

# WARS BETWEEN THE STATES IN THE 21ST CENTURY: WATER LAW IN AN ERA OF SCARCITY

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## INTRODUCTION

Amidst record-breaking droughts, the southeastern region of the United States is facing serious concerns regarding water. Georgia's Lake Lanier, the principal source of drinking water for the metropolitan Atlanta area, reached a record low in December 2007 at 1,050.79 mean sea level, or approximately twenty feet below its full level.<sup>1</sup> In October of 2008, Lake Lanier was still seventeen feet below its full level.<sup>2</sup>

Until recently, water quantity was a problem more common in the western United States. However, significant growth and droughts in the Southeast have threatened a continued, reliable supply of water for residents and industry.<sup>3</sup> In Georgia's sixteen-county Metropolitan North Georgia Water Planning District alone, approximately 652 million gallons of water are used every day; the District predicts that population within the District will increase from four million in 2000, to nearly eight million by 2030.<sup>4</sup> Without adequate planning and conservation measures, the demands of population growth will lead to exhaustion of available water supplies as soon as 2017.<sup>5</sup> Although conservation and planning efforts are underway, water planning throughout the Southeast is at least partially dependent on the outcome of the ongoing "Tri-State Water Wars" litigation among Georgia, Florida, and Alabama.

This article takes a comprehensive look at the history and future of the Tri-State Water Wars litigation and its implications for water planning and water law in the eastern United States. First, in Part I, this article details the historical and ecological value of the river basins at issue. Next, Parts II and III provide an overarching explanation of the history of the controversy and seek to help the reader navigate the complex and unique procedural history and posture of this multi-jurisdictional litigation. Part IV addresses the history of water rights doctrines and compares the differing traditional views of the law east and west of the Mississippi River. Part V looks at how courts have resolved interstate water-allocation disputes. Part VI turns the reader's attention to the future of the Tri-State Water Wars litigation by

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1. U.S. Army Corps of Engineers, Mobile District, Lake Sidney Lanier: Frequently Asked Questions, <http://lanier.sam.usace.army.mil/faqs.htm> (last visited Mar. 18, 2009).

2. Stacy Shelton, *Georgia Drought Persists, But Not Panic*, ATLANTA J.-CONST., Oct. 3, 2008, available at [http://www.ajc.com/metro/content/metro/stories/2008/10/03/georgia\\_drought.html](http://www.ajc.com/metro/content/metro/stories/2008/10/03/georgia_drought.html).

3. Brenda Goodman, *Drought-Stricken South Facing Tough Choices*, N.Y. TIMES, Oct. 16, 2007, at A14.

4. METROPOLITAN NORTH GEORGIA WATER PLANNING DISTRICT'S WATER SUPPLY AND WATER CONSERVATION MANAGEMENT PLAN 2 (2003), available at [http://www.northgeorgiawater.com/files/WSWC\\_ExecSum.pdf](http://www.northgeorgiawater.com/files/WSWC_ExecSum.pdf).

5. *Id.* at 9.

looking at the jurisdiction of the U.S. Supreme Court. Finally, Part VII discusses a rather unusual, new strategy by Georgia to obtain increased water volume by calling for a modern survey of the state's northern boundary, a move that may result in a U.S. Supreme Court boundary dispute case. As this article explains, although this country's fight over water may be centuries old, the outcome of the new wars between the states in the East is anything but predictable.

## I. THE RIVER BASINS

Since the droughts of the 1980s, the states of Alabama, Florida, and Georgia have engaged in ongoing disputes over the waters of the shared Apalachicola-Chattahoochee-Flint (ACF) and Alabama-Coosa-Tallapoosa (ACT) river basins.<sup>6</sup> Both river systems have their headwaters in relatively close proximity to the fast-growing metropolis of Atlanta and supply water to significant industrial, commercial, and agricultural areas.<sup>7</sup> Additionally, both river systems rank among the most diverse ecosystems in the world.<sup>8</sup>

### A. *The ACF River Basin*

The ACF River Basin is the watershed of the ACF River System, which begins in north Georgia and flows into the Gulf of Mexico at Apalachicola Bay, Florida.<sup>9</sup> The basin covers more than twelve million acres (or roughly 19,600 square miles) throughout Georgia, Alabama, and Florida.<sup>10</sup> The river basin is dominated by Georgia, which comprises ninety percent of its population, holds seventy-five percent of the basin's land area, and

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6. See *Alabama v. U.S. Army Corps of Eng'rs*, 382 F. Supp. 2d 1301, 1304 (N.D. Ala. 2005) (describing Alabama's commencement of a suit against the U.S. Army Corps of Engineers in 1990 alleging mismanagement of the ACF and ACT river basins).

7. JONATHAN WATTS HULL, *THE WAR OVER WATER*, COUNCIL OF STATE GOVERNMENTS (2000), available at <http://www.csg.org/pubs/Documents/slc-0010-warwater.pdf>.

8. *Id.*

9. Brian D. Richter et al., *Ecologically Sustainable Water Management: Managing River Flows For Ecological Integrity*, 13 *ECOLOGICAL APPLICATIONS* 1, 218 (2003), available at <http://www.nature.org/initiatives/freshwater/files/eswm.pdf>. Additional information on the ACF Basin, including water flows, is available through the U.S. Army Corps of Engineers at <http://water.sam.usace.army.mil/acfframe.htm> (last visited Mar. 18, 2009).

10. CELESTE A. JOURNEY & J.B. ATKINS, *GROUND-WATER RESOURCES OF THE TALLAPOOSA RIVER BASIN IN GEORGIA AND ALABAMA—SUBAREA 5 OF THE APALACHICOLA-CHATTAHOOCHEE-FLINT AND ALABAMA-COOSA-TALLAPOOSA RIVER BASINS* 3 (1997), available at <http://pubs.usgs.gov/of/1996/ofr96-433/pdf/ofr96-433.pdf>.

accounts for slightly more than eighty percent of the water withdrawals.<sup>11</sup> The ACF provides water for approximately sixty percent of Georgia's population and about one-third of Georgia's irrigated agriculture.<sup>12</sup> The Chattahoochee River, which is largely impounded by reservoirs operated by the U.S. Army Corps of Engineers, begins in north Georgia at the base of the Appalachian Trail.<sup>13</sup> Metropolitan Atlanta derives most of its drinking water from Lake Lanier, a reservoir along the Chattahoochee, north of Atlanta.<sup>14</sup> Water collected at Lake Lanier flows south, through Buford Dam, past the city of Atlanta, toward LaGrange and Columbus, Georgia.<sup>15</sup> The Flint River originates just south of Atlanta's Hartsfield-Jackson International Airport and travels south through the agricultural portions of the state before joining with the Chattahoochee in the southwest corner of Georgia at Lake Seminole.<sup>16</sup> The water leaving Lake Seminole forms the Apalachicola River, which discharges into the Gulf of Mexico at the ecologically diverse Apalachicola Bay in Florida—an area that is mostly in conservation status and is very sparsely populated.<sup>17</sup>

The ACF basin became embroiled in the Water Wars when Georgia lobbied Congress to end navigation on the Apalachicola and Chattahoochee Rivers during times of drought because keeping the rivers navigable requires large releases from dams upstream.<sup>18</sup> Those releases, in turn, reduce the water available in dry weather for drinking water, wastewater assimilation, irrigation, recreation, and other uses in the Atlanta metropolitan area and agricultural areas south of Atlanta. Increased demands for consumptive water uses on the river system may threaten the ecology in Apalachicola Bay.<sup>19</sup> In terms of flow, the Apalachicola is the largest river in Florida, and it provides a natural habitat for many rare,

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11. *Id.*; J.B. Ruhl, *Water Wars, Eastern Style: Divvying Up the Apalachicola-Chattahoochee-Flint River Basin*, 131 J. CONTEMP. WATER RES. & EDUC. 47, 48 (2005).

12. METRO ATLANTA CHAMBER OF COMMERCE, FACT SHEET—INTERSTATE WATER CONFLICTS: GEORGIA-ALABAMA-FLORIDA, available at <http://www.metroatlantachamber.com/macoc/initiatives/img/tri-statefactsheet.pdf>.

13. JOURNEY & ATKINS, *supra* note 10.

14. Ruhl, *supra* note 11. Approximately 350 million gallons per day of that withdrawal are returned to the river downstream as treated wastewater. *Id.*

15. Andy Peters, *New water plan floats no one's boat*, FULTON COUNTY DAILY REPORT, June 17, 2008, at 1, 11.

16. HULL, *supra* note 7, at 2.

17. HULL, *supra* note 7, at 48–49. Approximately thirty-five percent of the freshwater input to the eastern Gulf of Mexico is supplied by the Apalachicola. *Id.*

18. Jefferson G. Edgens, *Thirst for Growth*, 16 FORUM FOR APPLIED RES. & PUB. POL'Y 1 (2001), available at <http://forum.ra.utk.edu/Archives/Spring2001/edgens.pdf>.

19. Dara H. Wilber, *Associations Between Freshwater Inflows and Oyster Productivity in Apalachicola Bay, Florida*, 35 ESTUARINE, COASTAL AND SHELF SCI. 179, 179 (1992).

threatened, and endangered plant and animal species along the River and in Apalachicola Bay.<sup>20</sup> Though there is disagreement as to the amount and significance of the reduction, Georgia's growth and increased consumption has led to a reduction in the downstream water flow.<sup>21</sup> Florida contends that the reduction in the Apalachicola River's downstream flow affects estuarine productivity because certain types of life in the estuary, such as oysters and mussels, require large fresh water flows to prevent excessive saltwater intrusion into the Bay.<sup>22</sup> Given this growth, Florida is also concerned with the amount of silt accumulating in the Bay—and associated dredging costs—which Florida maintains is largely attributable to growth across metropolitan Atlanta's red clay soil.<sup>23</sup> In essence, the dispute over the ACF is a classic fight among urban, agricultural, and rural areas of different states.<sup>24</sup>

### B. The ACT River Basin

The ACT basin is comprised of the Alabama, Coosa, and Tallapoosa Rivers.<sup>25</sup> The Coosa River begins at the confluence of the Oostanaula and Etowah Rivers in northwest Georgia, but approximately ninety percent of the river's length is located in Alabama.<sup>26</sup> There are a total of seven dams along the river in Alabama before the Coosa's confluence with the Tallapoosa River, all of which were built by the Alabama Power Company and which impound the Coosa River's natural flow for almost its entire length in Alabama.<sup>27</sup> Given its size and the land it traverses, the Coosa River Basin contains a plethora of biodiversity. For example, in the Middle Coosa River Watershed, approximately 280 occurrences of rare plant and animal species and natural communities have been documented, including seventy-three occurrences of twenty-three species that are under federal or

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20. Press Release, Florida Dep't of Env'tl. Prot., Florida Reaffirms Commitment to Protect Apalachicola River (July 30, 2003), <http://www.dep.state.fl.us/secretary/news/2003/july/0730.htm>.

21. METRO ATLANTA CHAMBER OF COMMERCE, *supra* note 12. According to the Metro Atlanta Chamber of Commerce, which advocates for Georgia's rights to the waters within its borders and its ability to accommodate future growth, total water supply withdrawals for metro Atlanta reduce flows at the Florida State line by just one to two percent on average. *Id.*

22. Wilber, *supra* note 19, at 188.

23. Florida Dep't of Env'tl. Prot., *supra* note 20.

24. See J.B. Ruhl, *Equitable Apportionment of Ecosystem Services: New Water Law for a New Water Age*, 19 J. LAND USE & ENVTL. L. 47, 48–49 (2003) (discussing how the U.S. Supreme Court will likely rule in cases involving an interstate water controversy).

25. U.S. Army Corps of Engineers, Alabama-Coosa-Tallapoosa River Data, *available at* <http://water.sam.usace.army.mil/actframe.htm> (last visited Mar. 19, 2009).

26. *Id.*

27. *Id.*

state protection.<sup>28</sup> The Tallapoosa River—formed by the confluence of McClendon Creek and Mud Creek in Paulding County, Georgia—runs from the southern end of the Appalachian Mountains in Georgia southward and westward into Alabama. The four hydroelectric dams on the Tallapoosa are important sources of electricity generation for Alabama Power (a unit of the Southern Company) and recreation for Alabama citizens.<sup>29</sup> Both the Coosa and the Tallapoosa Rivers end just northeast of the Alabama state capital, Montgomery, where they join in Alabama to form the Alabama River, which then empties into the Gulf of Mexico.<sup>30</sup>

## II. HISTORY OF THE CONTROVERSY

Under the Rivers and Harbors Act of 1945, the Army Corps of Engineers (Corps) received congressional approval to build the Jim Woodruff Dam, better known as Buford Dam, on the Chattahoochee River, thereby creating Lake Lanier.<sup>31</sup> The authorization for the project was amended by the Rivers and Harbors Act of 1946.<sup>32</sup> The construction of Buford Dam was completed in 1956.<sup>33</sup>

During the 1970s, the Corps permitted some water stored in Lake Lanier to be reserved for local water supply.<sup>34</sup> In fact, the Corps later allowed the withdrawal of water from Lake Lanier and the Chattahoochee River for a fee by contracting with several water supply providers, including the Atlanta Regional Commission (ARC); the cities of Cumming, Gainesville, and Buford, Georgia; Gwinnett County, Georgia; and the state of Georgia itself (collectively “Water Supply Providers”).<sup>35</sup> Then, in 1989, the Corps announced plans to seek congressional approval to enter into permanent water storage contracts with the Water Supply Providers to help meet the growing water demands of metropolitan Atlanta.<sup>36</sup> Having suffered droughts throughout the 1980s and concerned that the Corps’s plan

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28. *Identifying Rare Species in the Middle Coosa River Watershed*, NPS NEWS (Alabama Nonpoint Source Program Newsl.), 2004 Spring/Summer, at 3, available at <http://www.adem.state.al.us/Publications/Newsletters/NPS/newsletterspring041.pdf>.

29. LEAH RAWL ATKINS, DEVELOPED FOR THE SERVICE OF ALABAMA, THE CENTENNIAL HISTORY OF THE ALABAMA POWER COMPANY 1906–2006, at 154–55 (2006).

30. HULL, *supra* note 7.

31. Rivers and Harbors Act of 1945, ch. 19, § 59, Stat. 10, 17, Pub. L. No. 79-14, 59 Stat. 10 (partially codified at 33 U.S.C. § 603(a) (2000)).

32. Rivers and Harbors Act of 1946, Pub. L. No. 79-525, ch. 595, § 60, Stat. 634, 635 (1946).

33. *Se. Fed. Power Customers, Inc. v. Harvey*, 400 F.3d 1, 2 (D.C. Cir. 2005).

34. *Se. Fed. Power Customers, Inc. v. Caldera*, 301 F. Supp. 2d 26, 28 (D.D.C. 2004).

35. *Id.*

36. *Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d, 1117, 1122 (11th Cir. 2005).

would disrupt water flow to downstream states, Alabama and Florida opposed the plan.<sup>37</sup>

In 1990, Alabama filed suit against the Corps in the Northern District of Alabama to oppose the Corps's water plan, marking the beginning of what would become known as the Tri-State Water Wars.<sup>38</sup> In that same year, the litigation was stayed to allow for negotiations between the states.<sup>39</sup> The negotiations lasted throughout the 1990s as Georgia, Alabama, and Florida worked to form the ACF and ACT Compacts (collectively "Compacts"), which did not allocate water between the states but rather have been widely described as essentially agreements to agree.<sup>40</sup> In 1997, Georgia, Alabama, and Florida, with the approval of Congress and President Clinton, entered into the ACF Compact,<sup>41</sup> and Georgia and Alabama entered into the ACT Compact.<sup>42</sup> The two Compacts, which contain identical language, had the stated purpose of "promoting interstate comity, removing causes of present and future controversies, equitably apportioning the surface waters of the [ACF/ACT], engaging in water planning, and developing and sharing common data bases."<sup>43</sup> Under the compacts, until an allocation formula was approved, water withdrawals, diversions, and consumption could continue, and even increase, to satisfy water demands.<sup>44</sup> The states voted to extend the ACF and ACT Compacts several times, but both compacts expired in September 2003 and August 2004 respectively, with no permanent agreements having been reached.<sup>45</sup>

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37. *Se. Fed. Powers Customers, Inc.*, 301 F. Supp. 2d at 29.

38. *Alabama v. U.S. Army Corps of Eng'rs*, 382 F. Supp. 2d 1301, 1304 (N.D. Ala. 2005).

39. *U.S. Army Corps of Eng'rs*, 424 F.3d at 1123.

40. Josh Clemons, *Interstate Water Disputes: A Roadmap for States, National Sea*, 12 SE. ENVTL. L.J. 115, 137 (2004).

41. Apalachicola-Chattahoochee-Flint River Basin Compact, Pub. L. No. 105-104, 111 Stat. 2219 (1997) (codified at GA. CODE ANN. § 12-10-100 (1997); ALA. CODE § 33-19-1 (1997); FLA. STAT. § 373.71 (1997)) [*hereinafter* ACF Compact].

42. Alabama-Coosa-Tallapoosa River Basin Compact, Pub. L. No. 105-105, 111 Stat. 2233 (1997) (codified at GA. CODE ANN § 12-10-110 (1997); ALA. CODE § 33-18-1(1997)) [*hereinafter* ACT Compact].

43. ACF Compact, *supra* note 41, at art. I; ACT Compact, *supra* note 42, art. I.

44. ACF Compact, *supra* note 41, at art. VII; ACT Compact, *supra* note 42, art. VII.

45. In 1997, Congress approved the ACF Compact for the purpose of creating "an orderly process by which the three states would achieve a water allocation formula." *S. Fed. Powers Customers, Inc. v. Caldera*, 301 F. Supp. 2d 26, 29 (D.D.C. 2004). However, the compact expired on August 31, 2003 without an agreement. *Id.*; Press Release, Office of Gov. Bob Riley, Riley: Georgia Positions Unacceptable (Aug. 2, 2004), available at <http://www.governorpress.state.al.us/pr/pr-2004-08-02-01-watercompact.asp>.

## III. LITIGATION

In the past two decades, the Tri-State Water Wars have resulted in litigation that is perfect fodder for a law school civil procedure exam. It all began when Alabama—alleging concern about interference with its own growth primarily during low-flow conditions—was the first state to file suit.<sup>46</sup> In 1990, Alabama sued the Corps in the U.S. District Court for the Northern District of Alabama, arguing the Corps's plans to allocate water flow in the ACF and ACT basins would interfere with, and significantly affect, Alabama's water supply, irrigation, hydropower, and recreation.<sup>47</sup>

Meanwhile, Georgia sought to obtain more water for municipal and industrial use, primarily in the rapidly growing metropolitan-Atlanta area.<sup>48</sup> In 2000, the Governor of Georgia made a written water supply request to the Corps asking it to commit to making increased releases of water from Lake Lanier until 2030 to assure a reliable water supply to the growing metropolitan-Atlanta area.<sup>49</sup> After receiving no response for nine months, Georgia filed suit in the U.S. District Court for the Northern District of Georgia in February of 2001, arguing that the Corps was interfering with Georgia's use of its own water in Lake Lanier.<sup>50</sup> At about the same time, in December of 2000, a group of power companies brought suit in the U.S. District Court for the District of Columbia arguing that the Corps was managing water in Lake Lanier in such a way that it improperly inflated the price of electricity they were required to pay to hydropower producers.<sup>51</sup>

Noting the direct impact to its water—namely the ecological impact on Apalachicola Bay—Florida threw its hat into the ring and intervened in the

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46. *Alabama v. U.S. Army Corps of Eng'rs*, 382 F. Supp. 2d 1301, 1304 (N.D. Ala. 2005); *see also* Alabama Rivers Alliance, Water Wars Background, <http://www.alabamairivers.org/River%20Resources/water-wars/water-wars-background> (last visited Mar. 19, 2009) (describing how the use of litigation has forced the Corps to engage in comprehensive review of water allocation decisions).

47. *U.S. Army Corps of Eng'rs*, 382 F. Supp. 2d at 1304.

48. *Georgia v. U.S. Army Corps of Eng'rs*, 223 F.R.D. 691, 693 (N.D. Ga. 2004).

49. *Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1247 (11th Cir. 2002).

50. *Georgia v. U.S. Army Corps of Eng'rs*, No. 2:01-CV-0026-RWS, Document 1, 36 (N.D. Ga. Feb. 7, 2001). Georgia sought (1) an order compelling the Corps to grant its water supply request; (2) a declaration that the Corps has the authority, without additional congressional authorization, to grant its request; (3) a declaration that the Corps is subject to state law insofar as it does not conflict with federal law and that state law mandates that the Corps grant the request; and (4) a declaration that, if applicable federal law prohibits the Corps from granting Georgia's request, then such federal law is unconstitutional on its face or as applied to the Corps. *Id.*

51. *Se. Fed. Power Customers, Inc. v. Caldera*, 301 F. Supp. 2d 26, 30 (D.D.C. 2004).

litigation.<sup>52</sup> Florida adopted a position seemingly diametrically opposed to Georgia's theories and interests, and brought claims under the Endangered Species Act of 1973 (ESA).<sup>53</sup> Pointing to the diverse ecology of Apalachicola Bay, Florida argued that reducing the downstream flow of Lake Lanier would seriously threaten many endangered species, including species of mussels, oysters, and gulf sturgeon, as well as the Bay's fishing economy as a whole.<sup>54</sup> Additionally, in *Georgia v. U.S. Army Corps of Engineers*, Florida argued that Georgia's lawsuit was wholly improper, as the ACF Compact was designed to be the exclusive mechanism to resolve disputes in the basin.<sup>55</sup> In fact, one of the major difficulties in the water compact negotiations was that, while Georgia and Alabama were willing to guarantee a specific minimum river flow for Florida, Florida rejected that plan on the basis that natural fluctuations in flow are necessary to protect the ecology in the Bay.<sup>56</sup>

Although the primary parties in the litigation are the three states themselves, other interested parties have intervened, including the Lake Lanier Association and the Atlanta Regional Commission (ARC), which includes the cities of Atlanta, Gainesville, and Marietta, as well as the counties of Fulton, DeKalb, and Cobb.<sup>57</sup> In an effort to reconcile conflicting opinions on the magnitude of the problem, and relying on the National Environmental Policy Act (NEPA),<sup>58</sup> the ARC urged the Corps to conduct a comprehensive scientific study of the hydrology of the ACF basin, specifically looking at the impacts of water withdrawals from Lake Lanier on downstream users.<sup>59</sup>

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52. *See* *Se. Fed. Power Customers, Inc. v. U.S. Army Corps of Eng'rs*, No. 1:00CV02975 (D.D.C. Oct. 9, 2003) (order granting Florida's motion to intervene); *Alabama v. U.S. Army Corps of Eng'rs*, No. 1:90-cv-01331 (N.D. Ala. Sept. 10, 2003) (order granting Florida's motion to intervene).

53. Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2000); *see also* Florida's Memorandum in Support of Motion for Preliminary Injunction on Endangered Species Act Claims at 4, *Alabama v. U.S. Army Corps of Eng'rs*, No. 1:90-cv-01331 (N.D. Ala. Jan. 31, 2006) (moving for a preliminary injunction against the Corps to comply with the Endangered Species Act); *Alabama v. U.S. Army Corps of Eng'rs*, 441 F. Supp. 2d 1123, 1135 (N.D. Ala. 2006) (finding that the State of Alabama failed to establish a substantial likelihood of success on the merits, as required to obtain a temporary restraining order, by claiming that an unlawful "take" of protected mussels arose under the ESA).

54. Florida's Memorandum in Support of Motion for Preliminary Injunction on Endangered Species Act Claims at 4, *Alabama v. U.S. Army Corps of Eng'rs*, No. 1:90-cv-01331 (N.D. Ala. Jan. 31, 2006) (moving for a preliminary injunction against the Corps to comply with the Endangered Species Act); *U.S. Army Corps of Eng'rs*, 441 F. Supp. 2d at 1125.

55. *Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1248 (N.D. Ga. 2004).

56. *Id.* at 1250.

57. *Georgia v. U.S. Army Corps of Eng'rs*, 223 F.R.D. 691, 692 (N.D. Ga. 2004).

58. 42 U.S.C. §§ 4321–4370 (2000).

59. Peters, *supra* note 15, at 11.

*A. The Alabama Case: State of Alabama v. United States Army Corps of Engineers*<sup>60</sup>

In 1990, Alabama filed suit against the Corps in the Northern District of Alabama (Alabama Court) challenging the Corps's management of Carters Lake and Lake Allatoona, part of the ACT, and Lake Lanier, part of the ACF.<sup>61</sup> Alabama, which is downstream from those reservoirs and relies on water from the ACT and ACF river basins, alleged that it was being injured by the Corps's mismanagement of the water resources.<sup>62</sup> Specifically, Alabama alleged that the Corps failed to comply with NEPA<sup>63</sup> because it did not properly assess the environmental impacts before it entered into contracts with the Water Supply Providers for withdrawals from Lake Lanier.<sup>64</sup>

Within a month after the filing, Florida—which like Alabama relies on the downstream flow of the ACF—sought to intervene as a plaintiff; Georgia and the ARC sought to intervene as defendants on the side of the Corps.<sup>65</sup> In September of 1990, Alabama and the Corps jointly moved for a stay of proceedings (1990 Stay) in an attempt to negotiate an agreement between the parties and the proposed intervenors, Florida and Georgia.<sup>66</sup> As a condition of the 1990 Stay, the Corps agreed not to execute any contracts regarding the subject of the action without written permission from Alabama and Florida.<sup>67</sup> The stay was granted and several times extended.<sup>68</sup> As such, litigation in the Alabama case remained dormant until 2003.

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60. *Alabama v. U.S. Army Corps of Eng'rs*, No. 1:90-cv-01331 (N.D. Ala. filed June 28, 1990).

61. *Alabama v. U.S. Army Corps of Eng'rs*, 382 F. Supp. 2d 1301, 1304 (N.D. Ala. 2005).

62. *Id.*

63. *Id.* Under NEPA, all agencies must create an environmental impact statement for all “[f]ederal actions significantly affecting the quality of the human environment are required to produce a detailed statement by the responsible official.” 42 U.S.C. § 4322(2)(C) (2000).

64. *U.S. Army Corps of Eng'rs*, 382 F. Supp. 2d at 1321.

65. *Id.* at 1304.

66. *Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1123 (11th Cir. 2005).

67. *Id.*

68. *U.S. Army Corps of Eng'rs*, 382 F. Supp. 2d at 1305.

*B. The D.C. Case: Southeastern Federal Power Customers, Inc. v. Caldera*<sup>69</sup>

In December of 2000, Southeastern Federal Power Customers, Inc. (SeFPC)—a consortium of electric power suppliers who purchase hydropower generated at Buford Dam on Lake Lanier—filed suit against the Corps in the U.S. District Court for the District of Columbia (D.C. Court).<sup>70</sup> SeFPC alleged that the Corps was without authority to allow the withdrawal of water from Lake Lanier for local and industrial usage because water supply benefits were not an authorized purpose of the Buford Dam project.<sup>71</sup> Pursuant to the Water Supply Act of 1958,<sup>72</sup> the Corps charges beneficiaries of projects, such as Buford Dam and Lake Lanier, for the benefits provided.<sup>73</sup> The charges are calculated based on “the ratio of the quantity of water allocated to storage for a particular use to the cost of a project’s construction and operation.”<sup>74</sup> SeFPC argued that the Corps was overcharging for hydropower generated by Buford Dam because the prices had not been adjusted to reflect the increased withdrawals for water supply, which diminished the amount of water flowing through Buford Dam to generate hydropower.<sup>75</sup> Further, SeFPC sought an injunction compelling the Corps to limit the uses of Buford Dam and Lake Lanier to those authorized by statute or, in the alternative, to grant SeFPC financial concessions to make up for the inequity in its payment schedule.<sup>76</sup>

In February of 2001, Georgia and the Water Supply Providers moved to intervene.<sup>77</sup> The next month, SeFPC and the Corps agreed to allow Georgia and the Water Supply Providers to participate in mediation.<sup>78</sup> In 2003, after nearly two years of negotiations, SeFPC, the Corps, Georgia, and the Water Supply Providers reached a settlement agreement (D.C. Agreement), under which the Corps agreed to enter into interim contracts with the Water Supply Providers to lease them water storage space in Lake Lanier.<sup>79</sup> In return, the Water Supply Providers would pay higher fees for the storage to

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69. *Se. Fed. Power Customers Inc. v. Caldera*, No. 1:00-cv-02975 (D.D.C. filed Dec. 12, 2000).

70. *Se. Fed. Power Customers, Inc. v. Caldera*, 301 F. Supp. 2d 26, 30a (D.D.C. 2004).

71. *Id.*

72. 43 U.S.C. § 390b (2000).

73. *Se. Fed. Power Customers, Inc.*, 301 F. Supp. 2d at 29.

74. *Id.*

75. *Alabama v. U.S. Army Corps of Eng’rs*, 424 F.3d 1117, 1124 (11th Cir. 2005).

76. *Se. Fed. Power Customers, Inc.*, 301 F. Supp. 2d at 30.

77. *Se. Fed. Power Customers, Inc. v. Harvey*, 400 F.3d 1, 2 (D.C. Cir. 2005).

78. *Se. Fed. Power Customers, Inc.*, 301 F. Supp. 2d at 30.

79. *Se. Fed. Power Customers, Inc.*, 400 F.3d at 3.

compensate SeFPC for lost hydropower.<sup>80</sup> The interim contracts were issued for a period of ten years, with the option to renew for ten years, but the Corps would seek authorization from Congress to make them permanent contracts.<sup>81</sup> The parties filed the D.C. Agreement with the court on January 16, 2003.<sup>82</sup>

### C. *The Alabama and D.C. Cases Converge*

In the same month that the D.C. Agreement was filed, Alabama and Florida revived the Alabama Case when the states asked the Alabama Court for a preliminary injunction and declaration that the D.C. Agreement was null and void in violation of the 1990 Stay.<sup>83</sup> Alabama and Florida then moved to intervene in the D.C. Case to challenge the D.C. Agreement, claiming that the Corps lacked the necessary statutory authority to enter into the D.C. Agreement, and that the terms of the D.C. Agreement violated a number of federal statutes, including NEPA and the ESA.<sup>84</sup>

In September of 2003, eight months after the D.C. Agreement was filed, the Corps gave the required notice to unilaterally trigger the end of the 1990 Stay in the Alabama Case.<sup>85</sup> On October 15, 2003, the Alabama Court found that the Corps had violated the 1990 Stay by entering into the D.C. Agreement and entered a preliminary injunction prohibiting the Corps from filing or implementing the D.C. Agreement or entering into any other new storage or withdrawal contracts affecting the ACF.<sup>86</sup>

In November of 2003, notwithstanding its October 15, 2003 order, the Alabama Court ordered that all activity in the Alabama Case be stayed until the judge in the D.C. Case issued an order deciding the validity of the D.C. Agreement.<sup>87</sup> The D.C. Court then held a hearing in which SeFPC, the Water Supply Providers, the Corps, and Georgia argued in favor of the D.C. Agreement.<sup>88</sup> Alabama and Florida, which had been permitted to intervene in the D.C. Case, opposed the D.C. Agreement arguing that it violated various federal environmental statutes.<sup>89</sup>

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80. *Id.*

81. *Id.*; Alabama v. U.S. Army Corps of Eng'rs, 424 F.3d 1117, 1124 n.9 (11th Cir. 2005).

82. *Se. Fed. Power Customers, Inc.*, 400 F.3d at 3.

83. *U.S. Army Corps of Eng'rs*, 424 F.3d at 1124; Alabama v. U.S. Army Corps of Eng'rs, 382 F. Supp. 2d 1301, 1305 (N.D. Ala. 2005); *Se. Fed. Power Customers, Inc.*, 301 F. Supp. 2d at 30.

84. *Se. Fed. Power Customers, Inc.*, 301 F. Supp. 2d at 30–31.

85. *U.S. Army Corps of Eng'rs*, 424 F.3d at 1125.

86. *U.S. Army Corps of Eng'rs*, 382 F. Supp. 2d at 1306.

87. *U.S. Army Corps of Eng'rs*, 424 F.3d at 1125; *Se. Fed. Power Customers, Inc.*, 400 F.3d at 3.

88. *U.S. Army Corps of Eng'rs*, 424 F.3d at 1126.

89. *Id.*

In February of 2004, the D.C. Court entered an order (D.C. Order) declaring that the D.C. Agreement was “valid and approved, and may be executed and filed and thereafter performed in accordance with its terms; provided, however, that the preliminary injunction entered by the Northern District of Alabama Court on October 15, 2003, is first vacated.”<sup>90</sup> Then, notwithstanding that its approval of the D.C. Settlement expressly depended on the Alabama Court lifting its injunction, the D.C. Court dismissed the D.C. Case as moot in light of the settlement.<sup>91</sup>

#### *D. D.C. Appeals*

Alabama and Florida appealed the D.C. Court’s approval of the D.C. Agreement.<sup>92</sup> In March of 2005, the U.S. Court of Appeals for the D.C. Circuit issued an opinion holding that the lower court’s February 2004 decision did not render all claims moot because it only conditionally approved the D.C. Agreement, and the Alabama Court could still decide to lift the preliminary injunction.<sup>93</sup> The D.C. Circuit also vacated the lower court’s dismissal of the D.C. Case, saying that it was not a final decision on the merits.<sup>94</sup> Finally, because the D.C. Order was not final, the D.C. Circuit dismissed the appeal for lack of appellate jurisdiction.<sup>95</sup>

In 2006, the D.C. Court entered final judgment,<sup>96</sup> and another appeal ensued. In February of 2008, the D.C. Circuit found for Alabama and Florida, holding that, under the Water Supply Act of 1958,<sup>97</sup> the Corps must obtain prior congressional approval before undertaking “major . . . operational changes.”<sup>98</sup> Further, because the D.C. Agreement’s reallocation of Lake Lanier’s storage space constituted a major operational change on its face and was not authorized by Congress, the D.C. Circuit reversed the D.C. Court’s approval of the D.C. Agreement.<sup>99</sup> In May of 2008, the D.C.

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

91. *U.S. Army Corps of Eng’rs*, 424 F.3d at 1126 n.13.

92. *Se. Fed. Power Customers, Inc.*, 400 F.3d at 2.

93. *Id.* at 4.

94. *Id.* at 5.

95. *Id.*

96. *Se. Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316, 1320 (D.C. Cir. 2008).

97. 43 U.S.C. § 390b (2000).

98. *Se. Fed. Power Customers, Inc.*, 514 F.3d at 1318.

99. *Id.*

Circuit denied a petition for rehearing.<sup>100</sup> Georgia petitioned the U.S. Supreme Court for a writ of certiorari on August 13, 2008.<sup>101</sup>

In November 2008, the Department of Justice (DOJ) filed its response to the State of Georgia's petition. Surprisingly, the DOJ acknowledged that the D.C. Circuit erred in setting aside the settlement agreement. The DOJ conceded that the D.C. Circuit "inaccurately determined the percentage change in the allocation of water" at Lake Lanier, and "improperly resolved" the "intensely factual question" of whether the implementation of the proposed settlement agreement would result in a major operational change.<sup>102</sup> Despite these assertions, the DOJ's brief urged the U.S. Supreme Court to deny certiorari for three reasons. First, the DOJ argued that the Corps has yet to take any final agency action regarding water allocation so that there is no administrative record to review, and therefore, hearing the case would "be both unnecessary and premature."<sup>103</sup> Second, the DOJ asserted that the decision below did not involve a question of substantial importance, arguing that there is "no conflict among the courts of appeals on the requirements of the Water Supply Act or the definition of major . . . operational change," and that the "precise issues presented here are very unlikely to recur."<sup>104</sup> Finally, the DOJ contended that the D.C. Circuit correctly applied precedent when it determined that Alabama and Florida had standing.<sup>105</sup>

The U.S. Supreme Court denied Georgia's petition for writ of certiorari on January 12, 2009,<sup>106</sup> a development that the governors of Georgia, Alabama, and Florida appear to interpret very differently. In a press release issued the day of the Supreme Court's denial of Georgia's petition, Georgia governor Sonny Perdue said, "[w]hile we are disappointed with the Supreme Court's decision today to not correct a flawed ruling by the D.C. Circuit, it is important to remember that this decision simply maintains the status quo in terms of the operation of Lake Lanier by the

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100. *Se. Fed. Power Customers v. Geren*, No. 06-5080 (D.C. Cir. May 15, 2008) (order denying petition for rehearing).

101. *Georgia v. Florida*, No. 08-199, 2008 WL 3833287 (S. Ct. Aug. 13, 2008) (petition for writ of certiorari).

102. Brief for the Federal Respondents in Opposition at 5, *Georgia v. Florida*, No. 08-199 (S. Ct. 2009) (arguing that although the lower court erred in its fact-finding, it was not so erroneous as to require additional review).

103. *Id.* at 8-9 (expressing concern that the factual record was largely undeveloped and incomplete).

104. *Id.* at 10.

105. *Id.* at 11-12.

106. *Georgia v. Florida*, No. 08-199, 2009 WL 56204, at \*1 (2009).

Army Corps of Engineers.”<sup>107</sup> Alabama’s Governor Bob Riley, on the other hand, said the decision

confirms that federal law does not permit Atlanta to take more and more water from Lake Lanier to the detriment of downstream interests in Alabama and Florida . . . Georgia tried to pull off a massive water grab, and this decision makes it clear that Georgia’s actions were in blatant violation of federal law.<sup>108</sup>

Like the governor of Alabama, Governor Charlie Crist of Florida applauded the Supreme Court’s decision to deny Georgia’s petition for writ of certiorari, saying “[t]his action will allow Florida to continue our efforts to help protect the adequate flow of freshwater in the Apalachicola River.”<sup>109</sup> In light of the Supreme Court’s decision, the February 2008 D.C. Circuit decision, which reversed the lower court’s approval of the D.C. Agreement reasoning that reallocation of Lake Lanier’s storage space constituted a major operational change requiring Congressional authorization, stands.

### *E. Alabama Appeals*

In December of 2003, Georgia, the Corps, and the ARC (which was not yet a party) appealed the Alabama Court’s October 15, 2003 preliminary injunction order.<sup>110</sup> In April of 2004, the Eleventh Circuit decided that, because the D.C. Court’s order approving the D.C. Settlement was issued during the pendency of the appeal in the Alabama case, it would stay the appeal to permit the Corps, Georgia, and Gwinnett County to file a motion in the Alabama Court seeking “dissolution or modification of the preliminary injunction based upon the D.C. Order.”<sup>111</sup> In February of the following year, the Alabama Court declined to dissolve the injunction.<sup>112</sup> Finding that the D.C. Order had not caused any change in circumstances that would justify lifting the injunction, the Alabama Court explained:

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107. Press Release, Office of the Governor of Georgia, Statement from Governor Sonny Perdue Concerning Denial of Supreme Court Review of Water Cases (Jan. 12, 2009) (on file with author).

108. Press Release, Office of the Governor of Alabama, U.S. Supreme Court Hands Major Victory to Alabama in Water War Litigation (Jan. 12, 2009) (on file with author).

109. Press Release, Office of the Governor of Florida, Statement by Governor Charlie Crist Regarding Today’s Decision by the United States Supreme Court (Jan. 12, 2009) (on file with author).

110. *Alabama v. U.S. Army Corps of Eng’rs*, 382 F. Supp. 2d 1301, 1306 (N.D. Ala. 2005) (appealing the preliminary injunction).

111. *Alabama v. U.S. Army Corps of Eng’rs*, 424 F.3d 1117, 1126 (11th Cir. 2005).

112. *Alabama v. U.S. Army Corps of Eng’rs*, 357 F. Supp. 2d 1313, 1320–21 (N.D. Ala. 2005) (denying Georgia’s and the Corps’s motions to dissolve the preliminary injunction granted October 15, 2005), *vacated by U.S. Army Corps of Eng’rs*, 424 F.3d at 1117 (voiding preliminary injunction granted in *Alabama I* and order denying motion to dissolve granted in *Alabama II*).

This court entered the injunction at issue because Alabama and Florida succeeded on the merits of demonstrating that negotiations that led to the D.C. agreement violated this court's September 19, 1990 stay [o]rder and, therefore, was unenforceable as against public policy; the injunction was necessary to prevent irreparable injury; the potential harm caused by the settlement agreement outweighed any harm the injunction might cause the defendants; and the injunction was not adverse to the public interest.<sup>113</sup>

Although the Alabama Court also recognized that the 1990 Stay was vacated by the Corps's September 2003 notice to that effect, it accorded that fact no weight because the Corps's "transgression" had already occurred.<sup>114</sup>

On a subsequent appeal in 2005, the Eleventh Circuit held that the Alabama Court's October 15, 2003 order granting the preliminary injunction against the D.C. Agreement and its February 18, 2005 order refusing to dissolve the injunction were abuses of discretion.<sup>115</sup> In vacating the injunction, the court found that Alabama and Florida did not establish either an "imminent threat of irreparable harm" or a "substantial likelihood of prevailing on the merits."<sup>116</sup> Both states petitioned the U.S. Supreme Court for certiorari, which the Court denied.<sup>117</sup>

In early 2006, Florida filed a motion for a preliminary injunction of ESA claims in the Alabama Court. The motion was denied for failure to show that the Corps's actions constituted an unlawful "take" of federally protected species.<sup>118</sup> Then, in April of 2007, all claims in the Alabama Case relating to the ACF River Basin were transferred to the Middle District of Florida to be consolidated with three other cases as the Tri-State Water Rights Litigation.<sup>119</sup> The ACT claims remained in the Northern District of Alabama, where they are still pending.<sup>120</sup>

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113. *U.S. Army Corps of Eng'rs*, 357 F. Supp. 2d at 1317.

114. *Id.* at 1317 n.3.

115. *U.S. Army Corps of Eng'rs*, 424 F.3d at 1136.

116. *Id.* at 1133.

117. *Alabama & Florida v. U.S. Army Corps of Eng'rs*, 547 U.S. 1192 (2006) (denying certiorari).

118. *Alabama v. U.S. Army Corps of Eng'rs*, 441 F. Supp. 2d 1123, 1124 (N.D. Ala. 2006).

119. *In re Tri-State Water Rights Litigation*, No. 3:07-md-00001 (M.D. Fla. Mar. 21, 2007) (multi-district litigation transfer order).

120. *See Alabama v. U.S. Army Corps of Eng'rs*, No. 1:90-cv-01331 (N.D. Ala. Apr. 19, 2007) (remanding with instructions that Florida and Alabama state with specificity in their filings which agency actions they are challenging and what statutory authority they are basing the claims upon).

*F. The Georgia Cases: Georgia v. U.S. Army Corps of Engineers*

In 2000, Georgia asked the Corps to set aside more water from Buford Dam until the year 2030 to assure a reliable municipal and industrial water supply to the Atlanta region. The Corps failed to act on Georgia's request and in February of 2001, after waiting approximately nine months for a response from the Corps, Georgia filed suit against the Corps in the Northern District of Georgia (Georgia Court).<sup>121</sup> Georgia sought:

(1) an order compelling the Corps to grant its water supply request; (2) a declaration that the Corps has the authority, without additional congressional authorization, to grant the request; (3) a declaration that the Corps is subject to state law, which mandates that the Corps grant Georgia's request; and (4) a declaration that, if applicable federal law prohibits the Corps from granting Georgia's requests, then such federal law is unconstitutional on its face or as applied by the Corps.<sup>122</sup>

Florida then filed a motion to intervene as a defendant and simultaneously filed a motion to dismiss or abate the proceedings.<sup>123</sup> Florida contended that Georgia was seeking to effect a de facto partial apportionment of the water in the ACF Basin in violation of the ACF Compact.<sup>124</sup> Additionally, Florida asserted that if Georgia's requests were granted, less water would be available for uses in Florida.<sup>125</sup> The Northern District of Georgia Court denied Florida's motion to intervene on the ground that it had no legal interest in the controversy since it involved only intrastate water allocation.<sup>126</sup> The court explained that the case would not impair Florida's ability to protect its interests via the ACF Compact or an equitable apportionment claim in the U.S. Supreme Court.<sup>127</sup>

SeFPC also filed a motion to intervene as a defendant. It argued that, unlike hydropower, municipal and industrial water supply is not an established purpose of the Buford Dam project, and that granting Georgia's Water Supply request would reduce the availability of hydropower to

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121. *Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1247 (11th Cir. 2002).

122. *Id.* at 1248.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

SeFPC's members.<sup>128</sup> Because the case involved only the legal standards applicable to Lake Lanier and the legal relationship between the Corps and Georgia with respect to water allocation, SeFPC's motion to intervene was denied.<sup>129</sup> The Georgia Court further noted that denying SeFPC's motion to intervene would not preclude SeFPC from enforcing its rights under its contracts with the Corps.<sup>130</sup>

In August of 2002, the Eleventh Circuit reversed the Georgia Court's denial of Florida's and SeFPC's motions to intervene and remanded the case.<sup>131</sup> The court reasoned that "[a]lthough the remedy sought in Georgia's lawsuit may occur within Georgia's borders, it will have a practical effect upon water flowing in the Chattahoochee River . . . to which Florida has a right."<sup>132</sup>

However, before the Eleventh Circuit's decision in April of 2002, the Corps denied Georgia's water supply request, saying it lacked "legal authority to grant Georgia's request without additional legislative authority, because the request would involve substantial effects on project purposes and major operational changes."<sup>133</sup> Subsequently, motions to intervene by the Lake Lanier Association, Alabama, and the Water Supply Providers were granted, and *Georgia I*<sup>134</sup> was abated and administratively closed pending final judgment in the Alabama case.<sup>135</sup> In April 2007, the case was transferred to the Middle District of Florida for consolidation in the Tri-State Water Rights Litigation.<sup>136</sup>

In another case filed in June of 2006, *Georgia v. Army Corps of Eng'rs* (Georgia II),<sup>137</sup> the State of Georgia sought judicial review of the Corps's issuance of its March 2006 "Interim Operations at Jim Woodruff Dam and Release to the Apalachicola River In Support of Listed Mussels and Gulf Sturgeon" (IOP).<sup>138</sup> The IOP was issued in connection with the Corps's initiation of formal consultation with the U.S. Fish and Wildlife Service

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128. *Id.*

129. *Id.* at 1249.

130. *Id.*

131. *Id.* at 1242.

132. *Id.* at 1251.

133. *Id.* at 1249.

134. *Georgia v. U.S. Army Corps of Eng'rs*, No. 2:01-cv-00026 (N.D. Ga. Feb. 7, 2001).

135. *Georgia v. U.S. Army Corps of Eng'rs*, No. 2:01-cv-00026 (N.D. Ga. July 20, 2004) (order granting motion to abate proceeding and motion to intervene).

136. *In re Tri-State Water Rights Litigation*, No. 3:07-md-00001 (M.D. Fla. Mar. 21, 2007).

137. See Brief in Support of Motion for TRO at 8, *Georgia v. U.S. Army Corps of Eng'rs*, No. 1:06-cv-01473-CAP (N.D. Ga. June 21, 2006).

138. *Id.* at 19-20 (requiring formal agency consultation to determine whether reservoir management practices were adversely affecting the endangered "fat threeridge," threatened "purple bankclimber," and the threatened Gulf sturgeon species).

(FWS) under § 7 of the ESA.<sup>139</sup> The IOP established certain rules for the Corps's operation of the federal reservoirs in the ACF, including Lake Lanier, for the purpose of providing sufficient flow for three different aquatic species.<sup>140</sup> Georgia, however, argued that the IOP involved the release of too much water, that it was arbitrary and capricious, and that it exceeded the Corps's authority.<sup>141</sup> Alabama, and the water supply providers were then allowed to intervene.<sup>142</sup> *Georgia II* was subsequently transferred to the Middle District of Florida for consolidation in the Tri-State Water Rights Litigation.<sup>143</sup>

### G. *In re Tri-State Water Rights Litigation*<sup>144</sup>

In the spring of 2007, *Georgia I*, *Georgia II*, and the ACF Claims in the Alabama Case were consolidated in the Middle District of Florida (Florida Court), along with *Florida v. U.S. Fish and Wildlife Serv.* (Florida Case).<sup>145</sup> Judge Paul A. Magnuson of the District of Minnesota was appointed to hear the consolidated case. In the Florida Case, the State of Florida sought review of a September 2006 biological opinion (BiOp) by the FWS concluding consultation with the Corps pursuant to § 7 of the ESA.<sup>146</sup> The BiOp addressed the impact of the Corps's reservoir operations on the three protected ACF species discussed in the IOP.<sup>147</sup> The BiOp concluded that the IOP was not likely to adversely affect the species.<sup>148</sup> Florida argued that the BiOp was arbitrary and capricious, and sought an injunction directing FWS to withdraw the BiOp and prepare a new opinion that fully complies with the ESA.<sup>149</sup>

In one of the first substantive motions in the consolidated Tri-State Water Rights Litigation, Alabama and Florida requested that the Florida

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139. Endangered Species Act, 16 U.S.C. §§ 1531, 1536(a)(2) (2006).

140. *But see* Brief in Support of Motion for TRO, *supra* note 137, at 8 (arguing that unless the IOP is revised, there will be an inadequate supply of water to the Chattahoochee River).

141. Complaint at 5, *Georgia v. U.S. Army Corps of Eng'rs*, No. 2:06-cv-0026-WCO (N.D. Ga. June 20, 2006).

142. *U.S. Army Corps of Eng'rs*, No. 2:06-cv-0026-RWS, at 11-13 (N.D. Ga. July 20, 2006).

143. *Id.*

144. *In re Tri-State Water Rights Litigation*, No. 3:07-md-00001 (M.D. Fla. transferred Mar. 21, 2007).

145. Complaint for Declaratory and Injunctive Relief, *Florida v. U.S. Fish and Wildlife Serv.*, No. 4:06-410 (N.D. Fla. filed Sept. 6, 2006).

146. *Id.* at 22-23 (finding by FWS that the Corps' activities presented no significant harm to the critical habitat of the ACF species).

147. *Id.*

148. *Id.*

149. *Id.* at 24.

Court find the Corps in contempt for entering into the D.C. Agreement.<sup>150</sup> However, the court denied the motion finding that sanctions were inappropriate because Alabama and Florida failed to meet the clear and convincing standard.<sup>151</sup>

In light of the D.C. Circuit's February 2008 decision that some of the water-supply contracts constitute a major operational change for which the parties are required to seek Congressional approval, and in light of the issuance of the revised IOP and BiOP, the Florida Court ordered in August of 2008 that it would first consider the statutory authorization issues, followed by the BiOp issues.<sup>152</sup> As such, summary judgment motions have been filed with the Florida Court in "Phase I" regarding whether allocation of water in Lake Lanier to municipal water supply is authorized by existing congressional legislation. The Florida Court will hear oral arguments on the Phase I summary judgment motions on May 11, 2009.<sup>153</sup>

#### *H. Potential Future Litigation*

On June 19, 2008, the Florida Department of Environmental Protection sent a sixty-day notice of intent to sue pursuant to the ESA.<sup>154</sup> This was Florida's fourth such letter since 2004.<sup>155</sup> The letter indicated Florida's intent to sue the Corps for violations of §§ 7 and 9 of the ESA "arising from the Corps's management of reservoirs in the Apalachicola-Chattahoochee-Flint River Basin."<sup>156</sup> The letter alleged that "[t]he Corps' operation continues to jeopardize the threatened Gulf sturgeon, endangered fat threeridge, and threatened purple bankclimber" (species of fish).<sup>157</sup>

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150. *In re* Tri-State Water Rights Litigation, No. 3:07-md-00001 (M.D. Fla. Aug. 13, 2007) (order denying motion for order to show cause).

151. *Id.*

152. *In re* Tri-State Water Rights Litigation, No. 3:07-md-00001 (M.D. Fla. Aug. 12, 2008) (order granting motion to lift suspension of the present scheduling order and flip phases one and two).

153. *In re* Tri-State Water Rights Litigation, No. 3:07-md-00001 (M.D. Fla. Feb. 23, 2009) (amended motion hearing notice).

154. Letter from Michael Sola, Fla. Dep't of Env'tl. Prot. to Federal Officials (June 19, 2008) (providing 60-day notice of intent to sue pursuant to the Endangered Species Act) (on file with the Vermont Journal of Environmental Law).

155. *Id.* at 1.

156. *Id.* (citing 16 U.S.C. §§ 1536(c), 1538(b) (2006)).

157. *Id.*

## IV. BRIEF HISTORY OF WATER RIGHTS DOCTRINES

This article does not attempt to predict the outcome of the procedurally and substantively complex Tri-State Water Rights Litigation. Rulings in the various courts to date have focused on congressional authorizations, and therefore on federal water management issues. However, the litigation raises issues of water rights, both those of the states involved, and those of the riparian users of the water in the two river basins involved. A discussion of water law that may be applicable to those issues is therefore useful.

Historically, water disputes are more common in the dry western states, where water is generally scarcer than in the eastern states.<sup>158</sup> With dramatic increases in population and recent climate changes, however, eastern states are seeing increasing controversies involving water law and allocation.<sup>159</sup> Georgia, Florida, and Alabama—now firmly entrenched in the “Tri-State Water Wars”—are at the forefront of the issue.<sup>160</sup>

Water disputes are often discussed in terms of East versus West because two separate water rights doctrines have developed for apportioning intrastate waters, the application of which simply depends on whether the state is to the west or east of the Mississippi River.<sup>161</sup> States west of the Mississippi generally follow the prior appropriation doctrine.<sup>162</sup> Under the prior appropriation doctrine, water rights are acquired and maintained through actual use of the water for a beneficial purpose.<sup>163</sup> Thus, the prior appropriation doctrine is based on the “rule of priority,” or a first in time, first in right, system of allocation.<sup>164</sup> When water resources

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158. Bryan Hobson, Interstate Water Disputes, Encyclopedia of Alabama, (Mar. 27, 2008), <http://encyclopediaofalabama.org/face/Article.jsp?id=h-1498> (discussing traditionally “bountiful” supplies of the eastern U.S.). See, e.g., Victor Brajer et al., *The Strengths and Weaknesses of Water Markets as They Affect Water Scarcity and Sovereignty Interests in the West*, 29 NAT. RESOURCES J. 489, 489 (1989) (“[W]ater scarcity has presented problems in Western States since well before the settlement of this area by the United States . . .”); All Business, Drought Magnifies Importance of U.S.-Mexico Water Disputes (April 17, 2002), <http://www.allbusiness.com/north-america/mexico/175326-1.html>.

159. See JONATHAN WATTS HULL, THE WAR OVER WATER, REGIONAL RESOURCE (2000), available at <http://www.csg.org/pubs/Documents/slc-0010-warwater.pdf> (focusing on the regional water shortages in the southern U.S.).

160. *Id.*; Hobson, *supra* note 158.

161. See, e.g., Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882) (discussing the evolution of the prior appropriation doctrine); see also Christopher L. Len, *A Brand New Water Law*, 8 U. DENV. WATER L. REV. 55, 59–60 (2004) (exploring the bifurcation of U.S. water doctrine).

162. See Colorado v. New Mexico, 459 U.S. 176, 179 n.4 (1982) (differentiating doctrines of prior appropriation and riparian in water rights).

163. *Id.*

164. *Id.*

become scarce, a senior appropriator is entitled to his full share of the water, and a junior appropriator is only entitled to the remaining amount, if any.<sup>165</sup>

In eastern states, including Georgia,<sup>166</sup> Florida,<sup>167</sup> and Alabama,<sup>168</sup> surface water is allocated according to a system of riparian rights,<sup>169</sup> which evolved from English common law.<sup>170</sup> A “riparian owner” historically was defined as one who owns land on the bank of a river or stream, whereas a “littoral owner” referred to one who owns land abutting an ocean, sea, or lake.<sup>171</sup> Under the riparian doctrine:

[T]he owner of land contiguous to a watercourse is entitled to have the stream flow by or through his land undiminished in quantity and unpolluted in quality, except that any riparian proprietor may make whatever use of the water that is reasonable with respect to the needs of other appropriators.<sup>172</sup>

In other words, riparian rights originate from land ownership, remain vested even if unexercised, and are subject to the reasonable uses of others.<sup>173</sup> Unless modified by statute, riparian water rights cannot be sold or transferred apart from the adjoining land, and water cannot be transferred out of the watershed. And while a landowner can make a reasonable use of

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165. See *Erickson v. Queen Valley Ranch Co.*, 99 Cal. Rptr. 446, 448–49 (1971) (finding no continued beneficial use when prior appropriator partially forfeits use of water rights); Steven T. Miano & Michael E. Crane, *Eastern Water Law: Historical Perspectives and Emerging Trends*, 18 NAT. RESOURCES & ENV'T 14 (2003) (“When water supplies are short and not all users can be accommodated, water users lose their supply in reverse order, with the junior-most user losing its entire allocation before the next-most junior user loses any of its allocation.”).

166. GA. CODE ANN. § 51-9-7 (2000).

167. FLA. STAT. § 253.141 (2003).

168. ALA. CODE § 9-10B-27 (2008).

169. *Colorado v. New Mexico*, 459 U.S. at 179 n.4.

170. See *Kansas v. Colorado*, 206 U.S. 46, 64 (1907) (discussing the evolution of the system of riparian rights from the common law due to society’s recognition that water use is a necessity and its specific use for irrigation is a recognizable need).

171. *Dorroh v. McCarthy*, 462 S.E.2d 708 (Ga. 1995) (internal quotations omitted). However, please note that riparian rights grow out of ownership of the banks of a stream, not ownership of its bed. See *Moulton v. Bunting McWilliams Post No. 658, Veterans of Foreign Wars*, 102 S.E.2d 593, 595 (Ga. 1958) (“riparian owner [is] one having land bounded on a stream of water, as such owner having a qualified property in the soil to the thread of the stream . . .”).

172. *Colorado v. New Mexico*, 459 U.S. at 179 n.4; see also *Haynes v. Carbonell*, 532 So. 2d 746, 748 (Fla. Dist. Ct. App. 1988) (“[r]iparian rights are legal rights incident to lands bounded by navigable waters and are derived from the common law as modified by statute.”) (internal quotations omitted).

173. *Colorado v. New Mexico*, 459 U.S. at 179 n.4.

the water on his or her land, any downstream users have a right to have the water remain clean and to have sufficient supply for their needs.<sup>174</sup> If there is not enough water to satisfy all users, allotments are generally fixed in proportion to frontage on the water source.

In light of recent droughts, population increases and other factors, the Eastern view of water rights has come under scrutiny through the recent litigation. Florida—and its supporters—claim that just because Georgia is upstream it has “no inherent right to deplete the flow of water to Florida, or take priority over Florida in the use of the ACF waters, or use interstate waters within its boundaries however it sees fit.”<sup>175</sup> Alabama’s law finds that landowners have “a right to the reasonable use of the running water,” but the right is qualified, not absolute, and therefore “must be enjoyed with reference to the similar rights of other riparian proprietors.”<sup>176</sup> By contrast, “Georgia’s water rights law is based on the natural flow theory of riparian rights doctrine modified by a reasonable use provision.”<sup>177</sup> Thus, every riparian owner is entitled to the reasonable use of the water and to have a stream pass over his or her land according to its natural flow, subject to other riparian owners’ reasonable use of the water.<sup>178</sup> Given this, Georgia argues, so long as its use is *reasonable*, even if it is increasing over past years’ use, there is nothing improper about Georgia’s actions. In fact, Georgia argues that if a newer use is deemed to be more reasonable or necessary, a senior riparian user may lose the majority—if not all—of its existing flow.<sup>179</sup> Under Georgia’s view of the riparian system of water allocation, downstream users, including Alabama and Florida, find themselves at a disadvantage.<sup>180</sup>

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174. See *Martin Marietta Materials Sw., Ltd. v. St. Paul Guardian Ins. Co.*, 145 F. Supp. 2d 794, 799 (N.D. Tex. 2001) (stating that riparian owners do not have “an unrestricted license” to use water).

175. Ruhl, *supra* note 11, at 50.

176. *Cove Properties, Inc. v. Walter Trent Marina, Inc.*, 702 So. 2d 472, 475 (Ala. Civ. App. 1997).

177. *Stewart v. Bridges*, 292 S.E.2d 702, 704 (Ga. 1982); *Pyle v. Gilbert*, 265 S.E.2d 584, 587 (Ga. 1980).

178. *Stewart*, 292 S.E.2d at 704. In fact, pursuant to GA. CODE ANN. § 51-9-7 (2000), a landowner has the right to have nonnavigable watercourse flow through his land with its natural and usual flow, subject only to the diminution from other riparian owners’ reasonable use. Therefore, Georgia courts hold that it is a trespass if another landowner or individual obstructs, diverts, or pollutes a stream.

179. See *Erickson v. Queen Valley Ranch Co.*, 99 Cal. Rptr. 446, 450–51 (1971) (finding that in cases of water surplus, reasonableness is an inadequate basis to support diversion by a later appropriator); see also *In re Waters of Long Valley Creek Stream System*, 599 P.2d 656, 666 n.10 (Cal. 1979) (stressing the importance of reasonable use in riparian rights system); see also *Miano & Crane*, *supra* note 165, at 16 (describing shortcomings in the riparian system).

180. *But see Georgia v. U.S. Army Corps of Eng’rs*, 223 F.R.D. 691, 696 (N.D. Ga. 2004) (recognizing the legal rights of downstream water users).

## V. RESOLVING INTERSTATE WATER ALLOCATION DISPUTES

During the eighteen years of litigation over water rights in the ACF and ACT basins, Alabama, Florida, and Georgia have avoided a lawsuit by one state against another. While such a lawsuit presumably would resolve water allocation issues between and among the states, they have chosen other ways to settle these controversies.

There are four principal ways in which to resolve interstate water allocation disputes. First, the states can negotiate a resolution and seek congressional approval of the same.<sup>181</sup> After Alabama started the litigation wars by suing the Corps in 1990, Georgia, Florida, and Alabama attempted to resolve their water allocation issues in this way by negotiating and entering into the ACF and ACT Compacts.<sup>182</sup> Both compacts subsequently failed.<sup>183</sup> Second, Congress can exercise its Commerce Clause power to allocate water via statute.<sup>184</sup> For political reasons, however, this option is rarely exercised.<sup>185</sup>

Third, litigation can be brought in lower federal courts under other federal laws, such as the National Environmental Policy Act (NEPA)<sup>186</sup> and the ESA,<sup>187</sup> as has been the case with the Tri-State Water Rights Litigation.<sup>188</sup> In such cases, even though states may intervene to oppose one another, they do not necessarily come within the U.S. Supreme Court's exclusive, original jurisdiction over "all controversies between two or more States."<sup>189</sup>

Lastly, one state may sue another in the U.S. Supreme Court under its original jurisdiction to resolve disputes between states.<sup>190</sup> The Eleventh Circuit held that "to invoke the Supreme Court's original and exclusive jurisdiction, 'a plaintiff State must first demonstrate that the injury for

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181. U.S. CONST. art. I, § 10. Georgia, Florida, and Alabama tried this option with the ACF and ACT Compacts, which terminated in 2003 and 2004, respectively.

182. See *Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1246–47 (11th Cir. 2002) (discussing the different states' objectives in the negotiations of the compacts).

183. *Id.* The ACF and ACT Compacts terminated in 2003 and 2004, respectively. METRO ATLANTA CHAMBER OF COMMERCE, FACT SHEET—INTERSTATE WATER CONFLICTS: GEORGIA—ALABAMA—FLORIDA, <http://www.metroatlantachamber.com/macoc/initiatives/img/tri-statefactsheet.pdf>.

184. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have power to . . . regulate commerce . . . among the several states . . ."); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982).

185. See *Sporhase*, 458 U.S. at 960 (emphasizing Congress's traditional deference to states in water disputes).

186. 42 U.S.C. §§ 4321–4370f (2006).

187. 16 U.S.C. §§ 1531–1599 (2006).

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

189. 28 U.S.C. § 1251(a) (2000).

190. U.S. CONST. art. III, § 2; 28 U.S.C. § 1251(a) (2006).

which it seeks redress was directly caused by the actions of another State.”<sup>191</sup> The Supreme Court lacks original jurisdiction over actions where the state itself is a party of record but does not seek to protect its own property or interests.<sup>192</sup> Rather, only when the state represents an interest of its own can it invoke the Supreme Court’s original jurisdiction.<sup>193</sup> In other words, there must be an actual controversy involving the state and its interest.<sup>194</sup> Although the states in *Georgia I* and the Alabama case did not seek relief from each other, or from harm caused by another state—“rather, each has a different view of how the Corps should fulfill its obligations under both federal law and the agreements it has entered [in other cases]”<sup>195</sup>—the option of the Supreme Court’s original jurisdiction is still available to the three states. However, invoking the Supreme Court’s jurisdiction would be a strategic move for the states specifically seeking a more equitable, rather than legal, approach to allocation of water.

## VI. ORIGINAL JURISDICTION IN THE SUPREME COURT

The U.S. Supreme Court has been hearing cases involving interstate water allocation for more than 100 years, beginning with the 1907 case of *Kansas v. Colorado*.<sup>196</sup> However, the dispute over the water in the ACF and ACT basins may very well provide the Supreme Court with what one commentator has dubbed “the first major interstate apportionment case the Court has entertained in the age of mature environmental statutory law.”<sup>197</sup>

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191. *U.S. Army Corps of Eng’rs*, 424 F.3d at 1130 (quoting *Georgia v. U.S. Army Corps of Eng’rs*, 302 F.3d 1242, 1256 n.11 (11th Cir. 2002)).

192. *See Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 446 (1945) (holding that Georgia’s bill of complaint set forth a “justiciable controversy” within the Supreme Court’s original jurisdiction).

193. *Massachusetts v. Missouri*, 308 U.S. 1, 17–18 (1939).

194. *See, e.g., Kansas v. Colorado*, 206 U.S. 46, 66 (1907) (describing the sovereign power of states). The rule that there must be an actual controversy involving a state “is strictly enforced in order to prevent the proliferation of essentially private disputes on the Supreme Court’s original docket.” 8 FED. PROC., L. ED. § 20:273 (2005) (citing *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387 (1938)); *see also North Dakota v. Minnesota*, 263 U.S. 365, 375–76 (1923) (noting that the Eleventh Amendment precludes states from initiating actions for damages against other states when the damage award will be turned over to residents of the suing state).

195. *U.S. Army Corps of Eng’rs*, 424 F.3d at 1130.

196. *Kansas v. Colorado*, 206 U.S. at 97–98.

197. Ruhl, *supra* note 11, at 48–49.

The U.S. Supreme Court has original jurisdiction over controversies between states, including those over the allocation of water resources.<sup>198</sup> Article III, Section 2 of the Constitution provides, in part: “The judicial Power shall extend . . . to Controversies between two or more States . . . . In all Cases . . . in which a State shall be Party, the [S]upreme Court shall have original Jurisdiction.”<sup>199</sup> The Supreme Court has said:

One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of *Missouri v. Illinois*<sup>200</sup> . . . the action of one State reaches, through the agency of natural laws, into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this [C]ourt is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.<sup>201</sup>

Because it has original jurisdiction over interstate water allocation disputes, the Supreme Court acts as a trial court.<sup>202</sup> However, if any state involved in the interstate water dispute wishes to bring such a suit, that state would face another hurdle: the Court has set a high standard of injury as a prerequisite to establish standing.<sup>203</sup> In order to invoke the Supreme Court’s original jurisdiction, the complaining state must advance clear and convincing evidence of a substantial injury as a result of another state’s allegedly improper use of the water.<sup>204</sup>

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198. See *In re Application for Water Rights of United States*, 101 P.3d 1072, 1087 (Co. 2004) (recognizing that federal questions over water allocations decided in state courts can be reviewed by the U.S. Supreme Court).

199. U.S. CONST. art III., § 2, cl. 1–2.

200. *Missouri v. Illinois*, 180 U.S. 208 (1901).

201. *Kansas v. Colorado*, 206 U.S. at 97–98 (referring to *Missouri v. Illinois*, 180 U.S. 208 (1901)).

202. See *State v. Hoskins*, 1877 WL 2917, at \*7 (N.C. 1877) (stating that the Supreme Court has original jurisdiction, as opposed to appellate jurisdiction, where a state is a named party).

203. See *Missouri v. Illinois*, 200 U.S. 496, 521 (1907) (“Before this [C]ourt ought to intervene the court’s reluctance to hear cases involving interstate water disputes unless ‘the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the [C]ourt is prepared deliberately to maintain against all considerations on the other side.’”).

204. *Id.*; see also *Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982) (holding that a state wishing to enjoin another state’s diversion of its water must prove “real or substantial injury or damage” from the diversion) (citations omitted).

Assuming that a state can jump this hurdle, it is likely that the Supreme Court would appoint a Special Master to gather facts, make findings and conclusions of law, and make recommendations to the Court.<sup>205</sup> Even so, the Court does not always follow the recommendations of the Special Master, and it may even remand the case for additional fact finding. This suggests that, without settlement, the Tri-State Water Wars would be far from over even if one of the states sues in the U.S. Supreme Court.<sup>206</sup>

In addition to the facts and recommendations provided by the Special Master, the Court sometimes considers the water rights doctrines followed by the party states for disputes arising within those states.<sup>207</sup> Addressing this issue, the Court has stated:

When, as in this case, both states recognize the doctrine of prior appropriation, priority becomes the “guiding principle” in an allocation between competing states. But state law is not controlling. Rather, the just apportionment of interstate waters is a question of federal law that depends “upon a consideration of the pertinent laws of the contending States and *all other relevant facts*.”<sup>208</sup>

Given the states’ rights and local concerns at issue, if the Tri-State Water Wars were to come before the Supreme Court, the Court would likely follow equitable apportionment, a federal common law doctrine that “governs disputes between States concerning their rights to use the water of an interstate stream.”<sup>209</sup> Equitable apportionment is “a flexible doctrine which calls for ‘the exercise of an informed judgment on a consideration of many factors’ to secure a ‘just and equitable’ allocation.”<sup>210</sup> The U.S. Supreme Court has said that its aim in applying the doctrine is “to secure a just and equitable apportionment ‘without quibbling over formulas.’”<sup>211</sup>

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205. *New Jersey v. New York*, 280 U.S. 533 (1930); *Connecticut v. Massachusetts*, 280 U.S. 523 (1929).

206. *See Colorado v. New Mexico*, 459 U.S. at 189 (criticizing the sufficiency of the lower court’s findings regarding the availability of conservation measures and its balancing of harms analysis concerning the proposed diversion of water from New Mexico).

207. *See id.* (arguing that equitable apportionment permits states to divert water for future use).

208. *Id.* at 183–84 (quoting *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945); *Connecticut v. Massachusetts*, 282 U.S. 660, 670–71 (1931)).

209. *Id.* at 183 (citing *Kansas v. Colorado*, 206 U.S. 46, 98 (1907); *Connecticut v. Massachusetts*, 282 U.S. 660, 670–71 (1931)).

210. *Id.* at 183 (quoting *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945)).

211. *Id.* at 183 (quoting *New Jersey v. New York*, 283 U.S. 336, 343 (1931)).

Further, the Court has identified several factors to be considered in applying the equitable apportionment doctrine to an interstate water dispute:

[P]hysical 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, [and] the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former.<sup>212</sup>

The Court first applied these factors in *Nebraska v. Wyoming*.<sup>213</sup> In that case, Nebraska, Wyoming, and Colorado, all prior appropriation states, were fighting over usage of the North Platte River.<sup>214</sup> Nebraska contended that irrigation diversions by upstream states Wyoming and Colorado both violated the rule of prior appropriation and deprived Nebraska of water to which it was equitably entitled.<sup>215</sup> In response, Wyoming and Colorado denied causing Nebraska any injury.<sup>216</sup> At the request of the states, the Court equitably apportioned the North Platte River by applying the aforementioned factors.<sup>217</sup>

In another case, *Pennsylvania v. West Virginia*, the U.S. Supreme Court addressed a situation where multiple states argued over the use of a single natural resource—natural gas.<sup>218</sup> In that case, Pennsylvania and Ohio argued that West Virginia's use of natural gas would either curtail or cut off their supply and thus violated the interstate Commerce Clause of the U.S. Constitution.<sup>219</sup> Specifically, Pennsylvania and Ohio argued that they used large amounts of gas in institutions and schools, and claimed that a disruption of the supply of natural gas would either interfere with the discharge of state functions or force the states to incur the cost of converting their heating equipment.<sup>220</sup> The Court held that the West Virginia law, which kept natural gas within the state's borders, was unconstitutional. Its enforcement would "subject the complainant states to

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212. *Id.* at 183–84 (quoting *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945)).

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

214. *Id.* at 591–92.

215. *Id.*

216. *Id.* at 592.

217. *Id.* at 618.

218. *Pennsylvania v. West Virginia*, 262 U.S. 553, 581 (1923).

219. *Id.* at 580–81.

220. *Id.* at 582–86, 590.

injury of serious magnitude,” and that it would otherwise “operate most inequitably against those states.”<sup>221</sup> Accordingly, the Court found in favor of Ohio and Pennsylvania.<sup>222</sup>

In summary, an original jurisdiction lawsuit in the U.S. Supreme Court is an available and viable option to the states of Georgia, Alabama, and Florida to resolve the Tri-State Water Rights Litigation. Moreover, U.S. Supreme Court precedent is illuminating, and highlights the Court’s tendency to rely on specific facts in finding equitable resolutions. It is likely that none of the states have chosen that route because its result is fraught with uncertainty because the allocation is based on the Court’s consideration of numerous equitable factors.

## VII. GEORGIA V. TENNESSEE: A DISPUTE IN THE MAKING

In an interesting turn of events which would bring yet another state into the ongoing dispute over water in the southeastern states, in February 2008, the Georgia General Assembly adopted a resolution calling for negotiations between the governors of Tennessee, Georgia, and North Carolina.<sup>223</sup> Georgia sought to move its border 1.1 miles north, and expressed the intention to file suit if negotiations did not occur or were unfruitful.<sup>224</sup> Georgia lawmakers argue that due to an erroneous 1818 survey, the boundary line was incorrectly placed further south than what Congress had established.<sup>225</sup> Georgia’s argument is based on three reasons: first, when Georgia was admitted to the Union in 1788, its northern boundary was fixed at the 35th parallel;<sup>226</sup> second, when Tennessee was created by an Act of Congress in 1796, Congress specified that the State’s southern boundary was the 35th parallel;<sup>227</sup> and third, that Georgia’s Code, section 50-2-3, specifically provides that Georgia’s northern border runs the 35th parallel of north latitude.<sup>228</sup> However, arguably due to the rudimentary science and

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221. *Id.* at 600.

222. *Id.*

223. S. Res. 822, 110th Leg. Reg. Sess. (Ga. 2008).

224. *Id.*; see also Crews Townsend et al., *Crossing the Line: Does the Georgia Plan to Redraw the Tennessee-Georgia Border Pass Legal Muster?*, 44 TENN. B.J. 14, 15–16 (2008) (outlining the history of the tri-state water saga, in which Georgia is currently trying to bring the Tennessee River within its border).

225. S. Res. 822, 110th Leg., Reg. Sess. (Ga. 2008).

226. Townsend et al., *supra* note 224, at 15.

227. *Id.*

228. See Water Policy Memorandum, William Bradley Carver et al., Tapping the Tennessee River at Georgia’s Northwest Corner: A Solution to North Georgia’s Water Supply Crisis, 6–8 (Feb. 2008), <http://www.hbss.net/www/pdf/publications/TappingtheTennesseeRiverFeb08.pdf> (citing 5 THE

technology available at that time (and legends of threats from nearby Indian tribes), the 1818 survey team was allegedly unable to properly locate the 35th parallel, resulting in a boundary line that Georgia claims is 1.1 miles off base.<sup>229</sup> Why bother with slightly more than a mile? The answer lies in a simple fact: moving the boundary line to the 35th parallel would place the Georgia state line directly in the center of the Tennessee River at Nickajack Reservoir.<sup>230</sup> This, Georgia lawmakers think, would provide Georgia with the ability to assert its riparian right to withdraw water from the Tennessee River in order to slake the thirst of metropolitan Atlanta.<sup>231</sup> Accordingly, Georgia's lawmakers argue that the current boundary line is incorrect.<sup>232</sup>

Although not amused, Tennessee was hardly surprised.<sup>233</sup> The Tennessee Valley Authority (TVA) conducted a study in 2004 determining that the Tennessee River could handle significant inter-basin transfers—approximately one billion gallons per day—without having an effect on existing water reservoir levels.<sup>234</sup> There is no effect because the average flow of the Tennessee River at the Nickajack Reservoir adjoining Dade County, Georgia is roughly fifteen times the average flow of the Chattahoochee River at Lake Lanier's Buford Dam, and four times that of the Savannah River in Augusta, Georgia.<sup>235</sup> However, at the same time that Georgia is facing rapid population growth, Tennessee is also concerned

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TERRITORIAL PAPERS OF THE UNITED STATES 142–46 (Clarence Carter ed., 1937)). Mr. Carver's work stated that in 1802, Georgia ceded the Mississippi Territory to the United States per an agreement which specifically noted the new border for Georgia would reach and cross the Tennessee River at Nickajack. *Id.* Georgia's lawmakers argue that the "intent was obviously to maintain Georgia's original sovereign riparian access to that river." *Id.* For a map of Georgia from 1796, please visit the Carl Vinson Institute of Government University of Georgia, [www.cviog.uga.edu/Projects/gainfo/histcountymaps/ga1796map.htm](http://www.cviog.uga.edu/Projects/gainfo/histcountymaps/ga1796map.htm) (last visited Mar. 21, 2009).

229. Greg Bluestein, *Drought Has Georgia Revisiting Border Dispute*, THE WASHINGTON POST, Feb. 10, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/09/AR2008020902283.html>.

230. Carver, *supra* note 228.

231. *Id.* at 7. Mr. Carver and his colleagues argue that although Tennessee has claimed the "faulty survey line to be the border," the state of Georgia has never officially accepted it and, in fact, has requested the mistake be corrected. *Id.* at 9. "In 1941, the Georgia General Assembly created a boundary line committee to resolve the dispute, however little was accomplished . . ." *Id.* at 10. The issue was revived in 1971, when the Georgia General Assembly enacted a joint resolution calling on then-Governor Jimmy Carter to speak with Tennessee's governor "for the purpose of resolving the boundary disputes . . . [and] creation of the Georgia-Tennessee Joint Boundary Line Commission." *Id.* In 1971, Mr. Hood was legal aide and chief research assistant for the Commission.

232. S. Res. 822, 110th Leg., Reg. Sess. (Ga. 2008).

233. Bluestein, *supra* note 229.

234. Carver, *supra* note 228, at 3.

235. *Id.*

with its water resources in light of its own growth.<sup>236</sup> A report prepared by the TVA and the U.S. Geological Survey Team shows that the Tennessee River watershed will add about 1.2 million more residents to the existing 4.7 million by 2030, significantly increasing pressure on the Tennessee Valley's water resources.<sup>237</sup> Presumably to save water for the state itself and prevent such inter-basin transfers, the State of Tennessee passed the Inter-Basin Water Transfer Act of 2000, specifically to block such water transfers to the state of Georgia.<sup>238</sup> Tennessee's Inter-Basin Water Transfer Act requires Tennessee's public water providers to acquire a permit for surface or groundwater withdrawals that are diverted outside the basin of origin and have the potential to affect the flow of a Tennessee surface water body.<sup>239</sup>

Despite the lengthy history of the boundary dispute, to date little progress has been made with regard to a resolution. Also, no litigation has ensued regarding Georgia's proposal. Should the dispute enter the court system; whether the case would immediately go to the U.S. Supreme Court under its original jurisdiction depends on the named parties.<sup>240</sup> As discussed previously, it is clear that a controversy between two or more states falls within the exclusive jurisdiction of the U.S. Supreme Court.<sup>241</sup> Accordingly, to protect its own interests, a state may bring an original action to protect a state instrumentality;<sup>242</sup> to prevent intervention with the performance of a contract in which the state has an interest;<sup>243</sup> or even to challenge a neighboring state's law that restricts the interstate shipment of natural resources.<sup>244</sup> Yet, a state may not invoke the Supreme Court's original jurisdiction for other state-related matters, such as challenging the

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236 *Id.* at 4 (stating that the metro Atlanta is one of the fastest growing urban areas in the country); Tennessee Valley Authority, Water Supply, <http://www.tva.gov/river/watersupply/> (last visited Mar. 21, 2009).

237. Tennessee Valley Authority, *supra* note 236.

238. TENN. CODE ANN. §§ 69-7-201 to -212 (2001); David Lewis Feldman, *Treading Political Water*, FORUM FOR APPLIED RES. & PUB. POL'Y 78, 79 (2001).

239. Feldman, *supra* note 238, at 79; TENN. COMP. R. & REGS. 1200-4-13.01 (2001).

240. *See Alabama v. U.S. Army Corps of Eng'rs*, 382 F. Supp. 2d 1301, 1309 (N.D. Ala. 2005). In that case, still pending in the system, Judge Bowdre wrote: "Even though the Supreme Court occasionally exercises original jurisdiction in interstate water disputes, 28 U.S.C. § 1251 circumscribes the Supreme Court's original jurisdiction based on the *identity of the parties* to a dispute, *not* based on the *subject* of the dispute between the parties." *Id.*

241. 28 U.S.C. § 1251(a) (2000) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.").

242. 8 FED. PROC., L. ED. § 20:273 (2005) (citing *Arkansas v. Texas*, 346 U.S. 368 (1953)).

243. *Id.*

244. *Id.* (citing *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), *aff'd*, 263 U.S. 350 (1923); *Wyoming v. Oklahoma*, 502 U.S. 437 (1992)).

constitutionality of tax laws of a neighboring state on the grounds that individual taxpayers rather than the state would be affected.<sup>245</sup>

Also, Tennessee and Georgia would be required to make a substantial showing that original jurisdiction is proper, as the Supreme Court has traditionally taken a very conservative stance on exercising its § 1251 jurisdiction:

We construe 28 U.S.C. § 1251(a)(1), as we do Art. III, section 2, cl. 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases . . . . We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer.<sup>246</sup>

The cases have made it clear that the Supreme Court's original jurisdiction is based upon the identity of the parties to the suit, not upon the subject matter implicated or issues raised.<sup>247</sup> Again, the Supreme Court only has exclusive jurisdiction where the states are, and remain, opponents in the controversy.<sup>248</sup> Thus, if the states are not actually adverse as parties in the controversy, the Supreme Court has original, but not exclusive, jurisdiction. Hence, it can decline to hear the case, leaving a district court to adjudicate the dispute—even where the states involved have differing interests.<sup>249</sup> A district court can even adjudicate a private dispute that would necessarily determine the boundary line between two states, although this adjudication is only binding on the private parties and not the states.<sup>250</sup>

Moreover, when a boundary dispute coincides with a water rights dispute, federal law will preempt state law—even if the parties attempt to

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245. *Id.* (citing *Pennsylvania v. New Jersey*, 426 U.S. 660, 664–66 (1976)); Wilber, *supra* note 19, at 188.

246. *Illinois v. City of Milwaukee*, 406 U.S. 91, 93–94 (1972).

247. *Alabama v. U.S. Army Corps of Engineers*, 382 F. Supp. 2d 1301, 1309 (N.D. Ala. 2005); see *United States v. Nevada*, 412 U.S. 534, 537 (1973) (holding that the Supreme Court did not have original jurisdiction where the United States sued two states who were not seeking relief from one another); see also *Georgia v. South Carolina*, 497 U.S. 376, 392 (1990) (“[T]his Court, not a Court of Appeals, is the place where an interstate boundary dispute usually is to be resolved.”) (internal citations omitted).

248. *United States v. Nevada*, 412 U.S. 534, 537–40 (1973); *California v. Nevada*, 447 U.S. 125, 133 (1979).

249. See *Nevada*, 412 U.S. at 538–40 (holding that there is no actual controversy between two states: “[w]e [the Supreme Court] seek to exercise our original jurisdiction sparingly and are particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim.”).

250. See *Mississippi v. Louisiana*, 506 U.S. 73, 78 (1992) (holding that the adjudication of a private action does not violate 28 U.S.C. §1251(a) (2000)).

bring the lawsuit as between private parties, for purposes of ultimately deciding an interstate water dispute.<sup>251</sup> In *Virginia v. Maryland*, the U.S. Supreme Court held that where a river forms the border between two states, it is governed by federal common law.<sup>252</sup> That case has interesting ramifications for an interstate water dispute where, as with the ACF basin dispute, two states share the same river as their boundary. In the case, Virginia sought a declaration that it had a right to withdraw water from the Potomac River, free from any regulation from Maryland.<sup>253</sup> A 1785 Compact between the two states provided that “[t]he citizens of each state . . . shall have full property in the shores of Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging . . . .”<sup>254</sup> However, the 1785 Compact—which was approved by Congress—did not determine the boundary line between the two states.<sup>255</sup> In 1933, Maryland established a permitting system for water withdrawal.<sup>256</sup> In 1996, the Fairfax County, Virginia, Water Authority sought permission to construct a water intake structure, which was opposed by Maryland officials.<sup>257</sup> Eventually, Virginia brought an original jurisdiction lawsuit.<sup>258</sup> Recognizing that control of the river has been disputed for nearly 400 years, the Supreme Court held that Virginia may withdraw water and construct improvements free of any other state’s regulation, despite a history riddled with Maryland issuing water withdrawal permits to Virginia residents.<sup>259</sup> The only way Maryland could demonstrate Virginia had acquiesced would be to show Virginia “failed to protest” Maryland’s assertion of sovereignty.<sup>260</sup> Because Virginia had in fact vigorously protested Maryland’s asserted authority, the Court found that Virginia had “explicitly asserted her sovereign riparian rights.”<sup>261</sup> This idea of acquiescence has implications for a potential lawsuit between Tennessee and Georgia, as it indicates that issues of acquiescence and equity will substantially influence the Court’s final holding.

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251. See *Idaho ex rel. Evans v. Oregon*, 444 U.S. 380 (1979) (recognizing that the U.S. does not have to be a party to a dispute in order for federal law to preempt).

252. *Virginia v. Maryland*, 540 U.S. 56, 74 n.9 (2003).

253. *Id.* at 64–74.

254. *Id.* at 62.

255. *Id.*

256. *Id.* at 63.

257. *Id.* at 63–64.

258. *Id.* at 60.

259. *Id.* at 60, 79.

260. *Id.* at 77.

261. *Id.* at 78.

If the dispute between Tennessee and Georgia should proceed to litigation, both side's arguments are supported by case law and each state's code.<sup>262</sup> On Georgia's side, the state's supporters point both to the U.S. Constitution and several boundary dispute cases.<sup>263</sup> Pointing to Article IV, Section 3 of the Constitution, Georgia argues that the consent of both state legislatures and Congress is required in order to move an established border. The pertinent provision provides:

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.<sup>264</sup>

Georgia argues that because there were no such acts—and because Georgia was admitted in 1788, eight years before Tennessee, with its border fixed as the 35th parallel—the erroneous survey could not change the congressionally established boundary.<sup>265</sup> Further, in 1981, the Federal Energy Regulatory Commission (FERC) determined that—for purposes of the Natural Gas Act—Georgia had sole jurisdiction of the supply of gas to a customer in the disputed boundary strip at the 35th parallel.<sup>266</sup> Georgia's supporters rely on this case as additional support because, in it, the FERC pointed to a 1974 decision on the same issue where a unanimous U.S. Court of Appeals for the D.C. Circuit stated:

In 1818, two mathematicians, James Camack and James S. Gaines, were commissioned by Georgia and Tennessee to

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262. See *Georgia v. Tennessee Copper Co.*, 237 U.S. 474, 477–78 (1915) (granting Georgia's request for an injunction reducing the amount of copper ore smelted in eastern Tennessee plants after a trial period passed and no viable method of containing fumes was implemented); see *Wisconsin v. Illinois*, 281 U.S. 696, 696 (1930) (enjoining Illinois and the city of Chicago from diverting water from Lake Michigan in excess of an annual average); see *New Jersey v. City of New York*, 284 U.S. 585, 586 (1931) (enjoining the City of New York from “dumping, or procuring or suffering to be dumped, any garbage or refuse, or other noxious, offensive, or injurious matter, into the ocean, or waters of the United States, off the coast of New Jersey” and instead directing the City of New York to construct additional incinerators to be used for the disposal of garbage and refuse); Townsend et al., *supra* note 224, at 15.

263. Townsend, *supra* note 224, at 17.

264. U.S. CONST., art. IV, § 3.

265. S. Res. 822, 110th Leg., Reg. Sess. (Ga. 2008); GA. CODE ANN. § 50-2-3 (2006); Townsend, *supra* note 224, at 15–16.

266. See *In re Atlanta Gas Light Company*, Docket No. CP71-221, 15 FERC ¶ 61240 (Apr.–Jun. 1981).

survey the 35th parallel north latitude in order to fix the boundary between the states. Had they done their job well this case would not be before us. Due, however, to poor instruments, the Camack-Gaines line ended up roughly one mile south of the 35th parallel. While Georgia did not ratify the survey, Tennessee did. To [sic] this day, the Georgia Code defines the boundary between Georgia and Tennessee as the 35th parallel, while the Tennessee Code insists that the boundary is the 35th parallel as found by Camack and Gaines, that is, the line one mile south of the parallel. The result is a strip of land which has been claimed by both states for 156 years. Citizens of the area live with numerous anomalies—real estate taxes may be paid to both states, people may go to school in one state while paying taxes in another, and so on.<sup>267</sup>

Tennessee, however, can point to a 1990 boundary dispute case where the Supreme Court found that islands emerging in the Savannah River did not change the mutually accepted boundary line between Georgia and South Carolina.<sup>268</sup> In the case of *Georgia v. South Carolina*, the Court was required to determine the ownership of a number of different areas found in and around the mouth of the Savannah River, which formed the boundary between Georgia and South Carolina.<sup>269</sup> That case shows that a boundary dispute is a very contentious, fact-specific inquiry.<sup>270</sup> The Court first recognized that “[i]naction, in and of itself, is of no great importance; what is legally significant is silence in the face of circumstances that warrant a response.”<sup>271</sup> After reviewing the facts at issue, the Court then held that “inaction alone may constitute acquiescence when it continues for a sufficiently long period.”<sup>272</sup> Thus, because Georgia was aware of South Carolina’s exercise of authority and sovereignty over certain barrier islands but failed to act, Georgia had relinquished control of those areas.<sup>273</sup>

In determining the boundary at another area, however, the Supreme Court relied upon principles of “equitable balance.”<sup>274</sup> Thus, although the survey may have misplaced the Georgia-Tennessee border, Tennessee could argue both that Georgia acquiesced to the border, or that Tennessee

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267. *Atlanta Gas Light Co. v. Fed. Power Comm’n*, 495 F.2d 1070, 1071 (D.C. Cir. 1974).

268. *Georgia v. South Carolina*, 497 U.S. 376, 408 (1990).

269. *Id.* at 379.

270. *Id.* at 392–93.

271. *Id.* at 389.

272. *Id.* at 393.

273. *Id.* at 392.

274. *Id.* at 408.

acquired the property through prescription.<sup>275</sup> This doctrine, contemplated by the framers of the U.S. Constitution,<sup>276</sup> has been developed under federal common law.<sup>277</sup> Under a prescriptive theory, Tennessee would attempt to show that Georgia has “acquiesced” to the current location of the boundary line through its inaction over the years.<sup>278</sup> However, Georgia would likely counter by stating that the record demonstrates there was not a long period of acquiescence, if any.<sup>279</sup> Yet determining whether Tennessee has acquired the property by prescription is a broad, fact-based determination that does not depend on the passage of a predetermined amount of time.<sup>280</sup> Rather, Tennessee must have engaged in meaningful conduct that evidences an actual exercise of sovereignty and control over the disputed area of land, while Georgia must have evidenced a concurrent failure to do so.<sup>281</sup>

As a result, Tennessee’s actual entry and occupation of the disputed land is paramount.<sup>282</sup> Factors the Court will consider in determining prescription include establishment of towns, taxation systems, and voting franchises in the disputed area.<sup>283</sup> In any litigation between Tennessee and Georgia, the Court will consider whether Georgia failed to properly engage in similar activities thus disputing Tennessee’s dominion over the land.<sup>284</sup> Similarly, the Court will also consider whether Georgia has engaged in legislative activity, formal protests, and judicial activity demonstrating its

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275. *See* *Virginia v. Tennessee*, 148 U.S. 503, 522–24 (1893) (recognizing acquiescence and prescription as conclusive to control and authority over disputed boundaries).

276. U.S. CONST., art. III, § 2. The Framers placed original jurisdiction in the Supreme Court to resolve disputes between states that include boundary disputes and trans-boundary water and pollution rights.

277. *See, e.g.*, *Wisconsin v. Illinois*, 281 U.S. 696, 696 (1930) (enjoining Illinois and the city of Chicago from diverting water from Lake Michigan in excess of an annual average); *New Jersey*, 284 U.S. 585, 586 (1931) (mandating the City of New York to take actions, such as the construction of additional incinerators, to prevent the polluting of New Jersey’s water and beaches).

278. *See Georgia v. South Carolina*, 497 U.S. at 389 (stating Georgia’s argument against South Carolina on the basis of acquiescence).

279. *See New Jersey v. Delaware*, 291 U.S. 361, 377 (1934) (“[a]cquiescence is not compatible with a century of conflict.”).

280. *See Georgia v. South Carolina*, 497 U.S. at 389–92 (considering the specific facts involved in an interstate dispute to fix a state boundary line).

281. *See New Jersey v. New York*, 523 U.S. 767, 787–89 (1998) (finding no minimum period of prescription necessary).

282. *See id.* at 790 (recognizing occupation as a factor in prescription); *see also Michigan v. Wisconsin*, 270 U.S. 295, 306 (1926) (recognizing Wisconsin’s sovereignty based on long occupation).

283. *See New Jersey v. New York*, 523 U.S. at 792 (prescription through the building of towns, roads, and the assessment of taxes); *see also Illinois v. Kentucky*, 500 U.S. 380, 385 (1991) (finding that taxing power is “one of the primary indicia of sovereignty”); *and Virginia v. Tennessee*, 148 U.S. 503, 515–16 (1893) (recognizing prescription through taxes and voting franchises).

284. *New Jersey v. New York*, 523 U.S. at 792; *Illinois v. Kentucky*, 500 U.S. at 385; *Virginia v. Tennessee*, 148 U.S. at 515–16.

disagreement with Tennessee over the boundary.<sup>285</sup> It must be remembered that the true location of the boundary line is not the sole determinative factor of the validity of a boundary line.<sup>286</sup> Thus, the timing and nature of Georgia's protests are probative to the ultimate issue: if Georgia, despite knowledge of circumstances that indicate Tennessee's exercise of dominion over the disputed boundary, has kept silent and has taken no affirmative action opposing such control, the Court very well might find that, despite the actual location of the boundary, Georgia has acquiesced to Tennessee's claim of ownership.<sup>287</sup>

Thus, there are several facts that the Court will have to evaluate to determine the boundary dispute—no single one will be dispositive of the ultimate issue. Whether Georgia has acquiesced, and Tennessee has thereby prescribed the disputed boundary, will be a difficult question for the Court to decide.

#### CONCLUSION

At this point, and despite the plethora of rulings in the various cases, the final outcome of the Tri-State Water Wars remains highly uncertain. Whether it be the sharing of waters in the ACF and ACT basins, or the attempted relocation of the State of Georgia's northern boundary with Tennessee (and of necessity, North Carolina), these modern wars between the southern states are likely to be harbingers of future disputes. The outcomes of these disputes, as well as the legal and equitable processes and principles used in their resolutions, will not only plow new legal ground, but will provide guidance for other water and natural resource disputes, both those pending and those to come.

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285. See *Illinois v. Kentucky*, 500 U.S. at 386–88 (finding that Kentucky lacked a substantive record to prove that they had longstanding occupation and dominion over the area in dispute because the weight of the evidence showed that Illinois had well-established control on the boundary; under Illinois' Constitution the boundary with Kentucky is described as "following along [the Ohio River's] northwestern shore;" and the courts of Illinois repeatedly held until at least 1973 that the boundary was the "low-water mark on the northerly shore of the river at the 'point to which the water receded at its lowest stage.'").

286. See *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 218 (2005) ("The acquiescence doctrine does not depend on the original validity of a boundary line; rather, it attaches legal consequences to acquiescence in the observance of the boundary.").

287. See *Georgia v. South Carolina*, 497 U.S. 376, 389 (1990) (stating that "inaction . . . is of no great importance; what is legally significant is silence in the face of circumstances that warrant a response."); see also *Indiana v. Kentucky*, 136 U.S. 479, 515 (1890) (recognizing affirmative action asserting Kentucky's rights); *Illinois v. Kentucky*, 500 U.S. at 386–88 (recognizing no acquiescence where Illinois' legislature and courts noted boundary line).