THE APALACHICOLA-CHATTAHOOCHEE-FLTIN RIVER DISPUTE: ATLANTA VS. APALACHICOLA, WATER APPORTIONMENTS' REAL VERSION OF DAVID VS. GOLIATH

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I. INTRODUCTION

The ACF River Basin consists of the Apalachicola, Chattahoochee, and Flint rivers.[1] This river basin has been the site of an ongoing legal battle between Alabama, Georgia, and

1. Roy R. Carriker, *Water Wars: Water Allocation Law and the Apalachicola-Chattahoochee-Flint River Basin*, University of Florida: Institute of Food Agricultural Sciences Extension, http://ufdcimages.uflib.ufl.edu/UF/00/09/92/89/00001/FE20800.pdf (last visited Oct. 17, 2014).

Florida since 1990. [2] This battle centers on the proper apportionment of water from the ACF River Basin. Severe drought throughout the 1980's, combined with the explosion of growth experienced by the city of Atlanta, and forced these three states to stake a claim for their respective interest in the ACF River Basin's water distribution.[3] The resulting complex web of litigation is ongoing with seemingly no end in sight.

Many of the core issues that ushered in the wave of litigation between these three states in 1990 still remain in dispute today.[4] The main concern of both Alabama and Florida is the threat that the city of Atlanta's consumptive needs pose to their respective usages of the ACF River Basin.[5] Florida and Alabama base these challenges on the assumption that Georgia should not have authorization to use the ACF River as the substantial freshwater supply for the city of Atlanta. In 1948, Atlanta was a much smaller place compared to the modern day metropolis that it has become. The Rivers and Harbors Act, adopted by Congress in 1946, gave the Army Corps of Engineers authorization to make improvements along the ACF River Basin.[6] The plan included a proposal for a dam and reservoir at the upstream Buford site. [7] Before any discussion of whether water supply would be a benefit of the project, Atlanta did not seem to place much emphasis on the Buford project as a part of its long term plan for providing water to its inhabitants. [8] In 1948, the mayor of Atlanta boasted that, "Certainly a city which is only one hundred miles below one of the greatest rainfall areas in the nation will never find itself in the position of a city like Los Angeles."[9] That statement has since proved to be ironic because of the hardships that Atlanta now faces in the realm of supplying water for its residents.

Over the years, courts have differed in opinion over whether water supply, most notably supply kept for disbursement to

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

3. Carriker, *supra* note 1.

4. Megan Baroni, *Lessons from the "Tri-State" Water Wars*, A.B.A. State & Local Law News, Vol. 35 No.2 (2011), *available at* http://www.americanbar.org/publications/state_local_law_news/2011_12/winter_2012/tri-state_water_war.html (discussing the 20 yearlong battle between these three compelling interest and describing each of the interests).

5. *Id.*

6. Memorandum from the U.S. Army Corps of Engineers on the Authority to Prove for Municipal and Industrial Water Supply from the Buford Dam/Lake Lanier Project, U.S. Army Corps of Engineers, 2 (June 25, 2012) (on file with author).

7. Baroni, *supra* note 4.

8. *Id.*

9. *Id.*

Atlanta, was part of the initial plan of the Buford dam project.[10] No matter what the verdict on that matter may be, there seems to be a historical lack of preparedness and planning on the side of Atlanta when it comes to their future water needs.[11] This problem may be exacerbated in the near future because Atlanta is set to far exceed water usage levels that were not expected until 2030.[12] Atlanta's need for water is enhanced by the fact that the Chattahoochee River and Lake Lanier watershed is the smallest in the country to supply a majority of the water needed in a metropolitan area.[13] Both Florida and Alabama continue to seek an outcome that fits their needs, and both continue to blame the state of Georgia for a lack of environmental awareness and conservation efforts.[14] The water wars between these three states will continue as long as the city of Atlanta continues to grow at such a fast pace without an extensive and successful plan to deal with their future water problems. The importance that a city the size of Atlanta has to the southeastern United States is obvious, thus a proposed plan must be able to accommodate its continued growth and prosperity, while also maintaining the ecological needs of the rest of the ACF River Basin.

This paper will describe the prior legal history between these three states over the water apportionment of the ACF River Basin. However, the main focus of this paper will be on the future discourse between Florida and Georgia. Because much of the current litigation only focuses on the use of water from the Buford dam project at Lake Lanier,[15] which constitutes only about five to nine percent of the ACF River Basin, it seems likely that the vast majority of the river basin will need to be addressed in some measure in the near future.[16] Shaping a compromise that can address a solution for the water usage of the entire river basin would be the smartest way to quell the water wars. The dispute between these states is centered on the growing water needs of

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10. *See In re Tri-State Water Rights Litig.*, 639 F. Supp. 2d 1308, (M.D. Fla., 2009). *See also Florida v. United States Army Corps Eng'r*, 644 F. Supp. 3d 1160 (11th Cir. 2011).

11. Jody W. Lipford, *Averting Water Disputes: A Southeastern Case Study*, PERC Policy Series, Issue # PS-30, p.5 (Feb. 2004).

12. *Id.* at 5–6 (revealing that Atlanta had already approached their estimated 2030 water usage level; Georgia Environmental Protection Division says that the water supply for Atlanta is sufficient through 2030).

13. *Id.*

14. Alyssa S. Lathrop, *A Tale of Three States: Equitable Apportionment of the Apalachicola-Chattahoochee-Flint River Basin*, 36 Fla. St. U. L. Rev. 865, 892-94 (2009).

15. *Id.* at 876.

16. *Id.* at 878-81 (discussing that proper allocation could be decided by three different methods, with the likeliest being a water apportionment case in front of the Supreme Court or by Congress).

the greater Atlanta area, compared to the traditional needs of normal river flow for the town of Apalachicola. Normal flow levels are critical in order to maintain the environmentally rich Apalachicola Bay, which is home to one of the most fertile seafood industries in the United States.[17] This small fishing town has been waging water wars with the ever-growing city of Atlanta for nearly three decades. The dispute is a perfect case study on the debate between just how far we should be willing to accommodate humanity's modern needs when they threaten to exhaust an environmental treasure.[18]

Recent developments in the litigation between Florida and Georgia have made the likelihood greater for this dispute to be heard in front of the U.S. Supreme Court. This paper will discuss whether or not the U.S. Supreme Court will have standing to hear any further disputes between the state of Florida and Georgia. Reviewing previous equitable apportionment cases in front of the Supreme Court helps to gain insight into relevant factors that may make a difference in the ACF River dispute. One of the major problems with the ACF River dispute has been shortsightedness and lack of planning by each party involved;[19] so this paper will also focus on how these two sides are planning to conserve and use water, in order to better explain how this dispute will look in the predicable future. In order to contemplate future plans, a historical perspective on the steps already taken will be necessary to determine if future conservation is achievable.

Due to a history of unproductive interstate negotiations and legal outcomes, the main decision of this case should hinge on the recommendation by the Special Master that is appointed by the U.S. Supreme Court. The Master's recommendation, and the Courts willingness to rely on it, would be the best way to set a fair and informed legal precedent for the future usage of the ACF River Basin by Florida and Georgia. This recommendation should be shaped off of prior legal precedents in water apportionment that have stood the test of time. This recommendation should also focus on setting long term commitments to conservation efforts by both states, with a main focus on Georgia adopting future water sources to meet its consumption needs without further draining the entire ACF River Basin.

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17. Lipford, *supra* note 11 at 7 (noting that Apalachicola supplies 10% of the country's oysters).

18. *See Id.*

19. *See Id.* at 5–6 (discussing Atlanta's need for water and the ill-suited supply they currently use).

II. ACF RIVER DISPUTE PRIOR LITIGATION HISTORY

A. Initial Conflicts and the ACF River Basin Compact

Problems first arose when an extensive drought forced Atlanta to implement water-rationing strategies.[20] After the effects of this drought, and with an expected influx of an estimated 800,000 new residents over the next two decades, the city of Atlanta decided to work with the U.S. Army Corps of Engineers in a plan to withdraw around 529 million gallons of water per day from the Chattahoochee River in the Lake Lanier area.[21] In 1990, Alabama responded quickly to this proposed withdrawal plan, filing a federal suit against the Army Corps of Engineers Florida, which Florida quickly joined in order to protect its own interest in the ACF River Basin.[22] The initial dispute centered on water quantity as well as water quality.[23] Both of the states filing suits needed normal river flow. Alabama needed it to sustain its farming, industry, and hydropower, whereas Florida needed natural river flow to sustain its major seafood and oyster industry, located downriver in Apalachicola Bay.[24] The water quality issue centered on Georgia's pollution of the downstream water flow—any withdrawal of water would decrease water flow and cause the pollutants in the water to be less diluted once they reached downstream locations.[25] An agreement forged by the three states in 1992 began a five-year comprehensive study by the U.S. Army Corps of Engineers, a freeze of the water usage levels, and a period of negotiation for the three states to solve the dispute outside of a courtroom.[26] "In 1997, the three states [decided to] enter into the ACF River Basin Compact."[27] This agreement called for the states to further negotiate their interests in the ACF River Basin to find a proper means of appropriating the water.[28] On May 16, 2000, well before the set deadline of August 31,

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20. Dustin S. Stephenson, *The Tri-State Compact: Falling Waters and Fading Opportunities*, 16 J. Land Use & Envtl. L. 83, 86 (2001).

21. *Id.*

22. *Id.* at 87.

23. *Id.*

24. *Id.*

25. Stephenson, *supra* note 20 at 87-88.

26. *Id.* at 88.

27. Douglas L. Grant, *Interstate Allocation of Rivers Before The United States Supreme Court: The Apalachicola-Chattahoochee-Flint River System*, 21 Ga. St. U.L. Rev. 401, 402 (2004).

28. *Id.*

2003 when the negotiations were set to expire,[29] the state of Georgia submitted a request to the Army Corps of Engineers to enter into contracts for increased water withdrawals from Lake Lanier for the next thirty years.[30] Although this request was denied, it caused a divide in the negotiations between each party and eventually led Georgia to file suit, challenging the denial of its water supply request.[31] The filing of this suit led to many other legal disputes that mainly focused on Alabama and Florida joining sides to challenge Georgia and the Army Corps of Engineers on any proposed distribution of water from Lake Lanier for the city of Atlanta.[32] After the final date for negotiations expired, it was clear that the ACF River Basin Compact achieved minimal progress for these three states to find common ground in the water apportionment dispute. After negotiations broke down, this dispute would have to play out in the courtroom over the next decade.

B. Back and Forth Legal Battle

After the agreement between Georgia and the Army Corps was signed on October 2003, the D.C. District Court allowed Florida and Alabama to intervene in the matter.[33] This was followed by the Alabama district court granting a preliminary injunction that prevented the recent agreement from being fully implemented.[34] The D.C. District Court then approved the agreement in February of 2004, contingent upon the dissolution of the prior Alabama district court's injunction.[35] The D.C. District Court sided with the Army Corps of Engineers, ruling that they had the ability to divert water from hydropower generators—one of the original purposes of the Lake Lanier project—for storage purposes with the intent of providing water for the city of Atlanta.[36] Following dissolution of the Alabama district court's injunction,[37] the D.C.

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29. *Id.* at 402-03.

30. U.S. Army Corps of Engineers, *Supra* note 6 at 16.

31. *Id.* at 18 (discussing the federal suit, *Georgia v. U.S. Army Corps of Engineers*, as the beginning of the complex web of litigation over the corps disbursement of lake Laniers' water).

32. *See Alabama v. U.S. Army Corps of Eng'r*, 382 F. Supp. 2d 1301. *See also In Re Tri-State Water Rights Litig.*, 638 F. Supp. 2d 1308; *Florida v. U.S. Army Corps of Eng'r.*, 644 F. Supp. 3d 1160.

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

34. *Id.*

35. *See. Fed. Power Customers, Inc. v. Caldera*, 301 F. Supp. 2d 26, 35 (D.D.C. 2004) (decision came after injunction was ordered).

36. *Id.*

37. *Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1136 (11th Cir. 2005).

District Court entered a final judgment on March 9, 2006. This final judgment was reversed by the U.S. Court of Appeals for the D.C. Circuit.[38] On appeal, the District of Columbia Circuit stated that the reallocation of the storage space for Lake Lanier amounted to a major operational change that should require Congressional approval.[39] Georgia sought review of this decision in front of the United States Supreme Court, but the Justice Department recommended that the Supreme Court not grant review.[40] The Supreme Court denied Georgia's petition for review, thus declining to hear the case. [41]

The Judicial Panel on Multidistrict Litigation transferred the dispute to the Middle District of Florida and assigned the case to Judge Paul Magnuson. [42] Magnuson had prior experience presiding over complex water apportionment battles, having served as the presiding judge in the Missouri River litigation.[43] Judge Magnuson focused the case on the question of whether Atlanta had the right to rely on Lake Lanier as its primary source of water.[44] Georgia challenged Florida and Alabama's standing to bring suit, stating that they could not establish the necessary injury-in-fact requirement.[45] This challenge was rejected because Florida and Alabama brought sufficient evidence to support allegations that they were suffering harm caused by the diversion of water from the ACF River Basin to meet the water supply needs of Georgia.[46] Florida and Alabama argued that water supply was not one of the original purposes of the Buford Dam project, thus the Corps of Engineers needed Congressional approval for these types of changes to the operation of the dam.[47] The Florida District Court then noted that the Army Corps of Engineers and the municipal entities in the city of Atlanta began to "envision

38. *Geren*, 514 F.3d at 1325 (reversing on appeal due to lack of congressional approval).

39. *Id.*

40. Lathrop, *supra* note 14, at 873.

41. *Id.*

42. *In re Tri-State Water Rights Litig.*, 481 F. Supp. 2d 1351, 1353 (J.P.M.L. 2007).

43. *Id.*

44. Lathrop, *supra* note 14, at 873–74 (Judge Magnuson stated that this central question "may render other aspects of the case 'obsolete.' ") (footnote omitted).

45. *In re Tri-State Water Rights Litig.*, 639 F. Supp. 2d at 1340-41 (Georgia asserted that "there is no evidence that the Corp's support of water supply and recreation in Lake Lanier has resulted in any 'discernable reduction in flows downstream in Alabama or Florida.' ").

46. *Id.* at 1341-42. (court documents show that sufficient evidence was brought forward showing that low flows cause harm to wildlife in the Apalachicola river as well as "harm [to] navigation, recreation, …water quality and industrial and power uses [in the] downstream" area of the ACF River Basin).

47. *Id.* at 1321.

the water supply benefit as a storage and withdrawal benefit," at some point after the completion of the Buford dam project.[48] The district court looked to prior legislative history and concluded that water supply—more specifically water withdrawals from Lake Lanier—is not, and never was an authorized purpose of the Buford Dam project.[49] The court stated that because this usage was not one of the authorized purposes of the project, and because this usage constituted a major "operational change" under the Water Supply Act, the Army Corps of Engineers "was required to seek Congressional approval for those actions and its failure to do so renders the actions illegal."[50] The court set aside the Corps' actions because their failure to seek Congressional approval before following through with the changes to the project constituted an abuse of discretion.

The Middle District of Florida's decision was seen as a win for Florida and Alabama, with some people even hailing it as the end to the ACF River Basin water dispute.[51] The so-called "win" was short lived—in June 2011, the Eleventh Circuit reversed and remanded the 2009 District Court decision. The overruling of Judge Magnuson's 2009 order helped to prevent the cut off of water supplied to millions of people in the Atlanta metropolitan area.[52] The Eleventh Circuit Court of Appeals held that the Corps never took final action to reallocate storage from Lake Lanier to the city of Atlanta.[53] The corps contended that they had, "never made a formal reallocation of storage in the reservoir."[54] The court also decided that water storage was an original intended purpose of the Buford Dam project. The court used wording from the Newman Report, made in 1946 when the Army Corps of Engineers was planning the Buford Dam project, to show that under the original plan water storage for the city of Atlanta would be one intended use.[55] The Eleventh Circuit ordered a remand

48. *Id.*
49. *Id.* at 1346-47.
50. *Id.* at 1347
51. Lathrop, *supra* note 14, at 876 (footnote omitted).
52. Atlanta Regional Commission, *Tri-State Water Wars: 25 Years of Litigation between Alabama, Florida and Georgia*, ARC, *available at* http://www.atlantaregional.com/environment/tri-state-water-wars (last visited Oct. 17, 2014).
53. *In re MDL-1824 Tri-State Water Rights Litigation*, 644 F.3d 1160, 1184–85 (11th Cir. Fla. 2011).
54. *Id.* at 1181.
55. *Id.* at 1168–69 (the Army Corps project would divert water from the hydroelectric power sources for the city of Atlanta, but the Newman report stated other benefits for the city in order to justify such losses. The report expressed that any decrease in hydroelectric power from the Buford dam diversion would be outweighed by the benefit conferred upon Atlanta because of an "assured water supply for the city").

of the decision on this issue, with instructions for the Army Corps of Engineers to reconsider the plan and make a determination of its legal authority to operate the Buford Project in a way that would accommodate Georgia's water supply demands.[56] The court instructed the Corps to "complete its analysis of its water supply authority and release its conclusions" within one year of the decision.[57] This ruling put the ever-complex ACF River Basin dispute into more uncertainty and placed the power back into the hands of the Army Corps of Engineers to determine their legal authority in the matter.

C. Current State of the ACF River Basin Dispute

After the Army Corps agreement with Georgia was reestablished, the deadline set by the Eleventh Circuit Court of Appeals for July 2012 passed without any action by either side.[58] The Corps appears to be leaning in favor of Atlanta's call for greater water supply.[59] The Corp maintains that, "[i]t has always been apparent from the plain text of the Newman Report that the Corps proposed, and Congress authorized, a system that was expressly intended to 'ensure an adequate water supply for the rapidly growing Atlanta metropolitan area' downstream."[60] The Corps intends that they have, and always will, "operate[] the Buford project with this goal in mind."[61] Moreover, the Corps believes that Congress had a clear intention for this type of downstream use when the Buford dam project was approved;[62] relying on this reasoning would discredit any further arguments over whether or not the Army Corp of Engineers would be directly violating Congressional intentions described in the Newman Report.

Much of the most recent decisions and developments concerning the ACF River Basin dispute seem to be going in

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56. *Id.* at 1197.

57. *Id.* at 1205.

58. Atlanta Regional Commission, *supra* note 52.

59. Pema Levy, *Southeast Water Wars: Georgia winning over Alabama and Florida*, INTERNATIONAL BUSINESS TIMES (JULY 23, 2013), http://www.ibtimes.com/southeast-water-wars-georgia-winning-over-alabama-florida-1356799 (discussing the recent aim for Congress to block the decision to appropriate this water, with the Corps seeming to back giving the water to the city of Atlanta).

60. U.S. Army Corps of Engineers, *supra* note 6, at 27 (footnote omitted).

61. *Id.* (footnote omitted)

62. *Id.* ("[T]he Corps has discretion to adjust operations [of the Buford project] for all purposes…that could provide [for] greater downstream water supply" under Congresses approval of the Newman Report.)

Georgia's favor. Senator Jefferson Sessions of Alabama tried to add a provision into the Water Resources Development Act of 2013 ("WDRA") to limit Atlanta's usage of water.[63] Congress ultimately denied this provision in their 2013 enactment of the WRDA.[64] Some support has been garnered due to the conservation efforts made by the city of Atlanta since their 2000 request. These include the North Georgia Water Planning District, the Metro Water District Water Supply and Water Conservation Plan, and the Georgia Comprehensive Statewide Water Management Plan.[65] Although the battle has shifted in favor of Atlanta's needs, the dispute is far from over. Florida politicians have made recent attempts to get Congress involved; showing that Florida will do whatever it takes to stand up for its right to preserve a healthy and economically sustainable natural resource.[66]

Recently, Florida received some surprisingly positive news. The U.S. Supreme Court agreed to hear the current dispute between Florida and Georgia, against the U.S. Solicitor General's recommendation not to consider the case until the Army Corps of Engineers announces its updated plan for the ACF River system in 2017.[67] The Army Corps of Engineers and the state of Georgia responded by saying that Florida's suit was "premature" and the federal government should, "not get bogged down by Florida's litigation."[68] Florida's main argument centers on the reduced flow downstream into the Apalachicola Bay.[69] The key to the current lawsuit is Florida's allegation that Georgia is pulling 360 million gallons of water per day from the ACF River system.[70] Further, projections suggest that the daily amount of water being pulled from the ACF River will double by the year 2040, putting the current and future health of the river's ecosystem, including

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63. Levy, *supra* note 59.

64. *Id.*

65. Atlanta Regional Commission, *supra* note 52 (water conservation efforts put into place have decreased per capita water use by 27 percent since 2001, even though some of the drop is a by-product of recession).

66. Greg Bluestein & Daniel Malloy, *Latest phase of Water Wars plays out in Congress*, THE ATLANTA JOURNAL-CONSTITUTION, http://www.ajc.com/news/news/latest-phase-of-water-wars-plays-out-in-Congress (last visited Oct. 14, 2014) (Florida Governor Rick Scott pursuing "federal lawmakers to intervene" and Florida Representative Steve Southerland asking for "proper Congressional oversight" on the matter).

67. Bill Cotterell, *Water wars between Florida, Georgia advance at U.S. Supreme Court*, Reuters News, *(Nov. 3, 2014),* http://www.reuters.com/article/2014/11/03/us-usa-florida-oysters-idUSKBN0IN28420141103 (last visited Nov. 5, 2014).

68. *Id.*

69 Jeremy P. Jacobs, *Supreme Court will Review Fla.-Ga. dispute*, E&E News – Greenwire, *(Nov. 3, 2014),* http://www.eenews.net/greenwire/2014/11/03/stories/1060008284.

70. *Id.*

Florida's seafood industry, at risk.[71] The Supreme Court's review is progress towards a resolution between these states, but the solution should not be expected in the near future.[72] The factors that the Supreme Court will focus on to resolve this matter, and the way that each state has dealt with the strain on each of its respective water issues, will shape the outcome of this dispute. These factors will be discussed at length below.

III. IS WATER APPORTIONMENT LITIGATION THE ONLY RESOLUTION TO THIS ISSUE?

The logical answer to this question is no, but a water apportionment case before the Supreme Court may be the only way to solve the ACF River dispute, based on the history of unstable negotiations between these three states. There are two other possible resolutions to this problem: one being an interstate compact, the other a direct action by Congress to apportion the water between states.

Some scholars believe that an interstate water compact provides the most economically efficient method to resolve the dispute between Florida, Georgia and Alabama.[73] The three states attempted this route with the 1997 Apalachicola-Chattahoochee-Flint River Basin Compact, which basically was an agreement to negotiate.[74] However, the states failed to find any solution after several years of negotiation.[75] The three states not only failed to find a solution; the negotiation period also resulted in even more litigation and disputes than prior to the compact.[76] Georgia has never budged on its demand for sufficient water rights to maintain urban Atlanta's water needs, and neither has Florida backed away from demanding adequate downriver flows to preserve the water levels of the Apalachicola Bay.[77] This prior

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71. *Id.*

72. *Id.* (addressing the reality that the high court may not reach a resolution on the matter, "for months, if not years.").

73. *See* David N. Copas, Jr., Note, *The Southeastern Water Compact, Panacea or Pandora's Box? A Law and Economics Analysis of the Viability of Interstate Water Compacts*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 697, 730–33 (1997) (discussing the economic advantages to finding common ground through an interstate compact).

74. J.B. Ruhl, *Equitable Apportionment Of Ecosystem Services: New Water Law For A New Water Age*, 19 J. LAND USE & ENVT'L L. 47, 50 (2003). *See* C. Grady Moore, *Water Wars: Interstate Allocation in the Southeast*, 14 NAT RESOURCES & ENV'T 5, 6–10 (1999) (regarding background history and origins of the ACF River dispute).

75. Grant, *supra* note 27, at 402-03.

76. *Id.*

77. *Id.* (towards the end of the negotiation period of the 1997 compact, Georgia and Alabama sought to address Florida's ecological concerns with a guaranteed minimum flow

history suggests that a compact would not be a successful way to solve the ACF River dispute.

Another option is for these three states to seek apportionment of the river's water through Congress. This is a rare method, and the inability of these states to negotiate in the past makes it less likely that Congress would get involved.[78] Congress has historically not been willing to get involved with sensitive matters between states.[79] There are political concerns at play because Congress does not want to take sides on such highly contested issues of importance.[80] Although this method would include the gathering of expert information to make an informed decision on the best uses of the ACF River Basin, the historical reluctance by Congress to get involved makes this method an unrealistic solution.[81]

Although these two methods are economically efficient and may allow for the proper experts to weigh in on the issue, the unwillingness of each of these states to find common ground renders these methods unusable. Bringing this dispute in front of the Supreme Court is likely the only way to rationally resolve this issue once and for all. With the recent news that the Supreme Court will hear the current litigation between Florida and Georgia, a water apportionment showdown between these two states seems likely. In order to properly analyze the potential outcome of this suit, it is crucial to look at the law behind water apportionment as well as the Supreme Court's jurisdiction over these matters. It is also important to consider preceding Supreme Court case law regarding water apportionment disputes.

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for the Apalachicola River. Florida sought natural flows and thus rejected this position, threatening to sue in the U.S. Supreme Court).

78. William Goldfarb, WATER LAW 52, 54 (Lewis Publishers 2d ed. 1988).

79. Carl Erhardt, *The Battle over "The Hooch": The Federal-Interstate Water Compact and the Resolution of Rights in the Chattahoochee River*, 11 STAN. ENV'T L.J 200, 212 (1992).

80. *Id.* (discussing the political concerns that voters of states not involve face as well as the concerns that taking sides in this dispute would strike down the concept that each state is in control of shared water resources).

81. *Id.*

IV. STATE WATER LAW AND SUPREME COURT JURISDICTION

A. Differences in State Water Law

There are two distinctly different doctrines of water apportionment between states: the Doctrine of Prior Apportionment and the Doctrine of Riparianism. Western states follow the Doctrine of Prior Apportionment, due in part to the dry ecological characteristics of the western United States.[82] Under this doctrine, once a user of water has acquired a certain water right, that right is superior to any water claims that emerge after.[83] The senior appropriator's use reigns supreme over more socially beneficial uses, even in times of environmental need such as a drought. [84] Prior Apportionment favors older users over more efficient users.[85] Water rights can be traded just like a commodity; but as long as the senior appropriator maintains its beneficial use of the water, that claim will be treated as the superior claim.[86] This benefit is usually at the expense of the downstream user seeking to gain access to the river flow.[87] Disputes arise easily under Prior Apportionment, and although they are simple to resolve because of the concrete nature of the doctrine, the resolution may not always be in the best interest of society.

Eastern states use the Doctrine of Riparianism.[88] This doctrine is based on the assumption that groundwater will always be available and dispersible to relevant users.[89] The theory is that all uses along a river are allowed as long as "they do not unreasonably interfere with other uses." [90] Riparianism was created under the belief that the eastern United States always received plentiful amounts of rain, and had an abundance of water to be dispersed to all interested users.[91] In order for this doctrine to work successfully, water must be plentiful and users of the river must not completely threaten other uses. Using

82. Lathrop, *supra* note 14, at 880-81.
83. Moore, *supra* note 74, at 6.
84. *Id.*
85. Stephenson, *supra* note 20, at 90.
86. *Id.*
87. Lathrop, *supra* note 14, at 881.
88. *Id.*
89. Moore, *supra* note 74, at 6.
90. *Id.*
91. Stephenson, s*upra* note 20, at 90–91.

this doctrine creates problems, both in times of drought,[92] and where a user is exhausting the particular resource beyond its sharable means.

The state of Florida differs from other eastern States because they implemented a hybrid system. Generally this hybrid system uses riparian rights as a basis, but also incorporates an administrative permitting process for new water users.[93] New permit applicants must meet a three-part test to be granted a water right.[94] This system combines riparian water rights with prior apportionment to find a proper balance between the two.[95] The Florida Water Resources Act of 1972 established this hybrid system.[96] The Resources Act also established state-level administration for water disputes to the Florida Department of Natural Resources or its successor agency.[97] This responsibility has since been transferred to the Florida Department of Environmental Protection.[98] The Department of Environmental Protection has essentially given all policymaking authority, as well as day-to-day management, to the five regional water management districts that make up the entire Florida Water Management System.[99] This delegation of power presents current and, more importantly, future issue regarding the ability for the state to enter into negotiations for interstate water compacts because these compacts face the hurdle of having to be approved by five different water districts, each of which have contrasting and conflicting water needs.[100] If the state of Florida intends to enter into serious interstate water negotiations, it should look into solidifying its intrastate water authority.

B. Supreme Court Original Jurisdiction

The likelihood of a water apportionment case between Florida and Georgia coming in front of the U.S. Supreme Court has increased with the recent news that the Supreme Court will

92. Moore, *supra* note 74, at 6.

93. Stephenson, *supra* note 20, at 92.

94. *Id.* (three-prong test consists of user proving that the use is defined as a reasonable beneficial use, the use does not adversely affect other prior users, and that the use is consistent with public use).

95. *Id.*

96. Ronald A. Christaldi, *Sharing the Cup: A Proposal for the Allocation of Florida's Water Resources*, 23 FLA. ST. U. L. REV. 1063, 1078–81 (1996).

97. *Id.* at 1073.

98. *Id.* at 1074.

99. *Id.*

100. *Id.* at 1075-76.

review the complaint. For the U.S. Supreme Court to hear a water dispute between Florida and Georgia, original jurisdiction must be properly established. Under Article III of the United States Constitution, the U.S. Supreme Court has original and exclusive jurisdiction over suits between states or where a state is a party.[101] The Supreme Court is the only court that can hear interstate water apportionment litigation between two or more states.[102]

The most recent litigation involving the ACF River dispute is between Florida and Georgia. The U.S. Supreme Court should have original jurisdiction under Article III. Once an original jurisdiction case is set to be heard by the U.S. Supreme Court, a Special Master is typically appointed to make certain factual findings, manage certain trial formalities, and to give a recommendation on the outcome of the case.[103] Special Masters are appointed directly by the Court and do not need any prior judicial experience to serve.[104] Although their effect on the outcome of the case differs based on the Court's interpretation of the facts and circumstances, Special Masters can have a profound impact on the decision making behind water apportionment rulings. This is especially true in cases where competing states' interests cannot be settled by simple negotiations.[105] The Special Master can intervene in these scenarios and formulate an informed decision that takes both sides' interests into account, but in the end formulates a smart plan that will apportion water in the fairest method. [106]In the current litigation between Georgia and Florida, a fair-minded Special Master could go a long way towards shaping an outcome that works for both sides.

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101. U.S. CONST. art. III, §2, cl. 1 (judicial power of the United States is extended "to Controversies between two or more States"); U.S. CONST. art. III §2, cl. 2 (Supreme Court has original jurisdiction in cases which a State is a party); 28 U.S.C §1251(a)(1) (2000) (Supreme Court has exclusive jurisdiction in suits "between two or more States").

102. Grant, *supra* note 27, at 403.

103. Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 627–28 (2002).

104. *Id.*

105. *Id.* at 662–63 (discussing the Master defining his role in the heavily contested water apportionment decision *New Jersey v. New York*).

106. *Id.* at 659–65 (in *New Jersey v. New York*, a dispute lasting an estimated 170-300 years was settled in part because of the recommendations by the Special Master; a recommendation that was based on balancing traditions kept by New York with honoring sovereign rights that were rightly attributed to the state of New Jersey).

C. Equitable Apportionment: The Method Used by the Supreme Court

The Doctrine of Equitable Apportionment is the primary method that the Supreme Court uses to deal with non-negotiable water rights disputes between states.[107] The Supreme Court endorses interstate compacts as the preferred method to solving apportionment disputes, but when this process is not possible, they tend to follow an ever-evolving apportionment method.[108] More recently, the Court has molded their use of the Equitable Apportionment Doctrine to force states to support their claim of interstate water rights through proof of concrete planning, as well as evidence of conservation efforts designed to make their usage more efficient.[109]

The first equitable apportionment case in front of the Supreme Court focused on crafting a rule that was based on sharing the available resources because each state had the right to use the interstate water.[110] The sharing rule has been used in the following cases regarding water apportionment, but the method of applying the rule has changed over time. The Supreme Court will defer to local law if each of the feuding parties follows the same method in deciding state water issues.[111] However, if the two states have different water laws, or if applying the local law will leave one party unfairly disadvantaged, the Supreme Court follows the Doctrine of Equitable Apportionment over other alternatives.[112] The factors that determine how the water should be equitably apportioned vary, and the methodology used by the Court to determine fair apportionment has changed over time, depending on the set of circumstances involved in the dispute.[113] Analyzing the types of factors previously used by the Supreme Court to determine fair apportionment of water will shed light on the factors that the Supreme Court may focus on in the upcoming litigation between Florida and Georgia.

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107. Erhardt, *supra* note 79, at 212.

108. A. Dan Tarlock, *The Law of Equitable Apportionment Revisited, Updated, and Restated*, 56 U. Colo. L. Rev. 381, 382–84 (1985).

109. *Id.* at 384.

110. Erhardt, *supra* note 79 at 212.

111. *Id.* at 213.

112. *Id.*

113. *Id.*

V. PRIOR EQUITABLE APPORTIONMENT DISPUTES IN FRONT OF THE SUPREME COURT

Kansas v. Colorado represents the first time that the Supreme Court extended its power to equitably apportion water in an interstate river dispute.[114] Kansas sued Colorado, seeking an enjoinment of Colorado's diversions along the Arkansas River, which caused a loss of downstream flow to Kansas.[115] The Court sided with Colorado, determining that each state had an equal right to use the river flow, and the irrigational use of the water by Colorado was a reasonable use under the Riparian Doctrine.[116] The Court established that, "each State stands on the same level as the rest."[117] They went on to rule that in disputes between two States where one State seeks to limit the rights of another, the Court must settle the dispute in a way that notices these equal rights, but "establishes justice between them."[118] The Supreme Court analyzed this case under the common law Riparian Doctrine, even though the States followed different laws regarding water rights.[119] The Court focused on the fact that Colorado was upstream and thus held the riparian rights to the stream if their uses were deemed efficient, compared to the injury caused to downstream Kansas.[120] The Court struggled to apply different State law doctrines to water apportionment disputes and thus chose to rely on common law, even though it was not the primary law of that region.

The Court used a basic cost-benefit analysis to determine the efficiency of both water uses.[121] Based on this analysis, the Court decided that Colorado's irrigation usage was efficient, and that interference with such usage to benefit Kansas would not be equitable.[122] The main factors to take away from this inaugural decision were that the Court focused on economic maximization in their Equitable Apportionment-Balancing Test, and due to this focus they effectively penalized Kansas for developing later than Colorado, even though the delay was due in part to a

114. Kansas v. Colorado, 206 U.S. 46 (1907).
115. Tarlock, *supra* note 108 at 385.
116. *Kansas*, 206 U.S. at 113–15 (1907).
117. *Id.* at 97.
118. *Id.* at 97–98.
119. Tarlock, *supra* note 108 at 385.
120. *Id.* at 386–87.
121. *Id.* at 386.
122. *Kansas*, 206 U.S. at 113–15 (1907).

drought that was suffered years earlier.[123] Because Colorado developed faster than Kansas, its potential loss of water affected a larger population and had greater economic impact. This was an issue of first impression for the U.S. Supreme Court; therefore much of the reasoning that justified the Courts decision was not clearly supported by prior standards of law used to resolve water disputes.[124] This early case was a landmark decision for water apportionment law, but the methods used by the Supreme Court were not clearly defined and needed to evolve through further decisions.

In 1922, Colorado found itself in another interstate water dispute, this time with the state of Wyoming. Wyoming brought an action to enjoin Colorado's proposed diversion of the Laramie River to a watershed in the Cache La Poudre Valley.[125] Colorado based its argument on the reasoning used in *Kanas v. Colorado*,[126] claiming that the watershed would be used for farming in a more developed area, as compared to the proposed use by Wyoming, therefore Colorado could accomplish more with the diverted water.[127] The Court was not willing to extend the same reasoning as in their prior decision, instead focusing on true equality amongst shared water rights.[128] The Court favored prior appropriations throughout the river when it chose not to ignore the needs of an arguably less efficient, or important, user in Wyoming.[129] Obviously, this is a different outcome from the first water apportionment decision, but in a sense it modernized the Court's apportionment method by ruling in favor of conservation efforts by new users. This method also dealt with addressing the needs of each side, not just the side that proved greater economic potential.

Nine years later, the Supreme Court heard a water apportionment dispute between New York and the downstream states of New Jersey and Pennsylvania. The downstream states sought to enjoin a plan by New York to divert water from the Delaware River, in order to meet the water demands of New

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123. *Id.* at 109.

124. *See* Tarlock, *supra* note 108 at 386 (clear inconsistency between cited case material stating that a riparian user could withdraw water for irrigation if it did not cause issues to a downstream user, and the Courts ruling basically contradicting this in favor of the upstream user).

125. Wyoming v. Colorado, 259 U.S. 419, 466–68 (1922).

126. Tarlock, *supra* note 108 at 395.

127. *Wyoming*, 259 U.S. at 468–69.

128. *Id.* ("In both States this is a purpose for which the right to appropriate water may be exercised, and no discrimination is made between it and other farming").

129. Tarlock, *supra* note 108 at 396.

York City.[130] New Jersey argued that the diversion would affect navigability of the water, alter salinity levels that would affect the Delaware Bay oyster industry, and would impact its citizen's rights to normal flow of downstream water.[131] This case represents the Supreme Court's most crucial decision between riparian eastern States. Although the decision turned on riparian water rights, Justice Holmes stated, in regards to the Court's method of appropriating water when compared to the different doctrines used in state water law, that, "the effort is always to secure an equitable apportionment without quibbling over formulas."[132]

The Supreme Court reasoned that New York's proposed diversion plan was not a prior use, so New York did not have a superior right over the downstream states.[133] The Court denied a complete injunction on the project that already had started, but the Court prevented New York from diverting any further water then they had originally planned.[134] This was one way to prevent future damages from occurring to the downstream users. Additionally, a water treatment plant was ordered to be built to monitor and treat all water flowing downstream from New York to prevent water contamination.[135] Finally, the Court gave the downstream states the right to inspect and oversee any dams or plants in connection with the diversion and downstream river flow.[136] The special master appointed in this case ruled that New York could divert over 160 million more gallons of water per day without "materially" affecting the river.[137] Typically, in Riparian Doctrine states, instream uses have been regarded as more important than consumptive use of the water.[138] The Supreme Court focused on this factor of riperianism when they controlled the base flow to the instream users.[139] The Court also preserved the health of the river and its ecosystem when it required that New York maintain water quality levels, and gave the downstream states the ability to perform oversight on any upstream projects.[140]

A subsequent dispute, *Nebraska v. Wyoming*, presented a further opportunity for the Supreme Court to evolve its standard

130. New Jersey v. New York, 283 U.S. 336, 341 (1931).
131. *Id.* at 343–44.
132. *Id.* at 343.
133. Tarlock, *supra* note 108 at 397.
134. *New Jersey*, 283 U.S. at 345–46.
135. *Id.* at 346.
136. *Id.* at 346–47.
137. *Id.* at 345.
138. Tarlock, *supra* note 108 at 398.
139. *New Jersey*, 283 U.S. at 345–46.
140. *Id.* at 346–47.

on what law to apply in water apportionment cases between similar water law states.[141] Nebraska brought suit against upstream Wyoming, which impleaded Colorado, over the need for natural flow for crucial irrigation areas in times of drought.[142] Although these states share similar water laws, it was clear that the application of prior appropriation might cause a substantial prejudice to one of the parties.[143] Although this ruling seemingly did not alter the Court's use of state water law as a basis for its decisions in apportionment cases, it did prove that state water law would not be the sole method used for analysis when it stands to severely prejudice another state.[144] This standard was more flexible and put greater emphasis on not affecting one state negatively at the benefit of another. Part of the flexibility in this ruling was that the Court considered factors that it had previously ignored. They stated that they would consider, "physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, . . . the extent of established uses, the availability of storage water, [and] the practical effect of wasteful uses on downstream areas."[145] This ruling seemed to apply more practical factors and less plainly rigid standards to the equity test. Ultimately, the Court entered an Equitable Apportionment decree that required the upstream users to maintain a certain minimum flow to satisfy the needs of the downstream user.[146]

The Supreme Court has been reluctant to interfere with congressionally approved water compacts. In the 1963 decision *Arizona v. California*, the Court was faced with whether or not Congress had the power to apportion water through the Boulder Canyon Project Act of 1928.[147] The Court found that Congress did apportion the flow of the Colorado River between these states.[148] The Court stated, "where Congress has so exercised its constitutional powers over waters, courts have no power to substitute their own notions of an equitable apportionment for the apportionment chosen by Congress."[149] This decision solidified the role that the Supreme Court takes whenever Congress has

141. Tarlock, *supra* note 108, at 399–400.
142. Nebraska v. Wyoming, 325 U.S. 589 (1945).
143. *Id.*
144. Tarlock, *supra* note 108, at 400 (the state law in this matter was the prior appropriation doctrine).
145. *Nebraska*, 325 U.S. at 618–19.
146. *Id.* at 628–634.
147. Arizona v. California, 373 U.S. 546 (1963).
148. *Id.* at 560–67.
149. *Id.* at 565–67.

made a decision to appropriate water. The ultimate decision in these cases is for the Court to determine whether or not Congress has directly appropriated water through one of the constitutionally afforded powers at their disposal.

Colorado was involved in another water dispute in 1982, this time with New Mexico. This dispute was centered on the Vermejo River, which originates in Colorado.[150] Most of the withdrawals were in New Mexico, until Colorado intervened and attempted to apportion withdrawals within the state.[151] In New Mexico, the main uses were through industrial, mining and ranching water rights holders.[152] The proposed diversion would be used for the Colorado Fuel and Iron Steel Corporation.[153] The Special Master ruled that under a strict rule of priority, Colorado would not be permitted to any diversions since the entire supply of the river is needed to fulfill the needs of the users in New Mexico, and those users held a senior right to the water flow.[154] However, the Special Master then changed course and applied the Supreme Court's Doctrine of Equitable Apportionment to the dispute.[155] Applying this standard, the master found that the proposed diversions "would not materially affect the appropriations granted by New Mexico for users downstream."[156]

The Court stressed the need to reasonably apportion the water between these states, especially due to the fact that water is scare in the western United States and must not be wasted in any inefficient manners.[157] Justice Marshall's opinion makes an effort to clarify the Court's goals when using equitable apportionment as a basis for water apportionment cases stating, "we have invoked equitable apportionment not only to require the reasonably efficient use of water, but also to impose on States an affirmative duty to take reasonable steps to conserve and augment the water supply of an interstate stream."[158] The Court centered the

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150. Colorado v. New Mexico, 459 U.S. 176 (1982).

151. *Id.* at 178–79 (Colorado Fuel and Iron Steel Corporation proposed a diversion of the water to a tributary to be used for industrial development. Four primary users in New Mexico opposed this apportionment and filed suit, seeking an enjoinment. Colorado filed an original complaint against New Mexico after the district court ruled in favor of the New Mexico parties because of their prior usage).

152. *Id.* at 178.

153. *Id.*

154. *Id.* at 180.

155. *Id.*

156. *Colorado*, 459 U.S. at 180.

157 *Id.* at 184–85; *see also* Washington v. Oregon, 297 U.S. 517, 527 (1936) (discussing equitable apportionment in western States stating, "[there] must be no waste . . . of the 'treasure' of a river . . . Only diligence and good faith will keep the privilege alive.").

158. *Colorado*, 459 U.S. at 185.

analysis around how each state should exercise its rights to the water of this interstate stream, which is a sharp contrast from prior analysis used by the Court that focused on what each state should do for each other.[159] The Court also used the Harm and Benefit Test to determine how the potential diversion would harm the downstream users in comparison to how much this diversion would benefit the upstream Colorado users.[160] The Court concluded that the rule of priority is not the sole criterion, and that the Doctrine of Equitable Apportionment is flexible and can extend to future uses that qualify as reasonable and non-detrimental.[161] The Court remanded the case to determine further facts on the potential conservation efforts that may be available to offset any harm to either side, and to determine the extent of the harm to the downstream user compared to the benefit received by the new, upstream use.[162]

On remand, the Supreme Court focused on evidence brought forth by both parties. New Mexico brought forward evidence showing potential economic harms that could be created by this diversion.[163] Colorado, which had the burden of proving that its diversion would not detrimentally harm existing users, did not bring forth any such evidence to support its claim.[164] Colorado only brought forth speculative future uses and unidentified conservation measures that did not prove any concrete benefit or plan.[165] This case did not alter the landscape of equitable apportionment cases in front of the Supreme Court, but it did set clear guidelines to the modern factors that the Court views as important. The case also showed the flexibility of the Equitable Apportionment Doctrine, while at the same time provided an example of the burden placed on new users to prove that their use will not detrimentally harm existing users. It can also be argued that Colorado's lack of a concrete plan showing the scheduled usage of the water, coupled with the lack of any conservation plan in place to limit harm to downstream users, hurt its chances of getting this diversion approved by the Court.[166] The outcome on remand was an example of the type of evidentiary

159. *Id.* at 185–87

160. *Id.* at 186 (prior case law supports the use of this test, *see Kansas v. Colorado*, where the Court determined that the great benefit to Colorado outweighed the detriment to Kansas).

161. *Id.* at 188–90.

162. *Id.* at 190.

163. Colorado v. New Mexico, 467 U.S. 310, 322 (1984).

164. *Id.*

165. *Id.* at 323–24.

166. *Id.*

threshold that new users must pass in order to satisfy the Court's Harm and Benefit Test.

VI. ANALYSIS OF THE MAIN FACTORS IN THE FLORIDA/GEORGIA DISPUTE

A. Legal Rights and Congressional Approval

The Supreme Court has stated in the past that, "all the factors which create equities in favor of one state or the other must be weighed."[167] Although this is a broad interpretation of the factors used by the Supreme Court in water apportionment cases, it shows that each case is unique and the Court is willing to consider any factors that help shed light on resolving the dispute fairly. Many of the modern factors that are important to the Supreme Court are on display in *Colorado v. New Mexico*. Established legal rights between the states are an important factor that also goes along with determining each of the disputing state's water laws.[168] Both Florida and Georgia primarily follow the Riparian Doctrine for their respective state water laws. This means that the Court will have to balance the rights afforded to each state rather than focus on prior usage rights as the main determination. Professor Dan Tarlock states, "the Court will seek to preserve the essential feature of the common law that riparian states are entitled to a substantial quantity of the base flow or lake level left in place to support a wide variety of non-consumptive uses."[169] Under this analysis, Florida would seem to be entitled to their claim of base flow to support their existing non-consumptive uses. However, the most recent litigation sided with the Army Corps of Engineers when they determined that the Buford Dam project was originally designed to provide water storage amongst its many functions.[170] As seen in prior case law, the Supreme Court does not intend to cast its own judgment in matters where Congress has spoken.[171] The Supreme Court must first determine whether Congress has specifically given consent to the Army Corps of Engineers to divert water from downstream under the Buford Dam project. If the

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

168. Lathrop, *supra* note 14, at 891; *see also* Idaho. Ex. Rel. Evans v. Oregon, 462 U.S. 1017, 1025 (1983).

169. Tarlock, *supra* note 108, at 410.

170. In re MDL-1824 Tri-State Water Rights Litig., 644 F. 3d 1160, at 1184 (11th Cir. 2011)(overturning the Middle District of Florida's ruling that the Army Corps had not received Congressional approval to divert water and affect base water flows downstream).

171. *See* Arizona v. California, 373 U.S. 546 at 565 (1943).

Court believes that Congress has specifically given consent to the Army Corps and Georgia, it would be unlikely that the Court would intervene any further in this dispute. The difference between the Buford Dam project and the Colorado River Compact, the defining piece of legislation used to determine Congressional approval in *Arizona v. California*, is that the Buford Dam does not directly address the issue at hand, like the Colorado River Compact did. The Colorado River compact determined the apportionment of interstate river flows that were disputed later on so there did not need to be any further inquiry into whether or not the Congressional compact spoke on this matter.[172] The Buford project was put in place over a half century ago, and there remains a question that the Supreme Court must determine, of whether the project directly addresses the actions taken to divert water for storage purposes.[173]

B. Harm Caused vs. Benefit Received

In previous water apportionment litigation, the Supreme Court has used the harm versus benefit test, which takes many factual findings into consideration when determining whether a new user has the potential to detrimentally harm or alter the existing uses.[174] Once these potential harms are determined, the Court must decide whether the benefit of the new use outweighs the harm posed to existing uses. Some relevant factors used in this test include extent of established water uses, effect of wasteful uses on downstream areas, the potential harmful effects on upstream users if limitations were to be levied upon them, availability of storage water, extent that new users have plan in place for water usage, efficiency of any plans, and potential conservation efforts to limit harm on downstream users.[175]

For the past couple of decades, both Florida and Georgia have used the water in the ACF River Basin for the purposes currently disputed, but historically it is clear that one of the uses has been more established than the other. Since the early 1970s, Georgia has realized its increasing need for more water in the rapidly growing Atlanta area and has consistently sought ways to gain

172. *Id.*

173. *See* Lathrop, *supra* note 14, at 873–76 (discussing prior Middle District of Florida ruling, which held that water supply is not an authorized purpose of the Buford project).

174. *See* Colorado v. New Mexico, 459 U.S. 176 (1982); Nebraska v. Wyoming, 325 U.S. 589 (1945); Kansas v. Colorado, 206 U.S. 46 (1907).

175. *See, e.g.*, Colorado v. New Mexico, 459 U.S. at 188.

more access to freshwater.[176] It was during this time that they commissioned the U.S. Army Corps of Engineers to help create a long-term water supply plan, which concluded in the diversion of parts of both Lake Lanier and the Buford Dam.[177] Apalachicola has used the natural resources stemming from the ACF River Basin flow as the backbone of its community and economy for a much longer time than the Atlanta usage. From Florida's perspective, Atlanta's water supply was badly planned and now they have to pay the price for an emerging use.

The availability of stored water for both sides is another issue. Apalachicola cannot substitute any stored water for the natural flow and water level of the Apalachicola Bay. The bay's ecosystem relies on a healthy natural flow of water, and reduced flows would threaten the local seafood industry.[178] As for Atlanta, lack of an adequate freshwater source or location for water storage has placed them in this predicament. Atlanta has experienced a large growth in population for over three decades and the lack of available water was seen as an obvious barrier to the city's projected growth.[179] This is clearly an issue and it ties into the overall lack of planning with regards to the city of Atlanta's water supply. There is clear evidence that Atlanta has developed at a more rapid pace than its water supply can handle.[180] Georgia's population continues to grow, with an estimated population increase of fifty percent by the year 2030.[181] Additionally, by 2030, six out of every ten Georgia residents will live in Atlanta, creating even more of a need for Georgia to find ways to get Atlanta a major water supply.[182]

Even though most of the factors show critical shortsightedness by the state of Georgia, the lack of planning to accommodate the amount of people that have migrated to the Atlanta area may actually work in Georgia's favor. The Court may have a hard time

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176. CARRIKER , *supra* note 1, at 2–3.

177. *Id.*

178. Lipford, *supra* note 11 at 7 ("ecosystem preservation requires a pattern of flows that mimics nature's seasonal cycle and may conflict with other demands").

179. *Id.* at 5–6.

180. *See* JEREMY L. WILLIAMS, SOUTHERN LEGISLATIVE CONFERENCE, THE COUNCIL OF STATE GOVERNMENTS, WATER ALLOCATION AND MANAGEMENT: SOUTHERN STATES OUTLOOK 12–14 (2010). (Atlanta's current water usage is 652 million gallons a day, but they only withdraw around 440 million gallons a day from surrounding water sources and their water usage is set to increase by 53% by 2035. In 2007 Atlanta came within a few months of running out of water. On top of this northern Georgia's environmental characteristics include long and narrow river basins that make it hard for cities to get water without transferring it).

181. *Id.*

182. *Id.*

finding that the overall benefit received by maintaining a river ecosystem and small town economy outweighs the potentially catastrophic scenario where eleven million people in Atlanta are at risk of not having adequate water supplied to them.[183] This is the harsh reality for the town of Apalachicola. It is dealing with an ill-planned metropolis that is home to millions of people,[184] and this main factor will continue to persuade the Court no matter how many other factors are brought forward in support of preserving the natural flow of the ACF River Basin. The harms and benefits on each side are so grave that the Supreme Court may have to use a more amenable test to create more flexible recommendations. "Unlike the typical equitable apportionment case, Florida and Georgia are seeking different uses for the water."[185] The Court may rely heavily on other, more modern methods of encouraging water use efficiency and conservation of this precious natural resource.

C. Conservation Efforts

The Court could find some compromise and satisfy each state's needs by ordering Georgia to engage in more conservation efforts, as well as more water supply or diversion projects, in order to create some freshwater source planning for the future growth of Atlanta. The Court can look no further than Georgia's own statewide resources to find some relief for the city of Atlanta.[186] As a state, Georgia has extraordinary water resources; it just has an uneven distribution of water resources compared to its population.[187] Georgia can, and has, explored diverting their interstate resources towards the northern part of the State where most of its population resides.[188] If Georgia makes further efforts to conserve and divert the water it already has within its borders, this could be a crucial step towards convincing Florida that Georgia has some long-term plan in place that will not threaten to drain the ACF River Basin.

There is recent evidence that Georgia is putting more of an emphasis on water conservation efforts. In 2010, Georgia passed legislation to incentivize the conservation of water.[189] In its

183. *See* Lathrop, *supra* note 14, at 892.
184. *See* Baroni, *supra* note 4.
185. *See* Lathrop, *supra* note 14, at 890–91.
186. *See* Williams, *supra* note 180, at 13–14.
187. *Id.* (resources include 70,000 miles of stream; 40,000 acres of lakes; 4.5 million acres of wetlands; 854 miles of estuaries; and 49 inches of rainfall per year on average).
188. *See id.* at 14.
189. *Id.* at 20.

2012 water conservation report on Atlanta, the Chattahoochee Riverkeeper estimated that the city could reduce its future water demands, projected for the year 2035, by at least fifteen percent simply through conservation efforts that it put into place in 2010 and through compliance with the latest plumbing code. [190] Conservation efforts can also be increased through pricing water in a way that encourages efficient usage. [191] However, these conservation efforts may prove too little too late. Experts have even gone as far as to call Georgia's conservation efforts shortsighted in comparison to steps taken by other large, water-needy cities.[192]

When discussing the likelihood that conservation efforts will reduce the future water intake for the city of Atlanta, any discourse about the benefit of future reductions in water usage must take into account future increases in population. Atlanta has been a rapidly growing city for over four decades and current population projections predict that this trend will continue in the near future. [193] Although the latest U.S. Census numbers have been called "overly optimistic",[194] they follow a trend that does not seem to be disappearing any time soon.[195] Conservation efforts need to be increased if they want to offset the estimated 86% increase in Atlanta's population by 2050. For a city that is already facing grave water needs, conservation efforts need to be taken more seriously if Atlanta intends to provide water for its increasing population. Any court reviewing this dispute will need to weight the alarming water situation that is getting even worse in Atlanta with its history of bad planning and unwillingness to make significant conservation efforts or seek secondary water sources.

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190. *See* CHATTAHOOCHEE RIVERKEEPER, FILLING THE WATER GAP: CONSERVATION SUCCESSES AND MISSED OPPORTUNITIES IN METRO ATLANTA 2012 UPDATE, 7–8 (2012).

191. *See Id.* at 10,17 (tiered structure that takes peak demand times into account will result in residential customers looking to cut back when pricing makes efficiency worthwhile).

192. Jenny Jarvie, *Atlanta Water Use is Called Shortsighted*, L. A. TIMES (Nov. 4, 2007) http://articles.latimes.com/2007/nov/04/nation/na-drought4 (concerns for Atlanta being shortsighted include the fact that they have a rising population, no water, and no major conservation efforts in place to help with the issue).

193. *See* CHATTAHOOCHEE RIVERKEEPER, *supra* note 190, at 7 (Atlanta's population increase projections are estimated at 30% current population by 2025, 55% by 2035, and around 86% by 2050).

194. *See Id.* ("The Metro District's water demand projections also are overly optimistic with respect to population growth.").

195.Jacques Couret, *Metro Atlanta No. 9 in Population*, ATLANTA BUS. CHRON., (Jan. 3, 2013) *available at* http://www.bizjournals.com/atlanta/news/2013/01/03/metro-atlanta-no-9-in-population.html (discussing metro Atlanta's population in Jan. 2013 reaching 5,490,000); This number is greater than the Metro District's projection for 2015 showing that their number was not accurate and clearly not overly optimistic.

Another hurdle to any conservation effort is the Army Corps of Engineers. The partnership between the Army Corps and Georgia on the Buford Dam project has brought up even more issues in litigation over the history of the water usage for this project. The Middle District of Florida's ruling was made primarily with concerns over the Corp's refusal to take responsibility for its failure to conduct any type of environmental analysis over the last 20 years that they had been withdrawing water from the ACF River Basin.[196] The Army Corps' nonexistent environmental plan has contributed to the environmental degradation and resource misuse that has placed the ecological health of the ACF River Basin in jeopardy. Any further reallocation plan by both Georgia and the Army Corps should include an environmental plan to help mitigate the damage to the surrounding ecosystem.

Recently, the major oyster industry in Apalachicola has taken steps to augment the affected river flows by implementing conservation-based oyster harvesting.[197] These conservation efforts were implemented to help the oyster population recover from the effects of low river flows.[198] Included in these conservation efforts are the closing of commercial and recreational oyster harvests during the weekend. [199] Additional efforts include permanent closing of certain harvesting areas for the upcoming year, and lowering the daily harvest both recreationally and commercially per person.[200] These steps represent major changes for the area and the industry. For Apalachicola, this change may be the only way to save its valuable shellfish industry. Whether Atlanta is willing to take these types of major steps to find responsible ways to share the water supply will likely play a crucial role in upcoming water apportionment litigation.[201]

D. Prior Case Law Predicting an Outcome?

The Supreme Court decision in *Colorado v. New Mexico* gave more consideration to the conservation efforts displayed by the

196. *In re* Tri-State Water Rights Litigation, 639 F. Supp. 2d 1308 (M.D. Fla. 2009), rev'd 644 F.3d 1160 (11th Cir. 2011).

197. News Release, Fla. Fish & Wildlife Conservation Comm'n, *Conservation-based Oyster Harvest Changes Effective Sept. 1 in Apalachicola Bay*, (Aug. 28, 2014) http://myfwc.com/news/news-releases/2014/august/28/oyster-eo/.

198. *Id.*

199. *Id.*

200. *Id.*

201. Lathrop, *supra* note 14, at 892.

disputing party.[202] The standard set in that case gave states the duty "to employ 'financially and physically feasible' measures 'adapted to conserving and equalizing the natural flow.' "[203] The court then went on to clarify this by citing to the standard set out in *Wyoming v. Colorado*, which "lays on each of these States a duty to exercise her right reasonably and in a manner calculated to conserve the common supply."[204] Under this standard it is clear that Georgia would have a hard time proving that they have used this asset in a reasonable or calculated manner to conserve the common supply. The historical ineptitude of Atlanta to put a plan into place works against any defense, and a continuing reliance on diverting the ACF River's flow shows the unreasonable manner inwhich Atlanta has used this resource. Applying this duty to any potential decision by the Court, Florida would likely "win" guaranteed minimum flow down to the Apalachicola Bay.[205]

Another prior water apportionment case that could provide insight into any potential decision between Georgia and Florida is *New Jersey v. New York*. That case presents the only Riparian-based decision that the Supreme Court has made.[206] The dispute *in New Jersey v. New York* also presents a similar situation to the ACF River dispute where a metropolis upstream user seeks to divert water from a downstream user, potentially affecting ecosystem and industries from the loss of flow.[207] The Court found interesting ways to satisfy the demands of both parties. Applying a strict Riparian Standard, the Court concluded that all uses would be permitted if they did not substantially interfere with the other uses of the interstate river.[208]

The Court found that the possibility of further uses by upstream New York would substantially interfere with the downstream users. To cut down on some of this interference, the Court formulated solutions that would limit the upstream user. The Court assigned minimum downstream flows that would be monitored by the downstream states, and held that the upstream user would be responsible for maintaining the environmental and waste treatment to ensure the health of the river.[209] This

202. Colorado v. New Mexico, 459 U.S. 176 (1982).

203. *Id.* at 185 (quoting Wyoming v. Colorado, 259 U.S. 419, 484 (1922)).

204. *Id.* at 186; (quoting *Wyoming*, 259 U.S. at 484).

205. Lathrop, *supra* note 14 at 897 ("Unless the Court disregards ecological, conservation, and environmental concerns, Florida is likely to " 'win'…").

206. New Jersey v. New York, 283 U.S. 336 (1931) (indicating that both New Jersey and New York followed the Riparian Doctrine as their primary state water law).

207. *Id.* at 341–45.

208. *Id.* at 346–47; Lathrop, *supra* note 14, at 897.

209. *New Jersey*, 283 U.S. at 346–47.

was a revolutionary decision at the time because it stressed more modern environmental concepts. It also placed greater responsibility onto the infringing user by forcing them to have a plan in place to ensure the long-term ecological health for the river that they were taking advantage of. This decision could signal a possible solution that the Court should try and recreate to help alleviate this dispute between Georgia and Florida. Taking a special master's minimum flow level recommendation, and finding a way to hold Georgia responsible for further conservation, environmental health, and water storage efforts could help to remedy the dispute at hand. This does not seem too farfetched because the current ACF River dispute is similar both in state water laws, and factually when compared to *New Jersey v. New York*.[210] That decision may offer the only hope of shaping a true compromise based on previous litigation, and it could offer a key guideline for the Special Master to shape his recommendation on.

VII. SHAPING A COMPROMISE

Florida and Georgia are seeking different uses of the water, and that is what makes this water apportionment case difficult when compared to prior decisions.[211] The Supreme Court must also balance two very contrasting outcomes, one where the growth and developmental future of Atlanta is put at risk, and another where reduced flows threaten to wipe out an entire river ecosystem and thus put an end to one of the United States' major shellfish industries. Florida continues to contend that Georgia is simply asking that water be withheld from Florida while at the same time refusing to take actions that will mitigate its water problem.[212] Finding an end to a dispute that has been raging on for over three decades is not an easy task for the Supreme Court. A decision handed down by the Supreme Court may not be the best option for both sides. The first problem is that judges are not experts on the field of water apportionment. Even though special masters are appointed to make expert recommendations on the disputes, they only have limited judicial experience at best, and are usually given limited guidance or oversight on the matters by the Court.[213] Another issue with resolving this dispute in Court is that the dispute is very likely to resurface again in the future.

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210. *See Id.* at 341–45 (describing the case as involving a downstream user, New Jersey, trying to interfere with a metropolitan upstream use in New York).

211. Baroni, *supra* note 4.

212. Lathrop, *supra* note 14, at 894.

213. Carstens, *supra* note 103, at 628.

This dispute has already persisted for over three decades and the parties' involved want to find a solution that will end the dispute with a permanent solution.

Relying heavily on a balanced recommendation by the Special Master would be the best way to ease any of these concerns. The Master can bring expertise and research to the process, and can formulate a plan that meets the needs of both sides to ensure that this dispute does not resurface in the future. The Special Master should create a plan that would give Atlanta the recourses that it needs with the caveat that they must implement water conservation techniques, and seek permanent alternative sources of water. This would satisfy the requests of Georgia, while also judicially ordering Georgia to make long-term commitments to meet its water needs in a responsible way. The Master should also set a minimum flow requirement that will progress towards restoring the ACF River back to its normal flows. This would be a realistic way to help save the ecosystem and industry for downstream Florida. It may also be smart for the Master to allow for downstream Florida to monitor these flows in order to keep Georgia accountable to keep these minimum flows.[214] However, the truth remains that many of the previous cases on equitable apportionment have resurfaced down the road, and in some cases even created further disputes over the court ordered apportionment.[215] Litigation is costly, time consuming, and might not be a permanent solution to the ACF River dispute so other remedies may be better if these two states want to create a long lasting compromise.

If a balanced outcome cannot be found by the U.S. Supreme Court, the best remaining solutions to the problem may be either a bi-state water compact between Florida and Georgia, or a resolution set out by Congress. These states have gone down this road before with unsuccessful results, but these options may give each state the best chance to bring in experts and find creative ways to compromise on the issue. Congress has been unwilling to get involved, but they may be able to finally shed some light on the role of water storage in the Buford dam project.[216] Congress may be a better avenue because the water

214. *See New Jersey,* 283 U.S. at 347 (ordering downstream states to monitor the upstream user's commitment to water quality).

215. *See* Arizona v. California, 460 U.S. 605 (1983); Colorado v. Kansas, 320 U.S. 383 (1943); Kansas v. Colorado, 206 U.S. 46. 50–52 (1907) (describing the history of cases involving multi-state disputes over flow of the Colorado River); *see also* Nebraska v. Wyoming, 534 U.S. 40 (2001) (involving dispute over the flow of the North Platte River Basin); Nebraska v. Wyoming, 295 U.S. 40 (1935).

216. Bluestein & Malloy, *supra* note 66.

shortage for Atlanta is not going away anytime soon and other surrounding southern state leaders may want to find a solution before Atlanta attempts to find other, rather creative, ways to tap into surrounding sources of water.[217] Either congressional intervention or a bi-state negotiation could offers the best chances for these states to work out an equitable compromise. However, the prior unwillingness by Congress, Florida, or Georgia to intervene and make any progress towards a compromise makes these potential solutions unlikely.

As both Florida and Georgia await the upcoming review by the Supreme Court, the realities of the ACF River dispute remain. Atlanta's continued unwillingness to plan for its future and take responsibility for putting itself into the current water shortage remains a reality. The environmental and economic concerns for the ACF River Basin region also remain a reality. This dispute between conservation and over-development casts a shadow not only on the legal community, but also on society as a whole. Environmental concerns like the health of the ACF River basin continue to take the underdog role of David, and the real question is just how long can David hold off the ever developing Goliath?

217. Barnini Chakraborty, *Georgia Pols Ramp Up Campaign to Shift Tennessee Border, Siphon Water Supply*, FOX NEWS (Feb. 17, 2013) http://www.foxnews.com/politics/2013/02/17/water-wars-georgia-wants-slice-tennessee-river/ (reporting that Georgia was looking to challenge state border from 1818 survey in attempt to shift border north to gain access to the outer banks of the Tennessee River; with the state claiming that "unfriendly Indians" could have been the cause of the mistaken boundaries).