Water Law Review

Volume 18 | Issue 1 Article 5

9-1-2014

Man v. Mussel, the Gloves Are Coming off: Supreme Court Equitable Apportionment and the Tri-State Water Wars

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MAN V. MUSSEL, THE GLOVES ARE COMING OFF: SUPREME COURT EQUITABLE APPORTIONMENT AND THE TRI-STATE WATER WARS

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I. INTRODUCTION: A BLUE SIGN WITH A WHITE 'W'

In the Blue Ridge Mountains of northern Georgia, just south of the Chattahoochee Gap, a blue sign with a white "W" points to a small spring.[1]

The spring flows year round, running south through Georgia red clay, past forests of oak, pine, and fern. Curving along trails and under wooden bridges, various tributaries join its waters and it grows. Further south the stream still grows, from a stream to a creek, from a creek to a rivulet, from a rivulet to a river—the Chattahoochee.

Some miles south of the Blue Ridge Mountains stands the massive Buford Dam.[2] The 1,630 foot-long rolled-earth dam plugs the Chattahoochee River about fifty miles north of Atlanta.[3] In doing so, the dam creates Lake Sidney Lanier ("Lake Lanier"), a reservoir and popular recreational destination.[4]

The river flows from Lake Lanier—when the dam permits—south towards Atlanta.[5] After quenching Atlanta's thirst, the river forges on past dozens of towns and through dozens more dams.[6]

About ten miles south of Atlanta and forty miles west of the Chattahoochee, another river, the Flint, takes form.[7] The sister-rivers parallel one another moving south, the Chattahoochee along the Georgia-Alabama border, and the Flint through southwest Georgia.[8]

The sisters meet at Lake Seminole on the Georgia-Florida border.[9] Lake Seminole, a reservoir formed by the Jim Woodruff Lock and Dam, empties into the Apalachicola River.[10] The river then runs some 118 miles through the Florida panhandle, ultimately draining into the Apalachicola Bay, an inlet of the Gulf of Mexico.[11] Before reaching the Gulf, the Apalachicola River feeds a region teeming with more than 1,500 species of plants, over three hundred species of birds, 180 species of fish, close to sixty species of mammals, and the highest species density of amphibians and reptiles in all

1. Randy Golden, *Out of Habersham Chattahoochee River, Part 1*, ABOUT NORTH GEORGIA, http://www.aboutnorthgeorgia.com/ang/Out_of_Habersham (last visited Aug. 30, 2014).

2. U.S. ARMY CORPS OF ENG'RS, MOBILE DIST., FINAL UPDATED SCOPING REPORT & ENVIRONMENTAL IMPACT STATEMENT: UPDATE OF THE WATER CONTROL MANUAL FOR THE APALACHICOLA-CHATTAHOOCHEE-FLINT (ACF) RIVER BASIN, IN ALABAMA, FLORIDA, AND GEORGIA 3 (2013), http://www.sam.usace.army.mil/Portals/46/docs/planning_environmental/acf docs/1ACF%20Scoping%20Report_Mar2013.pdf [hereinafter SCOPING REPORT].

3. *Id.* at 3, 5.

4. *Id.* at 4-5.

5. *Id.* at 3.

6. *Id.*

7. *Id.* at 2-3.

8. *Id.*

9. *Id.* at 2, 8.

10. *Id.*

11. *Id.* at 2.

of the United States.[12] The river's injection of freshwater into the salty Gulf creates an ideal brackish environment where these thousands of marine species flourish.[13]

Together, the three rivers create the Apalachicola-Chattahoochee-Flint ("ACF") River Basin and drain over 19,800 square miles.[14] Unfortunately, over the years the ACF Basin has been unable to sufficiently provide for the three states that claim its water: Georgia, Alabama, and Florida.[15] As a result, the states have been fighting the so-called "Tri-State Water Wars" for over twenty years.[16] Thus far, private negotiation, water compacts, and various attempts at litigation have failed to settle the dispute.[17] As a result, on October 1, 2013, the State of Florida sought permission from the United States Supreme Court to sue Georgia, seeking equitable apportionment of the ACF River Basin water.[18] The Court subsequently granted Florida permission to file a complaint on November 3, 2014.[19]

This Article begins in Part II with an in-depth look into why the conflict over the ACF Basin developed and where the conflict now stands. Part III of the Article summarizes the history of interstate river allocation in the United States, with a special emphasis on Supreme Court equitable apportionment. Finally, Part IV analyzes the likelihood of an equitable apportionment decree in *Florida v. Georgia* and discusses what the outcome of a potential apportionment decree may look like.

II. TRI-STATE WATER WARS

A. 1925-1950

District Engineer Colonel R. Park of the United States Army Corps of Engineers ("Corps") sat at the headwaters of the Chattahoochee River; he watched the cold freshwater forge south as if nothing could impede its 385-mile journey to the Gulf.

In 1925 the United States Congress sent Colonel Park to the ACF Basin.[20] He surveyed the basin for suitable hydroelectric facility sites.[21] In 1939 he issued the "Park Report,"[22] which suggested eleven viable hydroelectric locations throughout the ACF Basin.[23] In the 1946 "Newman Report,"[24] the Corps determined that of those eleven

12. *Apalachicola National Estuarine Research Reserve, Florida*, THE ENCYCLOPEDIA OF EARTH (Oct. 6, 2009, 10:46 AM), http://www.eoearth.org/view/article/150141/.

13. *See id.*

14. SCOPING REPORT, *supra* note 2, at 2.

15. *Id.* at ES-1 to ES-4.

16. *See id.* at 14.

17. *See id.* at 13-19.

18. Motion for Leave to File a Complaint at 1, Florida v. Georgia, No. 142, Orig. (U.S. filed Sept. 25, 2013) [hereinafter Fl. Motion] (seeking Supreme Court permission "to file a complaint against the State of Georgia to equitably apportion the waters of the Apalachicola-Chattahoochee-Flint River Basin").

19. Order Granting Florida's Motion for Leave to File a Bill of Complaint, 135 S. Ct. 471 (2014).

20. *In re* MDL-1824 Tri-State Water Rights Litig., 644 F.3d 1160, 1167 (11th Cir. 2011).

21. *Id.*

22. *Id.*; *see also* H.R. DOC. NO. 76-342 (1939) [hereinafter PARK REPORT].

23. *In re* MDL-1824 Tri-State Water Rights Litig., 644 F.3d at 1167; PARK REPORT, *supra* note 22.

24. *In re* MDL-1824 Tri-State Water Rights Litig., 644 F.3d at 1167; H.R. DOC. NO. 80-300 (1947) [hereinafter NEWMAN REPORT].

sites, Buford, Georgia, would be the most productive location for a federal hydroelectric facility.[25]

With the Rivers and Harbors Acts of 1945[26] and 1946,[27] Congress authorized the Corps to begin construction of a dam at Buford in accordance with the Park and Newman Reports.[28] Notably, both the Park and Newman Reports described (i) hydroelectricity, (ii) navigation, and (iii) flood control as direct benefits of the Buford Project; however, whether water supply was an intended purpose of the project was unclear from the reports.[29]

B. 1950-1970

Construction of the Buford Dam began in 1950 and the Corps completed the project in 1957.[30] The completion of the dam marked the formation of the approximately 2,515,800 acre-foot Lake Lanier.[31] As the Buford Dam neared completion, the Corps produced the 1958 Apalachicola River Basin Reservoir Regulation Manual and the 1959 Apalachicola River Basin Reservoir Regulation Manual for Buford Dam.[32] Together, the manuals formed the master control manual for the Buford Project, describing the technical features and general operating procedures of the Project.[33] Because the Corps has not updated these manuals since their promulgation, they remain the current regulation manuals for the ACF Basin and Buford Dam.[34]

Under the regulation manuals, the Buford Dam must release a sufficient supply of water such that at least 650 cubic feet per second flow past Atlanta at any time.[35] In addition, the Corps granted three Georgia municipalities water supply contracts, allowing them to withdraw water from Lake Lanier and the Chattahoochee River.[36]

Pertinent to future litigation, Congress passed the Water Supply Act ("WSA") in 1958.[37] The WSA recognized the importance of federal and state cooperation to better

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25. NEWMAN REPORT, *supra* note 24, ¶ 69, at 27-28.

26. Rivers and Harbors Act of 1945, Pub. L. No. 79-14, 59 Stat. 10 (1945).

27. Rivers and Harbors Act of 1946, Pub. L. No. 79-595, 60 Stat. 634 (1946).

28. *Id.* at 635.

29. *See* NEWMAN REPORT, *supra* note 24, ¶ 73, at 28-29 (briefly discussing the rapidly expanding population in Atlanta and the fact that the project could serve as a possible water source); PARK REPORT, *supra* note 22, ¶¶ 243-61, at 78-80 (discussing the potential assets of the project and assigning a monetary value for each asset, but while mentioning increased water supply, neither concluding it was immediately necessary nor assigning a monetary value for that asset).

30. *In re* MDL-1824 Tri-State Water Rights Litig., 644 F.3d 1160, 1169 (11th Cir. 2011).

31. *See id.* at 1170 (noting various storage capacities in the different levels of the reservoir).

32. *Id.* at 1171; U.S. ARMY CORPS OF ENG'RS, APALACHICOLA RIVER BASIN RESERVOIR REGULATION MANUAL (1958) [hereinafter 1958 MANUAL]. The 1959 Reservoir Regulation Manual for Buford Dam [hereinafter BUFORD MANUAL] was not a separate report. It was included as an appendix to the 1958 manual. *See id.* app. B.

33. *In re* MDL-1824 Tri-State Water Rights Litig., 644 F.3d at 1171.

34. *Id.*

35. *Id.*

36. *Id.* at 1169-70. Two of these water supply contracts were not undeserved: "The creation of Lake Lanier inundated the water intake structures of the Cities of Buford, Georgia and Gainesville, Georgia. As a method of compensation, the Corps signed relocation agreements with the two municipalities authorizing water withdrawals directly from the reservoir—these agreements allowed Gainesville to withdraw 8 million gallons per day ("mgd") and Buford 2 mgd." *Id.* at 1169 (footnotes omitted). Congress authorized the third water supply contract with Gwinnet County, Georgia. *Id.* at 1169-70.

37. Water Supply Act, Pub. L. No. 85-500, 72 Stat. 297 (1958); *see also* 43 U.S.C. § 390b(f) (2012).

promote "water supplies for domestic, municipal, industrial, and other purposes."[38] To further this purpose, "Congress authorized the Corps to allocate storage in federal reservoirs for water supply, provided that the localities paid for the allocated storage."[39] However, the following limitation applied:

> Modifications of a reservoir project heretofore authorized, surveyed, planned, or constructed to include storage as provided by subsection (b) of this section which would *seriously affect the purposes for which the project was authorized,* surveyed, planned, or constructed, or which would *involve major structural or operational changes* shall be made only upon the approval of Congress as now provided by law.[40]

Because Congress enacted the WSA well after the Buford Project began, it did not directly affect construction. However, the Act would prove to be a major issue for the future of the project.

C. 1970-1990

By the early 1970s the issues underlying the Tri-State Water Wars began to materialize. In 1974 the Corps completed a final Environmental Impact Statement ("EIS") "for continued operation and maintenance of the existing Buford Dam."[41] According to the report, "[t]he Atlanta metropolitan area increased its water use from the river 37% (from 117 mgd. to 160 mgd.) between 1960 and 1968."[42] Moreover, the population "within 2 1/4 miles of [Lake Lanier] . . . doubled from the time of completion of the project in 1956 through 1969."[43] The completion of the EIS was especially timely because northern Georgia experienced a severe drought in the 1980s.[44] Due to Georgia's growing water needs, the United States Senate commissioned the Metropolitan Atlanta Area Water Resources Management Study ("MAAWRMS") to develop a plan for the long-term needs of the Atlanta area.[45] As the MAAWRMS proceeded, the Corps entered into various interim water supply contracts with Georgia municipalities, allowing them to withdraw water from the Buford Project.[46] Because these contracts were interim, the Corps determined the WSA was non-binding and therefore did not require congressional approval.[47] Notably, all interim contracts between the Corps and the municipalities were set to expire in January 1990.[48]

Ultimately, the Corps determined that the most economical way to solve the water shortage in Georgia was to reallocate storage space from the Buford Project to water

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38. 43 U.S.C. § 390b(a).

39. *In re* MDL-1824 Tri-State Water Rights Litig., 644 F.3d at 1170 (citing 43 U.S.C. § 390b(a)).

40. 43 U.S.C. § 390b(e) (emphasis added).

41. *In re* Tri-State Water Rights Litig., 639 F. Supp. 2d 1308, 1322 (M.D. Fla. 2009).

42. *Id.* (footnote omitted); U.S. ARMY CORPS OF ENG'RS, MOBILE DIST., FINAL ENVIRONMENTAL IMPACT STATEMENT: BUFORD DAM AND LAKE SIDNEY LANIER, GEORGIA (FLOOD CONTROL, NAVIGATION AND POWER) 14 (1974) [hereinafter 1974 BUFORD EIS].

43. *In re* Tri-State Water Rights Litig., 639 F. Supp. 2d at 1322 (quoting 1974 BUFORD EIS, *supra* note 42, at 15).

44. *See id.* at 1324.

45. *In re* MDL-1824 Tri-State Water Rights Litig., 644 F.3d 1160, 1171 (11th Cir. 2011).

46. *See id.* at 1171-72.

47. *See id.* at 1172.

48. *Id.* at 1174.

supply.[49] As a result, in 1989 the Corps issued a Draft Post-Authorization Change Notification Report for The Reallocation of Storage from Hydropower to Water Supply at Lake Lanier, Georgia ("PAC Report").[50] Among other things, the PAC Report recommended a reallocation of some 207,000 acre-feet from the Buford Project to water supply, allowing withdrawal from Lake Lanier and from the river downstream of the Buford Dam.[51] Because the reallocation represented close to a twenty percent increase from the originally planned water supply storage of the project, the Corps noted in the PAC Report that if the reallocation constituted a major operational change under the WSA, the recommendation would require congressional approval.[52]

D. 1990-2006

In January 1, 1990—as the Corps' PAC Report reallocation recommendation was in the process of formalization—a majority of the water supply contracts between the Corps and the Georgia municipalities expired.[53] The Corps, however, continued to allow the municipalities to withdraw water from the Buford Project.[54] Georgia's southern neighbors soon took notice and grew concerned with the Corps' apparently Georgia-centric operation of the Buford Project. In June 1990 Alabama filed suit against the Corps in the United States District Court for the Northern District of Alabama ("Alabama district court") challenging the PAC Report's reallocation recommendation and the "hold-over" municipality water supply contracts.[55] Soon thereafter, Florida and Georgia moved to intervene as plaintiff and defendant, respectively.[56] However, before the court made any ruling, Alabama and the Corps asked to stay proceedings pending negotiations.[57] The court issued a stay order in 1990, and in 1992 Alabama, Florida, Georgia, and the Corps entered into a Memorandum of Agreement ("MOA") to resolve the conflict.[58] The MOA required the Corps to reexamine the water supply issues facing the Georgia and ACF Basin.[59]

In 1997 the parties entered into the ACF Compact, which replaced the MOA.[60] The compact authorized an ACF Basin Commission composed of the governors of Georgia, Alabama, and Florida, as well as one non-voting federal government representative.[61] The commission's goal was to unanimously establish "an allocation formula for equitably apportioning the surface waters of the ACF Basin among the states" of

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49. *Id.* at 1172.

50. *Id.* at 1173.

51. U.S. ARMY CORPS OF ENG'RS: MOBILE DIST., DRAFT POST-AUTHORIZATION CHANGE NOTIFICATION REPORT FOR THE REALLOCATION OF STORAGE FROM HYDROPOWER TO WATER SUPPLY AT LAKE LANIER, GEORGIA 12 (1989).

52. *Id.*

53. *In re* MDL-1824 Tri-State Water Rights Litig., 644 F.3d at 1174. All water supply contracts expired except the 1950s contracts with Buford, Georgia, and Gainesville, Georgia. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. Apalachicola-Chattahoochee-Flint River Basin Compact, Pub. L. No. 105-104, art. VI(a)-(b), 111 Stat. 2219, 2221 (1997).

Alabama, Florida, and Georgia.[62] Ultimately, the commission was unable to agree on a water allocation formula, and the ACF Compact expired in August 2003.[63]

Meanwhile, in May 2000 Georgia officials sent a formal request ("Georgia's Formal Request") to the Corps asking permission (i) to withdraw up to 297 million gallons per day ("mgd") from Lake Lanier by 2030 and (ii) "to provide sufficient releases from the dam to allow downstream withdrawals of 408 million gallons per day by 2030."[64] The Corps denied the request, stating that the desired withdrawals would require a reallocation of more than thirty-four percent of the total conservation storage in Lake Lanier and accordingly would affect the project's authorized purpose under the WSA.[65] Therefore, the Corps concluded that it could not authorize Georgia's Formal Request without congressional approval.[66] As a consequence, Atlanta, Columbus, Gainesville, Gwinnett County, DeKalb County, Fulton County, the Appalachian Regional Commission, the Cobb County-Marietta Water Authority, and the Lake Lanier Association filed their own suit against the Corps in February 2001 in the United States District Court for the Northern District of Georgia.[67]

In December 2000 Southeastern Federal Power Customers, Inc. ("SeFPC") also filed suit against the Corps in the United States District Court for the District of Columbia ("D.C. district court").[68] SeFPC, a group of companies that purchases the power generated at the Buford Dam from the federal government, claimed that the Corps' handling of the Buford Project caused SeFPC's members to pay unfairly high rates for their power.[69] The D.C. district court referred the parties to mediation and later added Georgia as a party; the parties subsequently agreed to a settlement ("D.C. Settlement Agreement") in January 2003.[70] The agreement (i) called for a reallocation of 240,858 acre-feet of the Buford Project to water supply, (ii) created once-renewable ten-year interim contracts for water supply between the Corps and various Georgia municipalities, and (iii) required the same Georgia municipalities to pay higher rates for water supply as a credit against the rates charged to SeFPC's members.[71]

The D.C. Settlement Agreement did not last long, as the Alabama district court enjoined its filing in October 2003.[72] The Alabama district court found that the agreement violated its 1990 stay order because the parties made it without Alabama and

62. *Id.* art. VI(g)(12).

63. *In re* MDL-1824 Tri-State Water Rights Litig., 644 F.3d at 1175.

64. *Id.* at 1176; Letter from Roy E. Barns, Governor of Ga., to Joseph W. Westphal, Assistant Sec'y of the Army for Civil Works, at 1 (May 16, 2000) (on file with author).

65. *In re* MDL-1824 Tri-State Water Rights Litig., 644 F.3d at 1176; Memorandum from Earl Stockdale, Deputy Gen. Counsel of Dep't. of the Army, to Acting Asst. Sec'y of the Army for Civil Works, at 1, 8-9 (Apr. 15, 2002) (on file with author).

66. *In re* MDL-1824 Tri-State Water Rights Litig., 644 F.3d at 1176.

67. *Id.* at 1165 n.1, 1176; *In re* MDL-1824 Tri-State Water Rights Litig., 639 F. Supp. 2d 1308, 1336 (M.D. Fl. 2009); Georgia v. U.S. Army Corps of Eng'rs, No. 2:01-cv-00026 (N.D. Ga. filed Feb. 7, 2001).

68. Se. Fed. Power Customers, Inc. v. Caldera, No. 1:00-cv-2975 (D.D.C. filed Dec. 12, 2000); *see also* Se. Fed. Power Customers, Inc. v. Caldera, 301 F. Supp. 2d 26, 30 (D.D.C. 2004) (providing procedural history).

69. *In re* MDL-1824 Tri-State Water Rights Litig., 644 F.3d at 1165, 1175.

70. *Id.*

71. *Id.*

72. *See* Alabama v. U.S. Army Corps of Eng'rs, 357 F. Supp. 2d 1313, 1320 (N.D. Ala. 2005).

Florida's approval.[73] Soon thereafter, the D.C. district court approved the D.C. Settlement Agreement but delayed its enactment until the Alabama district court dissolved its injunction.[74] After the Alabama district court refused to modify or vacate the preliminary injunction, the parties to the D.C. Settlement Agreement appealed the Alabama injunction to the United States Court of Appeals for the Eleventh Circuit.[75] In September 2005 the appeals court vacated the Alabama district court's preliminary injunction;[76] the D.C. district court subsequently declared the D.C. Settlement Agreement valid.[77]

Soon after, Alabama and Florida appealed implementation of the D.C. Settlement Agreement to the United States Court of Appeals for the District of Columbia Circuit.[78] In *Southeastern Federal Power Customers, Inc. v. Geren*, the D.C. Circuit held that the settlement agreement exceeded the Corps' authority under the WSA.[79] The D.C. Circuit held that "[o]n its face . . . reallocating more than twenty-two percent . . . of Lake Lanier's storage capacity to local consumption uses . . . constitutes the type of major operational change referenced by the WSA."[80] With the appeal pending, the D.C. district court stayed the implementation of the D.C. Settlement Agreement.[81]

E. 2006-2009

In 2007 the Judicial Panel on Multidistrict Litigation ("MDL") transferred the Alabama, Georgia, and SeFPC cases, along with several others,[82] to the United States District Court for the Middle District of Florida.[83] Federal Judge Paul Magnuson of Minnesota, who had previously dealt with complicated water disputes between states, heard *In re Tri-State Water Rights Litigation*.[84] The parties to the MDL agreed that the court should consider the claims in two phases.[85] One phase concerned the Corps' authority to operate the Buford Project.[86] The other phase concerned the various environmental implications of the Corps' operation of the Project.[87]

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73. *Id.* at 1316.

74. Se. Fed. Power Customers, Inc. v. Caldera, 301 F. Supp. 2d 26, 35 (D.D.C. 2004).

75. Alabama v. U.S. Army Corps of Eng'rs, 424 F.3d 1117, 1121 (11th Cir. 2005).

76. *Id.* at 1136.

77. *Caldera*, 301 F. Supp. 2d at 35.

78. Se. Fed. Power Customers, Inc. v. Geren, 514 F.3d 1316, 1318 (D.C. Cir. 2008).

79. *Id.* at 1324.

80. *Id.*

81. *In re* Tri-State Water Rights Litig., 639 F. Supp. 2d 1308, 1337 (M.D. Fla. 2009); Memorandum Order, Se. Fed. Power Customers, Incl v. Caldera, No. 00-2975, 2006 WL 6608801 (D.D.C. Jan. 20, 2006).

82. *In re* Tri-State Water Rights Litig., 639 F. Supp. 2d at 1336-37 (stating that MDL combined the following cases: Florida v. U.S. Fish & Wildlife Serv., No. 4:06-cv-410 (N.D. Fla. filed Sept. 9, 2006); Georgia v. U.S. Army Corps of Eng'rs, No. 1:06-cv-1473 (N.D. Ga. filed Sept. 6, 2006); Georgia v. U.S. Army Corps of Engr's, No. 2:01-cv-26 (N.D. Ga. filed Feb. 7, 2001); Alabama v. U.S. Army Corps of Eng'rs, No. 1:90-cv-1331 (N.D. Ala. 1990)).

83. *Id.* at 1309.

84. Alyssa S. Lathrop, *A Tale of Three States: Equitable Apportionment of the Apalachicola-Chattahoochee-Flint River Basin*, 36 FLA. ST. U. L. REV. 865, 873 (2009) ("Judge Magnuson, a judge from Minnesota, has experience with difficult water battles, having served as a judge in the complicated Missouri River litigation").

85. *In re* Tri-State Water Rights Litig., 639 F. Supp. 2d at 1309.

86. *Id.*

87. *Id.*

The *In re Tri-State Water Rights Litigation* court first took up the phase concerning the Corps' authority to operate the Buford Project.[88] The fundamental issue concerned whether, under the WSA, water supply was an authorized purpose of the Buford Project, and if so, whether the Corps' operation of the project amounted to a major structural or operational change from that authorized purpose.[89] Inherent in this question was whether the Corps' actions with respect to supplying water to the Atlanta and Georgia municipalities required congressional approval.[90]

After an extensive review of the Buford Project's history, the court concluded that the only authorized purposes of the Project were flood control, navigation, and hydropower.[91] The court based this decision on the complicated history of the project, which indicated to the court that water supply was no more than an incidental benefit of the project.[92]

Consequently, the court noted that "[t]he Corps' failure to seek congressional authorization for the changes it has wrought in the operation of Buford Dam and Lake Lanier is an abuse of discretion and contrary to the clear intent of the Water Supply Act."[93] Accordingly, the court found that the PAC Report's reallocation of water from the Buford Project and the municipality "hold-over" contracts constituted major operational changes from Buford's authorized purposes that required congressional approval for implementation.[94] Similarly, the Corps would need congressional approval to fulfill Georgia's Formal Request for water.[95]

In a court order that Judge Magnuson conceded was draconian, the court gave the Corps three years to seek congressional approval for the operational changes it erroneously authorized.[96] During those three years, the parties to the litigation could continue then-current "water-supply withdrawal levels but should not increase those withdrawals absent the agreement of all other parties."[97] Without congressional approval, at the expiration of this three-year period all parties would "return to the 'baseline' operation of the mid-1970s."[98]

The court concluded its decision with a censure of the Corps for its slow movement, the local governments for their failure to consider long-term consequences of their decisions, and the states' citizens for their inability to account for "their consumption of our scarce resources."[99]

F. 2009-2011

Before the expiration of the three-year deadline, the United States Court of Appeals for the Eleventh Circuit took up Judge Magnuson's ruling in *In re MDL-1824 Tri-*

88. *Id.* at 1310.
89. *Id.*
90. *Id.*
91. *See id.* at 1310, 1321, 1339.
92. *Id.* at 1344-48 (concluding that the Rivers and Harbors Acts of 1945 and 1946 authorized the Buford Project in accordance with the Park Report and Newman Report, and because neither of these reports indicated to the court that water supply was major benefit of the Buford Project, it was not an authorized purpose of the Buford Project).
93. *Id.* at 1356.
94. *Id.* at 1347-53.
95. *Id.* at 1352-53.
96. *Id.* at 1355.
97. *Id.*
98. *Id.*
99. *Id.*

State Water Rights Litigation.[100] After reviewing the same factual and legislative details behind the construction of the Buford Project,[101] the appeals court determined that water supply was in fact an authorized purpose of the Buford Project.[102] The appeals court found that the district court did not give sufficient weight to the value placed on water supply at the time the 1945 and 1946 Rivers and Harbors Acts and the WSA authorized the Buford Dam.[103] As such, the appeals court reversed the district court's ruling, remanded the case, vacated the three year deadline, and gave special instructions to the Corps to determine the extent of its authority to operate the Buford Project under the Rivers and Harbors Acts and WSA.[104]

As to phase two of the MDL litigation, both the district and appeals courts found discussion of the various environmental implications of the Corp's operation of the Buford Project unnecessary until phase one concluded.[105]

G. 2011-2012

In June 2012 the United States Supreme Court denied Alabama, Florida, and the SeFPC's requests to review the Eleventh Circuit's decision.[106] Subsequently, the Corps issued an opinion affirming its legal authority to accommodate both current and increased levels of water supply withdrawals at Lake Lanier and downstream at Atlanta.[107] However, the Corps noted that

> Prior to making any final decision to reallocate storage for water supply, to implement a new operational scheme, or to implement updated water control manuals reflecting such decisions, the Corps must further evaluate the environmental effects of the proposed action and reasonable alternatives, pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 to 4370f, with appropriate public participation.[108]

In March 2013 the Corps completed the Final Scoping Report necessary to begin work on the ACF Basin's EIS and new Master Water Control Operating Manual.[109] In the report, the Corps estimated that updating the EIS and operating manual for the Buford Project would take approximately three years.[110]

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100. *In re* MDL-1824 Tri-State Water Rights Litig., 644 F.3d 1160, 1165 (11th Cir. 2011).

101. *See id.* at 1167-78.

102. *Id.* at 1192.

103. *Id.* at 1186-92 (concluding that the Rivers and Harbors Acts of 1945 and 1946 authorized the Buford Project in accordance with the Park Report and Newman Report, and because both of these reports indicated to the court that water supply was a major desired benefit of the Buford Project, it was an authorized purpose of the Buford Project).

104. *Id.* at 1205.

105. *In re* Tri-State Water Rights Litig., 639 F. Supp. 2d 1308, 1309 (M.D. Fla. 2009).

106. Adam Thornton, *Who Owns the Rain?*, 1 PROP. L.J. 80, 80 n.1 (2014).

107. Memorandum from Earl Stockdale, Deputy Gen. Counsel of Dep't of the Army on Auth. to Provide Muni. and Indus. Water Supply from Buford Dam/Lake Lanier Project, Georgia, to U.S. Army Corps of Eng'rs Chief of Eng'rs (June. 25, 2012), *available at* http://www.sam.usace.army.mil/Portals/46/docs/planning_environmental/acf/docs/2012ACF_legalopinion.pdf.

108. *Id.* at 2 n.4.

109. SCOPING REPORT, *supra* note 2, at 137-39.

110. *Id.* at 139.

H. 2013-PRESENT

Although the EIS and Master Water Control Operating Manual were not yet complete (and are still not complete at the time of this writing), Florida sought permission from the Supreme Court to file suit against Georgia on October 1, 2013, by filing a Motion for Leave to File a Complaint ("Motion").[111] Specifically, Florida asked the Court to "cap Georgia's overall depletive water uses at the level then existing on January 3, 1992."[112] This was the date Florida, Alabama, and Georgia entered into the MOA.[113]

In support, Florida asserted that Georgia's consumption in the ACF Basin has and will continue to cause Florida irreparable economic, environmental, and socioeconomic harm by diminishing freshwater flow to the Apalachicola Bay.[114] A majority of the alleged harm stemmed from the inability of the Apalachicola's estuarine ecosystem to function without sufficient freshwater from the basin.[115] When healthy, the Apalachicola Bay is one of the most productive ecosystems in the Gulf of Mexico, home to a multitude of flora and fauna, including many endangered species.[116] As such, residents of the Apalachicola Bay developed a resource-based economy that depends heavily on the harvest of commercially salable species.[117] However, significantly reduced flow to the bay area in recent years resulted in a near collapse of several important Apalachicola fisheries.[118] Florida alleged a significant loss of income to the area resulting in job loss and economic stagnation due to the lack of freshwater flows.[119]

The move to petition the Supreme Court came soon after the Department of Commerce declared in 2013 that the Apalachicola oyster fisheries were in a state of commercial fishery disaster.[120] In a statement about the move, Florida Governor Rick Scott explained, "Georgia has refused to fairly share the waters that flow between our two states, so to stop Georgia's unmitigated consumption of water we have brought the matter before the U.S. Supreme Court."[121]

On February 10, 2014, Georgia filed a response in opposition to Florida's motion.[122] In its response, Georgia claimed that Florida's move to petition the Court should fail for three key reasons: (i) the move was premature, (ii) the move failed to join an indispensable party, and (iii) Florida and its citizens were not adversely affected by the

111. Fl. Motion, *supra* note 18, at 1.

112. *Id.* at 21.

113. Brief in Support of Motion for Leave to File Complaint at 24, Florida v. Georgia, No. 142, Orig. (U.S. filed Sept. 25, 2013) [hereinafter Fl. Brief].

114. Florida's Complaint for Equitable Apportionment and Injunctive Relief at 15-21, Florida v. Georgia, No. 142, Orig. (U.S. filed Sept. 25, 2013) [hereinafter Fl. Complaint].

115. *Id.* at 10.

116. *See* Fl. Brief, *supra* note 113, at 6, 16.

117. Fl. Complaint, *supra* note 114, at 3.

118. *See generally* Pema Levy, *Apalachicola Water Wars: A Battle Between Georgia, Florida And Alabama Is Killing The Last Great Bay*, INT'L BUS. TIMES (Aug. 23, 2013, 10:18 PM), http://www.ibtimes.com/apalachicola-water-wars-battle-between-georgia-florida-alabama-killing-last-great-bay-1394907.

119. Fl. Complaint, *supra* note 114, at 3 (discussing the economic impact felt by Apalachicola oyster fishing industry as a result of the Tri-State Water Wars).

120. Levy, *supra* note 118.

121. Gary Fineout, *Florida asks US Supreme Court to stop Georgia water use*, ATHENS BANNER HERALD (Oct. 1, 2013, 8:40 PM), http://onlineathens.com/local-news/2013-10-01/florida-asks-us-supreme-court-stop-georgia-water-use.

122. State Of Georgia's Opposition To Florida's Motion For Leave To File A Complaint, Florida v. Georgia, No. 142, Orig. (U.S. filed Jan. 31, 2014) [hereinafter Ga. Brief].

direct action of Georgia and thus are not entitled to relief.[123] Specifically, Georgia asserted that the Court cannot adjudicate the suit before the Corps' promulgation of the new Master Water Control Operating Manual because any decision the Court makes must intricately depend on the Manual's allocation formulas.[124] Moreover, because the Corps has played such a significant role in the tangled history of the Tri-State Water Wars, Georgia asserted that the litigation cannot proceed in the Corps' absence.[125] Lastly, and perhaps most importantly, Georgia asserted that any harm Florida suffered due to lack of freshwater was not traceable to Georgia and thus Florida is not entitled to relief.[126]

At the request of the Supreme Court,[127] on September 18, 2014, the Solicitor General published a short Brief for the United States as Amicus Curiae analyzing the Tri-State Dispute.[128] In the brief, the Solicitor General opined that, based on Florida's complaint, the state is entitled to an equitable apportionment of the ACF Basin's water through the Court's exercise of original jurisdiction.[129] However, the Solicitor General ultimately advised the Court to refrain from taking any action on the apportionment issue until the Corps completes its updated Master Water Control Manual.[130] In support, the Solicitor General noted that equitable apportionment is a complex and expensive procedure.[131] Further, because the Corps' updated manual will directly address water flow regimes in light of the current ACF controversy, the Solicitor General argued that the updated manual will be invaluable to the Court in making its decision.[132]

In spite of Georgia's opposition and in spite of the Solicitor General's brief, on November 3, 2014, the Supreme Court granted Florida's Motion.[133] The Court subsequently appointed Ralph I. Lancaster, an attorney from Portland, Maine, as Special Master of the case.[134] As of the publication of this article, the Court's most recent action was to extend the time in which Georgia is permitted to file an answer until February 2, 2015.[135]

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123. *Id.* at 16-17.

124. *Id.* at 1.

125. *Id.* at 18.

126. *Id.* at 25-26.

127. Order Calling for the Views of the Solicitor General, 134 S. Ct. 1509 (2014).

128. Brief for the United States as Amicus Curiae at 1, Florida v. Georgia, No. 142, Orig. (U.S. filed Sept. 18, 2014).

129. Ga. Brief, *supra* note 122, at 13-17.

130. *Id.* at 22-23.

131. *Id.* at 17-18.

132. *Id.* at 17-20.

133. Order Granting Florida's Motion for Leave to File a Bill of Complaint, 135 S. Ct. 471 (2014).

134. Order Appointing Ralph I. Lancaster as Special Master, Florida v. Georgia, No. 142, Orig. (Nov. 19, 2014), 2014 WL 6473338.

135. Order Granting Extension of Time to File Answer, Florida v. Georgia, No. 142., Orig. (Nov. 25, 2014). As an unrelated aside, in petitioning the Supreme Court, Florida notes that "Alabama lies upstream of Florida within the ACF Basin. Although not opposed to Alabama's participation in this action, Florida asserts no wrongful act by Alabama and seeks no affirmative relief against Alabama. Therefore, Alabama is not named in this action." Fl. Complaint, *supra* note 114, at 7. For the purposes of this paper, Alabama's role in the potential Supreme Court issue is not discussed. However, it should be noted that there are various scenarios through which Alabama may choose or may be required to participate in any further litigation.

III. THERE'S MORE THAN ONE WAY TO SPLIT A RIVER

Historically, the United States has dealt with interstate water disputes in one of three ways: (i) interstate compacts, (ii) congressional allocation, or (iii) Supreme Court equitable apportionment.[136] While interstate compacts tend to be the preferred method to apportion rivers between states, congressional allocation and Supreme Court equitable apportionment remain valid alternatives.[137]

A. INTERSTATE COMPACTS

Under Article I, Section 10 of the United States Constitution, compacts between states are invalid without congressional approval.[138] An interstate compact allocating river water or river usage allows the interested states significant input in the terms of the agreement.[139] Further, "[a]part from requiring congressional consent, the Constitution places no limits on what might be done through an interstate compact."[140] If Congress approves a compact, it codifies the compact as binding federal statutory law.[141] It follows that states will likely accept a compact drafted by the interested states and approved by Congress. Moreover, compacts tend to be a cheaper method to settle interstate disputes.[142] Interstate compacts, however, have the distinct disadvantage of requiring the parties involved to reach a unanimous agreement. This requirement may be an insurmountable problem in many cases, such as in the ACF Basin.

B. CONGRESSIONAL ALLOCATION

Congressional authority to allocate interstate river systems derives from the power to regulate interstate commerce.[143] Though congressional allocation provides another mechanism to apportion water between states, to date Congress has only used congressional allocation twice—in the Boulder Canyon Project Act of 1928 and in the enactment of the Truckee-Carson-Pyramid Lake Water Rights Settlement Act of 1990.[144] Unlike interstate compacts, congressional allocation may proceed without unanimous consent of the states or other parties.[145] Generally, this can prevent situations where the dispute lasts years and years. However, truly interested states tend to disfavor congressional

136. *See* A. Dan Tarlock, *The Law of Equitable Apportionment Revisited, Updated, and Restated*, 56 U. COLO. L. REV. 381, 382 (1985).

137. *Id.*

138. U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.").

139. *See* Dustin S. Stephenson, *The Tri-State Compact: Falling Waters and Fading Opportunities*, 16 J. LAND USE & ENVTL. L. 83, 98-99 (2000).

140. Joseph W. Dellapenna, *Interstate Struggles over Rivers: The Southeastern States and the Struggle over the 'Hooch'*, 12 N.Y.U. ENVTL. L.J. 828, 833 (2005).

141. *Id.*

142. C. Hansell Watt, IV, Comment, *Who Gets the Hooch?: Georgia, Florida, and Alabama Battle for Water from the Apalachicola-Chattahoochee-Flint River Basin*, 55 MERCER L. REV. 1453, 1458 (2004).

143. *See, e.g.*, United States v. Grand River Dam Auth., 363 U.S. 229, 231-32 (1960); United States v. Twin City Power Co., 350 U.S. 222, 224-25 (1956); United States v. Gerlach Live Stock Co., 339 U.S. 725, 731 (1950).

144. Dellapenna, *supra* note 140, at 891-92.

145. *Id.* at 892.

allocation, as it leaves important state issues to disinterested and often uninformed members of Congress.[146]

C. SUPREME COURT EQUITABLE APPORTIONMENT

To date, the Supreme Court has been asked to apportion eight rivers: (i) the Arkansas River, (ii) the Colorado River, (iii) the Connecticut River, (iv) the Vermejo River, (v) the Walla Walla River, (vi) the Laramie River, (vii) the Delaware River, and (viii) the North Platte River.[147] Of those eight rivers, the Court has entered apportionment decrees on only three: (i) the Laramie River, (ii) the Delaware River, and (iii) the North Platte River.[148]

Critics of equitable apportionment cite the cost of the process as a major disadvantage.[149] For instance, "the officials involved in the negotiations under the [ACF] Compact estimated the costs of original litigation before the Supreme Court as in the range of four to six million dollars per year, per state."[150] Moreover, from beginning to end, the process can take a very long time; "[t]en years or more is not unusual given the complexity of the litigation."[151] However, in certain circumstances, equitable apportionment may represent the only feasible option to a problem demanding an answer.

The Supreme Court's authority to settle disputes between states originates in Article III of the United States Constitution: "In all Cases . . . in which a State shall be Party, the Supreme Court shall have original Jurisdiction."[152] Generally, when a state litigates against another, the Court will apply federal common law.[153]

Before delving into the history of Supreme Court equitable apportionment, a brief survey of United States water law is in order. First, it is important to note that water law is largely state-focused.[154] That is, states generally allocate the water within their borders. Two distinct water law schemes have developed in the United States.[155] In the western United States, where water tends to be scarce, states generally observe the prior appropriation doctrine.[156] The prior appropriation doctrine focuses on a "first in time, first in right" concept.[157] Typically, the first user to divert water from a particular source and apply it to a beneficial use will have a superior, or senior, right to continue using that water supply over later or junior users.[158] In contrast, eastern states tend to follow the doctrine of riparian rights.[159] So-called "riparian states" associate the right to use water with ownership of land bordering sources of water.[160] Unlike prior appropriation, the

146. *Id.* at 892-93.

147. Douglas L. Grant, *Interstate Allocation of Rivers Before the United States Supreme Court: The Apalachicola-Chattahoochee-Flint River System*, 21 GA. ST. U. L. REV. 401, 404 n.25 (2004).

148. *Id.*

149. Watt, *supra* note 142, at 1457-58.

150. Dellapenna, *supra* note 140, at 888.

151. *Id.* at 889.

152. U.S. CONST. art. III, § 2, cl. 2.

153. Colorado v. New Mexico (*Colorado v. New Mexico I*), 459 U.S. 176, 183-84 (1982).

154. *See* J.B. Ruhl, *Equitable Apportionment of Ecosystem Services: New Water Law for a New Water Age*, 19 J. LAND USE & ENVTL. L. 47, 49 (2003).

155. Lathrop, *supra* note 84, at 880-81.

156. *Id.*

157. Ruhl, *supra* note 154, at 49.

158. Lathrop, *supra* note 84, at 881.

159. *Id.*

160. Ruhl, *supra* note 154, at 49-50.

riparian doctrine focuses on sharing water sources; each riparian user has a right to use the water so long as that use does not infringe on the reasonable use of other riparian users.[161] Water disputes have long been common in the dry western states, but are relatively new to the East.[162] As such, much of the early equitable apportionment case law involves western prior appropriation states.

1. The Beginning (1907-1930)

Kansas v. Colorado[163]

In the 1907 Supreme Court case *Kansas v. Colorado*, the Court first articulated the federal common law doctrine of equitable apportionment.[164] In this case, Kansas sought to enjoin Colorado's upstream diversion of the Arkansas River.[165] Kansas, a traditional riparian state at the time, asserted that Colorado's diversion infringed on Kansas' right to reasonable use of the Arkansas.[166] Colorado, a prior appropriation state, argued that it had an absolute right to use the river's entire flow for its own benefit, regardless of any potential injury to Kansas.[167] Refusing to subject one state to the law of the other, the Court stated that in disputes between states, "[e]ach state stands on the same level with all the rest."[168] Because no state "can impose its own legislation on . . . others," the Court presides over the matter, applying "what may not improperly be called interstate common law."[169] Though the Court did not articulate a name for the interstate common law doctrine, the Court rooted the doctrine in the equitable apportionment of benefits between states.[170] To determine how to equitably apportion the benefits of the Arkansas between the two states, the Court proceeded to balance the benefit to Colorado from water gained with the detriment to Kansas by water loss.[171]

Ultimately, the Court dismissed the suit.[172] The Court explained that Kansas had no claim, but could re-petition the Court if "it shall appear that, through a material increase in the depletion of the waters of the Arkansas by Colorado . . . the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two States resulting from the flow of the river."[173] In denying Kansas equitable apportionment of the Arkansas River, the Court established a fundamental concept of equitable apportionment law: the substantial injury test.[174] Under this test, any state seeking to prevent another from diverting water from an interstate body through the doctrine of equitable apportionment must prove to the Court that the diversion currently is causing and will continue to cause injury to that state's substantial interest.[175]

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161. Lathrop, *supra* note 84, at 881.
162. Watt, *supra* note 142, at 1453-54.
163. Kansas v. Colorado, 206 U.S. 46 (1907).
164. *Id.* at 117-18.
165. *Id.* at 47.
166. *Id.* at 52.
167. *Id.* at 85.
168. *Id.* at 97.
169. *Id.* at 97-98.
170. *Id.* at 117-18.
171. *Id.*
172. *Id.* at 117.
173. *Id.* at 117-18.
174. Lathrop, *supra* note 84, at 883-84.
175. Kansas v. Colorado, 206 U.S. at 117-18.

Wyoming v. Colorado[176]

Wyoming v. Colorado, decided fourteen years after *Kansas v. Colorado*, is significant for two reasons. First, this case marks the first time the Court's application of the equitable apportionment doctrine, as defined in *Kansas v. Colorado*, resulted in an actual allocation of an interstate water source.[177] Second, both states followed a prior appropriation scheme.[178] Because both states followed the same water law doctrine, the Court held that application of that doctrine to the states' interstate dispute was "eminently just and equitable to all concerned."[179] The Court granted an equitable apportionment decree to Wyoming, which under the doctrine of prior appropriation had the senior water rights over the disputed Laramie River.[180] Integral to this decision was the proposition that the Court should adjudicate disputes between states that follow similar common law water schemes based closely on those water law schemes.

2. The East (1931)

Connecticut v. Massachusetts[181]

Adjudicated in 1931, *Connecticut v. Massachusetts* was the first Supreme Court equitable apportionment case east of the Mississippi and the first between riparian states.[182] Here, Connecticut claimed that Massachusetts' desired diversion of the Connecticut River would cause Connecticut substantial injury by impairing navigation and irreparably harming agricultural interests.[183] Although both states followed riparian law, the Court backed away from the idea that state water law should hold so significant a place in Supreme Court equitable apportionment jurisprudence.[184] Declining to strictly abide by riparian law, the Court noted that for the purposes of the equitable apportionment doctrine, "federal, state and international law is to be considered and applied . . . as the exigencies of the particular case may require."[185] Ultimately, the Court determined that Connecticut had not established sufficient injury to warrant apportionment.[186] In doing so, the Court explained it would "not exert its extraordinary power to control the conduct of one State at the suit of another, unless the threatened invasion of rights is of *serious magnitude* and *established by clear and convincing evidence.*"[187] Thus, the significance of *Connecticut v. Massachusetts* largely lies in the establishment

176. Wyoming v. Colorado, 259 U.S. 419 (1922).

177. *Id.* at 495-96.

178. *Id.* at 458 ("[T]he same doctrine respecting the diversion and use of the waters of natural streams has prevailed in both from the beginning, and that each state attributes much of her development and prosperity to the practical operation of this doctrine.").

179. *Id.* at 470.

180. *Id.* at 495-96.

181. Connecticut v. Massachusetts, 282 U.S. 660 (1931).

182. William D. Olcott, Comment, *Equitable Apportionment: A Judicial Bridge over Troubled Waters*, 66 NEB. L. REV. 734, 739 (1987).

183. Connecticut v. Massachusetts, 282 U.S. at 662-63.

184. *Id.* at 670 ("But the laws in respect of riparian rights that happen to be effective for the time being in both States do not necessarily constitute a dependable guide or just basis for the decision of controversies such as that here presented.").

185. *Id.*

186. *Id.* at 672 ("There is nothing in the master's findings of fact to justify an inference that any real or substantial injury or damage will presently result to Connecticut from the diversions by Massachusetts.").

187. *Id.* at 669 (emphasis added).

of a clear and convincing standard required to satisfy the equitable apportionment substantial injury test.

New Jersey v. New York[188]

Only a few months after the *Connecticut v. Massachusetts* decision, the Court took on *New Jersey v. New York.* New Jersey sought to enjoin New York from diverting the Delaware River for use in New York City.[189] In support of an injunction, New Jersey alleged that New York's diversion would "transgress its rights in many respects."[190] Specifically, New Jersey asserted that the diversion

> will increase the salinity of the lower part of the River and of Delaware Bay to the injury of the oyster industry there. That it will injure the shad fisheries. That it will do the same to the municipal water supply of the New Jersey towns and cities on the River. That by lowering the level of the water it will injure the cultivation of adjoining lands; and finally, that it will injuriously affect the River for recreational purposes.[191]

In an opinion authored by Justice Oliver Wendell Holmes, the Court found that, of those alleged transgressions, the effect on recreation, and "the increased salinity of the River upon the oyster fisheries," were the most pertinent to showing substantial injury.[192] These "transgressions" are notable as they relate to environmental concerns, whereas the Court decided the previous apportionment cases primarily based on industrial, agricultural, and anthropogenic concerns. Ultimately, the Court found that the amount of water New York sought to divert was "greater than New Jersey ought to bear."[193] Accordingly, the Court issued an injunction capping the amount of water New York could divert from the river.[194] Further, the injunction required a minimum flow past New Jersey.[195] New York bore the burden to maintain the flow, and if it dropped to a specified level, New York was required to release water from impounding reservoirs.[196]

3. The Modern Doctrine (1932-Present)

Nebraska v. Wyoming[197]

In 1935 the Court backed even further away from the significance of state water law to Supreme Court equitable apportionment law. In *Nebraska v. Wyoming,* Nebraska sought Supreme Court equitable apportionment of the North Platte River between itself, Wyoming, and Colorado.[198] Holding that in this case equitable apportionment of the river was warranted, the Court concluded that,

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188. New Jersey v. New York, 283 U.S. 336 (1931).
189. *Id.* at 341.
190. *Id.* at 343.
191. *Id.* at 343-44.
192. *Id.* at 345.
193. *Id.*
194. *Id.* at 346.
195. *Id.* at 346-47.
196. *Id.*
197. Nebraska v. Wyoming, 325 U.S. 589 (1945).
198. *Id.* at 591-92.

> in determining whether one State is using, or threatening to use, more than its equitable share of the benefits of a[n] [interstate] stream, all of the factors which create equities in favor of one state or the other must be weighed as of the date when the controversy is mooted.[199]

Thus, in *Nebraska v. Wyoming* the Court added a totality of circumstances test to equitable apportionment jurisprudence. The Court explained that after a state establishes substantial injury, for the Court to then determine whether that injury warrants equitable apportionment, it would consider not only the litigating states' common law, but also factors such as

> physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former.[200]

This is, of course, a non-exhaustive list. In determining what factors are important, in each case the Court will analyze "the nature of the problem of apportionment and the delicate adjustment of interests which must be made."[201]

Colorado v. New Mexico I[202]

The Court further broadened the equitable apportionment doctrine in adjudicating a controversy over the Vermejo River between Colorado and New Mexico in 1982. Colorado sought to reallocate water from the headwaters of the Vermejo River, which New Mexico had fully appropriated.[203] Colorado had never before used Vermejo water but proposed to use the diverted water for irrigation and various industrial and domestic purposes.[204] After a district court enjoined Colorado's planned diversion, Colorado sought Supreme Court apportionment.[205]

As both states followed prior appropriation,[206] New Mexico argued that its users had fully appropriated the Vermejo[207] and that *any* diversion by Colorado would substantially injure New Mexico's interest.[208] As such, New Mexico argued that the Court should strictly apply the rule of priority to preclude Colorado from diverting any water.[209] To counter this argument, Colorado claimed that New Mexico could avoid injury if it would only make an effort to conserve water.[210]

Although Colorado filed suit, the Court found that New Mexico, as the state seeking to enjoin diversion, would carry the initial burden to satisfy the substantial injury

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199. *Id.* at 618.
200. *Id.*
201. *Id.*
202. *Colorado v. New Mexico I*, 459 U.S. 176 (1982).
203. *Id.* at 177.
204. *Id.* at 177-78; *id.* at 195 n.6 (O'Connor, J., concurring).
205. *Id.* at 178-79 (majority opinion).
206. *Id.*
207. *Id.* at 177, 184.
208. *See id.* at 187 n.13.
209. *Id.* at 182.
210. *Id.* at 186.

test.[211] In what amounted to an apparent softening of the substantial injury test, the Court found that New Mexico could satisfy the injury test simply by proving that "*any* diversion by Colorado, unless offset by New Mexico at its own expense, will necessarily reduce the amount of water available to New Mexico users."[212] Having found that New Mexico satisfied the substantial injury test, the Court explained that "[t]he burden . . . shifted to Colorado to establish that a diversion should nevertheless be permitted under the principle of equitable apportionment."[213] However, the Court ultimately remanded the case, instructing the Special Master to conduct further research regarding the issue between the states.[214]

Colorado v. New Mexico II[215]

The Supreme Court returned to the issue over the Vermejo in 1984. Litigating under essentially the same issues, the Court ultimately denied Colorado's apportionment request.[216] However, in doing so, the Court injected an important element into equitable apportionment doctrinal law—that it "would be willing to sacrifice a comparatively inefficient [established and existing] use for an idealized future use."[217] Quoting *Colorado v. New Mexico I,* the Court noted:

> We recognize that the equities supporting the protection of existing economies will usually be compelling. . . . Under some circumstances, however, the countervailing equities supporting a diversion for future use in one State may justify the detriment to existing users in another State. This may be the case, for example, where the state seeking a diversion demonstrates by *clear and convincing evidence* that the benefits of the diversion substantially outweigh the harm that might result.[218]

Thus, Colorado, which had no established existing use of the Vermejo, could be granted an apportionment decree if it could (i) establish an ideal future use, and (ii) show by clear and convincing evidence that New Mexico's existing use was inefficient or unreasonable.[219]

Ultimately, Colorado failed to carry its burden.[220] Colorado asserted that New Mexico's use of the Vermejo was wasteful and lacked any conservation initiatives; however, the Court found that Colorado could not prove its assertion by clear and convincing evidence.[221] Commenting on Colorado's failure, the Court noted that throughout the proceedings Colorado had failed to specifically identify "conservation efforts that would

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211. *Id.* at 187 n.13.
212. *Id.*
213. *Id.*
214. *Id.* at 189-90.
215. Colorado v. New Mexico (*Colorado v. New Mexico II*), 467 U.S. 310 (1984).
216. *Id.* at 324.
217. Richard A. Simms, *Equitable Apportionment—Priorities and New Uses,* 29 NAT. RES. J. 549, 560 (1989).
218. *Colorado v. New Mexico II,* 467 U.S. at 313 (emphasis added) (quoting *Colorado v. New Mexico I,* 459 U.S. at 187-88).
219. *Id.* at 316-17.
220. *Id.* at 321.
221. *Id.* ("[W]e do not believe Colorado has produced sufficient facts to show, by clear and convincing evidence, that reasonable conservation efforts will mitigate sufficiently the injury that New Mexico successfully established last Term that it would suffer were a diversion allowed.").

preserve any of the Vermejo River water supply."[222] Moreover, even if Colorado had identified such efforts, New Mexico would be required to implement conservation measures only if they were "financially and physically feasible."[223] New Mexico further damaged Colorado's case by offering evidence that it was in the process of implementing significant conservation measures.[224] Lastly, the Court found it noteworthy that Colorado provided no evidence that Colorado itself had "undertaken reasonable steps to minimize the amount of the diversion that [would] be required."[225]

Idaho ex rel. Evans v. Oregon[226]

The latest equitable apportionment case from the West to reach the Supreme Court seems likely to have a substantial impact on future apportionment litigation. In the 1983 case, *Idaho ex rel. Evans v. Oregon*, Idaho sought an equitable apportionment decree of migrating fish on the Columbia-Snake River system.[227] Though historically the Court had only allocated water under the equitable apportionment doctrine, the Court seemingly broadened the doctrine to cover most if not all natural resources shared by states: "a State may not preserve solely for its own inhabitants natural resources located within its borders."[228] Characterizing the migrating fish at issue as a "natural resource," the Court concluded that the natural resource of migrating fish was "sufficiently similar" to water such that equitable apportionment was "an appropriate mechanism for resolving allocative disputes."[229] Accordingly, Idaho was potentially entitled to an equitable share of the benefits provided by the fish of the Snake River System.[230] Unfortunately, Idaho was unable to prove a real and substantial injury, and the Court dismissed the action without prejudice.[231]

The Supreme Court's equitable apportionment history makes clear that application of the doctrine is intensely fact-specific. However, case law has established some universal basics of the doctrine. First, a state seeking to enjoin another from diversion must show by clear and convincing evidence that its substantial interests—principally those of senior water rights owners—are being and will continue to be substantially injured.[232] After a showing of substantial injury by the state seeking to enjoin, the burden shifts to the state seeking to divert.[233] The diverting state must then show by clear and convincing evidence that, after balancing all relevant factors, the benefit to the diverting state outweighs any harm to the existing users.[234] Some of the notable factors that the

222. *Id.* at 318.
223. *Id.* at 319.
224. *Id.* ("New Mexico submitted substantial evidence that [it] is in the middle of reclamation project efficiencies and that [it] has taken considerable independent steps—including, the construction, at its own expense and on its own initiative, of a closed stockwater delivery system—to improve the efficiency of its future water use.").
225. *Id.* at 320 (quoting *Colorado v. New Mexico I*, 459 U.S. 176, 186 (1982)) (internal quotation marks omitted).
226. Idaho *ex rel.* Evans v. Oregon, 462 U.S. 1017 (1983).
227. *Id.* at 1018.
228. *Id.* at 1025 (citations omitted).
229. *Id.* at 1024.
230. *Id.* at 1026-27.
231. *Id.* at 1027-29 ("Idaho has not demonstrated sufficient injury to justify an equitable decree.").
232. *Colorado v. New Mexico I*, 459 U.S. 176, 187 n.13 (1982).
233. *Id.*
234. *Id.*

Court will consider include (i) states' common law doctrines;[235] (ii) states' established, existing use of disputed natural resources;[236] (iii) states' environmental, industrial, and anthropogenic interests in the resources;[237] and (iv) the states' natural resource conservation policies.[238]

IV. APPLYING EQUITABLE APPORTIONMENT TO THE ACF BASIN

A. SUPREME COURT PROCEDURE

Procedurally, Florida, as the party seeking equitable apportionment of the ACF Basin, is only at the beginning of the long process required to obtain an equitable apportionment decree. Beyond the plethora of issues that Special Master Lancaster must resolve, one of the threshold issues likely to be of relevance at the outset of the litigation is whether the Supreme Court should exercise original jurisdiction under Article III.[239] Although the Court has granted Florida's Motion for Leave to File a Complaint, Georgia may still challenge the Supreme Court's exercise of original jurisdiction.[240] For the Supreme Court to exercise its original jurisdiction pursuant to Article III, Florida must convince the Court that (i) the case is of sufficient dignity and seriousness and (ii) there is no alternative forum that can offer relief.[241]

In attacking the Court's exercise of original jurisdiction, Georgia has already argued, and will likely continue to argue, that Florida's action is premature because the states have yet to exhaust all forums through which to seek relief.[242] This assertion rests primarily upon the fact that Florida has moved to petition the Court before the Corps has finalized the Buford Project's updated Master Water Control Operating Manual.[243] In theory, Florida and Georgia may yet achieve relief because the Corps' manual may allocate water in a formula sufficient to appease both states.[244] Although such a result may seem unlikely, there is surely logic in Georgia's claim, especially in light of the Solicitor General's brief advising the Court to refrain from taking action until completion of the Manual.[245]

To counter this argument, Florida has already asserted in its Complaint that any manual promulgated by the Corps concerns only the obligation of the agency's duties under federal law and could not touch on the issue of allocating the water between the states.[246] Further, Florida can point to the longevity of the dispute between the states,

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235. *See, e.g., id.* at 184.

236. *Id.* at 189.

237. *Id.* at 183.

238. *Id.*

239. U.S. CONST. art. III, § 2., cl. 2.

240. *See* James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Calif. L. Rev. 555, 566 n.36 (1994) ("The Court has long required parties who seek to invoke its original jurisdiction to file a petition for leave to do so. The Court typically exercises its discretion at the threshold of the action, but the question of jurisdiction remains open throughout the litigation of the case.")

241. Mississippi v. Louisiana, 506 U.S. 73, 77 (1992) (citing Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972)).

242. *See* Ga. Brief, *supra* note 122, at 17-25.

243. *See id.* at 1.

244. *See id.* at 20-21.

245. Brief for the United States as Amicus Curiae at 1, Florida v. Georgia, No. 142, Orig. (U.S. filed Sept. 18, 2014).

246. Fl. Complaint, *supra* note 114, at 4.

including various attempts at negotiation, interstate compacts, and litigation, as evidence that there truly is no forum that can settle this dispute.[247] Whether or not the Court would consider the Corps' future manual as an alternate forum for the parties to seek relief is unclear. On its face, a written manual does not seem to satisfy the intention behind the Court's "alternate forum" standard;[248] however, the manual arguably provides the parties a "forum" through which they may ultimately find relief. This will be a difficult issue for the Court to decide.

Additionally, Georgia will surely assert that Florida cannot show sufficient seriousness to merit Supreme Court original jurisdiction, which should be "invoked sparingly."[249] The Court has generally held that interstate water disputes are cases that fall within the "sufficient seriousness" requirement.[250] Florida's claim that Georgia's use of the ACF Basin will continue to cause injury to the Apalachicola region and the state in general will likely satisfy the Court that the case is of sufficient seriousness and dignity. Note, however, that while there is a commonality, the "sufficient seriousness" requirement is separate from the substantial injury requirement under the equitable apportionment doctrine.[251] Thus, even if Florida can show the case is of sufficient seriousness, Georgia may still argue that Florida has not been substantially injured and does not deserve an equitable apportionment decree.

One of the more potent arguments Georgia can make in arguing that the Court should not exercise original jurisdiction is that the Corps is an indispensable party to the litigation.[252] As an indispensable party, the Corps—a federal agency—could likely assert sovereign immunity, and unless the Corps waived said immunity the Court would be forced to dismiss the case in the Corps' absence.[253] Supporting the Corps' status as an indispensable party, Georgia can point to the Corps' significant involvement in all aspects of the Tri-State Water dispute.[254] More importantly, as Georgia notes in its Response in Opposition: "[n]o water flows from Georgia into the Apalachicola unless and until the Corps releases it from Woodruff Dam. Thus, as a practical matter, the Corps must be involved in any adjudication of Florida's claim, since any resolution of that claim will need to be implemented by the Corps."[255] In response, Florida will likely assert that any decision by the Corps is limited by the scope of their statutory authority to control the federal dams, and that the heart of the dispute between Florida and Geor-

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247. *See supra* Part II.

248. Mississippi v. Louisiana, 506 U.S. 73, 77 (1992).

249. *See* Ga. Brief, *supra* note 122, at 13 (quoting Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972)).

250. Grant, *supra* note 147, at 405.

251. *See id.* at 412.

252. *See* Ga. Brief, *supra* note 122, at 3-4.

253. Grant, *supra* note 147, at 404; *see also* Arizona v. California, 298 U.S. 558, 571-72 (1936). Grant explains:

> Although Congress has given blanket statutory consent for joinder of the United States as a defendant in certain kinds of water disputes, it has not done so for equitable apportionment suits between states. Therefore, if federal interests make the United States an indispensable party to an apportionment suit and if it does not elect to intervene, the Court must dismiss the suit.

Grant, *supra* note 147, at 408 (footnotes removed).

254. *See* Ga. Brief, *supra* note 122, at 3-4.

255. *Id.* at 18.

gia concerns the water allocation between the states, regardless of the operating standards of any dam.[256] However, even if Georgia can establish that the Corps is an indispensable party, the United States may simply consent to joinder, allowing the case to proceed.[257]

The success of any challenges to the Court's original jurisdiction is unclear. A majority of the decision to either exercise jurisdiction or not would seem to fall on the Corps and its involvement in the suit.

B. GETTING TO THE SUPREME COURT

For the purposes of this paper, we will assume that any challenge to the Supreme Court's original jurisdiction is dismissed and that the Court has chosen to adjudicate the dispute under the equitable apportionment doctrine. Florida, as the state seeking to enjoin diversion, should then bear the initial burden to show injury substantial enough to warrant consideration of an equitable apportionment.[258] To carry this burden, Florida must prove to the Court by clear and convincing evidence that Georgia's water diversion from the ACF Basin is causing, and will continue to cause, injury to Florida's substantial interest.[259]

Early case law indicated that the substantial injury test limits equitable apportionment only to those cases where invasion was of "a serious magnitude."[260] However, in *Colorado v. New Mexico II*, the Court seemed to soften the standard when it found that "New Mexico [had] met its initial burden of showing 'real or substantial injury'" simply by showing that "'*any* diversion by Colorado, unless offset by New Mexico at its own expense, [would] necessarily reduce the amount of water available to New Mexico users.'"[261] If the Court holds Florida to the substantial injury test as outlined in *Colorado v. New Mexico I*, it seems likely that the state would pass the test. Florida need only show that "'any diversion by [Georgia], unless offset by [Florida] at its own expense, [would] necessarily reduce the amount of water available to [Florida] users.'"[262]

Even if the Court requires a heavier burden to prove substantial injury than in *Colorado v. New Mexico II*, Florida may still be able to shoulder the burden. In its Complaint, Florida asserted that Georgia's ACF Basin consumption has caused, and will continue to cause, Florida irreparable economic, environmental, and socioeconomic harm by diminishing freshwater flow to the Apalachicola Bay.[263] As evidence of this harm, Florida may only need to point to the recent collapse of the Apalachicola Bay oyster fishery. Historically, the Apalachicola ecosystem provided one of the most productive oyster fisheries in the Gulf region.[264] The freshwater from the Apalachicola River, fed by ACF Basin water, created an ideal estuarine environment for oysters: low salinity and high nutrients.[265] However, reduced freshwater flow from the ACF Basin

256. Fl. Brief, *supra* note 113, at 4.

257. *See* Grant, *supra* note 147, at 408.

258. *Colorado v. New Mexico I*, 459 U.S. 176, 187 n.13 (1982).

259. Idaho *ex rel.* Evans v. Oregon, 462 U.S. 1017, 1027 (1983).

260. *See, e.g.*, Connecticut v. Massachusetts, 282 U.S. 660, 669, 674 (1931) (dismissing Connecticut's bill of complaint without prejudice for failure to show that its substantial interest had been or would be injured by Massachusetts' diversion of the Connecticut River).

261. *Colorado v. New Mexico II*, 467 U.S. 310, 317 (1984) (alteration and emphasis in original) (quoting *Colorado v. New Mexico I*, 459 U.S. at 187 n.13).

262. *Id.* (third alteration in original).

263. Fl. Complaint, *supra* note 114, at 15-21.

264. *Id.* at 12.

265. Fl. Brief, *supra* note 113, app. at 37 (declaration of Paul A. Montagna, Ph.D.).

into the Apalachicola Bay has modified the estuary into a high salinity, low nutrient environment.[266] As a result, oysters and various other estuarine species have suffered adverse effects.[267]

Before the freshwater flow to the bay diminished, Apalachicola oysters accounted for upwards of "12 percent of the nation's harvest of Eastern Oysters,"[268] and represented a nearly seventy million dollar industry each year.[269] However, 2012 oyster production in the Apalachicola region was at a twenty-year low, "result[ing] in the U.S. Department of Commerce [and NOAA] declaring [Apalachicola oysters] a commercial fishery failure."[270] As the declaration attests, "[t]he surrounding economy suffered severe contraction" and has yet to recover.[271]

Note, however, that the oysters' importance is not limited to commercial value. Oyster habitats produce important ecosystem services such as "sediment stabilization, erosion control, shoreline protection, storm surge absorption, critical habitat for other estuarine species, and water quality enhancement by particle and nutrient removal."[272] It follows that oyster habitat loss could have extremely detrimental consequences on the rest of the Apalachicola ecosystem and environment.

Though the harm to Apalachicola's oyster fishery may represent the most compelling evidence that Florida has suffered real and substantial harm, the damage to the industry is by no means Florida's only injury resulting from reduced flow into the state. In its Complaint and Brief, Florida claimed that the change in the bay has resulted in harm (i) to other important fisheries such as shrimp, crab, and finfish; (ii) to the bay's tourist and recreational industry; (iii) to other wildlife and their habitat; and (iv) to the unique socio-cultural community of the region.[273]

Georgia's Answer will surely assert that Florida cannot pass the substantial injury test. In doing so, Georgia will presumably stand by and bolster those arguments made in its Response in Opposition to Florida's Motion for Leave, many of which the Solicitor General supported.[274] For instance, Georgia has continued to assert that Florida mischaracterized the evidence used to support its claim and that the facts actually show that Florida has not suffered any injury "plausibly connected" to actions by Georgia.[275] Georgia will claim that any harm suffered in the Apalachicola Bay is due to fishery mismanagement and natural climactic occurrences, not Georgia's freshwater use.[276] This argument may carry weight, as Georgia returns "roughly 70%" of the water it uses from the ACF Basin to downstream users.[277] Georgia is also likely to attack Florida's claim that Georgia is responsible for the recent collapse of the Apalachicola oyster industry.[278] Florida seeks to reduce Georgia water usage to 1992 levels; however, this date

266. *Id.* app. at 37-38.
267. *Id.* app. at 38.
268. *Id.* at 6.
269. Watt, *supra* note 142, at 1455.
270. Fl. Brief, *supra* note 113, at 20.
271. *Id.*
272. *Id.* app. at 38.
273. *Id.* at 6.
274. *See* Brief of the United States as Amicus Curiae at 22-23, Florida v. Georgia, No. 142, Orig. (U.S. filed Sept. 18, 2014).
275. *See* Ga. Brief, *supra* note 122, at 28-29.
276. *Id.* at 26-27, 29-30.
277. *Id.* at 26.
278. *Id.* at 28-30.

seems to have no rational relation to low oyster harvests in the past decade.[279] Noting that Florida must show substantial injury by clear and convincing evidence, Georgia has already asserted in its Response in Opposition that "Florida's attempts to attribute the 2012-2013 low oyster harvest to Georgia's upstream water usage do not even cross the line between possibility and plausibility necessary for an ordinary complaint filed in district court," and should be dismissed.[280]

Throughout equitable apportionment case law, the Supreme Court has held that harm to economic, environmental, and socioeconomic interests may warrant Supreme Court equitable apportionment adjudication.[281] If Florida can provide sufficient evidence to support the assertions put forward in its Complaint and Brief, it seems likely that the Court will find Florida satisfied the substantial injury test. However, Georgia can poke significant holes in Florida's case that Florida must carefully plug before the Court will exercise its original jurisdiction.

C. BALANCING THE FACTORS

If the Supreme Court decides that the Tri-State Dispute warrants apportionment, it would be the Court's first major equitable apportionment case in decades.[282] Assuming the Court finds that Florida can show substantial injury, equitable apportionment case law indicates that the Court would proceed to weigh and balance "all the factors which create equities in favor of one State or the other."[283] Because the equitable apportionment doctrine application tends to be intensely fact-specific, the factors the Court would consider would be unique to this ACF Basin dispute. Analyzing "all the factors which create equities in favor of one State or the other" is beyond the scope of this paper. However, equitable apportionment case law has established relevant factors: (i) the states' water laws,[284] (ii) the states' existing and planned water uses,[285] (iii) the likely damage to either state if changes in allocation occur,[286] (iv) the extent to which reasonable conservation measures have been and could be employed to reduce potential damage,[287] and (v) the potential environmental implications of allocation.[288] These factors are considered in more detail below.

279. *See id.* at 28-29.

279. *Id.* at 29.

280. *Id.* at 30 (internal quotation marks omitted).

281. *See, e.g.*, New Jersey v. New York, 283 U.S. 336, 345 (1931) (finding that harm to New Jersey's oyster fishery and recreational industry resulting from New York's diversion of the Delaware River warranted equitable apportionment of the river).

282. Lathrop, *supra* note 84, at 890.

283. Colorado v. Kansas, 320 U.S. 383, 394 (1943).

284. *Colorado v. New Mexico I*, 459 U.S. 176, 183-84 (1982).

285. *Colorado v. New Mexico II*, 467 U.S. 310, 323-24 (1984).

286. *Id.*

287. *Colorado v. New Mexico I*, 459 U.S. at 186.

288. Ruhl, *supra* note 154, at 55-56 (discussing the need for the Supreme Court to take environmental concerns into account).

1. The Water Laws of the States

The Supreme Court has established that, while important, the water law of the litigating states is only one of many factors to consider in equitable apportionment jurisprudence.[289] Georgia follows a form of riparian law.[290] In contrast, Florida follows what could be called a hybrid system of water rights, "which blends the 'reasonable use' riparian system with elements of prior appropriation."[291] The Supreme Court has yet to adjudicate an equitable apportionment decision with a hybrid state. Moreover, all recent equitable apportionment decisions have involved states with the same, if not substantially similar, water law schemes.[292] It follows that accepting a case involving a hybrid state and a riparian state would present a novel question to the Court.

Whether the Court characterizes Florida's water law as a new hybrid system or focuses more on the riparian aspects may affect the Court's final decision. On the one hand, Florida law seems to indicate that the state abides by the hybrid doctrine,[293] and perhaps the Court should respect the hybrid form as such. On the other hand, the Court may find it significant that Florida's hybrid system does not "place as much emphasis on priority in time as does the western model of prior appropriation."[294] Furthermore, neither Florida's Complaint nor its Brief assert the state's right to the ACF Basin's water based on prior appropriation; rather, the Complaint and Brief seem to invoke riparian law's focus on reasonable use.[295] If the Court characterizes Florida's law as a hybrid doctrine, the effect on the equitable apportionment analysis is unclear. However, if the Court characterizes Florida as a riparian state, Supreme Court case law may indicate the significance placed on Georgia and Florida's water law doctrines relative to apportionment.

Historically, the Court has developed equitable apportionment in relation to prior appropriation states more than those states with riparian water systems; the explanation for this is twofold. First, the Court has simply presided over more cases involving prior

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289. *Colorado v. New Mexico I*, 459 U.S. at 183-84 ("The laws of the contending states concerning intrastate water disputes are an important consideration governing equitable apportionment. . . . But state law is not controlling.").

290. Stephenson, *supra* note 139, at 92.

291. *Id.* A detailed analysis of Florida's hybrid water law system is beyond the scope of this paper, but as explained by Dustin Stephenson:

> [g]enerally, hybrid systems recognize riparian rights, while also implementing an administrative permit mechanism for new demands placed on water resources. . . . In Florida, new permit applicants must meet a three-prong test to be granted a water use permit: the use must be defined as a reasonable beneficial use, the use must not adversely affect other riparian users, and the use must be consistent with the public interest.

Id. It is noteworthy, however, that hybrid systems tend not to "place as much emphasis on priority in time as does the western model of prior appropriation." *Id.*

292. The last major equitable apportionment case between states with significantly different common law water schemes was also the first major equitable apportionment case: Kansas v. Colorado, 206 U.S. 46 (1907). Since this case—decided in 1907—the doctrine has gone through significant changes as outlined above. *See supra* Part III.C.

293. *See generally* Frank E. Maloney et al., *Florida's "Reasonable Beneficial" Water Use Standard: Have East and West Met?*, 31 U. FLA. L. REV. 253 (1979) (surveying Florida's hybrid riparian/prior appropriation common law water scheme).

294. Stephenson, *supra* note 139, at 92.

295. *See, e.g.*, Fl. Brief, *supra* note 113, at 14 (invoking Florida's right to a fair distribution of the water from the ACF Basin rooted in reasonableness rather than priority in time).

appropriation states than riparian states.[296] Secondly, riparian law's focus on reasonable use harmonizes well with equitable apportionment's doctrinal goal of equitizing benefits, meaning the Court is seldom called upon to analyze riparian equitable apportionment.

If the Court determines that Florida follows riparian law, the case of *New Jersey v. New York*, could provide guidance on how the Court should rule.[297] In *New Jersey v. New York*, a case between two riparian states, the Court found that New York could not divert water from the Delaware River over a specified amount because it would interfere with New Jersey's reasonable river use.[298] Commentators have described *New Jersey v. New York* as a "rather straightforward application of riparian law."[299] Florida likely has a valid argument that Georgia's diversions have interfered and will continue to interfere with Florida's reasonable ACF Basin water use. If the ACF Court follows *New Jersey v. New York*'s logic by adhering closely to riparian law, then Florida would likely be entitled to equitable apportionment.[300] Of course, Florida needs to prove causation, correlation, and harm before it could obtain apportionment.[301]

Whether or not Florida asserts its rights by prior apportionment, riparian law, or a hybrid of both, it is likely that Florida and Georgia's water law doctrines will be important, but not determinative factors in the case. As the Court has explained multiple times, the states' water law doctrines are not controlling; rather, "the effort always is to secure an equitable apportionment without quibbling over formulas."[302]

2. The Existence of Established Use

Fundamental to all equitable apportionment case law is the balance between the benefit gained by the state diverting natural resources and the detriment suffered by the state losing natural resources.[303] Here, both Florida and Georgia can make a compelling case that each state's existing ACF Basin water use is well established and deserves protection.

Florida will likely assert that the state has long utilized ACF Basin waters to the benefit of the Apalachicola Bay. As noted in Florida's Brief, "[s]ettlers established the port City of Apalachicola in the early nineteenth century. The economy and way of life those early settlers created has flourished for generations and has always depended on the environmental health of the River and Bay."[304] Inherent in Florida's desire to protect existing economic use of the bay is the state's interest in preserving the Apalachicola environment and ecosystem. Though the Court previously found that existing environmental use warrants protection,[305] it is unclear just how much weight the Court would

296. *See* New Jersey v. New York, 283 U.S. 336, 342-43, 345 (1931); Connecticut v. Massachusetts, 282 U.S. 660 (1931). *New Jersey v. New York* and *Connecticut v. Massachusetts* are the only two major equitable apportionment decisions involving riparian states.

297. *New Jersey*, 283 U.S. at 342-43.

298. *Id.* at 346.

299. Dellapenna, *supra* note 140, at 887; Lathrop, *supra* note 84, at 897; Natasha Meruelo, *Considering a Cooperative Water Management Approach in Resolving the Apalachicola-Chattahoochee-Flint River Basin Water War*, 18 FORDHAM ENVTL. L. REV. 335, 355 (2007).

300. *See New Jersey*, 283 U.S. at 343.

301. *See Colorado v. New Mexico II*, 467 U.S. 310, 316, 321 (1984).

302. *New Jersey*, 283 U.S. at 343.

303. *See* Nebraska v. Wyoming, 325 U.S. 589, 618 (1945).

304. Fl. Brief, *supra* note 113, at 1.

305. *See New Jersey*, 283 U.S. at 343, 345 (enjoining New York from diverting water from the Delaware River, at least in part, to decrease the salinity in the Delaware River for the benefit of

provide Florida's environmental interests. Those interests include (i) protecting various endangered species,[306] (ii) maintaining federally protected conservation reserves,[307] and (iii) protecting the unique ecosystem in general. An equitable apportionment case between Florida and Georgia "would be the first major interstate apportionment case the Court has entertained in the age of mature environmental statutory law."[308] As the importance of environmental consciousness grows, some commenters argue that the Court ought to provide more weight to states' existing environmental use.[309]

Conversely, Georgia will likely assert that Florida cannot show sufficient existing use; as Georgia notes in its Response in Opposition: "Florida does not claim that its citizens are being deprived of water for drinking, domestic, agricultural, or other consumptive uses."[310] On the other hand, Georgia municipalities have depended on the ACF Basin's water supply since state establishment. Georgia describes the issue between the states as "man vs. mussels,"[311] and it will surely emphasize its interest in supplying potable water to its residents.[312] Georgia is most likely to stress the dire need for anthropogenic water supply throughout the state, especially in Atlanta, which continues to grow at a swift rate.[313] Failure to supply enough river water to Atlanta could result in the city's economic stagnation.[314] As one of the largest and most productive cities in the nation, Atlanta's injury could potentially cause a ripple effect felt throughout the entire southeastern region, if not the country.[315] Georgia can also point to the Eleventh Circuit's holding that water supply was an authorized purpose of the Buford Project as further support that Georgia's existing ACF Basin use warrants protection.[316]

Ultimately, the Court must determine whether Florida's economic, environmental, and ecological interests are comparable to Georgia's interest in supplying water to its residents. While the Court's holding in *New Jersey v. New York* seemed to indicate that environmental interests warrant equitable apportionment protection,[317] the facts of

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oyster populations).

306. Some of the endangered or threatened species that have been known to inhabit the Apalachicola region include the West Indian manatee, the Indiana bat, the gray bat, some twenty species of bird, the Georgia blind salamander, the American alligator, the gopher frog, the gopher tortoise, the Barbour's map turtle, the alligator snapping turtle, the Atlantic Ridley sea turtle, the green sea turtle, the leatherback sea turtle, the Atlantic loggerhead turtle, the eastern indigo snake, the Atlantic sturgeon, the Bluestripe shiner, the shoal bass, and over one hundred plant species. *See Apalachicola National Estuarine Research Reserve, supra* note 12.

307. *See* Fl. Complaint, *supra* note 114, at 11.

308. Ruhl, *supra* note 154, at 48-49.

309. *See id.*; Lathrop, *supra* note 84, at 880, 891-92.

310. Ga. Brief, *supra* note 122, at 28.

311. Melissa Nelson, *'Man vs. Mussels' in Water War*, ORLANDO SENTINEL (May 26, 2008), http://articles.orlandosentinel.com/2008-05-26/news/oysters26_1_apalachicola-bay-oyster-meat-harvesters.

312. *See* Fl. Brief, *supra* note 113, app. at 3-20 (Affidavit of Judson H. Turner) (describing Georgia and Atlanta's need for water in relation to the state and city's growing population).

313. Metropolitan Atlanta's 2013 population is estimated at 5.45 million, making it the 9th largest in the United States. Projections place metro Atlanta's population at 5.7 million by 2020. *Atlanta Population 2014*, WORLD POPULATION REVIEW (Mar. 15, 2014), http://worldpopulationreview.com/us-cities/atlanta-population/.

314. *See* Tremaine Reese, *The ACF Water Crisis: A Major Challenge with A Feasible "Volunteer" Solution*, 7 FLA. A & M U. L. REV. 345, 346-47 (2012) (describing Atlanta as "The City Perfect").

315. *See id.*

316. *In re* MDL-1824 Tri-State Water Rights Litig., 644 F.3d 1160, 1186 (11th Cir. 2011).

317. New Jersey v. New York, 283 U.S. 336, 342-43 (1931).

that case did not require the Court to balance environmental interests of one state with another state's interest in supplying potable water to its residents.

3. Conservation

In *Colorado v. New Mexico I*, the Court explained that conservation should factor into future equitable apportionment case law: "We have invoked equitable apportionment not only to require the reasonable efficient use of water, but also to impose on States an affirmative duty to take reasonable steps to conserve and augment the water supply of an interstate stream."[318] Declaring its right to Vermejo River water, Colorado asserted that New Mexico could offset any harms from the diversion through conservation measures.[319] As a result, the Court held in *Colorado v. New Mexico II* that if Colorado could prove that conservation measures could offset the harm to New Mexico by clear and convincing evidence, equitable apportionment may be warranted.[320]

Ultimately, Colorado was unable to shoulder the burden put forth by the Court.[321] As such, it is unclear exactly how a state could carry the burden to show that conservation can offset harm from diversion. However, the Court did provide a list of Colorado's failures it found notable: (i) failure to provide evidence that it had taken reasonable steps to minimize the amount of water required in its planned diversion;[322] (ii) inability to prove that New Mexico's conservation measures were inefficient;[323] and (iii) inability to identify financially and physically feasible conservation efforts that New Mexico could apply to preserve water supply.[324] From these failures, it is possible to speculate just how conservation would factor into the equitable apportionment of the ACF Basin.

First, it is important to note that in *Colorado v. New Mexico I*, Colorado asserted that conservation measures could offset harm to New Mexico.[325] In Georgia's Response in Opposition to Florida's Motion, the state only indirectly mentions conservation issues, and as such, it is unclear exactly how conservation will factor into the potential equitable apportionment case. Georgia may be wise to bring the conservation issue to the Court. As the state seeking diversion, proving adequate conservation measures can provide Georgia with a method to convince the Court that the diversion benefit substantially outweighs the harm to Florida.[326] On the other hand, Georgia may want to avoid the conservation issue all together, as the state, and Atlanta especially, will likely need to increase water usage in the near future.[327] Ultimately, conservation is likely to be a relevant factor whether or not Georgia brings this factor to the Court's attention.

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318. *Colorado v. New Mexico I*, 459 U.S. 176, 185 (1982).
319. *Id.* at 186.
320. *Colorado v. New Mexico II*, 467 U.S. 310, 323-24 (1984).
321. *Id.* at 321.
322. *Id.* at 320.
323. *Id.* at 319-20.
324. *Id.* at 320.
325. *Colorado v. New Mexico I*, 459 U.S. 176, 186 (1982).
326. *See id.*
327. Fl. Brief, *supra* note 113, at 7-9.

The Court held in *Colorado v. New Mexico I* that it would not protect waste or inefficient water use.[328] Further, Florida attacked Georgia's inefficient water usage in its Complaint and Brief, likely indicating that conservation will be an important aspect in the dispute.[329]

In its Complaint and Brief, Florida attacked Georgia for its "massive and unchecked storage and consumption" of water.[330] Specifically, Florida pointed to Georgia's massive 360 mgd withdrawal from the Chattahoochee River for industrial and municipal purposes alone.[331] Though a portion of the withdrawal supplies Atlanta and other cities with drinking water, Florida notes that other uses include car washes, lawn watering, and supply for paper mills, water parks, golf courses, and other recreational purposes.[332] Florida also asserted that Atlanta's "lost or unaccounted for water"—water lost to transmission and conveyance—exceeds national standards.[333] What's more, by Georgia's own projections, municipal and industrial water supply needs could double by 2040, exceeding 705 mgd.[334] Note also that Georgia's cities are not the only ACF Basin water consumers: current estimates measure that for agricultural purposes, Georgia "allows 879 square miles to be irrigated with the Flint River water."[335]

If Georgia is to convince the Court that adequate conservation measures exist that can protect the ACF Basin, it must prove this proposition by clear and convincing evidence.[336] In its Response, Georgia has already attacked much of Florida's claim that Georgia uses an exorbitant amount of ACF Basin water. Georgia accused Florida of misusing information,[337] alleging that Florida had failed to include key factors in its Complaint and Brief.[338] For example, Florida claims that Georgia's use of over 360 mgd of ACF water is excessive; however, this fails to take into account that Georgia returns some seventy percent of that water for use downstream.[339] Similarly, Florida's analysis of Georgia's projected withdrawal of over 705 mgd by 2040 fails to take into account that those same projections estimated a return of seventy-eight percent (or 550 mgd) to downstream users.[340]

Moreover, Georgia can point to various initiatives and projects in recent years that seem to indicate an increased emphasis on the importance of conservation throughout the state.[341] For instance, in June 2010 the governor signed the Georgia Water Stewardship Act of 2010 into law.[342] Georgia promulgated this Act just after a severe 2009 drought ended, and its purpose was "to demonstrate Georgia's deep commitment to

328. *Colorado v. New Mexico I*, 459 U.S. at 184.
329. *See* Fl. Brief, *supra* note 113, at 9.
330. *Id.*
331. *Id.* at 6.
332. *Id.* at 7.
333. *Id.* (internal quotations omitted).
334. *Id.*
335. *Id.*
336. *See Colorado v. New Mexico I*, 459 U.S. 176, 187 (1982).
337. Ga. Brief, *supra* note 122, at 26.
338. *Id.*
339. *Id.*
340. *Id.* at 26-27.
341. *See, e.g.*, Grace Trimble, *Facts About Water Use In Georgia and Metro Atlanta*, ATLANTA REG'L COMM'N (July 18, 2013), http://www.atlantaregional.com/about-us/news-press/press-releases/facts-about-water-use-in-georgia-and-metro-atlanta.
342. 2010 Ga. Laws 732, 732-45 (enacting S.B. 370, 150th Gen. Assemb., 2009-2010 Reg. Sess.).

the conservation of critical freshwater supplies."[343] Among other things, the act (i) requires high efficiency plumbing in all new residential and commercial construction; (ii) created the Joint Committee on Water Supply to study new opportunities for enhancing water supply; and (iii) requires public water systems to conduct annual water loss audits.[344] In 2011 Georgia also invested three hundred million dollars in the Governor's Water Supply Program, designed to fund critical and cost effective water supply projects.[345] Georgia will likely claim that efforts such as these have reduced the water amount it has used from the ACF Basin in recent years. There is also evidence that per capita water use in metro Atlanta and the surrounding counties has decreased in recent years.[346] A 2011 study conducted by the Metropolitan North Georgia Water Planning District found that although Georgia's population continues to increase, "[i]ndividual water use dropped from about 149 gallons per day in 2000 to 102 gallons in 2009."[347]

Even if Georgia can prove the effectiveness of its conservation initiatives, a major obstacle in its way is Florida's impressive conservation track record, which should factor into the Court's conservation analysis.[348] Florida has long been a "national frontrunner in reclaiming water [. . .] reus[ing] more water than any other state."[349] In 2010 alone, "Florida conserved more than 121 billion gallons of fresh potable quality water and replenished more than 80 billion gallons of recycled water back into aquifers as a result of water reuse."[350] Further, Florida arguably has no duty to conserve water from the ACF Basin. Florida does not seek to divert water, it only wants a more natural flow restored to the Apalachicola River and Bay. Thus, Florida's water demand stems from its natural environment and ecosystems needs, not anthropogenic water supply.

Another hurdle that Georgia, and Atlanta specifically, must overcome is the unfortunate truth that Atlanta is simply a city situated without a sufficient water source.[351] In fact, Metropolitan Atlanta has the smallest watershed of any major metropolitan area in the United States.[352] Only about one thousand square miles of land lie in the watershed above Lake Lanier to capture the rainwater and send it downstream.[353] If Atlanta continues to grow, it would seem that no amount of conservation could prevent harm to states south of Georgia that depend on the basin's water.

At present, the conservation factor likely weighs in Florida's favor. There does not seem to be any way that Georgia can show that Florida's current conservation measures

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343. Brian Kiepper & Jason Evans, *2010 Georgia Water Stewardship Act*, UNIV. OF GA. COLL. OF AGRIC. AND ENVTL. SCI. (May 2010), *available at* http://www.caes.uga.edu/unit/occs/resources/water/pdf/Georgia-Water-Stewardship-Act.pdf.

344. *Id.*

345. Lauren Joy, *Time for Georgia to Recommit to Water Conservation and Regional Plans*, SAPORTA REPORT (Feb. 24, 2013, 1:55 PM), http://saportareport.com/blog/2013/02/time-for-georgia-to-recommit-to-water-conservation-and-regional-plans/.

346. *Less Water Use in Atlanta amid Georgia's Water Wars with Alabama, Florida*, AL.COM (Oct. 19, 2013), http://blog.al.com/wire/2013/10/less_water_use_in_atlanta_amid.html.

347. *Id.*; *see, e.g.*, Trimble, *supra* note 341.

348. *See Colorado v. New Mexico II*, 467 U.S. 310, 314 (1984).

349. PGillespie1, *Florida Celebrates Water Reuse Week May 19-25*, DEP NEWS (May 17, 2013), http://depnewsroom.wordpress.com/2013/05/17/florida-celebrates-water-reuse-week-may-19-25/.

350. *Id.*

351. *See 10 Facts About the Chattahoochee River*, CHATTAHOOCHEE RIVERKEEPER, http://www.chattahoochee.org/river-facts.php (last visited Oct. 2, 2014).

352. *Id.*

353. *Recreation*, CHATTAHOOCHEE RIVERKEEPER, http://www.chattahoochee.org/recreation.php (last visited Sept. 27, 2014).

are unreasonable or inefficient. Though Georgia has recently implemented various conservation initiatives, it is unclear how the Court would view the significance of the steps taken. Further, the Court may simply find that Georgia's efforts are too little and too late to compensate for the existing harm Florida has suffered as a result of Georgia's previous water usage.

Though the conservation factor likely weighs in Florida's favor, it is important to note that *Colorado v. New Mexico I and II* and the potential suit between Florida and Georgia are distinguishable in two important ways. First, *Colorado v. New Mexico I and II* involved two prior appropriation states,[354] whereas the current case involves a riparian and a hybrid state. Second, in *Colorado v. New Mexico I and II*, the state seeking to divert water sought equitable apportionment,[355] whereas in the current dispute the state seeking to enjoin diversion seeks equitable apportionment. These differences are important because Colorado's failure to prove adequate conservation measures essentially doomed its case.[356] Under prior appropriation law, Colorado had no right to the water it sought to divert, and when Colorado was unable to show that conservation could offset the harm to the senior user New Mexico, the court dismissed the case.[357] However, in the ACF dispute there is no argument that Georgia is entitled to at least some portion of the ACF Basin's water. Further, Georgia is not the petitioning state here. Thus, if the Court finds that the conservation issue tips in Florida's favor, it would not likely dismiss the case.

4. Relevance of the Tri-State Water Wars History

If the Court were to preside over the equitable apportionment between the states, it is unlikely that the twenty-year procedural history surrounding the Tri-State Water Wars would go unnoticed.[358] While a complete historical recapitulation is unnecessary here, two procedural elements are highly likely to be relevant: (i) the ACF Compact's failure and (ii) the Eleventh Circuit's decision in *In re MDL-1824 Tri-State Water Rights Litigation.*

Frankly, the ACF Compact may have been doomed from the start, as it required unanimous consent on an allocation formula between all parties.[359] However, both Florida and Georgia will point fingers and claim that the other was primarily responsible for the compact's failure. Georgia will likely claim that it attempted in good faith to address Florida's economic, environmental, and ecological concerns by offering to establish a minimum flow to the Apalachicola River.[360] Florida rejected Georgia's proposal, which came just before the compact dissolved, after which Florida subsequently dropped out of negotiations and made its first threat to bring the issue to the Supreme Court.[361]

Florida, on the other hand, will likely assert that the compact negotiations were compromised "[d]ue in large part to . . . secret negotiations between the Corps and Georgia concerning issues Florida had reason to believe would be addressed in good faith solely within the ACF Compact negotiations."[362] Moreover, Florida can assert that

354. *Colorado v. New Mexico I*, 459 U.S. 176, 183 (1982).
355. *Id.* at 177.
356. *Colorado v. New Mexico II*, 467 U.S. 310, 321 (1984).
357. *Id.* at 324.
358. *See supra* Part II.
359. Apalachicola-Chattahoochee-Flint River Basin Compact, *supra* note 61.
360. Grant, *supra* note 147, at 402.
361. *Id.* at 402-03.
362. *Apalachicola-Chattahoochee-Flint River System (ACF) Timeline of Action As of July 27,*

it was within its right to reject the minimum flow proposal, as the state has been firm in its demand for a natural flow down to the Apalachicola Bay.[363] Exactly how the Court would factor the failed compact into the equitable apportionment analysis is unclear. However, if the Court were to find that one state was unreasonable in refusing to negotiate or even acted in bad faith while negotiating, it may weigh negatively against that party.

Despite the failed compact, Georgia will surely assert that the Eleventh Circuit's *In re MDL-1824 Tri-State Water Rights Litigation* decision firmly cemented the state's right to use water from Lake Lanier and the Chattahoochee River.[364] Because the Eleventh Circuit found that water supply was an authorized purpose of the Buford Project, Georgia will likely argue that it has every right to that project's water.[365] To counter this argument, Florida has already asserted in its Complaint that the litigation did not touch on the issue of allocating the water between the states; rather, the litigation was concerned with the Corps' various obligations under federal statute.[366] Thus, Florida explained, "[t]he [Eleventh Circuit] litigation did not, and could not, address the fundamental problem facing Florida—Georgia's ever-increasing storage and use of water that has historically nourished the Apalachicola Region."[367] Further, Florida can point to the fact that both courts in the MDL case failed to address any and all "phase two" environmental issues at stake.[368]

In reality, the Tri-State Water Wars litigation has not reached a conclusion, as the Corps is still in the process of researching the proper water amount that it can supply to Georgia.[369] How will the Eleventh Circuit's holding affect equitable apportionment law? Perhaps the Court will find that the Eleventh Circuit's ruling weighs in Georgia's favor. Taken to its logical conclusion, the decision indicates that the water Georgia seeks to divert is contained in a project, an authorized purpose of which is to supply Georgia with water. Contrarily, the opinion left a great deal of discretion to the Corps to determine how much water could be and should be supplied to Georgia, and the Corps is a good ways away from coming to a final decision.

V. CONCLUSION

So who wins? At this stage, it is simply impossible to predict a "winner" in a potential equitable apportionment suit between the states. Superficially, many factors the Court has historically considered important seem to weigh in Florida's favor. The decrease in freshwater flow to the Apalachicola Bay seems to have injured Florida and this injury seems at some level to stem from Georgia's interference with Florida's reasonable use of the ACF Basin. Further, Georgia's water usage and conservation policies, although recently improving, may not be enough to offset the harm Florida has already

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2009, FL. DEP'T OF ENVTL. PROT., http://www.dep.state.fl.us/mainpage/acf/timeline.htm (last visited Sept. 27, 2014).

363. Grant, *supra* note 147, at 402.

364. *In re* MDL-1824 Tri-State Water Rights Litig., 644 F.3d 1160, 1192 (11th Cir. 2011); Ga. Brief, *supra* note 122, at 2.

365. *In re* MDL-1824 Tri-State Water Rights Litig., 644 F.3d at 1192.

366. Fl. Complaint, *supra* note 114, at 4.

367. *Id.*

368. *See id.*

369. *See* Memorandum from Earl Stockdale, Deputy Gen. Counsel of Dep't of the Army on Auth. to Provide Muni. and Indus. Water Supply from Buford Dam/Lake Lanier Project, Georgia to U.S. Army Corps of Eng'rs Chief of Eng'rs (June 25, 2012) (on file with author); *see also* Brief for the United States as Amicus Curiae at 22-23, Florida v. Georgia, No. 142, Orig. (U.S. filed Sept. 18 2014).

experienced due to lack of water. However, the Tri-State litigation history may weigh in Georgia's favor. The Court may also find Georgia's "Man v. Mussel" position persuasive.

Perhaps a more important question than who will win is whether anyone can truly win. Florida seeks flow levels at least equivalent to those in 1992 to help revitalize the injured Apalachicola region. Georgia wants a yet unspecified amount of water to keep its citizens hydrated and its state afloat. Meanwhile, Alabama will surely assert its right to water from the basin. Clearly there is insufficient water to keep *all* parties happy—but what if there is not enough water to keep *anybody* happy?