International Municipal Lawyers Association
2015 Annual Conference
Las Vegas, Nevada

Sunday, October 4, 2015

Work Session II: Today's Water Wars - Water Rights and Water Quality: From East Coast to West Coast

FLORIDA V. GEORGIA: IT'S NOT JUST ABOUT FOOTBALL

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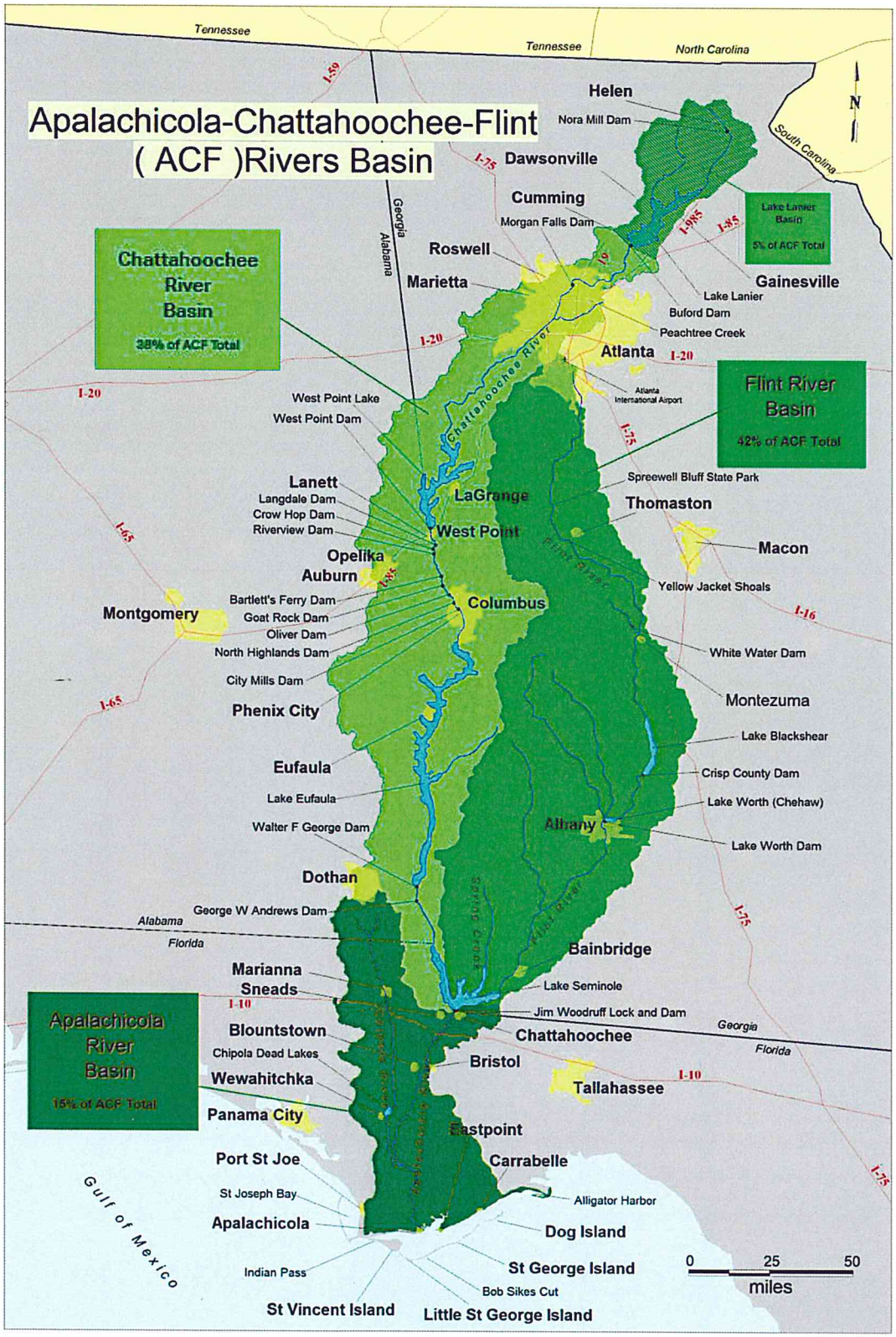
Figure 3-1 ACF Basin Map (Credit: Roy Ogles)



FLORIDA v. GEORGIA:

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Around the last weekend in October each year, the faithful of the Bulldawg Nation flock to Jacksonville, Florida for an annual skirmish in the Gator Bowl, known as Florida v. Georgia (aka "The World's Largest Cocktail Party"), in which the University of Georgia gets to prove its football superiority and send those Florida Gators packing back to The Swamp in Gainesville. My apologies to our incoming President Herb Thiele, County Attorney of Leon County, Florida, if he feels I'm somewhat biased in prejudging the outcome of this year's contest; however, we're not here to talk football.

On October 1, 2013, the State of Florida filed a Motion under the original jurisdiction of the U.S. Supreme Court against the State of Georgia seeking an equitable apportionment of the waters in the Apalachicola, Chattahoochee, Flint ("ACF") Basin. The State of Alabama intervened.

The Chattahoochee River originates in north Georgia, flows southwest past Atlanta, and then forms Georgia's western border with Alabama. At Georgia's southwest corner, the Chattahoochee joins the Flint River, which originates just south of Atlanta under Hartsfield-Jackson International Airport, and flows south by southwest to where it merges with the Chattahoochee at Lake Seminole to form the Apalachicola River, which flows south through northwest Florida and

into Apalachicola Bay in the Gulf of Mexico. The ACF Basin drains almost 20,000 square miles; about 75% of the basin lies in Georgia.

Since the early 1930's, the U.S. Army Corps of Engineers began formulating plans for the ACF Basin, whose multiple purposes include navigation, hydroelectric power, national defense, commercial value of riparian lands, recreation, and industrial and municipal water supply. Congress, through The River and Harbor Act of 1946, appropriated the funding for a dam near Buford, Georgia, that today backs up Lake Sidney Lanier. Today, there are 3 other major Corps' empoundments on the Chattahoochee, and some lesser dams (owned by Southern Co.) near Columbus, Georgia on the lower Piedmont, below which the river is navigable. The Woodruff Dam, which backs up Lake Seminole, is technically below the confluence of the Chattahoochee and Flint, on the Apalachicola; it is from this point that water is released into Florida.

Of importance to the legal process, the Corps operates its dams pursuant to a Master Manual. This Manual was essentially written in 1958 and has not been comprehensively revised since that time; however, in 1989, the Corps released a draft modifying the Manual by reallocation of some storage in Lake Lanier to water supply purposes in Georgia, primarily drinking water supply for Atlanta.

In 1990 Alabama filed suit to enjoin the Corps from implementing its recommendations; Florida and Georgia intervened, causing a stay of litigation until the parties reached a Memorandum of Agreement in 1992. This litigation has become popularly known as the "Tri-State Water Wars" and like a three-headed monster, seems to take many forms and have perpetual life. The MOA

contained a "live and let live" provision allowing the 3 States to continue to withdraw water from the ACF Basin for water supply and to make increases in those withdrawals, but prohibited the Corps from changing the purpose(s) of water withdrawals, until a comprehensive study could be completed. By 1997, the study was complete and the MOA was replaced by the ACF River Basin Compact, to which Congress consented. This Compact creates the framework for negotiating an equitable allocation of water among the three States, which has never occurred. By its terms, the Compact expired on August 31, 2003.

While negotiations under the Compact were ongoing, the Corps continued to operate Buford Dam in accordance with the Master Manual so in 2000 the State of Georgia filed a lawsuit against the Corps seeking to compel it to reallocate storage in Lake Lanier for water supply to meet Georgia's growth needs through 2030. The Corps asserted the position that it lacked authority to accommodate Georgia's request and further Congressional approval was required. Also at this time, the Southeastern Federal Power Customers, a group formed to buy electric power generated at Buford Dam, decided it was paying too much for power because Georgia wasn't paying the Corps for storing water supply in Lake Lanier to offset the loss in hydropower generation. So, in December 2000, SeFPC, sued the Corps in U.S. District Court for the District of Columbia seeking to compel the Corps to either end the overuse of storage for water supply, or to compensate SeFPC for the loss of hydropower value. Georgia, Florida and Alabama intervened.

Georgia, the Corps and SeFPC reached a proposed settlement, but neither Florida nor Alabama consented. The cases were joined and subsequently

transferred to the Middle District of Florida by the Judicial Panel on Multidistrict Litigation. All parties filed cross-motions for summary judgment addressing the Corps' authority to operate the Buford Dam. The District Court held the Corps' interim operations, allowing releases from Lake Lanier for water supply purposes, constituted a "de facto" reallocation of storage in the reservoir to water supply which under present law required Congressional approval. IN RE TRI-STATE WATER RIGHTS LITIGATION, 639 F.Supp.2d 1308 (M.D. Fla. 2009).

The Eleventh Circuit reversed, concluding the District Court lacked jurisdiction over the claims by Alabama and Florida because these states failed to challenge final agency action as required by the Administrative Procedures Act. With respect to Georgia's reallocation request, the Circuit Court found that the 1946 legislation appropriating funding for Lake Lanier provided the project was to accommodate downstream water supply demands and therefore required storage in Lake Lanier for that purpose. The case was remanded back to the District Court to order the Corps to reconsider Georgia's water supply storage request and reach a decision by June 2012. On June 25, 2012, the Corps concluded it had sufficient statutory authority to meet Georgia's request, but the Corps never decided to what extent it would allocate storage to water supply when balancing that demand against hydropower generation, navigation, and other authorized purposes.

In March 2013, the Corps released a new report for updating of the Master Manual. The update process, which is still ongoing, will determine whether and to what extent storage in Lake Lanier will be used to accommodate the present and future water supply needs of the Atlanta metropolitan area. This

determination will ultimately establish the flow rate at Woodruff Dam. The final report is due to be released in September 2015, with final approval of a new Master Manual by March 2017.

With this history and ongoing process by the Corps, Florida sought leave in October 2013 to file an original action to obtain an equitable apportionment of the waters of the ACF Basin. Florida alleges the ecosystem and economy of the Apalachicola region are suffering serious harm because of Georgia's consumption and storage of water from the Chattahoochee and Flint Rivers for municipal, industrial, recreational, and agricultural uses. Florida further alleges that the depletion of freshwater flows, particularly during drought years, precipitated a collapse in the oyster industry in Apalachicola Bay because of rising salinity levels.

Based upon these alleged harms, Florida is asking the Supreme Court to apply the federal common law of equitable apportionment of the waters of the ACF Basin. Florida's petition contends it has exhausted all other reasonable means of negotiation with Georgia and Alabama. Of course, Georgia contends Florida has not alleged sufficient injury to warrant the Court's exercise of original jurisdiction, and opposed the motion contending it was premature and that Florida should wait to see what the Corps does to revise its Master Manual. Georgia further pointed out that any attempt at resolution prior to the Corps' final action may only lead to further litigation. Georgia alleges that Florida's allegations of abuse by Georgia's consumption of water is unfounded and that Georgia returns approximately 70% of the water withdrawn back to the Basin before it leaves Georgia. The Solicitor General of the United States filed an

Amicus Curiae brief, at the Supreme Court's invitation, essentially agreeing Georgia's "wait and see" what the Corps does approach makes good sense.

On November 3, 2014, the Supreme Court granted Florida's motion and appointed Ralph I. Lancaster, Esq., of Portland, ME, as the Special Master. Special Master Lancaster wasted no time imposing a tough discovery schedule, which was to have reached completion in late July; however, as anticipated in a case of this magnitude, discovery is not close to being finished and both Georgia and Florida are now complaining about the lack of cooperation from non-parties from whom discovery is sought. Initial discovery requests were sent out by Subpoena in early March, seeking records going back 25 to 30 years; many recipients were local governments located within the Basin that operate public water systems supplied from waters of the Chattahoochee and Flint. Compliance with these subpoenas is voluminous and there is no provision for compensation of the non-parties to cover their cost of compliance.

An article appearing in the Atlanta press in early August has attorneys for both states pointing fingers at two major non-party players: the U.S. Department of Agriculture and the ACF Stakeholders, Inc., for non-compliance with discovery. The Department of Agriculture claims some of its data is classified for security purposes, while the Stakeholders, an independent non-profit corporation of environmentalists and business interests in the region, has produced its own Report, telling the Special Master, litigants, and affected local governments how the controversy should be resolved. The data underlying that report is being sought through subpoena, but the Stakeholders contends the data belongs to its

individual members and was only shared for purposes of understanding the issues in order to draft the Report.

The City of Griffin, Georgia, holds the largest municipal water withdrawal permit on the Upper Flint. Since the mid-1990's, largely at the urging of the Environmental Protection Division of the Georgia Department of Natural Resources, Griffin has become a regional water supplier to the south Atlanta metropolitan area. Today, the City operates 2 withdrawal points, one on the Flint near the boundary of Spalding and Fayette County, and another about 20 miles downriver in Pike County, in conjunction with 2 storage facilities or reservoirs, and two water treatment plants.

How did we get in this position and what does the litigation mean to us? In 1989, the then-Director of GaEPD approached the City to discuss water supply needs of the south metro area. We were told that Griffin, a city covering approximately 18 square miles with a population of approximately 23,000 (which has actually witnessed slight decreases since the 1990 Census), was the only jurisdiction in the area that the State felt could successfully manage a regional water system.

The City had operated a public water system since the 1880's, moving from a groundwater (wells) fed system in the 1920's to the Flint River for its water supply. In the early 1960's the City expanded its system to serve an expanded area of Spalding County surrounding the City and remains today the sole source of treated drinking water supply for Spalding County, now with service territory covering approximately 3/4th of the unincorporated county.

In the 1980's Griffin began selling treated drinking water to two small cities in Pike County, to our south and building a water distribution system that interconnects today with 6 other surrounding counties. By the early 1990's the City began entering into long-term water supply contracts with various nearby cities and counties as their treated water supplier. Many of these are 50 year intergovernmental agreements, expressly authorized by the Georgia Constitution, which incorporate a wholesale pricing formula, with an annual return on investment to the City of approximately 12%. Each wholesale customer owns their own water distribution system, except for major transmission facilities owned, installed and maintained by the City to deliver treated water at the wholesale customer's metering point(s).

During the 1990's the State continued to represent to the City that when we advanced to the point of building a major reservoir, located about 23 miles southwest of Griffin in neighboring Pike County, we could expect State funding of approximately $25-30 million. That facility, when completed and operational in 2005, cost the City almost $64,000,000 and the State of Georgia never contributed the first cent!!! Since that time, with renewals and extensions to the regional system, today the City easily has over $100 million invested in its regional system and about 30 years left on its contracts.

At the outset, for any project of this nature, you of course need good engineering and financial advisors. Projections have to be reasonable, and the Atlanta region in the late 1990's to early 2000's was one of the fastest growing areas in the country. During that time, we were also plagued with severe droughts, making ample water supply a highly sought-after commodity.

Around late 2007 however, we faced something no one had reasonably anticipated... a recession that brought the fast paced growth in our region, particularly in Coweta County, to a standstill. Now, 8 years later, growth is picking back up, but can we ever reasonably project it to reach the original projections of the early 2000's? Couple this with legitimate environmental concerns over the amount of water consumed and the advent of water conservation laws and regulations. The City has not had to upgrade capacity of the regional water system as originally predicted, but not all scheduled upgrades are intended to increase capacity. Some renewals of the existing facilities have to occur and there is still the need to lay new distributions lines to prevent water loss.

As mentioned earlier, a non-profit group largely consisting of environmentalists and business interests from the tri-state area was formed, calling itself the ACF Stakeholders, Inc. This truly, in my opinion, is a "pay to play" organization, whose mission statement is "to change the operation and management of the ACF Basin to achieve and ensure a sustainable resource for current and future generations". Even before Florida filed its motion, this group began gathering data from its members and the various governments and entities that withdraw water from the Chattahoochee and Flint. The City of Griffin felt we should monitor its work closely, but their committees started meeting in closed sessions. Keep in mind, this organization is not publicly-funded and not subject to the transparency of government organizations.

On May 13, 2015, the Stakeholders released a report called a "Sustainable Water Management Plan". The SWMP contains recommended actions for the

Corps of Engineers, other federal agencies, and the three states, along with all private and public water users in the Basin. Without getting too deep into the specifics of these recommendations, the Stakeholders are urging the Corps, in revising its Master Manual, to adopt a program of "adaptive management", a structured process of robust decision-making in the face of uncertainty, with the aim of reducing uncertainty over time via system monitoring. The ultimate goal is to increase water returns to the basin, which generally benefits all users of the system.

As I alluded to above, over the past 10 years, laws, regulations, and permit requirements have forced water system operators, such as the City of Griffin, to adopt conservation rates for its retail customers, implement programs to assess and reduce water losses, and impose building standards to replace old plumbing fixtures with high efficiency fixtures. For the City of Griffin, the ability to sell less water has had two consequences, it has stripped the profits from our water operations and forced increased water rates on our retail customers. The decision to become a regional water supplier would never have been made our governing body felt it could become a burden on our retail customers, who for the most part are also our citizens and taxpayers.

One of the recommended actions by the Stakeholders would require the State, as environmental regulator, to restructure all existing water withdrawal permits, with more justification on the part of permittees. Keep in mind that we operate a system with long-term contractual obligations to provide water across a wide area. Any curtailment of our withdrawal permit places the City's ability to deliver under those contracts in potential jeopardy.

One suggestion under consideration would be to impose an augmentation requirement on new withdrawal permits. While current permitting is designed to lessen the withdrawal in relation to drought and other low-flow situations, augmentation could actually require local permittees to pump water back into the river during these low-flows. Again, our ability as a system to deliver service to our customers is placed in jeopardy.

The City of Griffin has another unique historic feature that now comes into play...we were a planned city, laid out as a railroad camp by a company holding a State franchise in 1836 to build a railroad. Griffin is approximately the midpoint between the City of Macon and the point to the north where the north-south rails were to intersect with an east-west railroad, known at the time as "Terminus", the name was later changed to "Atlanta". Like good railroad engineers of their time, the company designed their railroad to run along the ridgeline separating the ACF Basin from the Altamaha – Ocmulgee-Oconee Basin; this means that rains falling to the west of the rails returns to the Flint and ultimately to the Gulf, while rains falling to the east in theory wind up in the Atlantic Ocean.

While this may have been sound engineering practice for building a railroad in the 1830's, it violates a basic premise of environmental theory. Surface waters withdraw from a river should be returned to the basin of origin. About 40% of the water Griffin takes out of the Flint, never finds its way back.

Last, Griffin also provides sewer treatment for its citizens and a sizable area of unincorporated Spalding County surrounding the City. Except for a very small area in northeast Spalding served by a package sewer plant operated by a developer in neighboring Henry County, the rest of the County is served by septic

tanks where wastewater percolates into the soil. The area of Spalding County closest to the Flint River corridor has no public sewer.

Of the City's 3 wastewater treatment plants, one is on the City's east side and drains into a tributary of the Ocmulgee. Another is on the south side and drains into a tributary of the Flint. The third, and the newest and largest of the three plants, is in the northwest quadrant and land applies its effluent onto approximately 500 acres.

In the Stakeholders' recommendations, the City of Griffin is singled out, primarily because we are the largest municipal permittee on the Upper Flint, have an major interbasin transfer as described above, and made the decision in the early 1980's that operating a large LAS was a better environmental alternative than stream discharge. The SWMP finds that if the City could totally eliminate its interbasin transfer, its return to the Flint would increase by 20%. This measure alone would likely cost the City one of its WWTP's and a major retrofit to reverse sewer flows back to the Flint. I find it telling that no cost estimate was attempted by the Stakeholders, but their recommendation is that the State either provide the City with some funding, or other incentive, for this to occur.

Recognizing that shutting down a WWTP still leaves sewage to be treated, the recommendation is further made that the existing LAS could be upgraded to expand its capacity while at the same time eliminating the spraying and piping the effluent further west into the Flint River. Again, the recommendation fails to incorporate a funding source, other than a weak reference to State support.

CONCLUSION

So where does this leave the City of Griffin today with its regional water supply operation? Has the Florida v. Georgia litigation impaired the City's ability to continue to deliver service to its wholesale customers? Will the State of Georgia stand behind the City and its investment as a regional water supplier? What about the political will by our incumbent governing body some 20 years after initial decisions were made and direction given?

I am quite pleased to say I feel the political will of our governing body is still strong and they remain very committed to the City's role as a regional water provider. If anything, I sense they share some alarm as to the direction the State may take in this matter. We know from press accounts that Governor Nathan Deal has been engaged in closed door discussions with the Governors of Florida and Alabama and has publicly stated that the legal fees and costs of litigating this matter warrant a settlement.

As a city, we have and must remain vigilant in our monitoring of the litigation, of regulatory actions, and of our General Assembly. There is an old saying in Georgia that no one is safe while the General Assembly is in session. As City Attorney, I feel it is my responsibility to understand the legal issues at stake and let those directly involved know we will zealously represent our client's interest. If it gets to a point, where we aren't confident that our interests are protected, the City needs to intervene; yet, I think the current parties and Special Master have made it clean they would oppose intervention by local permittee who potentially have a stake in the outcome.

In closing, I felt it appropriate to share with you the words of one of Georgia's native sons, the poet Sidney Lanier. Mr. Lanier was born in Macon, Georgia on February 3, 1842. Shortly thereafter, his family moved to a railroad camp, known as Griffin, where young Sidney was baptized in the First Presbyterian Church in 1843.

THE SONG OF THE CHATTAHOOCHEE

OUT OF THE HILLS OF HABERSHAM,
DOWN THE VALLEYS OF HALL,
I HURRY AMAIN TO REACH THE PLAIN,
RUN THE RAPID AND LEAP THE FALL,
SPLIT AT THE ROCK AND TOGETHER AGAIN,
ACCEPT MY BED, OR NARROW OR WIDE,
AND FLEE FROM FOLLY ON EVERY SIDE,
WITH A LOVER'S PAIN TO ATTAIN THE PLAIN,
FAR FROM THE HILLS OF HABERSHAM,
FAR FROM THE VALLEYS OF HALL.

---- Sidney Lanier