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Water Wars
Will Georgia, Alabama and Florida ever agree?

By Associate Professor Peter A. Appel

The Chattahoochee River runs through the city of Atlanta, one of the South’s largest cities, which has a high demand for water.
The states of Georgia, Alabama and Florida have fought over the last few decades about important subjects — SEC championships and economic development are just two such fights. However, disputes over water have, in recent years, made up the most important of these controversies.

For over a decade, these three states have battled over the resources of the Alabama-Coosa-Tallapoosa (ACT) and Apalachicola-Chattahoochee-Flint (ACF) river basins. Despite adopting congressionally-approved interstate compacts — which were essentially agreements to agree — the three states have never reached final accords over these water bodies.

Many commentators believe this dispute will inevitably wind up before the U.S. Supreme Court.

What they overlook, however, is how this controversy began, the different forums in which it has been fought and the various ways it could be resolved in the interest of all of the parties.

The basis of the controversy among these three southeastern states lies in the different interests each of the states has in the uses of water in the ACT and ACF basins, the mechanical structure of each of the basins and the fact that each of the states operates by some version of the riparian rights doctrine.

This article will provide an overview of how the dispute originally arose, the different means of resolving it and what some of the potential outcomes of it might be depending on the means chosen for resolution.

The common misconception that, in the end, the U.S. Supreme Court must resolve this water war ignores the strong evidence that suggests that other means and probably other branches of the federal government will end the dispute.

Mechanical and legal structure of the basins

The ACT and ACF river basins both drain into the Gulf of Mexico, the ACT at Mobile and the ACF into Apalachicola Bay off the Florida panhandle.

Both river basins have a great deal of federal involvement in the management of the flow of the rivers.

The most obvious involvement of the federal government is through the U.S. Army Corps of Engineers.

The corps has historically managed navigation on internal waterways in the United States, and the corps’ civil works projects have historically included removing obstacles from navigable waters, dredging rivers and harbors to promote navigation, building and maintaining levees, and building and managing dams for the purposes of promoting navigation, creating hydroelectric power and controlling floods.

In addition, in 1958, Congress authorized all corps projects to supply municipal drinking water consistent with their other authorized purposes.

Both the ACT and ACF basins have a number of dams owned and operated by the corps.

The most prominent of these in the ACT basin is the Allatoona Dam, which forms Lake Allatoona; in the ACF, Buford Dam forms Lake Lanier.

Although there are certainly more dams along each of the basins, lakes Lanier and Allatoona form significant sources of municipal water supply for the Atlanta metropolitan area.

As the region’s most populated area, the Atlanta area has a high demand for water.

The situation is further complicated because Atlanta is the largest metropolitan area that relies on the smallest water resources in the country.

Lakes Lanier and Allatoona are also popular recreation areas for people in the Atlanta region, which means that Atlantans often want water in Lake Lanier on the weekend for recreation and water from Lake Lanier for their households during the week.

The management of these two dams, which are both toward the beginning of their respective watersheds, are thus important in fueling the dynamics in the tension over water: Georgia against the other two states; municipal uses of water against other consumptive uses, particularly agricultural irrigation; nonconsumptive uses such as recreation and navigation; and maintaining habitat and water for fish and wildlife.

Although neither lake completely controls its watershed, these operations have emerged as flashpoints in the disputes among the three states and affected stakeholders.

Further downstream, other dams the corps operates form significant reservoirs and lakes. In the ACT, these lakes include Carters Lake, Logan Martin Lake, Weiss Lake and Woodruff Lake. In the ACF, significant lakes operated by the corps include West Point Lake, Lake Seminole and the Walter F. George Reservoir.

In addition to the corps, the Federal Energy Regulatory Commission (FERC) has authority over all of the non-federally owned and operated dams in the ACT and ACF basins.

Many of the dams are operated by Georgia Power; some are municipally or otherwise owned.

The Federal Power Act grants FERC the authority to issue licenses for these non-federal entities and licenses typically last for 50 years.

Many of the dams in both the ACT and the ACF were built during the 1950s, so the renewal of these licenses is about to become an ongoing project.

The Federal Power Act dictates that FERC consider a number of factors before issuing a license or relicensing a project.

In recent years, FERC has imposed a number of restrictions on dams around the country for environmental reasons, such as fishways and minimum flow requirements.

Some of these requirements have proven too costly for the dam operators, and FERC has required the dams to be removed.

Although none of these situations have occurred in Georgia yet, the relicensing procedures could conceivably cause some dams to be removed in this state.

In addition, FERC licenses are subject
to section 401 of the federal Clean Water Act. Section 401 requires that a licensee receive certification from the affected state for any discharge that occurs from a federally-approved or licensed project.

Without such certification, the federal agency may not issue the required federal license. The Supreme Court has affirmed that states have wide latitude to place conditions on such certifications or to deny them altogether.¹

In addition to these specific provisions of law that affect the federal agencies with responsibility in the ACT and ACF basins, more general provisions of environmental law affect their decisions.

The two most important are the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). NEPA requires federal agencies to study the environmental impacts of their actions before undertaking them. ESA requires federal agencies to consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service (also known as NOAA Fisheries) before undertaking any project that will jeopardize the continued existence of an endangered or threatened species or destroy or adversely modify the critical habitat of such a species. In one famous case, the completion of Tellico Dam in Tennessee was halted because of the Endangered Species Act.

These acts apply to all federal activities and any actions licensed or authorized by the federal government.

Indeed, as will be seen, it was a lawsuit brought to enforce the provisions of NEPA that initially triggered the water war among Georgia, Alabama and Florida.

**How interstate water resources are allocated**

The U.S. Constitution recognizes three means to allocate interstate water bodies.

The most prominent of these is a suit before the U.S. Supreme Court for the equitable allocation of a water resource.

When one state believes that another has wrongfully taken too much water from a source, the adversely affected state may petition the Supreme Court to decide the matter. To merit review by the high court, the affected state must show that its interests have been affected by clear and convincing evidence.

The Supreme Court has decided several water disputes between and among states. Typically, when the court agrees to hear such a dispute, it will appoint a special master to receive the facts of the case, ask the special master to issue a report and recommendations, and then hear objections from the parties to that report and recommendation.

Unfortunately for the parties involved, the law that governs these disputes is a muddle.

The Supreme Court has held that “equitable apportionment” means only that the court’s apportionment “is based on broad and flexible equitable concerns rather than on precise legal entitlements.”²

The burden of proof rests on the petitioner, and that state will prevail only if it can show harm by clear and convincing evidence.

The court has announced the rule of equitable apportionment is one of federal common law, and it relies on state, federal and international law as sources for the common law rule it is developing.

In addition, most lawsuits for equitable apportionment have arisen in the West, where the rule of prior appropriation of water controls.

Although the court has eschewed reliance on that doctrine rigidly to determine interstate water disputes, it has recognized that the doctrine will give it guidance.

In the East, where the rule of riparian rights reigns, no such clear rule governs because of the nature of riparian rights as being correlative and not fixed.

Indeed, the Supreme Court has really decided only two interstate water allocation disputes from the East: Connecticut v. Massachusetts and New Jersey v. New York.

Both cases were decided within a short time of each other in 1931, and neither gives firm guidance about what principles the Supreme Court would apply to divide water bodies between two states that adhere to the riparian rights system.

In the first, the court simply held that there was enough water in the disputed resources to satisfy each state’s demands. In the second, the court announced a division of the water but did not give exact reasons for its division.

Thus, even though the lawyers for each of the three states in the ACT/ACF disputes wanted to negotiate a settlement in light of potential Supreme Court litigation, the rules affecting those negotiations did not yield many principles to help them.

The second means of allocating water among states is a congressionally approved interstate compact.

Interstate compacts are essentially treaties between and among states, and Congress has approved many of them to deal specifically with water issues.

The three southeastern states actually entered into two such compacts but, as will be explained, ultimately the agreements failed.

Nevertheless, if all affected states can reach such a compact, it can clarify the issues of resource allocation.

Indeed, in several instances, the Supreme Court has suggested that the interstate compact is the means it prefers for interstate water allocation over litigation, as interstate compacts allow the parties flexibility and direction that litigation in court cannot.

The third means of allocation of water between and among states is by congressional act.

For example, the Supreme Court held in one of the phases of the Arizona v. California litigation – litigation that divided the resources of the Colorado River – that an act of Congress can amount to an allocation of water, even though the record of congressional intent was not entirely clear.

Congress has, for many reasons, shown reluctance to enter into this area deliberately without the approval of the affected states (through an interstate compact).

The reasons vary, but since the mid-1800s, Congress has expressed a policy of deferring to state water law on the allocation of this resource.

In addition, congressional allocation brings with it the attendant risks that always come with a legislative solution to a problem – the horse-trading and log-rolling that can occur during the drafting and amend-
The tri-state water war begins

As suggested earlier, each of the three states has different interests in the waters of the ACT and ACF basins.

At the risk of caricature, and recognizing that each state also has private and local interests that may differ from the interest of the state overall, the positions of the states are as follows.

Alabama relies on the waters in the ACT for recreation and the production of hydroelectricity.

Florida relies on the waters in the ACF primarily for in situ uses such as recreation (e.g., boating and fishing) and for maintaining the environment of Apalachicola Bay, which is a very productive and fertile marine estuary environment and supports one of the largest oyster harvests in the country.

As previously stated, Georgia has different conflicts within itself over uses in both the ACT and the ACF such as municipal water supply and agricultural irrigation.

In addition to the need for Atlanta and other burgeoning cities for water, water in the Flint River – which meets the Chattahoochee River at Lake Seminole to form the Apalachicola River – recharges groundwater aquifers in South Georgia.

Unlike some other areas of the country, farmers in South Georgia use groundwater for irrigation, not surface water. Nevertheless, ground water and surface water are interrelated, and groundwater withdrawals for irrigation affect the level of water available in the Flint River.

These tensions among the three states originally came to a head in a lawsuit brought not as an original jurisdiction action against one of the states against another, but as a lawsuit that Alabama brought against the corps.

The suit alleged the corps had failed to comply with NEPA adequately when evaluating the environmental impacts of a proposed water withdrawal by Georgia, and it suggested the corps was exceeding its authority by making a de facto allocation of the water in the ACT basin. Georgia intervened in the lawsuit to protect its interests in the water resources of the ACT.

The interesting features of the suit were: 1) that Alabama had brought suit in district court (not the Supreme Court) over a dispute that essentially called upon the court to allocate water between two states; 2) that Georgia was not originally a party to the lawsuit; and 3) that a federal statute (NEPA) provided the basis for the lawsuit, not federal common law principles of interstate resource allocation.

It was this lawsuit, eventually stayed, that prompted the parties to begin the negotiations of the interstate compacts.

During the pendancy of those negotiations, the parties agreed to hold the action in abeyance and not to object to reasonable increases in water consumption.

A cease-fire in the water war?

In 1997, the three states agreed to enter into two interstate compacts, one for each basin (although the relevant terms of the compact were identical).

Unlike many compacts, however, this compact had two significant and intertwined differences.

First, the parties agreed only that they would reach an agreement about water allocation in the future; the compacts did not themselves establish a water allocation or water master.

Second, the parties agreed that discussions about water allocation would be subjected to public notice, comment and involvement.

Many such negotiations between states in the past have excluded the public from involvement in discussions about how to allocate natural resources. These three states
and, as the Atlanta region continues to grow, drought appears to be setting in this summer. Unfortunately, however, another has remained fairly stable during the last few years. The exact level of this flow was one that Georgia and Florida could not agree to, especially in times of drought.

The presence of negotiations among the states did not abate all of the litigation. Indeed, in 2000, Georgia brought suit against the corps for failing to act on its permit application to increase water withdrawals.

Nevertheless, the parties worked hard to reach an agreement through the compact process, extending it several times from the original deadline.

Alabama and Georgia elected new governors who, it was thought, might make headway in the negotiations. Nevertheless, in 2002, the governor of Florida announced that the state would withdraw from the negotiation process.

Because no accord could be reached for the ACF basin, negotiations over the ACT basin ceased as well and the compacts expired under their own terms.

Litigation that lower courts had, for the most part, stayed then reignited.

Where do we go from here?

The most interesting question facing the three states in this battle is how to resolve it.

Often, especially with states that adhere to the riparian rights doctrine, battles about water allocation erupt when there is a drought (as opposed to in the West, where water shortages are more chronic).

Fortunately, water supply in the region has remained fairly stable during the last few years. Unfortunately, however, another drought appears to be setting in this summer and, as the Atlanta region continues to grow, the overall demand for water will continue to grow as well.

The states face four choices.

The first is for one state – most likely Florida or Alabama – to bite the bullet and petition the U.S. Supreme Court in its original jurisdiction to make an allocation of the water in these basins.

The standard for relief, however, is quite high, and the law governing how the court will make such an allocation is quite unclear. Thus, a suit for equitable apportionment will not necessarily benefit the petitioning state or states.

Such a suit also may not include some of the statutory qualifications on allocating water required by the panoply of federal laws affecting it (such as NEPA and the Endangered Species Act).

Despite the predictions of some that the dispute must make its way to the Supreme Court, no state yet has been willing to undertake that course of action, and each state’s reluctance is understandable.

The second choice is for the states to continue to battle each other through smaller skirmishes in the district and appellate courts. These suits have prompted some temporary settlements and offer more of a chance for taking into account federal legal developments.

On the down side, however, the lower courts have thus far been careful to avoid making any type of allocation of water and thus appearing to interfere with the Supreme Court’s exclusive jurisdiction over disputes between states.

These ongoing battles have already raged in different courts in different circuits, creating procedural nightmares from which only lawyers will probably benefit.

The Judicial Panel on Multidistrict Litigation has recently consolidated four of the lower court cases involving the ACF before one judge to make discovery and pretrial rulings more efficient. These cases were all transferred to the Middle District of Florida, an area not directly implicated in the ACF battle, and the MDL panel selected Judge Paul Magnuson of Minnesota to serve as the district court judge in the multidistrict cases. Magnuson has experience with difficult interstate water battles, having served as the district court judge with many disputes over the allocation and use of the Missouri River.

Third, the states could ask Congress to make an allocation of the water. The recent shift in the composition of the House and Senate make this option undesirable for all of the concerned states, as the outcome would be especially unpredictable.

The best outcome, therefore, would be the negotiation of a new interstate compact.

The affected states should revisit the old compacts and review some of the key problems with them. One may have been the presence of the federal government as a nonvoting commissioner in both. The United States has more of an interest in the waters of these basins than as a neutral bystander: It operates important reservoirs, it has expertise, and it is subject to a variety of environmental laws regardless of the underlying allocation among the states.

The states should also consider the appointment of river masters during the pendency of such negotiations.

Merely agreeing to agree and not harm each other creates poor incentives for each of the states in terms of conservation and proper use.

End Notes


2 Idaho ex rel. Evans v. Oregon, 462 U.S. 1017, 1025 (1983); see also Nebraska v. Wyoming, 325 U.S. 589, 618 (1945) (apportionment decision includes “physical and climatic conditions; the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practice effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former, [considerations that] are all relevant but not an exhaustive catalogue”).
