

3-2005

Debacle in Dixie: A Story of Six Rivers, Three States, Two Compacts and One Well-Paved Path

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Recommended Citation

Sherk, George William. "Debacle in Dixie: A Story of Six Rivers, Three States, Two Compacts and One Well-Paved Path." (2005). https://digitalrepository.unm.edu/utton_pubs/20

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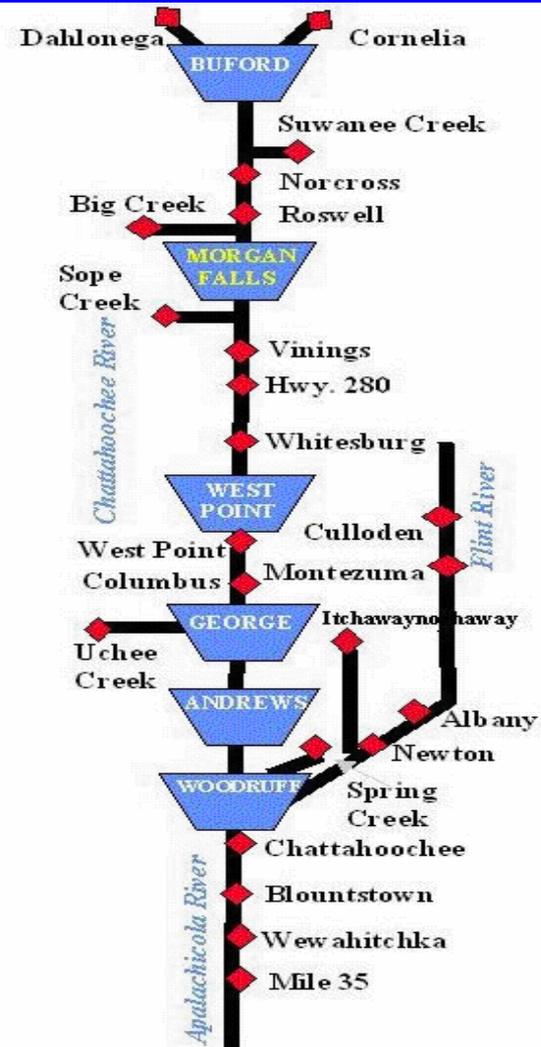
**Debate in Dixie:
A Story of Six Rivers,
Three States, Two Compacts
and One Well-Paved Path**

George William Sherk, D.Sc., J.D.
The Model Interstate Surface and
Groundwater Compacts Project
8-11 March 2005
Bishop's Lodge
Santa Fe, New Mexico

The ACT and ACF River Basins



The ACT and ACF River Basins

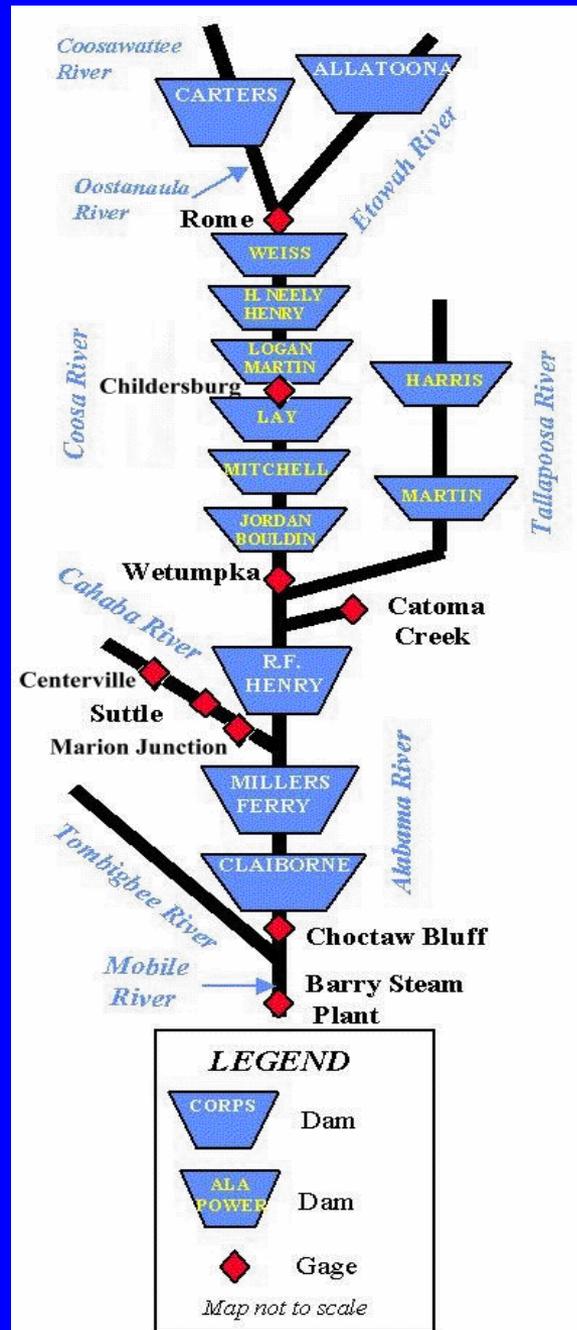


LEGEND

- CORPS Dam
- GA POWER Dam
- Gage

Map not to scale

The ACT and ACF River Basins



The Chronology



- November 1864: General Sherman burns Atlanta.

- 1972 – Congress authorized the Corps to study alternatives as needed to meet the anticipated water supply needs of the Atlanta metropolitan area.
- 1970s and 1980s – Corps entered into a series of five-year contracts for water supply from Lake Lanier. The contracts were authorized by the Water Supply Act of 1958 (limited to quantities that did not affect adversely the purposes for which specific projects were authorized).
- 1988 – Corps water supply study completed. The recommended alternative was reallocation of water stored in Lake Lanier. This reallocation would require a Post-Authorization Change (PAC).

- 1989 – The Corps released a new Water Control Plan for Lake Lanier and the draft PAC.
- 29 June 1990 – *State of Alabama v. Corps of Engineers* (U.S. District Court for the Northern District of Alabama) – Alabama initiated litigation alleging that the Water Control Plan and the draft PAC violated NEPA and riparian water law.
 - Florida moved to intervene – protect coastal resources
 - Georgia moved to intervene – protect “sovereignty”
- 19 September 1990 – *State of Alabama v. Corps of Engineers* (U.S. District Court for the Northern District of Alabama) – The court issued a stay order. The the parties were not to “execute any contracts or agreements” regarding the “subject of the complaint” in the litigation.

- April 1991 – Georgia and Alabama sign a Letter of Agreement mandating a comprehensive study of the ACT conflict.
- Supplements to the Letter of Agreement included Florida and expanded the scope of the comprehensive study to include the ACF conflict.
- September 1996 – Georgia, Alabama and Florida sign a supplemental agreement to develop an ACF River Basin Compact. A similar agreement was signed by Georgia and Alabama regarding development of an ACT River Basin Compact.
- Early drafts included attempts to circumvent the requirements of federal law.

- 15 November 1996 – the draft ACF Compact contained compromise language:

It is the intent of the parties to this Compact, including the United States, to achieve compliance with the allocation formula adopted in accordance with this Article. Accordingly, once an allocation formula is adopted, each and every officer, agency, and instrumentality of the United States shall have an obligation and duty to exercise their powers in a manner consistent with the allocation formula so long as the exercise of such powers is not in direct conflict with other federal law.
(excerpt from ARTICLE VIII(b))

All officers, agencies and instrumentalities of the United States shall exercise their powers and authority over water resources in the ACF Basin and Water Resource Facilities in a manner consistent with the allocation formula so long as the actions are not in direct conflict with any other applicable federal law. All officers, agencies, and instrumentalities of the United States shall exercise their discretion in carrying out their responsibilities to the maximum extent practicable in a manner that effectuates the allocation formula developed pursuant to this Compact or any modification of the allocation formula.
(excerpt from ARTICLE X(c))

- 20 November 1996 – The compromise language was submitted to the Department of Justice for review.

- 9 January 1997 – Attorney General Reno found the compromise language unacceptable:

This proposal is unprecedented, and is unacceptable to the numerous federal agencies with responsibilities in the basin. The federal agencies must have flexibility in meeting their varied duties, particularly in operating the public works projects throughout the basin. The projects operated by the Army Corps of Engineers alone have cost the taxpayers of the United States more than \$1.5 billion in construction, operation, and maintenance expenses. The United States simply cannot abdicate control of these projects to an allocation formula with contours that are completely undefined.

- 12 January 1997 – A marathon meeting in the office of Speaker of the House Newt Gingrich produced the ACF River Basin Compact. Substantially identical language became the ACT River Basin Compact. The compromise language was revised:

*It is the intent of the parties to this Compact, including the United States, to achieve compliance with the allocation formula adopted in accordance with this Article. Accordingly, once an allocation formula is adopted, each and every officer, agency, and instrumentality of the United States shall have an obligation and duty, to the maximum extent practicable, to exercise their powers, authority, and discretion in a manner consistent with the allocation formula **so long as the exercise of such powers, authority, and discretion is not in conflict with federal law.***

- 20 November 1997 - the ACF and ACT Compacts were ratified by Congress
 - Congressional ratification was predicated on full federal participation in the allocation formula agreement negotiations.
 - The Compacts included provisions requiring a Federal Commissioner to review the allocation formula agreement.
 - Commissioner concurrence, nonconcurrence or abstention (which constituted concurrence) was required.
 - The Compacts were to terminate by specific dates if the states failed to reach agreement on an allocation formula agreement.
 - The termination dates were extended repeatedly by the states.

- 12 December 2000 - *Southeastern Federal Power Customers, Inc. v. Caldera* (U.S. District Court for the District of Columbia) – Plaintiff alleged that the Corps was allowing use of water to meet Atlanta’s needs instead of generating hydropower as required by Congress; compensation sought equivalent to increased costs to meet contractual requirements.
- 7 February 2001 – *State of Georgia v. Corps of Engineers* (U.S. District Court for the Northern District of Georgia, Gainesville Division) – Georgia sought to force the Corps to allow the use of Lake Lanier for water supply. The first two counts of the complaint averred that Lake Lanier was authorized for water supply purposes. The third and fourth counts are of particular interest.

- Count Three - Declaratory Judgment (State Law) - Georgia averred that “the Corps in its operation of Lake Lanier is subject to the law of the State of Georgia and appropriate regulation by State officials.”
- Count Four, Georgia averred that the Corps did not have the constitutional authority to deny Georgia’s water supply requests. “The federal statutes authorizing the construction and funding of Buford Dam and Lake Lanier ... should be construed so as to require allocation for water supply to meet Georgia’s future water supply needs. Should these federal statutes be construed as not authorizing such allocations for water supply, however, then the federal statutes on their face or as applied by the Corps are unconstitutional because they exceed the power of Congress under the Commerce Clause[.]”

- February, 2001 – *Southeastern Federal Power Customers, Inc. v. Caldera* (U.S. District Court for the District of Columbia)
 - The State of Georgia, the Atlanta Regional Commission and the Atlanta water suppliers moved to intervene.
 - The mediator allowed participation in mediation even though the intervenors were not parties to the litigation.
- 2 April 2001 – *State of Georgia v. Corps of Engineers* (U.S. District Court for the Northern District of Georgia, Gainesville Division) – Florida moved to intervene; sought to dismiss or in the alternative to abate the proceedings.

- 7 December 2001 – *State of Georgia v. Corps of Engineers* (U.S. District Court for the Northern District of Georgia, Gainesville Division) – Florida motion to intervene was denied, Florida appealed to the 11th Circuit Court of Appeals.
- 15 April 2002 – Corps of Engineers denied Georgia's request to operate Lake Lanier as a water supply facility. The denial was based on the Corps' conclusion that water supply was not an authorized project purpose. At the time of the Corps' decision, the question was before the court in *State of Georgia v. Corps of Engineers* (U.S. District Court for the Northern District of Georgia, Gainesville Division).

- 16 December 2002 – *State of Georgia v. Corps of Engineers* (11th Circuit Court of Appeals) – The decision of the district court denying Florida’s motion to intervene was reversed and the case remanded to allow Florida’s intervention.
- 9 January 2003 – *Southeastern Federal Power Customers, Inc. v. Caldera* (U.S. District Court for the District of Columbia) – The parties to the mediation conclude a Settlement Agreement that provides compensation to the plaintiff and allocates water stored in Lake Lanier to the Atlanta water suppliers.
- 16 January 2003 – *Southeastern Federal Power Customers, Inc. v. Caldera* (U.S. District Court for the District of Columbia) – The Settlement Agreement was filed with the court.

- January 2003 – *State of Alabama v. Corps of Engineers* (U.S. District Court for the Northern District of Alabama) – Alabama and Florida file motions to have the Settlement Agreement enjoined and invalidated as violating the stay order of 19 September 1990.
- 4 February 2003 – *State of Georgia v. Corps of Engineers* (U.S. District Court for the Northern District of Georgia, Gainesville Division) – Alabama moved to intervene, sought to abate or in the alternative to transfer the proceedings to the Northern District of Alabama.

- February 2003 – *Southeastern Federal Power Customers, Inc. v. Caldera* (U.S. District Court for the District of Columbia)
 - Alabama and Florida move to intervene; both file motions to transfer the case to the Northern District of Alabama
 - Both were allowed to intervene on 9 October 2003
- 26 March 2003 – *State of Georgia v. Corps of Engineers* (U.S. District Court for the Northern District of Georgia, Gainesville Division) – The parties file a joint motion to stay the proceeding which was granted by Judge Story on 28 February 2003.
- 31 August 2003 – Expiration of the ACF Compact – Florida refused to agree to another extension.

- 12 September 2003 – *State of Georgia v. Corps of Engineers* (U.S. District Court for the Northern District of Georgia, Gainesville Division) – Georgia sought to lift the stay. (The case had been stayed in response to a joint motion of the parties to do so.)
- 15 October 2003 – *State of Alabama v. Corps of Engineers* (U.S. District Court for the Northern District of Alabama)
 - Judge Bowdre issued a preliminary injunction prohibiting the Corps and Georgia from filing or implementing the Settlement Agreement.
 - Georgia and the Corps appeal to the 11th Circuit Court of Appeals.

- 7 November 2003 – *Southeastern Federal Power Customers, Inc. v. Caldera* (U.S. District Court for the District of Columbia) – Judge Jackson denied the Alabama and Florida motions to transfer the case to the Northern District of Alabama.
- 24 November 2003 – *State of Alabama v. Corps of Engineers* (U.S. District Court for the Northern District of Alabama) – Judge Bowdre issued an order directing that “all activity” in the proceeding be stayed until Judge Jackson issued an order “deciding the validity of the proposed settlement agreement”.

- 10 February 2004 – *Southeastern Federal Power Customers, Inc. v. Caldera* (U.S. District Court for the District of Columbia) – Judge Jackson dismissed the Alabama and Florida challenges to the Settlement Agreement, declared that the agreement was “valid and approved, and may be executed and filed and thereafter performed in accordance with its terms; provided, however, that the preliminary injunction entered by N.D. Ala. on October 15, 2003, is first vacated” and dismissed the case –Alabama and Florida appealed to the Court of Appeals for the District of Columbia.
- 8 April 2004 – *State of Alabama v. Corps of Engineers* (11th Circuit Court of Appeals) – The appeal was stayed to allow Judge Bowdre to consider lifting the injunction based on Judge Jackson’s ruling of 10 February 2004.

- 20 July 2004 – *State of Georgia v. Corps of Engineers* (U.S. District Court for the Northern District of Georgia, Gainesville Division) – Florida’s motion to abate the proceedings was granted. The case was closed pending the outcome of *State of Alabama v. Corps of Engineers* (U.S. District Court for the Northern District of Alabama).
- 31 July 2004 – Expiration of the final extension of the ACT Compact – Alabama refused to agree to another extension.
- 4 August 2004 – *State of Georgia v. Corps of Engineers* (U.S. District Court for the Northern District of Georgia, Gainesville Division) – Georgia sought reconsideration of court order abating and closing the case. Georgia also filed an appeal with the 11th Circuit Court of Appeals.

- 10 November 2004 – *State of Georgia v. Corps of Engineers* (U.S. District Court for the Northern District of Georgia, Gainesville Division) – Georgia’s motion for reconsideration was denied.
- 18 February 2005 – *State of Alabama v. Corps of Engineers* (U.S. District Court for the Northern District of Alabama) – Concluding that the Corps and Georgia had engaged in “willful misconduct,” Judge Bowdre refused to lift the injunction issued 15 October 2003.

(and finally)

(at least for the moment)

- 4 March 2005 – *Southeastern Federal Power Customers, Inc. v. Harvey* (Court of Appeals for the District of Columbia)
 - Judge Jackson’s decision dismissing the case after approving the Settlement Agreement was erroneous – all pending claims had not been rendered moot by the approval.
 - Judge Jackson’s approval was a conditional approval based on events subsequent (“the preliminary injunction entered by N.D. Ala. on October 15, 2003” had to be vacated).
 - Because there was no “final order” in this proceeding, the Court of Appeals did not have jurisdiction.
 - Judge Jackson’s dismissal order was vacated “and the case is remanded to the district court.”

The Autopsy: What Killed the Compacts?

- The Settlement Agreement in *Southeastern Federal Power Customers, Inc. v. Caldera*.

Office of Governor Riley press release: The collapse of the ACF Compact on August 31, 2003 was also a factor in the demise of the ACT Compact. A key issue leading to that collapse was the discovery of a secret settlement agreement between the State of Georgia and the Corps of Engineers that provided water to the Atlanta metro area without consideration of downstream needs in Alabama and Florida. (2 August 2004)

- Georgia's refusal to stay litigation while negotiating.

29 August 2003 – Florida Governor Bush notified Georgia Governor Perdue and Alabama Governor Riley that Florida would agree to another extension only upon certain conditions: (1) “drought flows” be met (utilizing Lake Lanier to provide such flows if necessary), (2) “return flows for Metropolitan Atlanta” had to be returned to the ACF River Basin, and (3) “if we extend the ACF Compact it should only be with the understanding that all three states will use best efforts to stay the three pending court cases during the public comment and revision period.” Governor Perdue responded: “If Florida . . . is willing to work through [the] significant issues that remain, without a condition of a further stay, we remain open to do so as well.”

- Georgia's belief in a "headwaters" entitlement.

Georgia asserted (both explicitly and implicitly) that it held a sovereign right to the waters of the Coosa, Tallapoosa, Chattahoochee and Flint Rivers because those rivers arose in Georgia.

Alabama Governor Riley: "I will not sacrifice Alabama's water resources and our economy to satisfy Atlanta's growing thirst for more and more water. Unfortunately, it became clear during these long negotiations that Georgia's only priority was to obtain the maximum use of the waters in the ACT Basin while requiring Alabama to absorb virtually all of the negative impacts of Atlanta's uncontrollable growth." (2 August 2004)

- Georgia's bad faith:

Repeated allegations that the negotiations were merely a ruse under which the total quantity of water consumed in Georgia could continue to increase. Examples included issuance of permits for “planned” water uses (based on legislation enacted in 1995 that extended the terms of permits for both actual *and anticipated* uses of surface and groundwater to fifty years) and proposed reservoir construction in Georgia.

- **Absence of legitimacy:**

The states did their best to preclude both federal agencies and the public from participating in the allocation formula agreement negotiating process. The secrecy in which the draft allocation formula agreements were prepared was a key factor in destroying the legitimacy of both the draft agreements themselves and the process by which they were prepared. It was also the subject of ongoing inquiry by the media. For example, *see* Shelton, *Water Wars: Tri-state negotiations covered up*, [Congressman Bob] Barr says, *The Atlanta Journal-Constitution*, Sept. 9, 2002.

- **Inconsistency with the requirements of federal law:**

When the draft agreements were eventually made public, their inconsistency with the requirements of federal laws and regulations was made manifest.

- **Inconsistency of state positions:**

As Leitman has noted, state representatives and positions changed repeatedly. Nothing was ever resolved with finality. Also, changing representatives and positions did not allow trust in the process to develop. Suggestions to improve the negotiation process are included in Leitman.

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