THE REPORTER
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ELULS
THE ENVIRONMENTAL AND LAND USE LAW SECTION
Kelly K. Samek, Chair • Jeffrey A. Collier, Editor • Douglas H. MacLaughlin, Co-Editor
www.eluls.org

The Never-Ending Saga of the Tri-State Water Wars

by Sidney F. Ansbacher, Upchurch, Bailey and Upchurch, P.A.

If you live anywhere between Atlanta and the Gulf, you know of it. If you practice in any environmental specialty in the Southeast, you know of it. If you participate in any interstate, or any water resource allocation at all, you know of it. Now, what does anyone do about it? We speak of the Apalachicola-Chattahoochee-Flint (ACF) River Basin. Any doubters need only ask any member of these groups what they know of the Tri-State Water Wars. Eastern or Western water experts knowingly shake their heads. The basin has long known strife. That contentiousness began decades ago. That contentiousness will continue. The best way to explain how we reached this seemingly interminable and intractable debate is to start river by river.

THE SETTING

THE FLINT RIVER

We start with the Flint. The Flint begins as groundwater seepage near Atlanta, and ends over 200 linear miles (meandering 350 miles) later as it merges into the Chattahoochee. S. Morris, *Flint River, New Georgia Encyclopedia* (July 15, 2006, last updated September 9, 2014). A key hydrological gap permeates our consideration of the Flint, and the Chattahoochee below. "[T]here are no natural lakes in North Georgia …." M. Shoemaker, *Water Policy in Georgia* at VIII (May 2013).

John Werth presented a thorough analysis of the Flint's history. J. Werth, "*The Eastern Creek Frontier: History and Archaeology of the Flint River Towns, ca. 1750-1826*" (1997). Werth found that the area substantially depopulated shortly after DeSoto came through in 1540. *Id.* at 3-4.

See "Water Wars," page 13

From the Chair

by Kelly Samek

President of The Florida Bar Gregory W. Coleman extended to each Section the opportunity to give a report to the Board of Governors ("BOG") on the Section's activities, goals, and accomplishments. I would like to share with you what I recently provided the BOG.

The Florida Bar's Environmental and Land Use Law Section ("ELULS") took root more than forty years ago, at the same time current modern environmental law was in its infancy. ELULS's mission is to provide an organization within The Florida Bar for those who have a common interest in environmental and land use law and to provide a forum for discussion and exchange of ideas leading to increased knowledge and understanding of environmental and land use law.

Today, ELULS is led by an Executive Council of sixteen, in addition to four ex-officio voting officers. Our section's strength is in its diversity, and our Executive Council reflects this with practitioners hailing from governmental agencies, non-governmental organizations, and private firms. Our officers this year are Kelly K. Samek (Chair), Carl Eldred (Chair-Elect), Vivien J. Monaco (Secretary), and Janet E. Bowman (Treasurer). Our Section Administrator is Calbrail L. Bennett. ELULS has a robust committee structure consisting of substantive law committees (Energy; Land Use; Natural Resources; and Pollution Assessment, Remediation,

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Management and Prevention), Public Interest Representation, Young Lawyers, and core functional committees that support all ELULS activities (Affiliates; CLE; Florida Bar Journal; Internet; Law School Liaison; Membership; and Section Reporter).

ELULS is a section in transition. Economic and political changes in the past decade have altered many of our members' practices, and consequently that has affected the section. Membership dropped from a high approaching 2000, but now appears to have leveled off between 1500 and 1600 members. We have also seen a dramatic change in our members' needs when it comes to Continuing Legal Education. A core focus of ELULS is to deliver quality and timely CLE offerings. To continue to do so, we have had to 'right-size' our traditional in-person events and explore new means for delivering convenient programming.

We held our final Annual Update, for years the flagship event of the ELULS CLE calendar, at the Omni Amelia Island Plantation Resort from August 6-9, 2014. ELULS members can now look to multiple events replacing the content traditionally presented at the Annual Update. The first of these will be comprised of two consecutive programs offering substantive environmental and land use content. We ramped up this concept with a shorter program this year in January called "What You Need to Know About Current Environmental and Land Use Law Issues." Content with appeal to a wider audience--including panels on administrative law, changes resulting from the legislative session, and a view from agency General Counsels—will be presented in a program offered at The Florida Bar Convention in June.

Virtual learning opportunities are increasingly crucial to our CLE portfolio these days. Complementing our move to right-size our in-person CLE programs is an effort to offer more of the content packaged as convenient, affordable excerpts via The Florida Bar's OnDemand Course Catalog. Additionally, for the past several years, ELULS has offered a diverse audio webinar series that permits attendees to sign up for a single program or for the series. This year our series includes the following topics: "Medical Marijuana Regulation in the Sunshine State" (November 6, 2014); "Planning for Transportation in the New Normal" (January 22, 2015); "2015 Florida Legislative Session Forecast" (February 26, 2015); "Emotional Intelligence in Environmental and Land Use Practice: Improving Your Professional Practice and Your Outside Life" (March 26, 2015); and "Renewables in Florida's Backyard" (June 11, 2015). ELULS also offers occasional free web-based programming to our members as part of their membership dues. On October 30, ELULS's Energy Committee hosted a program entitled, "Exploring Florida's Oil & Gas Law." The recorded program is available for download at the Section website.

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Join the ELULS e-mail mailing list and stay up to date on the latest section news and events...

This newsletter is prepared and published by the Environmental and Land Use Law Section of The Florida Bar.

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CHAIR'S MESSAGE
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Speaking of which, maintaining communications with our members is also a priority for ELULS leadership. The Section website, ELULS.org, under the guidance of Internet Committee Chair Jonathan Huels, is a core method of outreach to our members and the public. Section webmaster Ken Tinkler continues to improve the accessibility and aesthetics of the site. The quarterly ELULS newsletter, The ELULS Section Reporter, under the guidance of Jeff Collier, Editor, contains excellent and timely articles consisting of case law updates, administrative law updates, governmental agency updates, law school updates, substantive articles, and information about upcoming CLE programs. This year has seen topics running the gamut from strategies to address flood risk to the status of Legionnaires' Disease in the U.S. The Reporter is published digitally and is available on the Section website.

ELULS is committed to supporting law student engagement in environmental and land use law through the work of our Law Schools Liaison Committee, led by Christopher T. Byrd and Patrick Krechowski. This committee administers our law school grants program as well as the annual Dean Frank E. Maloney Memorial Writing Contest. Each of the state's twelve law schools has at least one designated ELULS liaison serving as a resource for students and faculty alike.

ELULS is unique in the close relationship its legal practitioners share with environmental and land development consultants. To that end, we work closely with the ELULS Affiliates Committee to foster opportunities for sharing information and ideas through involvement in ELULS programs. The Affiliate Committee organizes popular mixers around the state each year to meet our members' desire to have additional networking opportunities with environmental and land use practitioners and consultants. Successful mixers were held in Tallahassee in October, in Orlando in January, and in Jacksonville in March.

* * *

I hope you are as proud as I am to be a member of this dynamic and evolving Section. It has been an honor to serve as your Chair this past year.

May 2015 Florida Case Law Update

By Gary K. Hunter, Jr., Hopping Green & Sams

The Bert J. Harris, Jr., Private Property Rights Protection Act does not extend standing to owners of property adjacent to the property subject of the government action. *City of Jacksonville v. Smith*, 2015 WL 798154 (Fla. 1st DCA 2015).

This case arose from the City of Jacksonville's construction and operation of a fire station adjacent to the Appellee's property. Appellees purchased their lot in May 2005. At the time, the adjacent lot was owned by the City and had a deed restriction that limited the use of the City's lot to the leisure and recreation of the county's employees. Later that year, the City obtained a cancellation of the deed restriction, and eventually rezoned the property so that it could construct and operate a fire station on the property.

Appellees filed an action against the City of Jacksonville alleging that the fire station adjacent to their property "inordinately burdened" their property pursuant to the Bert J. Harris, Jr., Private Property Rights Protection Act (Harris Act) because it made the property unmarketable as a luxury home site worth $470,000.00. At trial, the court entered an order determining that Appellees had a vested right to build a home on the property or a right to sell the property. Further, the trial court held that after the City's construction of the fire station, the Appellees were left with an inordinate burden on the property as to the viability for use or sale.

The City appealed the trial court's order, alleging that the Harris Act did not apply to claimants that had not demonstrated that a government regulation imposed on the claimaint's property was the cause of the inordinate burden. The First District began its analysis with an examination of the statute. Notably, the Court pointed out that the Act specifically states that "it is the intent of the Legislature that, as a separate and distinct cause of action from the law of takings, the Legislature herein provides for relief, or payment of compensation, when *a new law, rule, regulation, or ordinance* of the state[…] unfairly affects real property." The Court provided that the trial court erroneously isolated a section of the statute, "action of a government entity," to justify its interpretation that a cause of action under the Act includes the approval of activity on an adjacent parcel.

On public policy grounds, the First District stated that if it upheld the trial court's determination, all state and local governments would be subject to liability for construction and operation of facilities needed by the public. Ultimately, the Court reversed the trial court's order, holding that the Harris Act does not apply where the property was not itself subject to any governmental regulatory action. The court explained that because the trial court's opinion improperly broadened the scope of the Harris Act beyond its intent and had the potential to open the floodgates for claims against state and local governments, upholding the opinion would be legally incorrect.

Although the First District reversed the trial court's order, it

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certified to the Florida Supreme Court the following question as one of great public importance: May a property owner maintain an action pursuant to the Harris Act if that owner has not had a law, regulation, or ordinance directly applied to the owner's property which restricts or limits the use of the property?

Property Owners sought temporary injunction prohibiting developers from constructing a sidewalk within a ten-foot utility easement on their property. The Third DCA reversed on the grounds that issuance of the temporary injunction directly and substantially impacted two other parties who were not present at the hearing, and because they were found to be necessary and indispensable parties, the temporary injunction could not stand without giving the absent parties an opportunity to be heard. *Two Islands Development Corp. v. David Clarke*, 2015 WL 799270 (Fla. 3d DCA February 25, 2014).

The City of Aventura approved of a site plan for the residential development of the "Island Estates" subdivision. As a part of the approval, the City granted a non-use variance allowing for a sidewalk to be constructed solely on the north side of the subdivision, and not the typically required sidewalk construction on both the north and south side of the Island Estates. Additionally, the plan depicts a ten-foot utility easement running across the outer boundary of each property along the north and south side of the Island Estates, which was specifically reserved for the installation and maintenance of public utilities. At the City's approval, Appellants constructed a subdivision within Island Estates, including twenty-one single family homes and a marina. At the same time, the City also approved a luxury condominium project for the development of 160 units, called "Prive at Island Estates", which would be constructed by "the Trust", owner of the Prive at Island Estates, and developed by the Prive Developers.

The three Appellee Owners owned residential property in "Island Estates" subdivision, and thus were subject to the construction of the required sidewalk in the ten-foot easement area. The Appellee Owners filed an Emergency Motion for Temporary Injunction to challenge the construction of the four-foot paved sidewalk along the outer boundaries of their lots. At the time the Motion was filed, the sidewalk had been substantially completed on twelve of the fifteen lots, with only the three lots owned by Appellee Owners left to complete construction of the sidewalk.

At an evidentiary hearing, Appellant's counsel made an *ore tenus* motion for Prive Developers and the Trust to intervene in the underlying proceeding as necessary and indispensable parties. Appellants argued that, given their interest in their building construction project, the "direct and immediate and substantial impact" on the interests of both the Trust and Prive Developers made both parties indispensable to the proceeding. The trial court entered Appellee Owner's temporary injunction enjoining Appellants from proceeding with the installation of the sidewalk within the ten-foot easement area, and required each Appellee Owner to post a $20,000 bond. Additionally, the trial court denied Appellant counsel's motion, holding that it would prejudice Appellee Owners to allow the Trust and Prive Developers to intervene.

On review, Appellee Owners argued that the injunction was not intended to seek relief against the Trust or the Prive Developers, but was intended to protect Appellee Owners' private, residential lot from Appellant's construction of the sidewalk. The Third DCA held that the relief Appellee Owners sought effectively resulted in not only delaying Appellant's construction of the full sidewalk, but also frustrated the issuance of the building permit for the Prive Developers and the Trust, which was required to develop on the condominium project. The court utilized the rule that 'all persons materially interested, either legally or beneficially, in the subject-matter of a suit, must be made parties either as complainants or defendants so that a complete decree may be made upon all parties." The court concluded that the Trust and Prive Developors were indispensable parties, and held that the trial court could not temporarily enjoin construction of the sidewalk without joining them as parties. The Third DCA reversed and remanded the trial court's order, directing that if Appellee Owners were again successful in obtaining a temporary injunction, the trial court must allow the Trust and Prive Developers "an opportunity to be heard."

The Marketable Record Title Act does not extinguish restrictive covenants adopted and recorded by homeowner's association. *Barney v. Silver Lakes Acres Property, Etc*., 2015 WL 477675 (Fla. 5th DCA 2015).

This case raises the issue of whether the Marketable Record Title Act (MRTA) extinguishes restrictions imposed by a homeowner's association. The restrictive covenants for the Silver lakes Acres subdivision were recorded in 1968. More than a decade later, Amendment One was recorded. The amendment adopted the original restrictive covenants and provided for annual maintenance assessments to maintain streets, street lights, benches, and other association-authorized purposes.

The Appellants owned property within the Silver Lakes subdivision and sought declaratory relief asserting that Amendment One had been extinguished by the MRTA, which provides that "a person having the legal capacity to own land in the state, who alone or with his predecessor in title, has been vested with any estate in land of record for thirty years or more, has a marketable record title to such estate except as to certain exceptions to marketability." Section 712.02 Fla. Stat. (2014). Conversely, Appellee homeowner's association argued that Amendment One falls within a statutory exception found in section 712.03(1), Fla. Stat. (2014). The exception provides that "estate or interests, easements, and use restrictions disclosed by and defects inherent in the minuments of title on which said estate is based beginning with the root of title" will not be affected by MRTA.

The Fifth District Court of Appeal looked to the Appellant's deeds to determine whether the deeds fell

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within the statutory exception. The Court found that the deeds employed language that made the transfers subject to the restrictive covenants challenged by the Appellants. The Appellants argued that the language used in the deeds was vague and merely made general references to the restrictive covenants. To this point, the Fifth District stated that the language in the deeds was specific ratification and assumption of the obligations to the association; thus, more than a general reference. The Court affirmed the lower court's opinion, holding that based on the plain language of the deeds in question, there was nothing hidden with respect to the restrictive covenants of the association, and that "the Appellants simply cannot claim something was hidden in their chain of title to their respective lot."

When parties in a local land use action bring forth conflicting expert testimony interpreting permitted uses under the comprehensive plan, summary judgment may not issue. *Howell v. Pasco County*, 2015 WL 1381680 (Fla. 2d DCA 2015).

As part of its comprehensive plan, Pasco County was required to adopt a future land use plan that designated the purpose of future general distribution and location of county wide land uses. Once the County adopted a comprehensive plan, it designated the future land use of the Appellant's and Outlaw Ridge, Inc.'s property as Agricultural Rural (AG-R). The AG-R designation allows mining, but if the mining provides ancillary processing, special approval must be obtained from the Board of County Commissioners.

In 2007, Outlaw Ridge obtained a mining permit to mine sand on its property. Then in 2011, Outlaw Ridge sought a modification of its permit to extend the time for sand mining and to allow lime rock mining with ancillary processing. Initially, Outlaw Ridge was denied the permit authorizing lime rock mining, but after mediation between disgruntled neighboring citizens and the County, the Board of County Commissioners granted a permit allowing lime rock mining for fifteen years, subject to several conditions. Following the permit, Appellants filed this action, arguing that the approval was inconsistent with the County's comprehensive plan. Outlaw then filed a motion for summary judgment on the consistency issue, which resulted in the Appellant's challenge of the summary judgment in favor of Outlaw Ridge.

On appeal, the Second District Court of Appeal was asked to decide whether summary judgment was appropriate. The court explained that summary judgment should only be granted when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. The Second District examined the evidence presented at trial finding that there was conflicting evidence regarding consistency with the comprehensive plan. Outlaw Ridge provided an expert that noted that the mining was consistent with the comprehensive plan, but the Appellant's presented an expert contradicting those statements. As such, the Second District held that there was a disputed issue of material fact that could be resolved only by weighing the credibility of the experts and their opinions, which is not permitted in a summary judgment proceeding. Further, the Court held that just because mining is a permissible use in the comprehensive plan, does not mean that lime rock mining, specifically, was permitted. The comprehensive plan expressly provides that such mining would require special approval, and the court must give life to the intent of the comprehensive plan.

On Appeal

by Larry Sellers, Holland & Knight

Note: Status of cases is as of May 4, 2015. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

R. Lee Smith, et al. v. City of Jacksonville, Case No. SC 15-534. Petition for review of 1st DCA decision in *City of Jacksonville v. R. Lee Smith, et al.,* in which the majority of an en banc court determined that a property owner may not maintain an action pursuant to the Harris Act if that owner has not had a law, regulation, or ordinance applied which restricts or limits the use of the owner's property. 40 Fla. L. Weekly D516a (Fla. 1st DCA, February 26, 2015). Status: Notice of intent to seek discretionary review filed March 23, 2015.

SJRWMD v. Koontz, Case No. SC 14-1092. Petition for review of decision in *SJRWMD v. Koontz*, 39 Fla. L. Weekly D925a (Fla. 5th DCA 2014), on remand from the Florida Supreme Court, in response to the reversal by the U.S. Supreme Court in *Koontz v. SJRWMD,* 133 S.Ct. 2586 (2013). The U.S. Supreme Court concluded that an exactions taking may occur even in the absence of a compelled dedication of land and even when the unconstitutional condition is refused and a permit is denied. Subsequently, the 5th DCA adopted and reaffirmed its prior decision in *SJRWMD v. Koontz,* 57 So.3d 8 (Fla. 5th DCA 2009), which affirmed the judgment below. Judge Griffin dissented. Status: Notice filed May 30, 2014.

DOT v. Clipper Bay Investments, LLC, Case No. SC 13-775. Petition for review of 1st DCA decision determining that the Marketable Record Title Act's exception for easements in right-of-ways is applicable to land held as a fee estate for the purpose of a right-of-way, so long as competent substantial evidence establishes the land is held for such a purpose. The court reversed the trial court's award of a portion of the land north of the I-10 fence line and remanded with instruction to quiet title to all of the land north of the I-10 fence line in Clipper Bay, except for the portion used by Santa Rosa County. 38 Fla. L. Weekly D271a (Fla. 1st DCA 2013). Status: Quashed and remanded on March 26, 2015. 40 Fla. L. Weekly S164b.

FIRST DCA

Parker v. Davis and DEP, Case No. 1D15-1039. Appeal from final order dismissing with prejudice petitioner's amended petition for formal administrative hearing contesting DEP's authorization of the construction of a docking facility. The final order dismissed the amended petition with prejudice for the following reasons: (1) neither the self-certification, which included general consent by rule, nor the compliance letter are agency action that would entitle the petitioner to a formal administrative hearing under section 120.57, Florida Statutes, and (2) if any listed document or action could have been agency action, the petition is untimely and does not demonstrate standing, and the agency lacks jurisdiction because petitioner raises real property issues that are outside the jurisdiction of a formal administrative hearing under Chapter 120, Florida Statutes. Status: Notice of appeal filed March 6, 2015.

Herbits, et al. v. Board of Trustees of the Internal Improvement Trust Fund, Case No. 1D15-1076. Appeal from a final order dismissing an administrative petition filed by the appellants against the Board of Trustees of the Internal Improvement Trust Fund, which challenges the Trustees' decision to approve the City of Miami's request for a Partial Modification of Original Restriction to Deed No. 19447. The final order dismissed the petitioners' second amended petition on the grounds that the second amended petition: (1) is based upon the defective premise that the land in question is sovereign submerged lands; (2) fails to show that the petitioners as third parties may challenge this minor and purely proprietary Board action under sections 120.569 and 120.57, Florida Statutes; and (3) fails to establish that the petitioners' substantial interests will be affected by the Board's action granting Partial Modification of Original Restrictions to Deed No. 19447. Status: Notice of appeal filed March 9, 2015.

Save the Homosassa River, et al. v. DEP, Case No. 1D14-5872. Appeal from final order of the Department of Environmental Protection rendered pursuant to Section 373.l14(2)(a), Florida Statutes, concluding that Florida Administrative Code Rules 40D-8.041(16) and 40D-8.041(17), which establish minimum flows for the Chassahowitzka and Homosassa River Systems, are consistent with the Florida Water Resource Implementation Rule (Fla. Admin. Code Ch. 62-40). DEP Case No. 13-0914 (final order entered November 25, 2014). Status: Notice of appeal filed December 24, 2014.

Capital City Bank v. DEP, Case No. 1D14-4652. Appeal from final order of the Department of Environmental Protection approving the county's application for after-the-fact CCCL permit, authorizing the county to construct a rock revetment on Alligator Drive in Franklin County. DEP Case No. 13-1210, DOAH Case No. 14-0517 (final order entered September 8, 2014). Status: Notice of appeal filed October 8, 2014.

Guerrero, et al. v. Spinrad, et al., Case No. 1D14-4496. Appeal from a final order of the Department of Environmental Protection denying the Guerreros' request for attorney fees, costs and sanctions under Sections 120.569(2)(e) and 120.595, Florida Statutes. DEP Case No. 13-0858, DOAH Case No. 13-2254 (final order entered September 8, 2014). Status: Notice of appeal filed September 29, 2014.

Guerrero, et al. v. Spinrad, et al., Case No. 1D14-5465. Appeal from final order by DOAH Administrative Law Judge denying request for attorney fees under Sections 120.595(1), 120.569(2)(e), and 57.105(5), Florida Statutes. DOAH Case No. 14-4860F (final order entered October 31, 2014). Status: Notice of appeal filed December 1, 2014.

Ahler, et al. v. Scott, et al., Case No. 1D14-3243. Appeal from final

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ON APPEAL
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judgment denying petition for writ of mandamus seeking to compel defendants to require Georgia-Pacific to obtain authorization for the use of mixing zones associated with its discharge to the lower St. John's River. Status: Notice of appeal Filed July 18, 2014; request for oral argument denied on February 10, 2015.

SECOND DCA

Florida Audubon Society v. United States Sugar Corporation, Sugar Farms Co-Op and SFWMD, Case No. 2D14-2328. Appeal from final order renewing Everglades works of the district permits for the United States Sugar Corporation, Sugar Farms Co-Op and Sugar Cane Growers Cooperative of Florida. Status: Notice of appeal filed May 15, 2014; oral argument held on March 10, 2015.

THIRD DCA

Miami-Dade County, et al. v. Florida Power & Light Co., et al., Case No.: 3D14-1467. Appeal from final order of the Siting Board certifying two nuclear units at Turkey Point as well as proposed corridors for transmission lines. Status: Notice of Appeal filed June 16, 2014.

FOURTH DCA

Kijewski v. Northern Palm Beach County Improvement District, et al., Case No. 4D14-3402. Appeal from a Final Order of the South Florida Water Management District dismissing Petitioners' Response to District's Order Dismissing Amended Petition for Administrative Hearing and Denying Motion to Transfer Case to Administrative Law Judge. The petitioners requested a hearing to challenge the modification of a previously issued conceptual permit and construction authorization for a stormwater management system for part of the project. The petition for administrative hearing was dismissed twice, with leave to amend, for failure to satisfy the requirements of the Administrative Procedure Act. The petitioners responded with a "Response to District's Order Dismissing Amended Petition for Administrative Hearing" and Request to Transfer Case to the Division of Administrative Hearings. The District's final order dismisses this document with prejudice because it failed to meet the requirements of the Florida Administrative Code; the document was not filed with the clerk and was not timely; and the petitioners failed to allege how their substantial interests will be affected by a modification to the permit. SFWMD Case No. 2014-072-DAO-ERP (final order entered August 11, 2014). Status: Notice of appeal filed on September 10, 2014; all briefs have been filed.

Law School Liaisons

Florida State University College of Law Summer 2015 Update

by David Markell, Associate Dean for Environmental Programs and Steven M. Goldstein Professor

This column features honors and accomplishments of several of our distinguished alumni and students. We also highlight the events the Environmental, Energy, and Land Use Law Program held during the spring term.

We are delighted to report that our Environmental Law Program has again been ranked in the top 20 in the United States by *U.S. News & World Report*, for the eleventh year in a row.

In Fall 2015, a leading environmental law scholar, Professor **Erin Ryan**, Lewis & Clark Law School, will permanently join our faculty. Professor Ryan graduated from Harvard Law School and clerked for Judge James Browning of the U.S. Court of Appeals for the Ninth Circuit. She practiced environmental, land use, and local government law in San Francisco before beginning her career in academia. We are pleased to welcome Professor Ryan to our faculty.

Erin Ryan

Recent Alumni Accomplishments

- **Jacob T. Cremer** was appointed by Governor Rick Scott to the Tampa Bay Regional Planning Council. The Council, one of 11 in the state, is an association of local governments and gubernatorial representatives covering Hillsborough, Pinellas, Pasco, and Manatee Counties. The Council's duties include emergency preparedness, economic analysis, and comprehensive land use planning.
- **Ahjond Garmestani** has a new book coming out titled "Adaptive Management of Social-Ecological Systems."
- **Justin Green** was promoted from Deputy Director to Director of the Department of Environmental Protection's Division of Air Resource Management.
- **Kelleigh Helm** accepted a position as Energy Law and Policy Fellow at the Getches Wilkinson Center at the University of Colorado Law School.

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LAW SCHOOL LIAISONS
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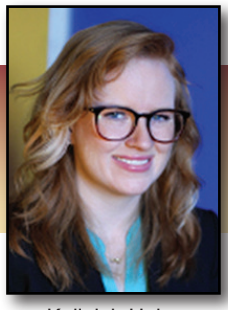
Steven Kimpland


Kelleigh Helm


Matthew Leopold

- **Steven Kimpland** has joined Audubon Field Solutions, a unit of Audubon Engineering Companies.
- **Matthew Leopold** has joined Carlton Fields Jorden Burt as Of Counsel in the Government Law and Consulting practice group in Tallahassee.
- **Andrew Missel** will begin clerking for Judge Mark E. Walker of the Northern District of Florida in August 2015 and will, following his District Court clerkship, clerk for Judge Susan Graber of the U.S. Court of Appeals for the Ninth Circuit.
- **James Parker-Flynn** had an article published: A Race to the Middle in Energy Policy, 15 SUSTAINABLE DEV. L & POL'Y 4 (2015).
- **Alan Richard** presented a Legislative and Regulatory Update as part of the Vessel Arrest Maritime Symposium 2015 hosted by American Bar Association/T.I.P.S. Admiralty & Maritime Law Committee, in conjunction with The Florida Bar Admiralty Law Committee at the University of Miami Law School; presented law enforcement instruction on Navigation Rules for Boating Accident Investigators as part of the Comprehensive Boating Accident Investigation Course hosted by the National Association of State Boating Law Administrators at the Florida Public Safety Institute; and has been reappointed as Vice-Chair of the Florida Bar Association's Admiralty Law Committee.
- **Floyd R. Self**, an energy & utilities attorney, has joined Berger Singerman as a partner. He is a member of Berger Singerman's Government and Regulatory Team.
- **Sarah Taitt** is a Board Certified Specialist in City, County and Local Government Law. She currently practices as an Assistant County Attorney in Osceola County with a focus on land use law, zoning law, animal law, and public sector compliance.
- **Jeff Wood** gave a lecture at the Florida State University College of Law in April 2015 as well as a talk at Vanderbilt Law School. Jeff is a partner in the Washington, DC office of Balch & Bingham LLP.

Recent Student Achievements

- **Sarah Logan Beasley** is writing a draft case note on the 9th Circuit's decision in Alaska Community Action on Toxics v. Aurora Energy Services for the ABA-SEER Water Quality and Wetlands Committee. Ms. Beasley will begin a clerkship with Judge Mark E. Walker, U.S. District Court for the Northern District of Florida, in the fall of 2017.
- **Sarah Logan Beasley and Stephanie Schwarz** were named semifinalists in The Jeffrey G. Miller Pace National Environmental Law Moot Court Competition. They were coached by Segundo Fernandez of the Oertel, Fernandez, Bryant & Atkinson, P.A. law firm in Tallahassee.
- **Chris Hastings** has accepted an offer to publish his student note, entitled TSCA Reform and the Need to Preserve State Chemical Safety Laws, in volume 30 of the Journal of Land Use & Environmental Law.
- **Simone Savino** was recently nominated to receive recognition through the City, County, and Local Government Law Section's Law Student Award Program as Top Local Government Scholar for the 2014-2015 school year. Simone will begin working with the City of Tampa as a Legal Consultant upon graduation this spring.
- **Stephanie Schwarz** wrote a case summary for the ABA SEER in the fall of 2014 on Houston Unlimited, Inc., v. Mel Acres Ranch.
- **Robert Volpe** published an article: The Role of Advanced Cost Recovery in Nuclear Energy Policy, 15 SUSTAINABLE DEV. L & POL'Y SUSTAINABLE DEV. L. & POL'Y 28 (2015). Robert will begin working for Hopping Green & Sams upon graduation this spring.

Spring 2015 Events

Spring 2015 Environmental Colloquium

The Spring 2015 Environmental Colloquium honored seven students for their outstanding papers on environmental, land use, natural resources, and energy law topics.

- **Sarah Logan Beasley**, *Growing Good Neighbors: Urban Farming Zoning in Tallahassee, Florida*
- **Devan Desai**, *Surging Costs: An Analysis of the Stafford Act's Financial Inadequacies*
- **Chris Hastings**, *Implementing a Carbon Tax in Florida Under the Clean Power Plan: Policy Considerations*
- **Adrienne Kendall**, *Removing the Psychological Barriers to Climate Change Adaptation Through Land Use Planning: The Road to Adaptation Implementation*
- **Simone Savino**, *A Taxing Endeavor: Local Government Protection of Our Nation's Coasts in the "Wake" of Climate Change*
- **Theodore Stotzer**, *Rising Tides: A Survey of Current Sea Level Rise (SLR) Adaptation Approaches and Suggestions Moving Forward*
- **Courtney Walmer**, *Governing Hydraulic Fracturing Through State-Local Dynamic Federalism: Lessons from a Florida Case Study*

Law School Liaisons, continued...

Spring 2015 Distinguished Environmental Lecture

Katrina Wyman, Sarah Herring Sorin Professor of Law, New York University School of Law, presented her paper "The Recovery in U.S. Fisheries" in her Spring 2015 Distinguished Lecture. To view the lecture, please click on the following link: http://mediasite.capd.fsu.edu/Mediasite/Play/9edc998fafd349c19ff24d8a5c30cf4f1d

Spring 2015 Environmental Forum

The Spring 2015 Environmental Forum, entitled "What Would Milton Friedman Do About Climate Change?," featured Congressman **Bob Inglis** of Energy & Enterprise Initiative (E&EI); Professor **Nathan Richardson**, University of South Carolina School of Law; **Eli Lehrer**, president and co-founder, R Street Institute; and Dr. **Jeff Chanton**, Professor of Oceanography at Florida State University. Professor **Shi-Ling Hsu** moderated the Forum. To view the Forum, please click on the following link: http://mediasite.capd.fsu.edu/Mediasite/Play/fb6c56fc4fd844538f546c2a3d7a300e1d

Environmental Certificate and Environmental LL.M. Enrichment Series

The Environmental Certificate and Environmental LL.M Enrichment Series welcomed our final two distinguished speakers for this spring: **Jeff Wood**, Partner, Balch and Bingham (April 2); and **Katrina Kuh**, Associate Professor of Law and Associate Dean for Intellectual Life, Hofstra University, Maurice A. Deane School of Law (April 8).

Jeff Wood

Katrina Kuh

UF Law Update

Submitted by Mary Jane Angelo, Director, Environmental and Land Use Law Program University of Florida Levin College of Law

ELULP Awards Degrees, Certificates

Jocelyn Croci received an LL.M. degree from the Environmental and Land Use Law Program in May.

Nine J.D. graduates received certificates in environmental and land use law. They are Melissa Fedenko, Dan Fontana, Bruce Groover, Chris Johns, Michael Lehnert, Gentry Mander, Michael Sylvester, Elizabeth Turner, and William White.

ELULP Fellowships Awarded

Four ELULP students received fellowships from the ELULP program to assist with their summer externships. The ELULP Conservation Law Fellowship was awarded to Anna Jimenez (1L); Rumberger Fellowships were awarded to Adrian Mahoney (2L) and Jen Lomberk (2L); and the ELULP Minority fellowship was awarded to Candace Spencer (1L).

ELULP Alumni Author Publications

Recent UF environmental law LL.M. graduates authored and co-authored recent publications, including:

Jaclyn Lopez (LL.M. 2014), *Biodiversity on the Brink: The Role of "Assisted Migration" in Managing Endangered Species Threatened with Rising Seas*, 39 Harvard Env. L. Rev. 157 (2015)

Alexis K. Segal (LL.M. 2013), *The Endangered Species Act and Marine Species Protection in the Climate Change Era, in* Climate Change Impacts on Ocean and Coastal Law: U.S. and International Perspectives (Randall S. Abate ed., Oxford Univ. Press 2015)

Chelsea Dalziel Hardy (LL.M. 2014) et al., *Special Assessments for Flood Elevation (SAFE): Using the PACE Financing Mechanism as a Model for Funding Structure Elevation to Avoid Flood Risk,* 36 Fla. Bar Sec. Env. Land Use L. Rep. No. 3 (2015)

Thomas T. Ankersen, Gabriela Stocks, Franklin Paniagua & Sekita Grant (LL.M. 2011), *Turtles Without Borders: The International and Domestic Law Basis for the Shared Conservation, Management, and Use*

Law School Liaisons, continued...

of Sea Turtles in Nicaragua, Costa Rica, and Panama, 18:1 J. Int'l Wildlife L. Pol. (2015)

UF Law Faculty Publications & Presentations

Christine A. Klein, *Chesterfield Smith Professor; University of Florida Research Foundation Professor; Director, LL.M. Program in Environmental & Land Use Law* – Professor Klein's book Mississippi River Tragedies: A Century of Unnatural Disaster (NYU Press 2014, with Zellmer), was the subject of three presentations. On March 9, Klein presented to the University of Alabama School of Law faculty. On Feb. 7, co-author Zellmer presented to Stanford Law School's Center for the American West. And on Feb. 9, Klein presented at the 75th Midwest Fish & Wildlife Conference in Indianapolis.

Mary Jane Angelo, *University of Florida Research Foundation Professor; Alumni Research Scholar; Director, Environmental and Land Use Law Program* -- The 2014 Florida Senate authorized the UF Water Institute to conduct an independent technical review of options to reduce damaging discharges to the St. Lucie and Caloosahatchee estuaries and move water from Lake Okeechobee to the Southern Everglades. The interdisciplinary team, comprised of Professor Angelo, Wendy Graham (hydrology), Tom Frazer (freshwater and marine ecosystem ecology), Peter Frederick (wetlands ecology), Karl Havens (limnology) and Ramesh Reddy (soil science and biogeochemistry), delivered their report to the Senate on March 1. Click here to review the report. Professor Angelo gave presentations at the Duke Environmental Law & Policy Forum in Durham, N.C., the Virginia Environmental Law Journal Symposium in Charlottesville, VA, and the Center for Progressive Reform Annual Meeting in Washington, D.C.

Thomas T. Ankersen, *Director, Conservation Clinic; Center for Governmental Responsibility* -- Professor Ankersen recently gave a presentation to a Washington, D.C., site review team from Florida Sea Grant on the UF Law Environmental Clinic's work helping marine and coastal stakeholders.

Timothy E. McLendon, *Staff Attorney, Center for Governmental Responsibility* -- McLendon (jointly with Terry L. McCoy, director emeritus of the Latin American business Environment Program) recently published the *2014 Latin American Business Environment Report,* which analyzes the business-relevance of developments in Latin America over the past year and assesses the outlook for 2015. Access and download a PDF version of the report at: http://www.latam.ufl.edu/media/ufledu/content-assets/latamufledu/documents/laber-and-ciber/2014-LABER-Final.electronic.pdf or request a hardcopy by emailing a mailing address to tlmccoy@latam.ufl.edu.

Chelsea J. Anderson (JD 13) (center), associate at Cobb Cole, talks about her experience in law school. (Photo by Julian Pinilla)

PIEC Dissects Energy Issues

Changes in the energy sector in the United States provided the focus of the 21st annual Public Interest Environmental Conference in February at the University of Florida. Participants examined issues of solar power, sustainable energy sources, and natural gas production during the three-day event.

UF Law Professor Amy Stein and Jonas Monast, Climate & Energy Program Director at Duke's Nicholas Institute for Environmental Policy Solutions, kicked off the second day with a discussion that served as an overview of the entire conference.

Stein focused on the changing face of energy – particularly as applied to Florida's unique energy issues. "We are sort of an electricity island," she said. "Unlike many states in our country, we don't have folks on all sides." As a result, Stein said, Florida currently gets its natural gas from only two pipelines, including one that runs through the Gulf of Mexico.

Stein also addressed the question of solar energy in Florida. Despite its Sunshine State moniker, Stein said Florida is "way down" the list of states ranked by solar energy production. This apparent paradox, Stein said, is the result of the current cost prohibitive nature of solar power. Gainesville, Florida, Stein said, has the highest electricity price rates in the state. Stein noted that although Gainesville was the first city in the country to implement a feed-in tariff, the tariff was recently suspended. Additionally, several buildings on UF campus have solar panels that produce some of the electricity the buildings use.

Monast highlighted the difficulties of predicting the future of energy in the United States. "It is difficult to know where the sector is going to go in the next 10 years, in the next 20 years," he said. For example, hydraulic fracturing ("fracking"), Monast said, is an area where the development has outpaced the research. "We'll know more in the future, but we're making decisions today," Monast said.

Monast noted that some of the areas experiencing a fracking boom across the country are already accustomed to an "industrial landscape." On the other hand, fracking corporations have also set up shop in areas that previously haven't experienced that kind of industrial presence – like rural Western Pennsylvania.

Nuclear power is another area in which experts will need to make predictions. "Between 2030 and 2040, most of the nuclear power plants are going to reach the end of their permits," Monast said. He added that decisions will need to be made about whether existing plants will be updated or new plants built – well before the permits expire.

Panel discussions covered a wide range of energy issues. "Feed-In

Law School Liaisons continued....

Tariffs: Why Can't the U.S. Keep Up?" was about payments made to renewable energy generators – including homeowners. Other panels discussed fracking, green homebuilding, energy in transportation, nuclear power, solar power, coal ash problems, and hydrokinetic energy. UF Law Professor Wentong Zheng joined Theodore Kury, Director of Energy studies at the Public Utility Research Center, for a discussion called "The Role of International Trade in U.S. Energy Security."

City Parks Provide Topic for Wolf Family Lecture

Robert C. Ellickson, the Walter E. Meyer Professor of Property and Urban Law at Yale Law School, discussed issues related to urban parks during the annual Wolf Family Lecture in February.

He said metropolitan areas can have too much open space in his lecture, "Open Space in Urban Areas: Might There Be Too Much of a Good Thing?" at the University of Florida Levin College of Law.

While numerous policies encourage the creation of open spaces citing the enhancement of recreational opportunities and scenic vistas for nearby residents, Ellickson proposes that a "key advantage of urban living is proximity to other people. Open spaces reduce urban densities, increase commuting times, and foster sprawl." He adds that the costs of open spaces are also often underestimated.

The Wolf Family Lecture Series was endowed by a gift from UF Law Professor Michael Allan Wolf, who holds the Richard E. Nelson Chair in Local Government Law, and his wife, Betty.

Nelson Symposium Looks at Eminent Domain

Panels of experts discussed the evolution of eminent domain in the United States in the wake of *Kelo v. City of New London* during the 14th annual Richard E. Nelson Symposium in February. The Supreme Court's 5-4 decision in *Kelo* provided a new view on established eminent domain jurisprudence. Though Kelo's lawyers couldn't save her house, the aftermath has seen numerous state governments seeking to limit the broad approach to "public use" espoused by the court in that case.

UF Law Professor Michael Allan Wolf, the Richard E. Nelson Chair in Local Government Law, kicked off the symposium with a discussion of the consequences of the *Kelo* decision. In *Kelo*, the Supreme Court ruled that a city in Connecticut could take land from private homeowners, including Suzette Kelo, to be used for a private development under the "public use" doctrine. Wolf said the timing of the decision was interesting because it occurred just before the economic bubble burst – resulting in the planned development for the area never coming to fruition.

Scott Bullock, who represented Suzette Kelo before the Supreme Court, said his first foray into eminent domain came in the early 90s, when he represented Vera Coking, a New Jersey resident who was facing the loss of her longtime home. Bullock said that in *Kelo*, the city was able to win over the justices with its economic development plan. The city's lawyers successfully argued that the development plan for the area constituted a valid public use for the land under the earlier *Hawaii Housing Authority v. Midkiff*. However, Bullock said, the plan turned out to be smoke and mirrors. "The city basically had no idea what they wanted to do with it," Bullock said. "They said it could be parking, it could be retail. It was labeled under the development plan as 'park support.'" Because the economy crashed soon after the city's victory in *Kelo*, the plan evaporated. The land, Bullock said, is now a barren field that's home to a colony of feral cats.

Ilya Somin, a professor at the George Mason University School of Law, said *Kelo* actually served to turn popular sentiment against the broad interpretation of "public use." He said, "Before *Kelo*, people like me – people who think the broad view of public use is wrong – were seen as weird, wild-eyed extremists." Somin authored *The Grasping Hand*, a book focusing on the state of eminent domain law after *Kelo*. In his book, Somin researched the massive political backlash against eminent domain following the decision. He found that, despite the unpopularity of *Kelo*, the public continues to be generally unaware of legislative efforts to curb eminent domain takings.

UF Law students Amanda Hudson (2L) and Bradley Tennant (2L) presented their research on the states' legislative and judicial responses to *Kelo*. Tennant said 40 states made a total of 51 changes, both legislative and constitutional, in the first two years following *Kelo*. By the end of 2013, Tennant said, 45 states had made changes – the holdouts being New York, Massachusetts, Oklahoma, Arkansas and Hawaii.

Scott Bullock, who represented Suzette Kelo before the Supreme Court, left, and Ilya Somin, professor at the George Mason University School of Law, during the 14th annual Richard E. Nelson Symposium. (Photo by Julian Pinilla)

The Creek nation expanded from the Chattahoochee into the Flint basin in the latter 1700s. *Id.* at 5-6. The area was initially stable, post-Revolution and after the 1783 Spanish return to Florida. *Id.* at 15.

American settlers, traders and agents originally coexisted peacefully with the native population, even though a major conflict nearly occurred in 1795. *Id.* at 16. Everything changed when Andrew Jackson arrived in 1818. While the Creek allied with Jackson in the Seminole Wars, the United States and the Creek eventually signed the removal treaty of 1832 and the Army enforced removal in 1836-37. *Muscogee (Creek) Nation History*, www.muscogeenation-nsn.gov/Pages/History/history.html.

Settlers began the eventually massive Georgia cotton industry in the Flint Valley. Georgia was the world's largest cotton producer by the Civil War. *Flint River History & Facts*, www.flintriverkeeper.org/history-and-facts. Much of that cotton went through one of over two dozen ferry landings on the Flint. *Id.* While the Civil War, boll weevil, soil erosion and then the Depression eviscerated the cotton industry, cotton remains one of several major crops in the region. *Id.*; W. Wright, B. Nielsen, J. Mullen, J. Dowd, *Agricultural Groundwater Policy During Drought: A Spatially Differentiated Approach for the Flint River Basin*, www.ageconresearch.umn.edu/bitstream/124793/2/Mullen.pdf.

The lower Flint basin does not alone provide water supply for the region's agriculture. About 80% of irrigation water in the lower Flint comes from the Floridan Aquifer. The Floridan is the nation's most shallow major aquifer, as well as one of the most productive. Its permeability and connectivity mean "interchange between ground and surface water in this region can occur rapidly, frequently, and unexpectedly." *Id.* at 1.1. (internal cits. om.)

THE CHATTAHOOCHEE

Like the Flint, the Chattahoochee has humble origins. It begins as "a tiny spring only a foot wide in a portion of the Chattahoochee National Forest …." *Georgia DNR, Environmental Setting of the Chattahoochee River,* COMPREHENSIVE INVENTORY at 75, http://www1.gadnr.org/greenspace/c_pdfs/19ciCh1Over.pdf. The river joins the Flint 430 miles away, at today's Lake Seminole, forming the Apalachicola. *Id.*

This forested region was consistently populated long before the Flint basin. *Id.* at 77. The United States removed remaining natives along with their offshoot populations in the 1830s. *Id. at 79*. Georgians used this basin afterwards for both agriculture and hydropower. *Id.* The region's population continues to use the river for hydropower, expanding from mills to modern dams. The Buford Dam is the most significant of these. We will discuss the dam below.

THE APALACHICOLA

The Apalachicola region has been populated for thousands of years. The cotton that originated in Georgia went down the Flint and Chattahoochee, then the Apalachicola and out into the Gulf. Lumber from the region likewise was long shipped down the river. *Apalachicola River-History*, www.myfwc.com. Most readers know that oysters and mussels in the lower basin and upper Gulf are intrinsically related to the health of the river system. *Florida Sea Grant, et al, Apalachicola Bay Oyster Situation Report TP-200* at 4 (April 24, 2013). The water quality dropped substantially after the Corps dredged a 9-foot x 100-foot channel between Columbus, Georgia, and Apalachicola. *Apalachicola River-History*, *supra.* That channel largely remains today, although Florida has recently denied maintenance permits based on water quality issues.

THE BUFORD DAM AND LAKE SIDNEY LANIER

The Buford Dam is the most significant factor in the Tri-State Water Wars. The key, two-pronged question is whether and when potable water supply became a core factor in authorizing the construction of this dam on the Chattahoochee, just north of Atlanta. As noted above, northern Georgia has no natural lakes. M. Shoemaker, *supra*, at VIII. "[T]herefore, metro Atlanta must use manmade reservoirs to store water for use during day times." *Id.*

The Corps initially requested the dam in the 1930s as an aid to navigation. Atlanta leaders focused on the hydropower potential. The dam was typical of a whole New Deal generation of similar structures throughout the nation. *See, e.g.,* D. Billington & D. Jackson, *Big Dams of the New Deal Era: A Confluence of Engineering and Politics* (2006); M. Reisner, *Cadillac Desert* (1986). Former Corps staffer Robert David Coughlin wrote an exhaustive book, no longer in print, about the background of this dam. R. Coughlin, *"A Storybook Site": The Early History & Construction of Buford Dam* (1998).

The 1946 Corps "ask" that led to the 9-foot-deep x 100-foot-wide channelization of the Apalachicola and Chattahoochee up to Columbus also sought the Buford and Woodruff dams. The Woodruff dam was constructed where the Flint and Chattahoochee form the Apalachicola, to provide hydroelectric power subordinate to its primary purpose as a navigational aid: *Secretary of War, Apalachicola, Chattanooga, and Flint Rivers, GA and Fla.* (1939); *See* J. Elder, S. Flagg and .l Mattraw, *HYDROLOGY AND ECOLOGY OF THE APALACHICOLA RIVER, FLORIDA: A SUMMARY OF THE RIVER QUALITY ASSESSMENT* AT §1.2 (USGS WATER SUPPLY PAPER 2196 at Chapter D) (1988). The dam impounds Lake Seminole on the Florida-Georgia line. *Id.*

The background of the Buford Dam is murkier and more attenuated. District Corps Colonel Park wrote the "Park Report" that ultimately provided the basis for the Buford Dam. While the Colonel noted that future potable demand in the Atlanta area was "not improbable," he concluded that "no immediate necessity [existed] for increased water supply in this area." Brigadier General Newman clarified and revised the Corps report in 1946. He requested a flow at Atlanta of 650 second-feet or greater so the hydropower function could "meet the estimated present needs of the city, and … prevent damage to fish, riparian owners, and other interests …."

A graduate history thesis by Georgia State University scholar Lori Coleman provides a thorough history of Buford. L. Coleman, *Our Whole*

continued...

Future is Bound Up in This Project: The Making of Buford Dam (GSU Thesis 2008). http://scholarworks.gsu.edu/history_theses/30.

Coleman emphasized that only two paragraphs in the 1939 supporting Corps report even mentioned water supply. *Id.* at 26. While the Corps noted that the Chattahoochee provided Atlanta's existing water supply, the report said "'[w]ith the continued rapid growth of population and industry in this area the storage capacity of a large reservoir might be of benefit for an assured continuous water supply.'" *Id.*, quoting *Secretary of War Report* at 80 (1939).

Many Georgia leaders wanted to construct hydropower facilities to create a "little Tennessee Valley Authority" or "Little TVA" in North Georgia. Just as the TVA provided power through much of the Mid-South, Georgia leaders wanted to harness the Chattahoochee to modernize the Piedmont region of their state. *Id.* at 25, citing, *inter alia*, J.R. Bachman.

The Corps initially foresaw navigation as the primary dam purpose. Flood control was also important. The Corps saw hydropower as a more contingent purpose: "[T]here is considerable uncertainty as to how many years it would be before there is a sufficient demand to absorb the entire power output of the proposed power developments." *Secretary of War* at 72. Coleman noted: "[S]urprisingly, engineers in the late 1930s were unconcerned about the water needs of the most populous city in the ACF basin." *Coleman* at 26.

Congress passed Rivers and Harbors Acts in 1945 and 1946 that emphasized the lower ACF basin. The acts funded navigational aids from Columbus down to the Gulf. Despite efforts by Atlanta Mayor Hartsfield and others, little attention was paid just yet to Atlanta. That soon changed.

Congress passed Rivers and Harbors Acts in 1945 and 1946 that emphasized the lower ACF basin. The acts funded navigational aids from Columbus down to the Gulf. Despite efforts by Atlanta Mayor Hartsfield and others, little attention was paid just yet to Atlanta. That soon changed.

Coleman cites at length to Professor Numan Bartley. Bartley was one of the last half century's best regarded and most published scholars on all aspects of Southern history and culture, particularly in Georgia. His work on the state post-World War II is likely without equal.

Coleman cites Bartley for a major development in southern post-war power. Bartley traced the change from 1940 to 1960 in the region's ratio of federal taxes paid to federal funds received. In 1940, the ratio was 17% to 16%; by 1960, it was 12% to 25%. *Coleman* at 31, citing N. Bartley, *The Era of the New Deal as a Turning Point in Southern History,* at 144. *NEW DEAL AND THE SOUTH* (COBB & NAMORATO EDS) (1984) As a result, the South gained access to a dramatically increased amount of federally funded infrastructure, while paying a substantially smaller proportion of federal taxes. The Atlanta area decided to revisit the dam in earnest early in this era.

We quote above the 1946 Corps report clarification and revision by General Newman. Newman downplayed navigation, and emphasized hydropower. This was the opposite of the Corps' priorities of the prior decade. Coleman discussed at length the Corps' cooperation with Georgia Power to gain the latter's support for Buford Dam for hydropower. This required delicate negotiations, because the Corps had to convince Georgia Power that a dam fifty miles north of Atlanta, rather than Roswell, as previously proposed, would support and supplement Georgia Power's several existing hydropower dams on the river. The Roswell location might have interfered with the downstream Georgia Power dams. *Coleman* at 38-43. (internal cits. om.)

The Corps report concluded that a major reservoir associated with the Buford Dam would aid navigation in two ways. First, it could ensure minimum flows. Second, and as a result, the substantial new minimum flow would minimize the amount of dredging otherwise necessary to establish and to maintain a navigable channel downstream. *Id*. at 38.

While the Corps weighed water supply, it did not recommend or request that Atlanta pay for the dam or reservoir. The agency continued to see water supply as an incidental consequence that did not add to the project cost. *In re: MDL-1824 Tri-State Water Rights Litigation,* 644 F.3d 1160, 1169 (11th Cir. 2011). The City agreed. Mayor Hartsfield said:

> The City of Atlanta has many sources of potential water supply in north Georgia. Certainly, a city which is only one hundred miles below one of the greatest rainfall areas in the nation will never find itself in the position of a city like Los Angeles …. [T]he City of Atlanta could go to the Cossawattie River which flows through Gilmer County near Ellijay. The George Power Company owns the water rights and has an occasion offered them to the City. A small dam there and a pipeline will bring the water by gravity without the necessity of a single pump ….

Coleman, *supra* at 58, fn 29 and accompanying text, quoting Hartsfield to Davis, March 1, 2948, Folder 5, Box 1, Rivers and Harbors Series, A. Correspondence, RBRC.

Atlanta's leaders knew that their water supply was more precarious and less predictable than Hartsfield let on. Georgia experiences frequent droughts, one from 1925 through 1927. D.E. Stooksbury, *Historical Droughts in Georgia and Drought Assessment and Management* at unnumbered pages 1-2 (2003), presented in Proceedings of the 2003 Georgia Water Resources Conference, held April 23-24, 2003. The Weather Bureau said the drought lasted longer, beginning in 1924. The bureau stated that the Chattahoochee and other rivers "in many places reached the lowest stages ever known" during this drought. Climatological data, Georgia section: Climate and Crop Service, USDA v.l 29, no. 1, 9, 49-50.

Atlanta's metropolitan population booms began long before Hartsfield, and continue, generally unabated. The forced removal of Native Americans discussed above opened the region for development in the early 19th century. Railroads led to further initial expansion. After Sherman burned it down, Atlanta became the Georgia capital in 1868. The confluence of railroads and the formation of various colleges and universities fostered its growth, and

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the presence of cotton led to industrial expansion. E. Glaeser, *Betting on Atlanta,* New York Times (March 9, 2010). The city grew from 22,000 in 1870 to 270,000 in 1930. *Id.*

While the Depression rocked the city, the New Deal caused major upgrades of Atlanta's previously woefully inadequate infrastructure. Of particular significance, the WPA and PWA built a modern sewer system to replace the previous one that not only served few, poorly, but discharged over half of its raw sewage into the Chattahoochee and other water bodies that were potable sources. *See, e.g.,* G. Wright, *The New Deal and the Modernization of the South* at 9-11, presented at Organization of American Historians (March 28, 2009); D. Fleming, *The New Deal in Atlanta: A Review of the Major Programs,* THE ATLANTA HISTORICAL JOURNAL 1 (Spring 1986) at fn 25 and accompanying text. (*cits. om.*) ("In early 1934 the CWA reported that Atlanta had 'greatly outgrown its sewer disposal plant, over half the city sewage has been dumped in a raw condition into the various streams flowing into the Chattahoochee River.'")

Atlanta experienced a major boom as the World War II ended. *Expansion in Atlanta After World War II,* http://wwii.lmc.gatech.edu/nan/expansion.html. Hartsfield and other civic leaders knew full well that expansion would require more, and more reliable, water supply. Notwithstanding Hartsfield's rosy quote, seeking to minimize Atlanta's co-pay obligations, he, and other leaders, recognized that a dam was necessary to alleviate the risk of short- and long-term water shortages. *Coleman*, *supra* at 57-59 (*cits. om.*) Local Congressman Davis privately opined that the source of water was "absolutely essential" to the city's future expansion. *Id.* at 59. (*cits. om.*) Coleman cites the Corps 1949 report:

> "[N]either system [City of Atlanta and Dekalb County] includes any large amount of storage …. The water requirements of this area have increased rapidly in recent years …. In view of the absolute necessity of an adequate water supply for this area releases from Buford Reservoir should be provided which will be ample to meet those future water supply demands."

Id. at 67-68, quoting Corps Report at 1-26 (1949). Hartsfield flipped from his 1948 summary in his 1950 Annual Address. The Mayor emphasized the "movement to control and regulate the flow of the Chattahoochee River" in ensuring the City's water supply. *Coleman* at 67 (*cits. om.)*

Coleman points out a crucial sample size error in determining the City's water supply needs. The Corps based demand analysis on the date available from 1929-47. *Coleman* at 68 (*cits. om.)* The sample just missed the historic drought of 1924-27. *Id.*; *Stooksbury, supra* at 2. As a result, the Corps supported Atlanta leaders' goals of minimizing local copay for the dam. The more overarching issue, however, was the Corps failed to factor the predictable and recurring historic drought cycles the area suffered. *Coleman* at 68-69.

Likewise, the Corps badly shortchanged needs analysis by asking the Board of Health to project growth needs for the next eleven years. *Id.* at 70. *(cits. om.)* The Corps and the City had to know that growth would explode. The 11 year projection would, and did, underestimate actual needs by a massive scale.

Let us put that into perspective. The Corps issued its report in 1949. The U.S. Census estimated 331,000 in Atlanta, and just under a million in the metropolitan area, in 1950. In 1960, virtually eleven years after the Corps report, those numbers were 487,000 and 1.3 million. The core city has shrunk slightly since, to slightly exceeding 400,000, but the metropolitan population approaches 6 million today. 2010 U.S. Census.

Georgia Power's plant and downstream dams also expected benefits from the Buford. *Coleman* at 75-76, fn. 93 and accompanying text. *Coleman* cited a Corps report that projected substantial power going to Georgia Power. *Id.*

Lake Lanier, formed behind the dam, is a major recreational asset in today's Atlanta. While Mayor Hartsfield foresaw that use, the original Corps reports did not emphasize that possibility. *Id.* at 78-80. (i.c.o.)

Finally, the federal government, including fish and wildlife service, did not substantially weigh potential environmental impacts of the dam. The state was concerned about fisheries impacts. The federal files do not reflect similar concerns. *Id.* at 81-83. Ironically, one of the concerns of Public Health Officials was the need to spray DDT to minimize diseases due to the flooding. *Id.* at 83. (i.c.o.)

DIVERSION AND PROHIBITION

After the Buford Dam was constructed in 1956, peace reigned until the Corps began authorizing withdrawals from Lanier and the Chattahoochee for various water supply providers around north Georgia. Matters reached a crisis point in 1989, when the Corps sought Congressional approval to enter into permanent contracts to provide water to various water authorities around the Atlanta metropolitan region. S. O'Day, J. Reece, J. Nachers, *Wars Between the States in the 21st Century: Water Law in an Era of Scarcity,* 10 VT. J. ENVTL. L. 229, 234 (2009).

Georgia exacerbated the problem by requesting Congress to bar navigable use of the Chattahoochee and Apalachicola during droughts. Georgia wanted maximum supply to

continued....

protect the Atlanta area. *Id.* at 233. (i.c.o.) Florida protested this, because the Apalachicola feeds a diverse ecosystem, including invaluable oyster habitat and habitat for numerous listed species. *Id.* That river has the most powerful flow of any in Florida. The dams have had a clear impact on the flow, and associated impacts are found to have caused downstream siltation. *Id.*

ALABAMA'S CONCERN

Alabama's concern with the ACF stems from its use of the "ACT Basin." The ACT consists of the Alabama, Coosa and Tallapoosa Rivers. *Id.* at 233-34. This basin contains rich biodiversity, recreational use, and numerous Alabama Power dams that provide power throughout the eastern states. *Id.* The Coosa and Tallapoosa form the Alabama near Montgomery, and the Alabama meanders to the Gulf. *Id.*

Alabama relies on substantial supply of water from both the ACF and ACT basins for hydropower. *Id.* at 238. Alabama claimed in 1990 that the Corps mismanaged two lakes in the ACT, Carters Lake and Lake Allatoona, as well as Lanier. *Id.* The state alleged that these upstream lakes reductions adversely affected Alabama, and that the Corps should have analyzed environmental impacts before allowing Lake Lanier water diversion for Atlanta water supply. *Id.*

Alabama faced a structural disadvantage throughout the various litigations. Unlike Florida and Georgia, Alabama did not have a statewide, comprehensive water management plan. Alabama Water Agencies Working Group, *Water Management Issues in Alabama* at 1-3 (Aug. 1, 2012). Many aspects of a statewide plan existed in agency statutes and rules, but no comprehensive plan existed. *Id*. at 7.

The 2012 Alabama working group that recommended a statewide plan pointed out a second anachronism in Alabama water law:

> Traditionally, most eastern states have relied on some variation of "riparian law" (i.e. legal rights associated with land ownership adjacent to a watercourse). However, pure riparian law as is used in Alabama is not an effective way to manage water resources for the betterment of all users. A regulated riparian legal structure is evolving in the southeastern states as a more efficient was to manage water resources, ensuring that public and private needs are met and minimizing conflicts and litigation.

Id. at 7. Alabama actually had a "regulated riparian system," but the Alabama Water Resources Act stated that statute was "not intended to change or modify the existing riparian system of water rights allocation." D. Stephenson, *The Tri-State Compact: Falling Waters and Fading Opportunities,* 16 FSU J. L. U. Envtl. L. 83, 92 (2000) (c.o.).

The Alabama Water Agencies Working Group issued a 214 page report to Governor Robert Bentley on December 1, 2013. Alabama Water Agencies Working Group, *Mapping the Future of Alabama Water Resources Management: Policy Options and Recommendations* (Dec. 1, 2013). The report proposed preparation of a statewide water management plan and implementation process. *Id.* at 25, et seq. Among the issues relevant to the Tri-State water wars were: should the state update riparian standards; is a more formal regulatory program needed for water use, as well as interbasin transfers and instream flow; and as to instream flow, creating a clear definition, standards for interaction with water users and flow targets. *Id.* at 25-28. Finally, the report concluded the state must better coordinate interstate water issues with its neighbors. *Id.* at 105-109. The process is developing; the working group is convening stakeholder meetings around the state throughout 2015 and performing further resource assessment. In the meantime, Alabama's water regulatory program lags far behind Georgia's and Florida's regimes.

Eastern states have increasingly transitioned from pure riparianism, as then found in Alabama, to a regulated riparianism, which requires riparian owners to obtain state permits to withdraw water. *See* generally, S. Ansbacher, *Muddying the Public Trust Doctrine One Vote at a Time,* 29. F.S.U. J. L.U. & Envtl. L. 221, 261, quoting S.C. DEPT. OF NAT. RES., SOUTH CAROLINA WATER ASSESSMENT at 2-25 (A. Wachob, et al, eds. 2d ed. 2009).

GEORGIA'S SYSTEM

Georgia long applied common law riparianism, applying the "natural flow [standard] subject to reasonable use." *Pyle v. Gilbert*, 245 Ga. 403 (1980). The Georgia Supreme Court applied this standard as long ago as 1909:

> If the general rule that each riparian owner could not in any way interrupt or diminish the flow of the stream were strictly followed, the water would be of but little practical use to any proprietor, and the enforcement of the rule would deny, rather than grant, the use of the water. Every such proprietor is also entitled to such disturbances, interruptions, and diminutions as may be necessary and unavoidable on account of the reasonable and proper use of it by other riparian proprietors.

Price v. High Shoals Manufacturing Co., 132 Ga. 246, 248 (1909).

Georgia long ago codified its common law riparianism in the former Civil Code at Sections 3057, 3802 and 3879. Today, however, Georgia uses a regulated riparian system. C. Moore, *Water Wars: Interstate Water Allocation in the Southeast,* 14 – SUM Nat. Resources & Envt at 6 (1999). Georgia adopted its Groundwater Use Act in 1972, which required a permit for withdrawals exceeding 100,000 gallons of groundwater per day. Ga. Code Am. §12-5-90, et seq. The Water Quality Control Act of 1974 and Water Management Act of 1977 amended the act to combine to require permits for withdrawals exceeding 100,000 gallons of surface water per day. Accordingly, Georgia used the antiquated per riparian system long after constructing the dam, but regulated larger scale users prior to the Tri-State litigation.

Jeffrey Mullen wrote an insightful overview of the impact of the Tri-State Water Wars on Georgia's statewide water regulation in 2011. J. Mullen, *Statewide Water Planning: The Georgia Experience,* JOURNAL OF AGRICULTURAL AND APPLIED ECONOMICS (Aug. 2011). Mullen

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says the tri-state issues led to "legal uncertainty of the state's water supply, which continues to date, coupled with water demand pressures and a drought." *Id*. This caused The Association of County Commissioners of Georgia to demand a statewide, comprehensive water plan in 1999. *Id.*

The state adopted its Comprehensive Statewide Water Management Planning Act in 2004. *Id*. citing HB 237, as passed into law. That act required the state to develop a plan, which the 2008 General Assembly did. *Id.*; *Shoemaker* at II.

Shoemaker emphasizes hydrogeologic problems for water planning and supply in Georgia, in addition to the absence of natural lakes in northern Georgia:

> The geography of our state poses a unique challenge in meeting Georgians' water needs: the mountainous northern part of our state provides surface water, while the southern part provides groundwater. The northern half of Georgia is where the majority of our population lives; however, groundwater sources cannot supply sufficient quantities of water for cities and large industrial operations.

Id. at III.

Georgia's system is the linchpin, because Georgia controls the waters upstream of Alabama and Florida. Georgia allows a riparian owner to use the natural flow, "modified by a reasonable use provision." *Stewart v. Bridges*, 292 S.E.2d 702, 704 (Ga. 1982). Georgia's modified riparianism arguably requires that state to simply use or authorize the use of water, in a reasonable fashion, even if the use increases with time. S. O'Day, et al, *Wars Between the States in the 21st Century: Water Law in an Era of Scarcity*, 10 Vt. S. Envtl. L. L. 229, 251 (2009). Regardless, federal courts in the Tri-State litigation held that the downstream states had standing to challenge upstream allocation in Georgia. *Id.* at fn 180, citing *Ga. v. U.S.A.C.O.E.*, 223 F.R.D. 691, 696 (N.D. Ga. 2004).

FLORIDA'S DUAL SYSTEM[1]

Florida was one of the First eastern states to establish a "dual" riparian/prior appropriation system. The state originally applied the traditional riparian rights doctrine. *Tampa Waterworks, Co. v. Cline*, 20 So.780, 782 (Fla. 1896). The state unconditionally allowed "natural" uses such as residential and basin agricultural consumption, while limiting such "artificial" uses as irrigation to reasonable use. *Id.* at 783. In 1956, the Florida Supreme Court held that groundwater would be subject to similar standards. This deviated from common law treatment of groundwater as an inexhaustible resource. *Koch v. Wick*, 87 So.2d 47, 48 (Fla. 1956) (applying a standard of "reasonableness and beneficial use of the land".

Florida's massive scale irrigation and development led the state to examine comprehensive water management, unconstrained by riparian boundaries except for prohibiting interference with existing reasonable uses. C. Klein, M. J. Angelo & R. Hamann, *Modernizing Water Law: The Example of Florida,* 61 U.F.L. Rev. 404, 417-19 (2009) (c.o.)

Dean Frank Maloney of the University of Florida and others on that faculty drafted *A Model Water Code* in 1972. *Id.* at 419 (e.a.) The Florida Legislature used early drafts of that proposal as a springboard for the Water Resources Act of 1972. *Id.* at 421, citing 1972 FLA. LAWS. 1082-83, codified at Ch. 373, Fla. Stat. In pertinent part, the 1972 act treated all waters within Florida as "waters of the state" whose use was subject to ch. 373. *Id.* at 422-23 (c.o.). Nelson Manfred Blake discussed these issues in a 1980 book. N. M. BLAKE, *LAND INTO WATER – WATER INTO LAND: A HISTORY OF WATER MANAGEMENT IN FLORIDA*, 223 et seq. (1980). The state continues today to use the dual system. *See, generally,* C. Klein, M. J. Angelo, and T. Hamann, *Modernizing Water Law: The Example of Florida,* 61 FLA. L. REV. 403 (2009).

LITIGATION HISTORY

The murky history of the Corps' authorizations for Buford Dam predictably culminated in litigation. The Corps published a draft plan in 1989 to reallocate existing water rights in both Lake Sidney Lanier and in Allatoona Lake. The latter waterbody impounded waters in the ACT basin. *In re MDL-1824 Tristate Water Rights Litig.*, 644 F.3d 1160, 1173 (11th Cir. 2011) (per curiam), *cert. den.*, 133 S. Ct. 25 (2012), citing Army Corps of Engineers, Post Authorization Change Notification Report (draft PAC Report) (1989).

Congress originally authorized the Corps to construct a "reregulation dam" on the Chattahoochee downstream of Lake Lanier. "This reregulation dam was intended to capture peaking hydropower releases from Lake Lanier and attenuate the flow to

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make water available for withdrawal by Atlanta downstream." L. Jones, et al, *Updating Twentieth Century Water Projects to Meet Twenty-First Century Needs: Lessons from the Tri-State Water Wars,* 29 Ga. St. U. L. Rev. 959, 965, f.n. 36 and accompanying text (2013). NEPA review caused the Corps to switch the plan from building the new dam to reallocating 207,000 acre feet in Lake Lanier for Atlanta's water supply needs. *Id.* (i.c.o.)

Alabama filed an injunction action in 1990 to seek to block the implementation of the PAC Report. *Alabama v. USCOE,* No. 90-V-1331 (N. D. Ala. June 28, 1990). Florida and Georgia intervened in the case. The parties agreed first to stay the case, then signed a Memorandum of Agreement (MOA) that authorized the Corps to withdraw the draft PAC report and to comprehensively study ACF water issues. *Tri-State*, 644 F.3d 1160, 1174. The parties agreed to allow the three states to withdraw a reasonably increasing amount of water from the ACF while the study took place. *In re Tri-State Water Rights Litig.*, 07-MD-00001 Docket No. 106 (M. D. Fla. April 14, 2008)

The Corps completed its study, leading the three states to terminate the MOA. In its place, they adopted the Apalachicola-Chattahoochee-Flint Basin Compact (ACF Compact). Congress consented to the compact, Pub. L. No. 105-104, 111 Stat. 2219-2232. The compact kicked the can down the road until the original expiration date of December 31, 1998, and on through the extended deadline of August 31, 2003. *Tri-State*, 644 F.3d at 1175. The ACF Compact essentially allowed the three states to continue to withdraw at allegedly reasonably increasing rates. *Id.*

The stay in Alabama's 1990 case remained in effect throughout the term of the ACF Compact. Georgia next upset the status quo by asking the Corps to formally reallocate storage capacity in Lake Lanier to accommodate Georgia's water needs through 2030. *Id.* at 1176. Georgia had been providing water from the lake throughout northern Georgia without formal contracts, so the state sought to provide certainty for its rapidly expanding needs. *Id.* at 1175-76.

Georgia sued the Corps to mandate the allocation. *Georgia v. USCOE*, No. 01-CV-00026 (N. D. Ga. Feb 7, 2001) The Corps eventually stated it needed Congressional approval to process Georgia's request. *Tri-State*, 644 F.3d at 1176, citing Water Supply Act of 1958, 43 U S C 390b. Georgia and the Corps abated this action pending the 1990 Alabama case result. *Tri-State*, 644 F.3d at 1176.

A coalition of electrical consumers then sued, alleging that Buford Dam electrical power was too expensive because water suppliers in Georgia were allegedly not paying enough to offset the lost hydropower due to their own use of the Dam. *Tri-State*, 644 F.3d at 1175. The coalition sued in the D.C. District, but settled with the Corps and the water suppliers in *SFPC v. Caldera*, 301 F. Supp2d 26, 30 (D.C.D.C. 2004). Alabama and Florida intervened in the trial court, and appealed to the D.C. Circuit. The appellate court held the settlement violated the Water Supply Act of 1958, because the settlement reallocated so much storage capacity that it required Congressional approval. *SFPC v. Geren*, 514 F.3d 1316, 1325 (D.C. Cir. 2008), *cert. den.*, 555 U.S. 1097 (2009).

The D.C. Circuit remanded *SFPC*. The Judicial Panel on Multidistrict Litigation packaged the prior *Alabama* and *Georgia* cases with *SFPC*, and transferred all three to the Middle District of Florida as a consolidated case. *In re Tri-State Water Rights Litigation*, 481 F. Supp. 2d 1351 (J.P.M.L. 2007).

The Middle District held that the Corps' authorization of releases from Lake Lanier essentially reallocated storage in the lake. The Court concluded similarly to the D.C. Circuit in *SFPC*, that the release allocations constituted major operational changes requiring Congressional approval pursuant to the Water Supply Act of 1958. *In re Tri-State Water Rights Litigation*, 639 F. Supp. 2d 1308, 1346-50 (M. D. Fla. 2009).

The Eleventh Circuit reversed on multiple grounds. The court held that Alabama's and *SFPC*'s failures to appeal the Corps' final agency action under the Administrative Procedure Act barred jurisdiction on the collateral attack. *Tri-State*, 644 F.3d at 1181, *et seq*. The appellate court made a fundamental and core holding in favor of Georgia and the Corps. The court held the 1946 act authorizing the project authorized downstream allocations of water. Therefore, no reallocation was involved. *Id*. at 1185, *et seq*. The 11th Circuit expressly did not address the scope of Corps authority to provide for Georgia's water supply needs. *Id*. at 1196-97. The appellate court directed the trial court to remand Georgia's request to the Corps, which it gave one year to analyze and make a final determination as to how to allocate Lake Lanier's waters. *Id.* at 1196, *et. seq*.

The Supreme Court denied certiorari on the appeal of the 2011 Eleventh Circuit decision. 133 S. Ct. 25 (2012).

The Corps determined on June 25, 2012, that it enjoyed delegated authority to address the allocation Georgia requested. USACOE, *Memorandum for the Chief of Engineers* (June 25, 2012). The Corps has since been compiling information to determine needs and supplies in Lanier, as well as the requirements of the Woodruff Dam. The Corps projects a draft manual concerning the process later in 2015, together with an environmental impact statement.

2014 FLORIDA COMPLAINT

The Tri-State Water Wars experienced a predictably brief cease-fire after the Supreme Court's refusal on June 25, 2012, to hear the Eleventh Circuit's latest rulings. -U.S.-, 133 S. Ct. 25 (2012). Florida filed a request to the Supreme Court to apportion the rivers one year later, on October 1, 2013. Complaint in *Florida v. Georgia*, SCOTUS No. 142, Original (2014). The Court allowed the complaint to proceed on November 3, 2014. On November 19, 2014, the Court appointed Ralph Lancaster of Portland, Maine to act as special master in the case. Order in Pending Case, 142, Orig. (Nov. 19, 2014). 574 U.S. Alabama did not participate. Brief for Alabama as Amicus Curaie Regarding Non-Joinder of Alabama (May 1, 2015). Georgia alleges that state is an indispensable party. Georgia's Motion to Dismiss for Failure to Join a Required Party

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(Feb. 16, 2015). The motion remains pending.

Florida alleged that Georgia's "storage, evaporation and storage of water" diminished water in the Apalachicola River flowing from Georgia to Florida by up to 4,000 cubic feet per second. Bill of Complaint at ¶ 50. Florida stated that this caused the Apalachicola Bay oyster grounds to collapse due to salinization. *Id*. at ¶s 54-56. The complaint also alleged harm to two listed species, mussels and Gulf sturgeon. *Id*. at ¶ 58. The Complaint concluded that Georgia's consumptive uses will double by 2040, thereby threatening the entire Apalachicola region in Florida. *Id.* at 59.

Georgia responded that Florida's claim was not ripe. The Corps had not concluded its study of capacity needs and ability to meet those needs in the ACF Basin. Georgia pointed specifically to the need to first allow the Corps to determine the flows allocated to the Woodruff Dam at the Florida-Georgia state line. Brief in Opposition at 17-25. Georgia also said that it returned the vast majority of units it withdrew from the Chattahoochee. *Id.* at 26. Finally, Georgia alleged that drought and overharvesting were the primary sources of harm to Apalachicola's oyster industry. *Id*. at 29-31.

The Court requested the U.S. Solicitor General to brief its position in this action. The Solicitor General's Brief argued Florida's allegations invoked the jurisdiction of the Supreme Court. Nonetheless, the Solicitor General said the issue was not ripe until after the Corps issued its report.

The proceeding is pending, with the most recent May 18, 2015 Court Order authorizing fees and costs to Lancaster for the period from November 19, 2014, through March 31, 2015. Orders in Pending Cases, 142, Orig. (May 18, 2015) 575 U.S.-.

CONCLUSION

The current Case Management Order, dated May 11, 2015, shows this case will take a while. No surprise. Dispositive motions are due by June 2016. *Id.* Nonetheless, the current Supreme Court's confused treatment of interstate water law indicates that the best considered special master recommendation might only result in more confusion and uncertainty. The court's recent expansion of full party standing to Duke Energy by 5-4 split in the equitable allocation case of *South Carolina v. North Carolina*, 130 S. Ct. 854 (2010), revealed a massive split as to the rights of private energy companies with dams to participate. *See, Ansbacher, supra,* at 258-70. Dams abound, and are at the center of rights claimed by Florida and Georgia, as well as so-far excluded Alabama, with a panoply of private rights in and associated with those dams. A fact specific resolution of the wholly uncompacted ACF basin may resolve matters, or it might open up a slough of new issues. Nothing in the history of the Tri-State Water Wars implies this will be the end.

Endnote:

[1] The author's sections on Florida are shorter than those on Georgia and Alabama. The author assumes the reader's familiarity with Florida.