

Environmental Litigation Update: Florida v. Georgia & Florida Water and Land Conservation Initiative

Environmental and Land Use Law Section of the Florida Bar

August 28, 2018

Frederick L. Aschauer, Jr.
Lewis, Longman & Walker, P.A.



LLW

**LEWIS
LONGMAN
WALKER**

Environmental Litigation Update Outline

Florida v. Georgia

- ▶ Original Action No. 142
- ▶ Timeline
- ▶ ACF Basin
- ▶ Georgia's Consumptive Use
- ▶ The Special Master's Report
- ▶ SCOTUS decides the issue

Amendment One

- ▶ Petition initiated amendment
- ▶ Ballot title, summary and language
- ▶ GAA
- ▶ Timeline
- ▶ Arguments
- ▶ Order



Environmental Litigation Update

► **Florida v. Georgia**

- Original Action No. 142
- Timeline
- ACF Basin
- Georgia's Consumptive Use
- The Special Master's Report
- SCOTUS decides the issue



Florida v. Georgia

Original Action No. 142

- ▶ “In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.” U.S. Const. art. III, § 2, cl. 2.



Florida v. Georgia Timeline

- ▶ October 1, 2013 - Florida files for leave to file a bill of complaint
- ▶ November 3, 2014 - SCOTUS grants the motion
- ▶ October 31, 2016 - Trial begins in Portland, Maine
- ▶ February 14, 2017 - Special Master issues report
- ▶ January 8, 2018 - Oral arguments
- ▶ June 27, 2018 - Opinion by the United States Supreme Court
- ▶ August 9, 2018 - Assignment of new Special Master



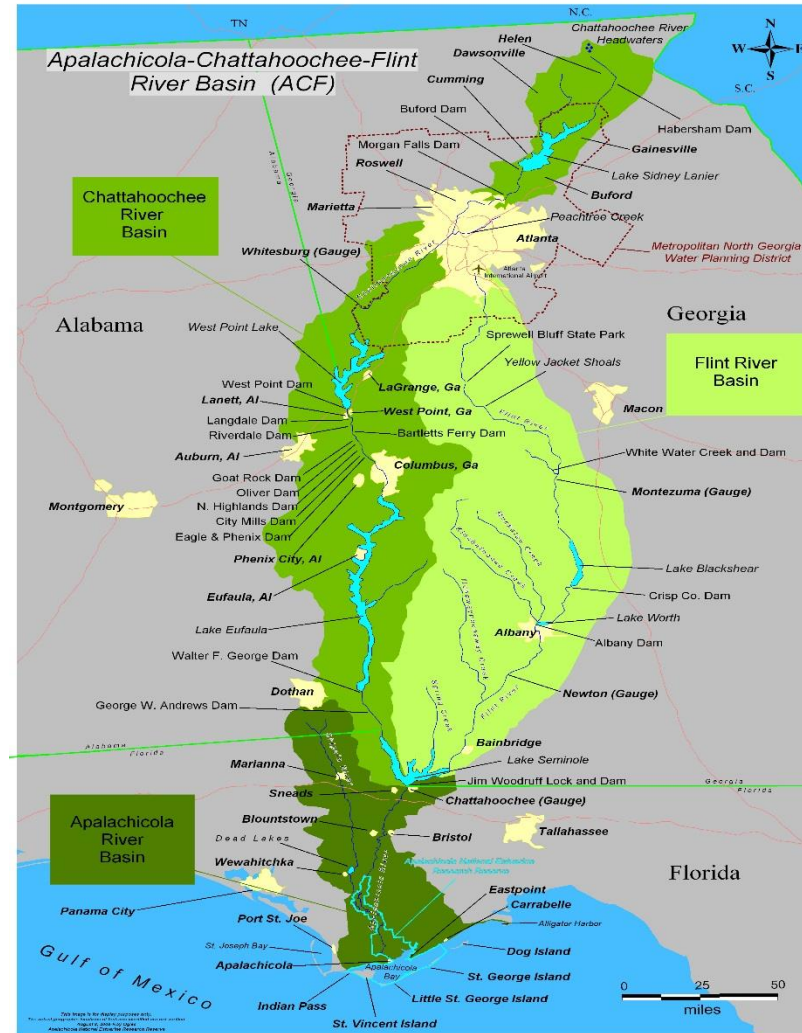
ACF Basin

Includes the Chattahoochee River, Flint River and Apalachicola River.

Five Dams on the Chattahoochee River, beginning at Buford Dam above Atlanta

Enters Florida at the confluence of the Chattahoochee and Flint Rivers, flowing through Jim Woodruff Dam

Flows down to Apalachicola Bay



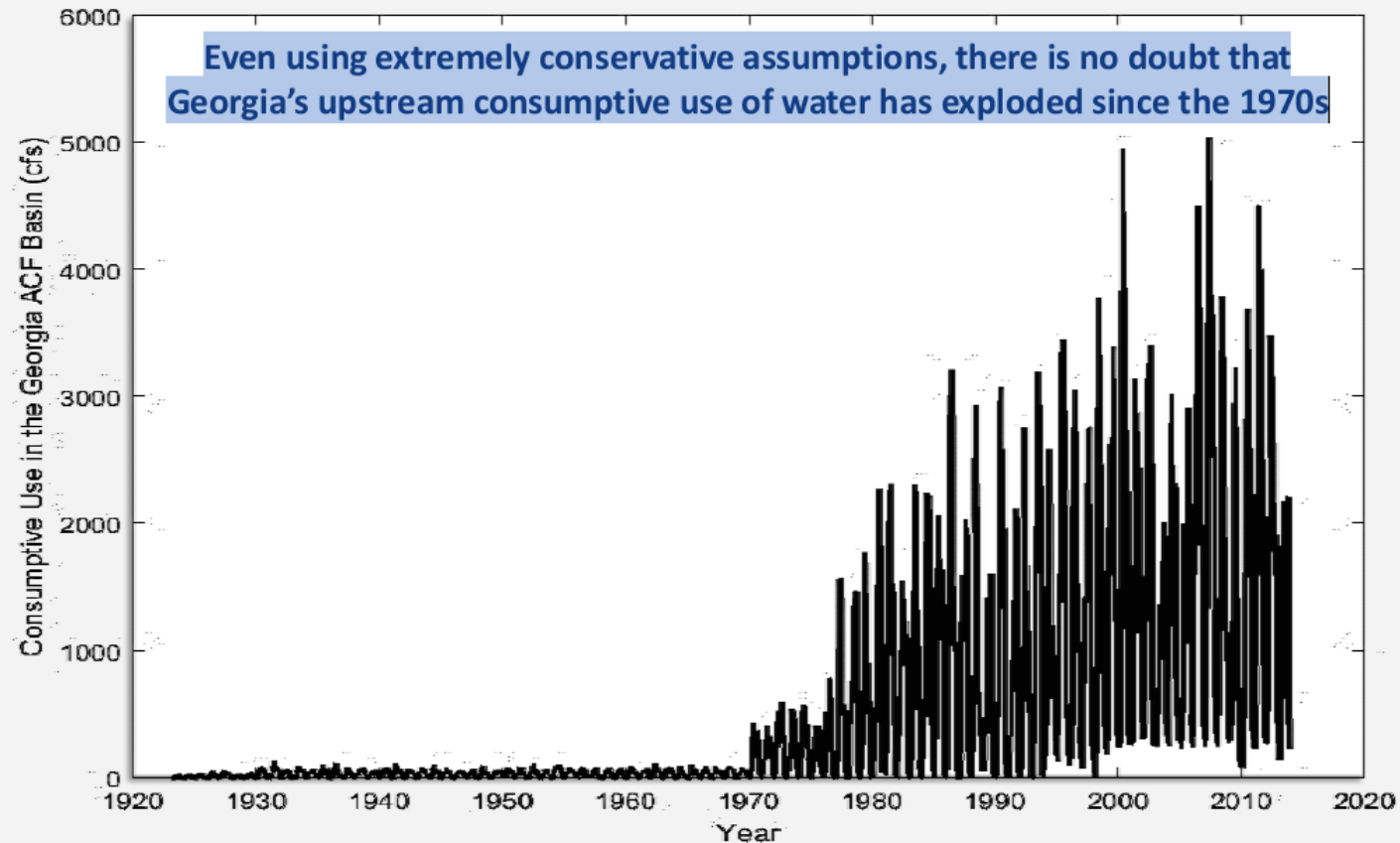
Governor Scott Announces Suit

- ▶ Governor Rick Scott said, “Because Georgia has not negotiated in good faith to fairly share the waters that flow between our two states, we are announcing today that Florida will bring suit in the U.S. Supreme Court next month to stop Georgia’s unchecked consumption of water that threatens the existence of Apalachicola fisheries and the future economic development of this region.”

- ▶ Gov. Scott Press Release, 8/13/13

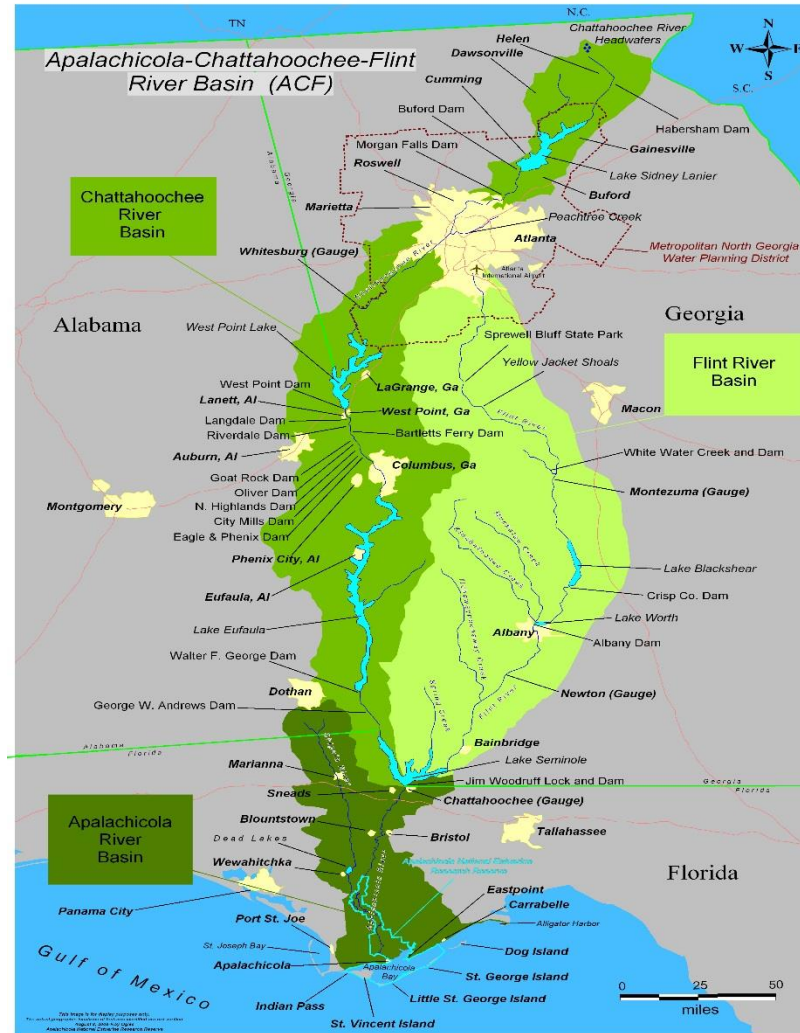


Georgia's Consumptive Use

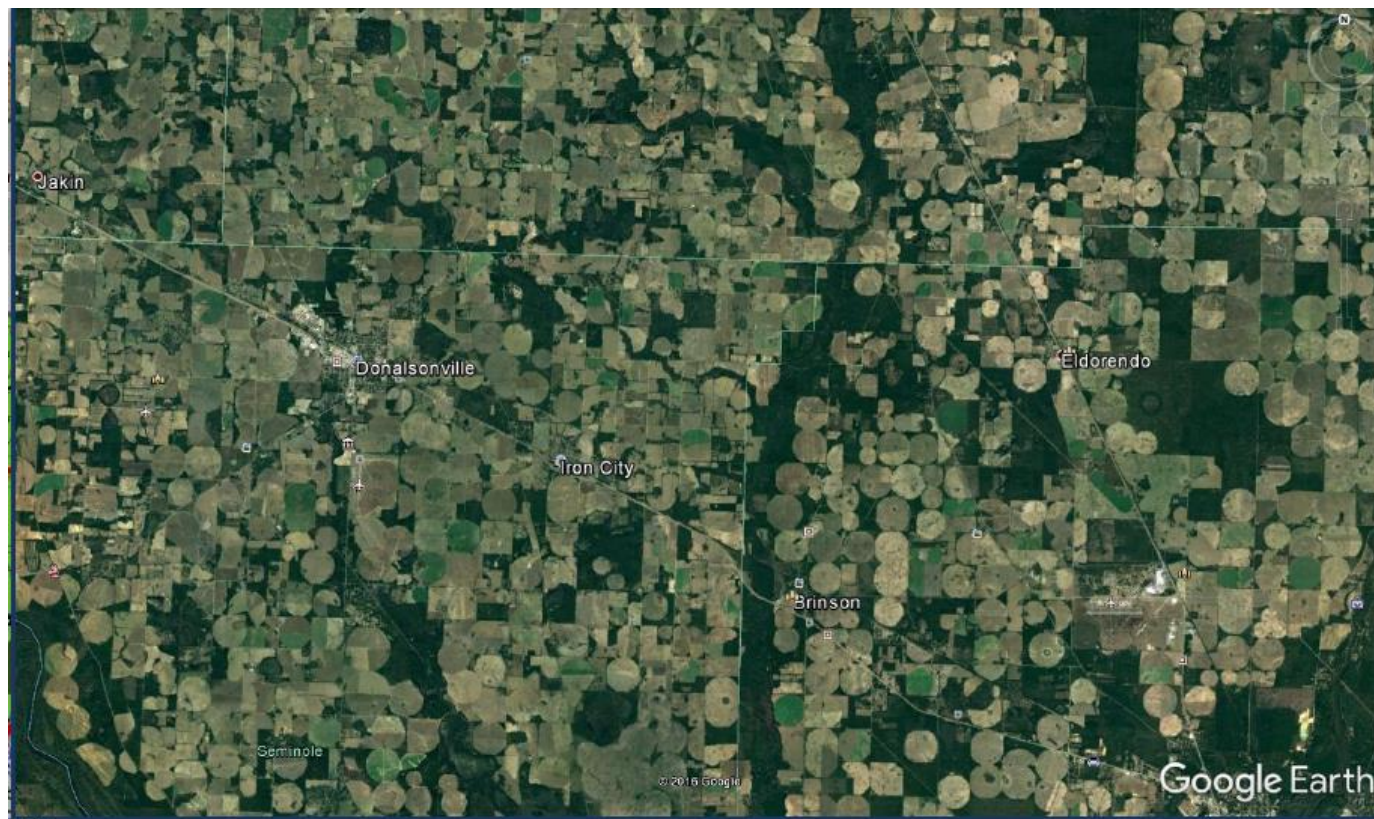


Who's consuming the water?

1. Metro Atlanta
2. Upper Flint
3. Lower Flint



Lower Flint River Basin



Consumption's Impact to Stream Flow



USGS 02358000 APALACHICOLA RIVER AT CHATTAHOOCHEE FLA

| 00060, Discharge, cubic feet per second, | | | | | | | | | | | | |
|--|--|--------|---------|--------|--------|--------|--------|--------|--------|--------|--------|--------|
| YEAR | Monthly mean in ft ³ /s (Calculation Period: 1928-10-01 -> 2016-01-31) | | | | | | | | | | | |
| | Calculation period restricted by USGS staff due to special conditions at/near site | | | | | | | | | | | |
| | Jan | Feb | Mar | Apr | May | Jun | Jul | Aug | Sep | Oct | Nov | Dec |
| 1928 | | | | | | | | | | 19,550 | 13,800 | 14,170 |
| 1929 | 22,810 | 38,370 | 171,600 | 37,240 | 36,240 | 23,850 | 19,440 | 15,820 | 13,790 | 37,510 | 28,200 | 28,150 |
| 1930 | 27,170 | 35,040 | 38,620 | 31,420 | 18,560 | 14,340 | 11,280 | 11,790 | 14,910 | 11,560 | 28,990 | 23,420 |
| 1931 | 23,430 | 19,990 | 20,210 | 21,800 | 19,580 | 8,898 | 9,010 | 11,590 | 7,235 | 5,980 | 5,524 | 14,870 |
| 1932 | 29,050 | 28,660 | 23,490 | 18,980 | 15,750 | 15,470 | 14,670 | 17,530 | 9,827 | 12,390 | 15,370 | 27,350 |
| 1933 | 37,090 | 43,010 | 41,050 | 37,990 | 21,400 | 13,810 | 14,360 | 12,190 | 11,380 | 8,111 | 7,888 | 8,906 |
| 1934 | 10,750 | 11,230 | 31,040 | 17,740 | 17,490 | 21,200 | 14,730 | 13,440 | 10,030 | 14,200 | 8,658 | 10,580 |
| 1935 | 12,020 | 13,850 | 27,450 | 20,690 | 14,500 | 8,905 | 11,030 | 11,690 | 12,670 | 7,056 | 9,299 | 9,688 |
| 1936 | 62,470 | 64,920 | 32,760 | 72,170 | 20,080 | 12,860 | 14,030 | 24,600 | 11,710 | 20,850 | 12,160 | 24,790 |



Consumption's Impact to Stream Flow



USGS 02358000 APALACHICOLA RIVER AT CHATTAHOOCHEE FLA

| YEAR | 00060, Discharge, cubic feet per second, Monthly mean in ft ³ /s (Calculation Period: 2000-01-01 -> 2016-01-31) | | | | | | | | | | | |
|---------------------------|---|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|
| | Period-of-record for statistical calculation restricted by user | | | | | | | | | | | |
| | Jan | Feb | Mar | Apr | May | Jun | Jul | Aug | Sep | Oct | Nov | Dec |
| 2000 | 11,550 | 16,650 | 14,570 | 17,330 | 8,413 | 4,826 | 5,117 | 5,806 | 5,889 | 5,659 | 6,361 | 10,300 |
| 2001 | 14,690 | 11,990 | 57,190 | 30,860 | 11,560 | 18,600 | 11,150 | 9,585 | 7,173 | 6,130 | 5,975 | 7,337 |
| 2002 | 9,036 | 13,770 | 14,770 | 13,890 | 8,326 | 6,578 | 6,084 | 5,735 | 6,991 | 8,206 | 17,300 | 20,130 |
| 2003 | 15,860 | 23,760 | 48,700 | 32,950 | 43,040 | 37,120 | 35,360 | 25,700 | 13,970 | 12,050 | 13,310 | 16,790 |
| 2004 | 17,680 | 30,020 | 16,390 | 11,510 | 9,885 | 9,458 | 12,740 | 9,998 | 28,410 | 16,400 | 20,490 | 24,730 |
| 2005 | 21,100 | 24,350 | 41,760 | 71,790 | 21,740 | 25,520 | 56,320 | 32,350 | 15,090 | 10,360 | 11,840 | 18,430 |
| 2006 | 25,040 | 23,450 | 26,530 | 16,120 | 13,770 | 6,953 | 5,773 | 5,738 | 6,969 | 6,169 | 12,120 | 9,153 |
| 2007 | 21,310 | 18,940 | 19,490 | 13,540 | 6,869 | 5,153 | 5,351 | 5,154 | 5,343 | 5,133 | 4,976 | 5,981 |
| 2008 | 14,770 | 28,410 | 24,020 | 18,240 | 9,048 | 5,405 | 5,863 | 13,520 | 8,945 | 7,415 | 10,630 | 29,420 |
| 2009 | 17,650 | 11,400 | 37,120 | 66,960 | 22,220 | 14,520 | 8,245 | 8,641 | 21,890 | 22,640 | 36,440 | 74,950 |
| 2010 | 54,220 | 61,170 | 41,840 | 19,460 | 29,570 | 14,130 | 9,203 | 8,097 | 5,977 | 7,158 | 7,724 | 9,836 |
| 2011 | 10,820 | 20,050 | 21,960 | 19,640 | 7,521 | 4,781 | 6,244 | 5,484 | 5,734 | 5,346 | 5,651 | 5,196 |
| 2012 | 11,310 | 11,050 | 16,240 | 9,513 | 5,352 | 5,525 | 5,498 | 5,438 | 5,212 | 5,381 | 5,316 | 5,418 |
| 2013 | 8,890 | 45,380 | 38,270 | 22,010 | 21,270 | 15,220 | 37,090 | 32,960 | 14,870 | 10,090 | 9,465 | 26,760 |
| 2014 | 32,740 | 35,710 | 30,270 | 61,730 | 29,560 | 13,490 | 11,280 | 8,968 | 8,759 | 9,992 | 10,230 | 16,630 |
| 2015 | 25,190 | 20,350 | 24,850 | 28,190 | 16,070 | 13,080 | 9,486 | 8,474 | 8,723 | 10,330 | 28,280 | 49,810 |
| 2016 | 67,800 | | | | | | | | | | | |
| Mean of monthly Discharge | 22,300 | 24,800 | 29,600 | 28,400 | 16,500 | 12,500 | 14,400 | 12,000 | 10,600 | 9,280 | 12,900 | 20,700 |



Special Master's Report

- ▶ “The facts presented at trial demonstrate the gravity of the dispute between Florida and Georgia. As the evidentiary hearing made clear, Florida points to real harm and, at the very least, likely misuse of resources by Georgia.” Pg. 38
- ▶ “There is little question that Florida has suffered harm from decreased flows in the River.” Pg. 38
- ▶ “Georgia’s position - practically, politically, and legally - can be summarized as follows: Georgia’s agricultural water use should be subject to no limitations, regard-less of the long-term consequences for the Basin.” Pg. 41



Special Master's Report

- ▶ “I find that Florida has not proven by clear and convincing evidence that any additional streamflow in the Flint River or in the Chattahoochee River would be released from Jim Woodruff Dam into the Apalachicola River at a time that would provide a material benefit to Florida (i.e., during dry periods), thereby alleviating Florida’s injury.” Pg. 54



Special Master's Conclusion & Recommendation

VII. CONCLUSION

... Florida has failed to show that a consumption cap will afford adequate relief. The testimony and evidence submitted at trial demonstrates that the Corps can likely offset increased streamflow in the Flint River by storing additional water in its reservoirs along the Chattahoochee River during dry periods. The evidence also shows that the Corps retains extensive discretion in the operation of those federal reservoirs. As a result, the Corps can release (or not release) water largely as it sees fit, subject to certain minimum requirements under the RIOP. There is no guarantee that the Corps will exercise its discretion to release or hold back water at any particular time. Further, Florida has not shown that it would benefit from increased pass-through operations under normal conditions. Finally, without the Corps as a party, the Court cannot order the Corps to take any particular action. Accordingly, Florida has not proven by clear and convincing evidence that any additional streamflow in the Flint River resulting from a decree imposing a consumptive cap on Georgia's water use would be released from Jim Woodruff Dam into the River at a time that would provide a material benefit to Florida.

VIII. RECOMMENDATION

Because Florida has not met its burden, I recommend that the Court deny Florida's request for relief. A proposed decree embodying my recommendation is attached as Appendix J.



SCOTUS Issues Its Opinion

- ▶ “[W]e conclude that the Special Master applied too strict a standard when he determined that the Court would not be able to fashion an appropriate equitable decree.”
- ▶ “Our ‘independent examination of the record,’ leads us to conclude that, at this stage, Florida has met its ‘initial burden’ in respect to remedy. But, we also believe that a remand is necessary to conduct the equitable-balancing inquiry.”



The Five Questions

- ▶ *First*, has Florida suffered harm as a result of decreased water flow into the Apalachicola River? (The Special Master assumed “yes.”)
- ▶ *Second*, has Florida shown that Georgia, contrary to equitable principles, has taken too much water from the Flint River (the eastern branch of the Y-shaped river system)? (Again, the Special Master assumed “yes.”)
- ▶ *Third*, if so, has Georgia’s inequitable use of Basin waters injured Florida? (The Special Master assumed “yes.”)
- ▶ *Fourth*, if so, would an equity-based cap on Georgia’s use of the Flint River lead to a significant increase in streamflow from the Flint River into Florida’s Apalachicola River (the stem of the Y)? (This is the basic question before us.)
- ▶ *Fifth*, if so, would the amount of extra water that reaches the Apalachicola River significantly redress the economic and ecological harm that Florida has suffered? (This question is mostly for remand.)



Dissent

- ▶ “The Special Master applied this balance-of-harms standard and, after presiding over a 1-month trial involving 40 witnesses and more than 2,000 exhibits, found that Florida had not met its burden. Because that finding is well supported by the evidence, I would have over-ruled Florida’s objections to the Special Master’s Report(Report) and denied Florida’s request for relief.”



Environmental Litigation Update

Amendment One

► Amendment One

- Petition initiated amendment
- Ballot title, summary and language
- GAA
- Timeline
- Arguments
- Order



Florida Constitution - Initiatives

Art. XI, Sect. 3

- ▶ “The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that, any such revision or amendment, except for those limiting the power of government to raise revenue, shall embrace but one subject and matter directly connected therewith. It may be invoked by filing with the custodian of state records a petition containing a copy of the proposed revision or amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight percent of the votes cast in each of such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen.” Art. XI, § 3, Fla. Const.



Amendment One

Ballot Title & Summary

- ▶ **Ballot Title:** Water and Land Conservation - Dedicates funds to acquire and restore Florida conservation and recreation lands
- ▶ **Ballot Summary:** Funds the Land Acquisition Trust Fund to acquire, restore, improve, and manage conservation lands including wetlands and forests; fish and wildlife habitat; lands protecting water resources and drinking water sources, including the Everglades, and the water quality of rivers, lakes, and streams; beaches and shores; outdoor recreational lands; working farms and ranches; and historic or geologic sites, by dedicating 33 percent of net revenues from the existing excise tax on documents for 20 years.



Amendment One

Text

- ▶ SECTION 28. Land Acquisition Trust Fund.--
- ▶ a) Effective on July 1 of the year following passage of this amendment by the voters, and for a period of 20 years after that effective date, the Land Acquisition Trust Fund shall receive no less than 33 percent of net revenues derived from the existing excise tax on documents, as defined in the statutes in effect on January 1, 2012, as amended from time to time, or any successor or replacement tax, after the Department of Revenue first deducts a service charge to pay the costs of the collection and enforcement of the excise tax on documents.
- ▶ b) Funds in the Land Acquisition Trust Fund shall be expended only for the following purposes:
 - ▶ 1) As provided by law, to finance or refinance: the acquisition and improvement of land, water areas, and related property interests, including conservation easements, and resources for conservation lands including wetlands, forests, and fish and wildlife habitat; wildlife management areas; lands that protect water resources and drinking water sources, including lands protecting the water quality and quantity of rivers, lakes, streams, springsheds, and lands providing recharge for groundwater and aquifer systems; lands in the Everglades Agricultural Area and the Everglades Protection Area, as defined in Article II, Section 7(b); beaches and shores; outdoor recreation lands, including recreational trails, parks, and urban open space; rural landscapes; working farms and ranches; historic or geologic sites; together with management, restoration of natural systems, and the enhancement of public access or recreational enjoyment of conservation lands.
 - ▶ 2) To pay the debt service on bonds issued pursuant to Article VII, Section 11(e).
- ▶ c) The moneys deposited into the Land Acquisition Trust Fund, as defined by the statutes in effect on January 1, 2012, shall not be or become commingled with the General Revenue Fund of the state.



General Appropriations Act

Ch. 2015-232, Laws of Florida

- ▶ Legislature passed the General Appropriations Act
- ▶ Governor approved the budget on June 23, 2015
- ▶ Budget appropriated funds out of the Land Acquisition Trust Fund (LATF) to various different agencies



Lawsuits Filed

Florida Wildlife Federation

- ▶ 6/22/15 - Complaint
- ▶ 1/12/17 - Cases consolidated
- ▶ 5/7/18 5th Amendment Complaint
- ▶ 6/15/18 Sum. Judgment Hearing
- ▶ 6/28/18 Final Judgment
- ▶ 7/26/18 Notice of Appeal

Florida Defenders of the Environment

- ▶ 11/9/15 Complaint
- ▶ 8/3/16 Amendment and Supplemental Pleading
- ▶ 6/15/18 Sum. Judgment Hearing
- ▶ 6/28/18 Final Judgment
- ▶ 7/26/18 Notice of Appeal



Amendment One

Text

- ▶ SECTION 28. Land Acquisition Trust Fund.--
- ▶ ...
- ▶ b) Funds in the Land Acquisition Trust Fund shall be expended only for the following purposes:
 - ▶ 1) As provided by law, to finance or refinance: the acquisition and improvement of land, water areas, and related property interests, including conservation easements, and resources for conservation lands including wetlands, forests, and fish and wildlife habitat; wildlife management areas; lands that protect water resources and drinking water sources, including lands protecting the water quality and quantity of rivers, lakes, streams, springsheds, and lands providing recharge for groundwater and aquifer systems; lands in the Everglades Agricultural Area and the Everglades Protection Area, as defined in Article II, Section 7(b); beaches and shores; outdoor recreation lands, including recreational trails, parks, and urban open space; rural landscapes; working farms and ranches; historic or geologic sites; together with management, restoration of natural systems, and the enhancement of public access or recreational enjoyment of conservation lands.
 - ▶ ...
- ▶ c) The moneys deposited into the Land Acquisition Trust Fund, as defined by the statutes in effect on January 1, 2012, shall not be or become commingled with the General Revenue Fund of the state.



FWF's Complaint

- ▶ Action for declaratory judgment and supplement relief
- ▶ 5th Amended Complaint
 - ▶ Defendants: Legislature; President of Senate; Speaker of the House; Florida Department of Environmental Protection; Secretary Valenstein, in his official capacity; Florida Department of Agriculture and Consumer Services; Commissioner Putnam, in his official capacity; Fish and Wildlife Conservation Commission; Director Nick Wiley, in his official capacity; Florida Department of State; and Secretary Detzner, in his official capacity.
- ▶ Focused on reporting in the annual reports of the Land Management Uniform Accounting Council



FDE's Complaint

- ▶ Action for declaratory judgment and supplemental relief
- ▶ Amended and Supplemental Pleading
 - ▶ Secretary Steverson*, in his official capacity; Commissioner Putnam, in his official capacity; Directory Nick Wiley, in his official capacity; Secretary Detzner, in his official capacity.
- ▶ “Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title.” Art. III, §6, Fla. Const.
- ▶ “Laws making appropriations for salaries of public officers and other current expenses of the state shall contain provisions on no other subject.” Art. III, §12, Fla. Const.
- ▶ *Was substituted for Secretary Valenstein.



Arguments in Motions for Summary Judgment

- ▶ FDE's Motion for Summary Judgment
- ▶ “The Legislature may not change the context of positive law through statements in line item appropriations in a general appropriations bill.”
- ▶ FDE argued that “the line item appropriations FDE plaintiffs have challenged in this litigation unconstitutionally change the uses of the funds authorized by Article X § 28 Florida Constitution.”
- ▶ The language of the Constitution limited the appropriations from the LATF to the purchase (or refinance) of “properties designated plus ‘together with management, restoration and enhancement of access or recreational enjoyment of conservation lands,’ so purchased (or refinance).”
- ▶ Funds were being impermissibly comingled
- ▶ Other Factors



Arguments in Motions for Summary Judgment

- ▶ FWF's Motion for Partial Summary Judgment
 - ▶ Per FWF, the “core question” was “whether [Constitution] permits monies from the Land Acquisition Trust Fund to be expended for management and restoration of natural systems on public and private lands throughout Florida or whether they may be expended only for management and restoration of lands acquired or held by the state as ‘conservation or recreation lands.’”
- ▶ FWF's Arguments
 - ▶ Ballot Title/Summary control
 - ▶ Other factors can be considered
 - ▶ Two-thirds of appropriates to Florida Forest Service were Unconstitutional
 - ▶ Meaning of Terms “Conservation Lands,” Improvement,” and “Resources” in the Amendment



Arguments in Motions for Summary Judgment

- ▶ Defendants' Consolidated Response
 - ▶ Addressing FWF
 - ▶ FWF Plaintiffs' offered no evidence to support the factual assertions in their motion
 - ▶ Argued against FWF's reading of the text
 - ▶ Addressing FDE
 - ▶ Did not plead a violation of anti-commingling provision
 - ▶ Argued against FDE's reading of the text



Final Summary Judgment

- ▶ “Article X, Section 28 was a citizen initiative amendment approved by 75% of Florida voters in the November 2014 election. It has a plain meaning based on its words and grammar. The plain meaning is that funds in the Land Acquisition Trust Fund can be expended only for (1) the acquisition of conservation lands, and (2) the improvement, management, restoration and enhancement of public access and enjoyment of those conservation lands purchased after the effective date of the amendment.”





LLW

**LEWIS
LONGMAN
WALKER**

Questions?

Thanks

Frederick L. Aschauer, Jr.

faschauer@llw-law.com

(850) 222-5702