵¹ *Id.*

¹⁵² *Id.* at 498.

¹⁵³ Treaty Between the United States and Great Britain Relating to Boundary Waters, and Questions Arising Between the United States and Canada, U.S.-G. Brit., Jan. 11, 1909, 36 Stat. 2448 [hereinafter *Boundary Waters Treaty*], available at <http://www.greatlakes.org/Document.Doc?id=147>.

¹⁵⁴ *Who We Are*, INT’L JOINT COMM’N, http://www.ijc.org/en/background/ijc_cmi_nature.htm#What (last visited Nov. 20, 2010).

¹⁵⁵ See Robert H. Abrams, *The Boundary Waters Treaty of 1909 as a Model for Interjurisdictional Water Governance*, 54 WAYNE L. REV. 1635, 1636 (2008) (“[T]he BWT [Boundary Waters Treaty] created a governance structure that has minimized water-related conflict in its century of operation. At the core of the BWT’s operation is one of the best respected international bodies, the International Joint Commission . . . [which] has thrived, despite its potential for impasse at the hands of its evenly divided voting authority, by building a record of impeccable research and analysis and promoting bi-national consensus.”). See generally Colleen P. Graffy, *Water, Water, Everywhere, nor Any Drop to Drink: The Urgency of Transnational Solutions to International Riparian Disputes*, 10 GEO. INT’L ENVTL. L. REV. 399, 424 (1998) (“The International Joint Commission is particularly effective because of the non-governmental composition of the Commission and its method of hearing and resolving

interested parties a 'convenient opportunity to be heard' on matters under consideration."¹⁵⁶ In other words, the public is invited to participate in matters that concern them. Additionally, citizens are able to serve on special boards and task forces established under the IJC as a way to gain both expert and lay opinions on water management.¹⁵⁷

The more recent International Commission for the Protection of the Danube River (ICPDR) was enacted to implement the Danube River Protection Convention.¹⁵⁸ The ICPDR is "formally comprised by the Delegations of all Contracting Parties to the Danube River Protection Convention, but has also established a framework for other organisations to join."¹⁵⁹ These organizations include technical and scientific experts, as well as citizens. While The ACF Commission allows for the input of expert opinion, the ICPDR has included impartial experts in its working body, considering them to be the "backbone of the operation and the success of the ICPDR."¹⁶⁰ The ICPDR is similar to the IJC¹⁶¹—both utilize impartial, non-political delegates and experts to expedite negotiations and decision-making processes.

The Mekong River Commission (MRC), established by an agreement between the governments of Cambodia, Laos, Thailand, and Vietnam, follows a similar structure to the ICPDR.¹⁶² The MRC uses expert groups to aid in guiding the process, and consists of three different bodies that serve as checks to ensure no abuse of power from any one nation-state or committee.¹⁶³

disputes based upon equitable utilization of the use and flow of the water." (citations omitted)).

¹⁵⁶ *Treaties and Agreements*, INT'L JOINT COMM'N, <http://www.ijc.org/rel/agree/water.html#how> (last visited Nov. 20, 2010).

¹⁵⁷ *Id.*

¹⁵⁸ ICPDR, *supra* note 15.

¹⁵⁹ *About Us*, INT'L COMM'N FOR PROTECTION OF DANUBE RIVER, http://www.icpdr.org/icpdr-pages/about_us.htm (last visited Nov. 20, 2010).

¹⁶⁰ *Expert Groups*, INT'L COMM'N FOR PROTECTION OF DANUBE RIVER, http://www.icpdr.org/icpdr-pages/expert_groups.htm (last visited Nov. 20, 2010).

¹⁶¹ Boundary Waters Treaty, *supra* note 153.

¹⁶² *About the MRC*, MEKONG RIVER COMM'N FOR SUSTAINABLE DEV., http://www.mrcmekong.org/about_mrc.htm (last visited Nov. 20, 2010).

¹⁶³ *Id.* ("The MRC consists of three permanent bodies: The Council [ministerial or cabinet level], the Joint Committee (JC) [heads of departments], and the Secretariat [technical branch]."); Greg Browder & Leonard Ortolano, *The Evolution of an International Water Resources Management Regime in the Mekong River Basin*, 40 NAT. RESOURCES J. 499, 524 (2000) ("The Council, which meets at least once a year, is the policy-making body of the MRC The Joint Committee . . . is the operational decision-making body of the MRC . . . and the Secretariat . . . procure[s] international assistance, administer[s] projects, and undertake[s] selected technical tasks such as maintaining a hydrological database.").

Lastly, the Indus Waters Treaty¹⁶⁴ also provides a good example of a successful commission structure to be used by Alabama, Florida, and Georgia. While the ICPDR utilized impartial experts and delegates, the Indus Waters Treaty provided for a commission with an impartial mediator to assist in the negotiations.¹⁶⁵ At an impasse in negotiations, and desperate to get water, India and Pakistan accepted an offer by the World Bank to act as the impartial mediator.¹⁶⁶ Since the Indus Waters Treaty was formed in 1960, it has earned praise for “governing the division of the Indus waters for a half-century, through multiple wars and deteriorations in bilateral relations.”¹⁶⁷ The two countries quickly accepted the World Bank’s impartiality, and have respected the treaty that emerged as a result of the mediation.¹⁶⁸ This resolution is quite impressive, as the World Bank’s offer came “against the backdrop of failed bilateral diplomacy” and great tension.¹⁶⁹ Considering the amount of time Alabama, Florida, and Georgia have spent fighting over their shared water resources, the accusations of bad faith negotiations, and the tense relationship between these states currently, a strong, independent mediator would only benefit the three parties and the hope of a settlement.¹⁷⁰

While the three states need not implement every aspect of these successful international commissions, it is recommended that they invite impartial experts, delegates, and a mediator to guide and assist in the negotiation process. Additionally, they should invite citizens to serve on special task forces. Modifying the negotiation structure would control abuses of power, expedite the process, and facilitate a final agreement.

V. CONCLUSION

Alabama, Florida, and Georgia have been arguing over water resources for more than twenty years. Throughout that time, they have failed to resolve any of their individual complaints regarding water quality, water

¹⁶⁴ Indus Waters Treaty, *supra* note 101.

¹⁶⁵ Manav Bhatnagar, *Reconsidering the Indus Water Treaty*, 22 TUL. ENVTL. L.J. 271, 275 (2009).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 278. See generally Keene, *supra* note 1, at 485 (positing that some of the success of the treaty may be because the “treaty borne of the subsequent negotiations was based on the principle of equitable utilization”).

¹⁶⁸ Keene, *supra* note 1, at 498.

¹⁶⁹ Bhatnagar, *supra* note 165, at 275.

¹⁷⁰ See Keene, *supra* note 1, at 498 (suggesting possible mediators that could assist in negotiations, including a “high figure in the Environmental Protection Agency” or “a strong-minded individual or organization from outside of the political process . . . such [as] a mediator[,] could facilitate and expedite negotiations without having his or her own agenda to fulfill”).

scarcity, industrial growth, and negative environmental impacts on natural resources and endangered species.

Of the three resolution strategies that Georgia is now considering, this Note suggests that Georgia should resume negotiations with Alabama and Florida. A negotiated settlement would help to ensure that Georgia receives the water it requires to support its rapidly growing population, while a congressional apportionment or an appeal to the U.S. Supreme Court may not. If Georgia continues negotiating, Georgia will be guaranteed to have a say in the final apportionment.

Further, this Note suggests that these three states should apply principles of international law on transboundary water management to aid in an agreement when negotiations resume. As prior attempts to negotiate have proven fruitless, these states should look beyond rigid, domestic water appropriation systems and adopt a more relaxed framework that allows the parties to protect their own interests, while also yielding to the interests of others. International legal principles, including the Berlin Rules and the doctrine of equitable utilization, have proven beneficial in forming international treaties and negotiating agreements, and are based on values of shared resources, interstate cooperation, compromise for the greater good of the people and the land, in addition to the duty not to cause harm. These values are well tailored to form the framework for a negotiation among the states, as these needs have not yet been satisfied.

Additionally, these states should look to the commissions formed under successful international agreements as best practice models for efficiency and productiveness. These international commissions, comprised of scientific and technical experts, as well as impartial mediators, have been praised for their sound structure and neutral decision-making bodies. If the states would pursue independent and neutral guidance to mitigate the influence of personal interests and animosities, they would find greater success in the negotiation process. Although Alabama, Florida, and Georgia have thus far been unsuccessful in reaching a final settlement, international legal principles would provide an effective way to progress since such principles focus on the greater good while providing for a flexible but structured negotiations process.

