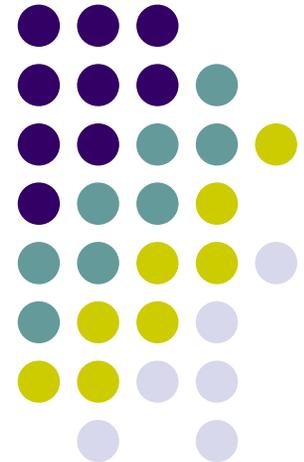


# The ACF Dispute: A Water Allocation Law Failure

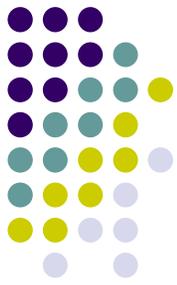
Robert Haskell Abrams  
Professor of Law, Florida A & M University  
College of Law

Presentation to USDA-CSREES  
National Water Conference  
Savannah, GA  
January 31, 2007



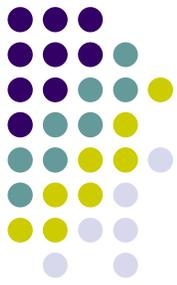


# Watersheds and Estuaries



- Ecosystems formed and evolved over geologic time frames that are adapted to “natural” conditions of flow and variability
- Modernity challenges the adaptive capacity of these systems
  - Dams, consumptive uses, high capacity pumps, canopy destruction, impervious surfaces, contour changes, sedimentation, pollution, even climate

# The Ends of the ACF Basin and Their Contrasting Views



- The “Hooch” and Lake Lanier upstream; the Apalachicola and its Bay downstream
  - Primary source of drinking water, irrigation, hydropower, point source outfalls, flat water recreation, and the press of suburbia
  - Oystering, fishery, wetlands, riparian habitat, estuarine habitat, and the natural hydrograph
- DO NOT forget the farmers in the middle



# Basin Snapshot

- 19,600 sq. miles = 12.3 million acres; 385 miles top to bottom
- 1995 population = 4 million; 2050 est. population = 7 million
- Land is 6 percent residential; 2 percent commercial; 25 percent agricultural; balance is mainly undeveloped forested
- hundreds of reservoirs, 16 on the three principal river mainstems-11 non-federal -5 federal
- W.F. George storage area 45,000 surface acres
- Lake Lanier storage area 38,500 surface acres

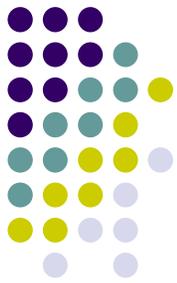
<u>Georgia</u>	<u>Alabama</u>	<u>Florida</u>
90 percent of population	7 percent	3 percent
74 percent of basin area	15 percent	11 percent
82 percent of withdrawals	11 percent	7 percent



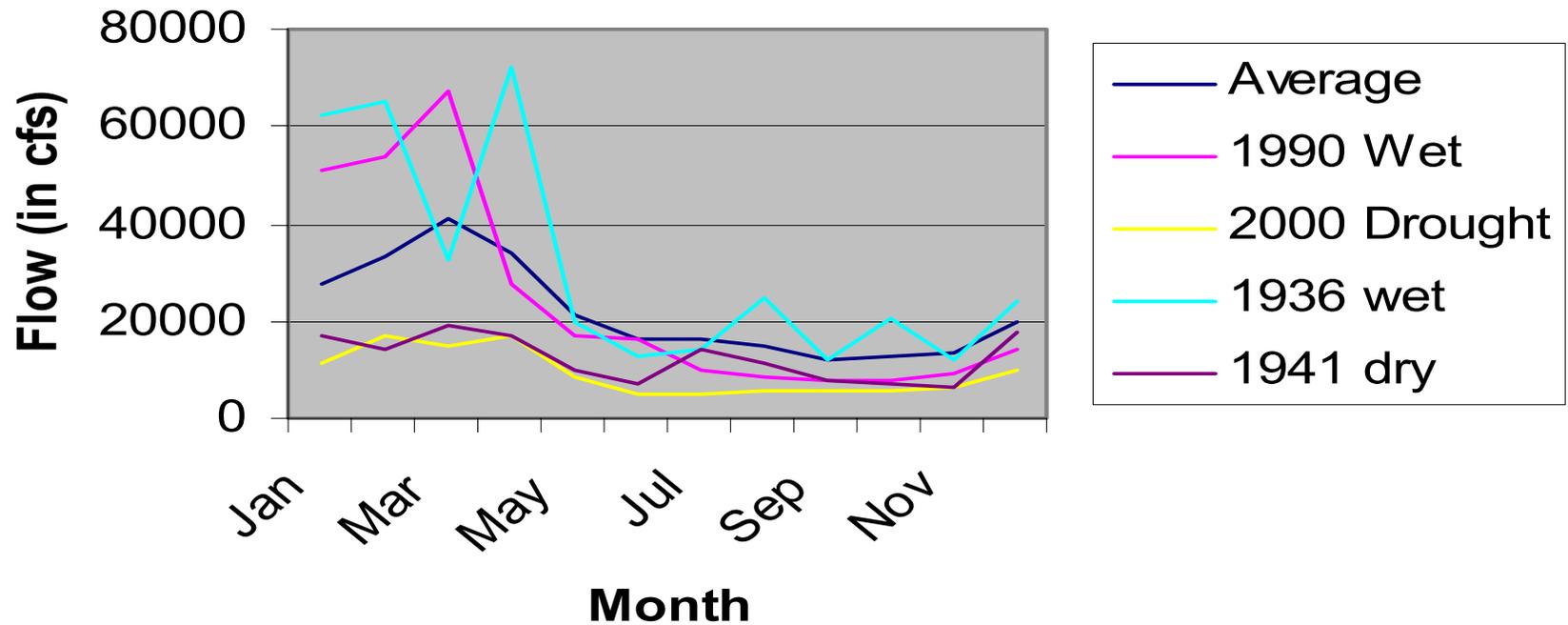
# Demands and Timing

- Municipal steady with peaks in Summer
- Recreation high storage in Summer
- Hydro store Spring release Summer
- Navigation sufficient flows at all times
- Agriculture highly consumptive Summer
- Ecosystem relies on variability

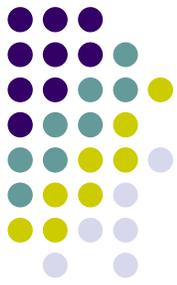
# A Sense of the River



## Apalachicola Flows at the Bay

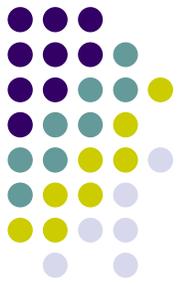


# Interstate Watershed Management



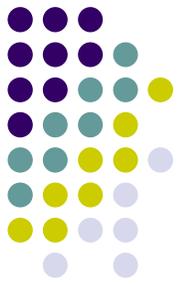
- Geopolitical boundaries do not correspond to physical realities of drainage basins
  - Fragmented authority
    - Competing state interests
    - Programmatic federal interests
  - Self-interested decisionmaking/externalities
- Historic and continuing commitment of water law to instrumental policies favoring development

# Florida's Reflexive Reaction



- Seek interstate allocation of water
- Create quantified entitlement
- Manage that water to Florida objectives

# Interstate Allocation Methods

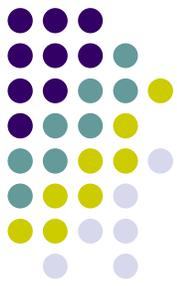


- Federalism and Article VI Supremacy Clause create unique possibilities
- Article I, §10, Interstate Compact
- Article I, §8, Congressional Apportionment
- Article III, Equitable Apportionment by United States Supreme Court (that has become the basis for the international law of shared basins)
- Lesser impact, comity accorded to results of private litigation

# Post-Allocation Quantitative Clarity



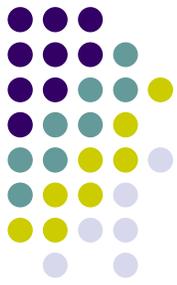
- If allocation is obtained, states have an “umbrella” of water rights that can confidently be doled out as state law property to state’s water users , usually an average annual delivery
  - Injurious overuse (in excess of state share) is illegal and can be enjoined
  - Even non-injurious overuse is subject to injunction when a compact requires (KS v. NB & CO (2002))
  - Under the allocation umbrella, a state can hoard as express allowance to ignore dormant commerce clause (certain under compact or congressional apportionment, likely under equitable apportionment)



# Assessing the Options

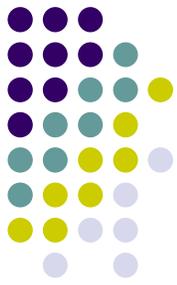
- Compacts require agreement of the party states and Congress
  - Even then, no compacts manage to a hydrograph and the average delivery is usually “controlled” by the upstream state
- Congress has never knowingly apportioned a river absent all (well, almost all) states agreement
- Piecemeal private litigation settles almost nothing
- Equitable apportionment can be invoked, and usually is, (1) when there is not an agreement and (2) when one state is sufficiently aggrieved that it can make out a case for relief

# Equitable Apportionment Conflicts



- More intuitive cases, a downstream state objects because of impact of low flows
  - Florida for benefit of the panhandle area (less developed downstream plaintiff) is planning to do this in regard to ACF & Apalachicola Bay
  - Kansas v. Colorado (more developed downstream plaintiff, Arkansas River)
- Less intuitive, upstream state seeks the equivalent of a declaratory judgment so that it reliably can invest in initiating uses
  - Colorado v. New Mexico (Vermejo River case)

# Equitable Apportionment Jurisprudence – the good



- Justice Brewer’s equality principle (KS v. CO I)
  - “One cardinal rule, underlying the relations of the States to each other, is that of equality of right.”
- Olympian Justice Holmes (in NY v. NJ)
  - “A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the river might come down undiminished.”

# Equitable Apportionment Jurisprudence – the bad



- Only real “traditional” water use conflicts need apply
  - S.Ct. will not grant relief absent showing of harm (KS v. CO I (1907)), but door is open to reapplication upon changed conditions
  - Conservation of authority rationale requires injury of “serious magnitude” b/c it is an “extraordinary power ... to control the behavior of one state at the suit of another.” (NY v. NJ (1921))
- Court defines injury in a way that disadvantages later developing states and passive uses.
  - Historic pro-developmental bias of water law, especially in the West where the bulk of the cases arise, usually considers only active uses to be “beneficial” and legally recognized.
  - Harm is measured as interference with rights conceptualized in accordance with western standards of diversionary beneficial use
  - Cf., difficulty in quantifying natural resource damages, even where statutes (e.g. CERCLA) expressly provide for them.

# Equitable Apportionment Jurisprudence – the ugly



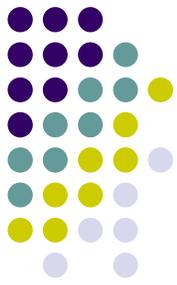
- Colorado v. New Mexico I and II
  - Colorado headwaters state, previously taking no water, proposed a small interbasin diversion to a seriously and provably over-appropriated basin
  - New Mexico claimed it was already using all of the Vermejo's water, that it was conserving water reasonably, but its evidence was weak
  - Court in I established elements of cause of action
  - Court in II rejected Special Master's findings and held for New Mexico because it was using all the water and Colorado hadn't proved state law waste

# Behavioral Consequences



- Faster developing states improve the likely outcome by delaying allocation and using ever more water
  - Encourages a race to use
  - In the West, prior appropriation's perverse incentives to establish large, low value uses are exacerbated
  - Riparian jurisdictions, likewise, are affected: encourages over-building municipal supply reservoirs and (groundwater) irrigation uses

# Ominous Situation for Florida



- Agreement seems unlikely to protect Apalachicola Bay flows from ACF system
  - ACF/ACT compacts were agreements to try to agree that failed after years of trying
  - Georgia, in particular, has no incentive to agree because it gains less than it is already likely to obtain by use (CO v. NM II)
- Equitable apportionment will be hard to win using current standards
  - “Injury” seems to mean denial of water to existing active users
  - Non-using state is saddled with proving using state could do with less

# Strategies Open to Florida



- Equitable apportionment of whole resource not just water
  - Persuade Court to abandon CO v. NM and return to heritage of Brewer equality and Holmes grand vision
  - Prove significant injury to ecosystem and economy, which are both large using “ecosystem services” measures (J. B. Ruhl)
  - Acquire more than simple allocation, must win flow regime decree (cf., ID v. OR, (apportioning salmon runs, 1983))
- Non-equitable apportionment
  - Endangered Species Act
  - Federal “small handle” lawsuits under CWA (TMDL, wetlands, 401 certification), FPA, Water Supply Act (Army Corps law), etc.
  - Congressional intervention
  - Public opinion

# Activities to Date



- Compact officially died Sept. 1. 2003
- Florida has hired outside counsel to sue
- Lake Lanier litigation (3-ring circus) involving the US Army CoE has been, is, and will be in progress
  - 1990 AL USDcT suit by AL claiming NEPA violation in reference to Corps' Lanier operations
    - FL, GA intervened and suit stayed while ACF was in force
    - Suit has resumed and stay reinstated and enjoined Coe and GA from lodging settlement in DC action (see below)
  - 2000 DC USDcT suit by SeFPC (hydro preference customers) sued Sec'y of Army to require releases from Lanier
    - By early 2003 had settlement agreement of GA, CoE, SeFPC, and water supply Cos., stayed waiting to see what happened with ACF Compact
    - Despite AL DCt order, DC DCt has ordered argument on Settlement Agreement in 2004
  - Also 2001 GA USDcT suit by GA seeking to compel CoE to increase water supply to Atlanta, Florida and hydro preference customers won contested intervention in 2002 (302 F3d 1242) deferred to DC action
- 2007 Corps is working to “establish” revised allocation favoring top of basin

# The “Book” on the Future



- No state has the political clout to win in Congress without an agreement
- Florida will file for equitable apportionment and “lose”
- The Army Corps, will run Buford Dam (that forms Lake Lanier) as it sees fit. The current indication is that more water for Atlanta and hydropower demands are in the works. Traditional use for navigation, hydropower, and flood control, that the Corps deems to be its statutory mandate will continue to be served
- Georgia will continue to grow in the north and irrigate more in the middle
- Florida’s best legal hope: Prove that endangered species need flow regime that Florida favors; the Corps accepts that it is required to comply with ESA
- Idealist hope: Rational decisionmaking
  - Prioritize importance of uses
  - Maximize synergies
  - Eliminate reflexive submission to low value, but politically powerful irrigation interests