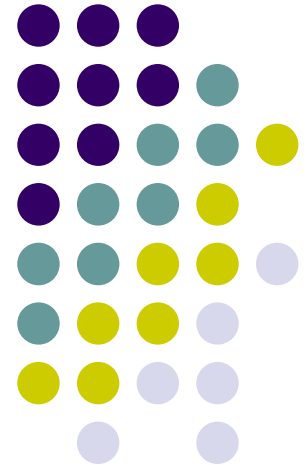


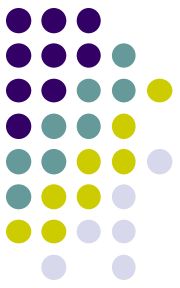
Water Federalism and the Army Corps of Engineers in the East

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H₂O Overdrawn
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November 7, 2008

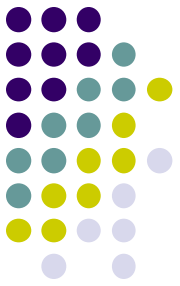


Water Allocation Law in the Eastern United States

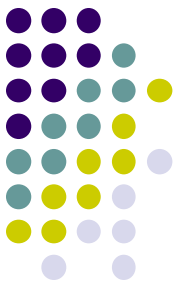


- Historically water use was governed by common law riparianism
- Region is humid, pre-1900 uses mostly small, use conflicts rare, water widely available
- 20th Century changes scale of use – big dams, large cities, irrigation, cooling water
- 21st Century changes are more radical
 - New recognition of water security needs
 - Climate change

Water Security and Priorities



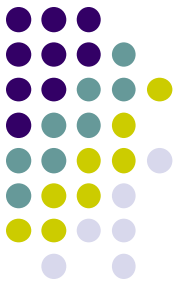
- Water for human population security
- Water for ecological security
- Water for energy security
 - Domestic energy source development
 - Carbon emission reduction
- Water for food security



Water Federalism

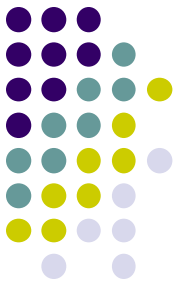
- Overlapping sovereignty of states and federal government affects water resources
 - Traditional state role included police power – health, safety, & welfare – and property law
 - Constitutional federal role included commerce
 - Historically that began with admiralty and navigation more generally
 - With the New Deal that expanded – now including environment, energy, flood control, drinking water, etc.

First Premise: the States are the Masters of their Water Law



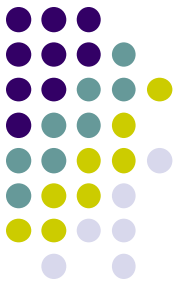
- From the Crown to the 13 original states, and on by the equal footing doctrine to the rest
 - Police power for health, safety, and welfare included natural resources
 - Property law is state law
 - 10th Amendment at work
- And they should be ... up to a point
 - Local conditions, economies, and expertise
 - National and interstate interests

Second Premise: Congress, Supremacy, and Other States



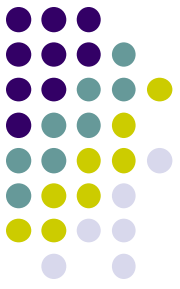
- Interstate commerce clause water interests
 - Navigation
 - Hydropower
 - Flood control
 - Reclamation
- Interstate equity limits state sovereignty over water
 - Congressional apportionment
 - Equitable apportionment
 - Interstate compacts

Water Shortage as the Challenge and Catalyst

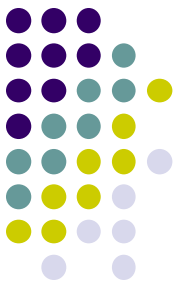


- The law is irrelevant if there is enough water for everyone
- Water law mediates conflicts and, historically, consciously promoted development
- Premise 1 and Premise 2 are, to a degree, incompatible under shortage
- Experienced first in the West and it was the primary crucible for water federalism

Three Eras of Water Federalism, ... and a Fourth?



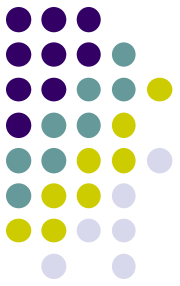
- First era – until about 1920
 - the states controlled water allocation
 - the Corps controlled navigation
- Second era – until about 1980
 - Federal programmatic interests became dominant
 - Hydropower and reclamation laws said one thing, but were construed to put federal ahead of state
- Third era – Rehnquist revisionism
 - Preferable policy, doubtful reading of precedent



At the Millennium

- State primacy in allocation was generally the norm
- Federal statutes (especially reclamation law) construed to defer to state or to minimize or eliminate conflict
 - California v. US (New Melones Dam)
- Hydropower was less deferential to states
 - California v. FERC (Rock Creek Dam), but see
 - PUD No. 1 v. Washington Dep't. of Ecology

The Corps' Expanding Empire



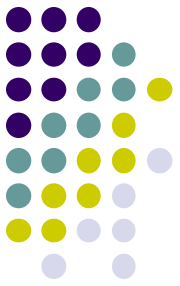
- Vast number of projects
- Purposes have grown and now include navigation, hydro, flood control, flat water recreation, irrigation, municipal supply
- Each project, though, has its history
 - Congress specifies purpose(s)
 - Congress limits unfettered discretion of Corps to reallocate projects, and hence, the water

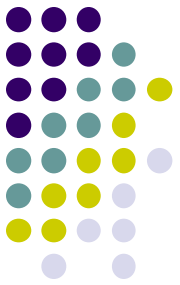
It's the Corps' World ...



- ... and the states just live in it
- The Corps operates many key dams that effectively determine how the water will be used
- Even if it were by pumps alone and not by dam operations, a congressional mandate, if it says, “Pump,” will preempt state law

The ACF Basin as Example





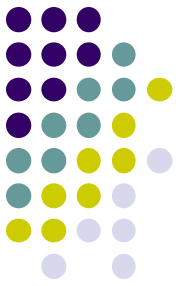
Basin Snapshot

- 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, 4 of which manage the river's flow

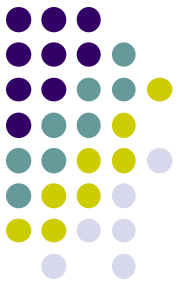
<u>Georgia</u>	<u>Alabama</u>	<u>Florida</u>
90 percent of population	7 percent	3 percent
74 percent of basin area	15 percent	11 percent
82 percent of withdrawals	11 percent	7 percent

And a brief travelogue in pictures, some during what was then the drought of record in the region

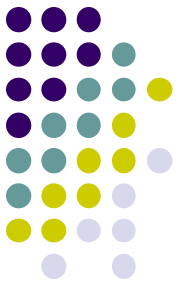
Atlanta



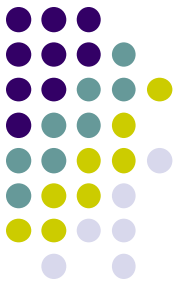
An Old Atlanta Home c. 2007



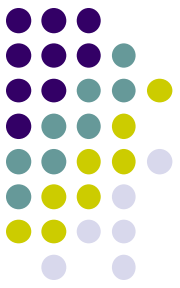
Drought of 2007



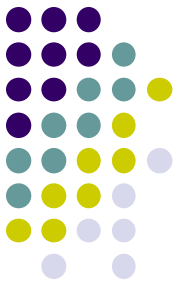
More Drought of 2007



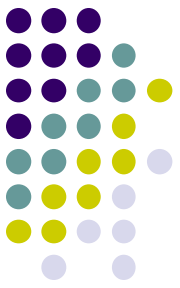
A Corps Reservoir in 2007



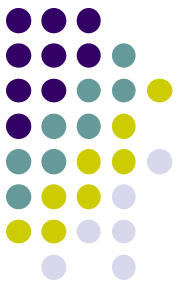
Flint River Irrigation



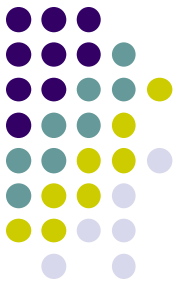
Lower Flint River



Apalachicola Honey Harvesting

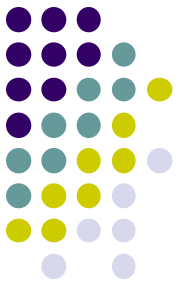


Apalachicola River in 2007

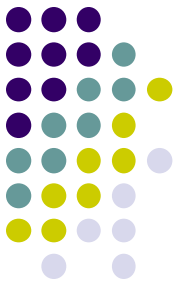




Oystering in the Bay

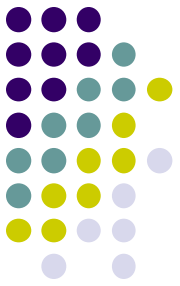


Watersheds and Estuaries

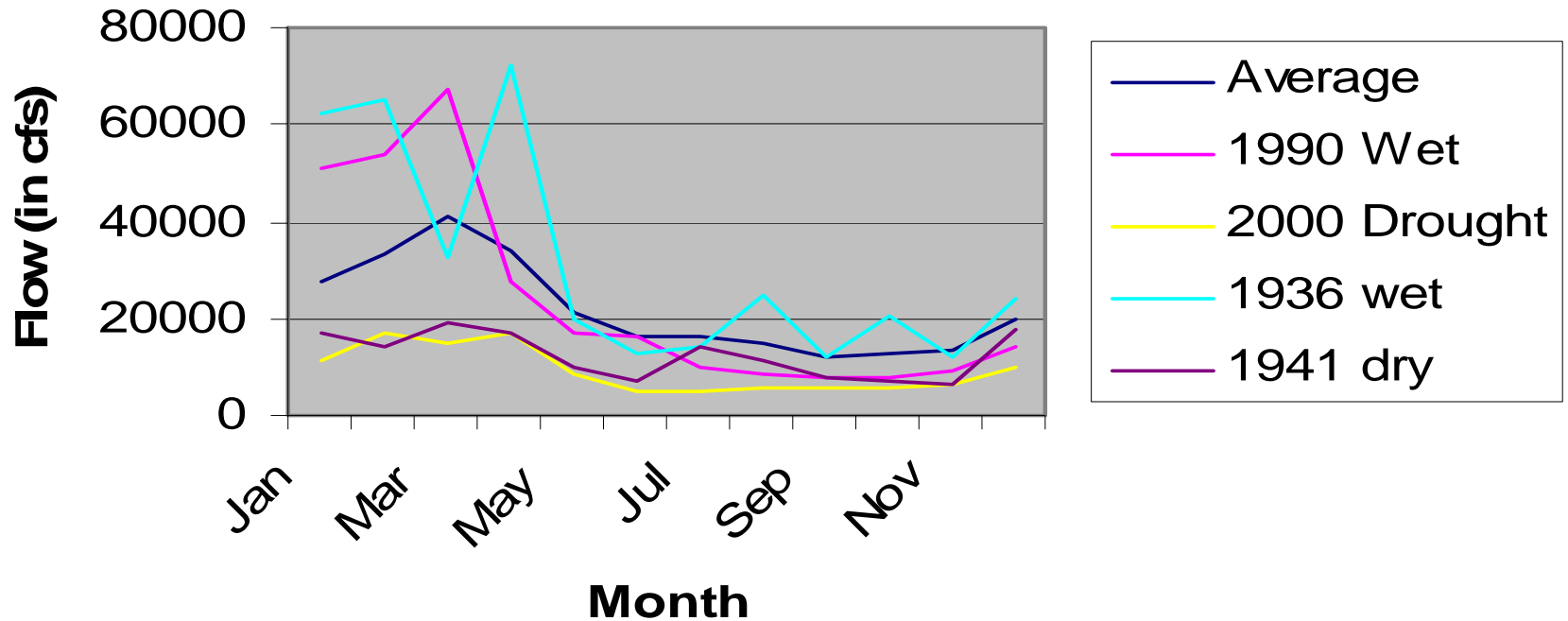


- Ecosystems formed and evolved over geologic time frames that are adapted to “natural” conditions of flow and variability
- Modernity challenges the adaptive capacity of these systems
 - Dams, consumptive uses, high capacity pumps, canopy destruction, impervious surfaces, contour changes, sedimentation,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

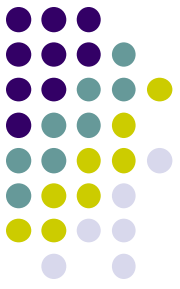
A Historic Sense of the River



Apalachicola Flows at the Bay



The Ends of the ACF Basin and Their Contrasting Views



- 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, its sprawl and its landscaping demands
 - Oystering, fishery, wetlands, riparian habitat, estuarine habitat, and the natural hydrograph
- DO NOT forget the Flint farmers in the middle or the Alabama navigation, recreation and nuclear power plant cooling interests



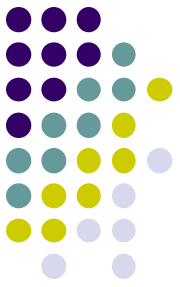
Demands and Timing

- 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 natural variability

Dams on the Chattahoochee

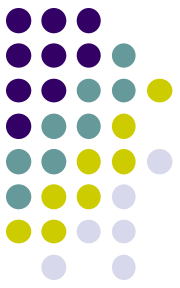


Interstate Watershed Management



- 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

Assessing the Overarching Legal Options for Allocation



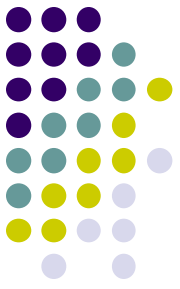
- Compacts require agreement of the party states and Congress
 - Even then, no compacts manage to a hydrograph and the average delivery is usually “controlled” by the upstream state
- Congress has never knowingly apportioned a river absent all (well, almost all) states agreement
- Piecemeal private litigation 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

Strife-Oriented Strategies Open to Georgia

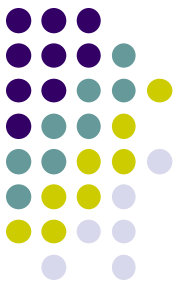


- Equitable apportionment of the basin's water
 - Rely on CO v. NM preference for existing economies and uses
 - Place burden on downstream states to show significant material injury)
- Non-equitable apportionment
 - Congressional intervention
 - **Cut a deal with hydro and the Corps over Lake Lanier**
 - Treat the Flint as if it is not part of the basin
 - Follow the Flint Conservation and Development Plan
 - Continue to rely on Drought Management following based on March date prediction
 - Grandfather older permits from conservation requirements
 - Continue to grant new permits
 - Pander to public sensibilities – water for people is more important than water for a few sturgeon or mussels

Strife-Oriented Strategies Open to Florida and Alabama



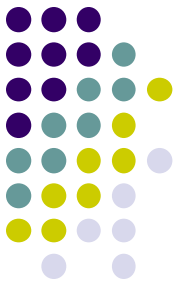
- Equitable apportionment of whole resource not just water
 - Persuade Court to abandon CO v. NM and return to heritage of Brewer equality and Holmes grand vision
 - Prove significant injury to ecosystem and economy, which are both large using “ecosystem services” measures (J. B. Ruhl)
 - Acquire more 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, etc.
 - **Water Supply Act of 1959 and dam authorization acts**
 - Congressional intervention



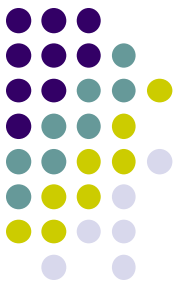
Strife: the Recent Past

- 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

Strife: the Very Recent Past



- The DC litigation reached a settlement
 - The settlement gave Atlanta more water from Lake Lanier and paid off the power interests
 - Florida and Alabama appealed
- 2007 was one of the most severe droughts on record
 - The Corps undertook work to establish revised allocation favoring top of basin
 - There was litigation regarding flows needed to protect endangered species that resulted in some additional temporary releases that made no one happy



Strife: the Very Recent Past

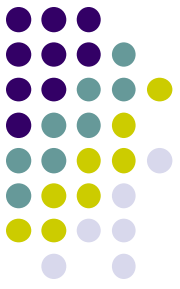
- The 11th Circuit lifted the injunction against the Corps taking action outside of that lawsuit that had been entered in reliance on a claimed violation of the 1992 stay order
 - The Corps was now free to pursue the DC settlement
 - The 11th Circuit also allowed the plaintiffs to amend their complaint to make it clearer
- Late 2007 the governors began negotiation although key stakeholders were being excluded

Strife: The Immediate Past

2008



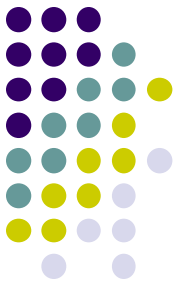
- The negotiations seemed to be promising, with the Secretary of Interior leading them
- The DC Circuit vacated the settlement agreement as violative of the Water Supply Act of 1959
 - The reallocation without congressional approval was a significant change not permitted under that law
- The negotiations almost immediately thereafter failed
- The Secretary of Interior indicated that the Corps was going to adopt new interim operating rules by June 1, 2008 in any event
- And the scramble continues ...



Moving Beyond Strife

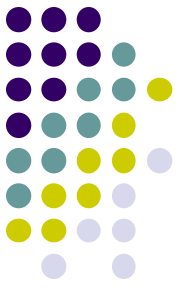
- Pick the low hanging water use fruit
 - Conservation
 - Landscaping restrictions
 - Irrigation limits on all permittees, selective following
 - Non-zero sum storage projects
 - Time shifting capacity in the upper basin
 - Micro projects in the Flint basin

Get a Better Model of the Basin and Get All to Use It

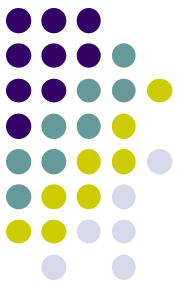


- A single model allows consistent comparisons
- A better model allows more finely tuned dam operations
- Shared models allow all stakeholders to participate meaningfully
- The model needs to address a wide range of high and, especially, low precipitation event

The Tenor Needs To Change



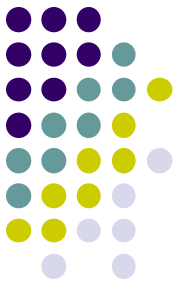
- No more political grandstanding
- Overgenerous water use must be understood to be a thing of the past, not a starting point for negotiating future entitlement
- All the stakeholders need to be able to participate meaningfully
- The dry year results are not going to make anyone happy



Roles Must Change

- The Corps needs to become a facilitator, not a policy maker
 - The Corps will operate the dams, but the master manual needs to be a collectively agreed document
- The operating plan must be self-adjusting
 - The operating norms have to be linked to measures of harm in the system
 - There has to be some hierarchy of harms to be avoided

There Are No Sacred Cows ... Not even the Corps



- 1. Atlanta always will get water for people, but not always for landscaping
- 2. Dry year ecology flows for species and the Bay will be suboptimal
- 3. Hydro will be paid off
- 4. Flint basin irrigation reductions will occur
- ... and more storage will be built, dry year flatwater will decrease, navigation will be limited to high flow times, and we'll get by ...