

No. 142, Original

---

---

**In The  
Supreme Court of the United States**

---

STATE OF FLORIDA,

*Plaintiff,*

v.

STATE OF GEORGIA,

*Defendant.*

---

Before the Special Master

Honorable Ralph I. Lancaster

---

**Brief *Amicus Curiae* of Chattahoochee Riverkeeper,  
Flint Riverkeeper, and Alabama Rivers Alliance**

---

Mindy Goldstein, *Director*  
Katherine Lee, *Clinical Fellow*

Turner Environmental Law Clinic  
Emory University School of Law  
1301 Clifton Road  
Atlanta, GA 30322  
(404) 727-3432  
[magolds@emory.edu](mailto:magolds@emory.edu)  
[knlee3@emory.edu](mailto:knlee3@emory.edu)

*Attorneys for Amici Curiae*

---

---

**TABLE OF CONTENTS**

INTERESTS OF THE *AMICI CURIAE* .....1

BACKGROUND .....4

ARGUMENT .....7

A. THE SPECIAL MASTER SHOULD CONSIDER ECOLOGICAL AND CULTURAL INTERESTS IN THE EQUITABLE APPORTIONMENT OF THE ACF BASIN.....9

B. EQUITABLE APPORTIONMENT CAN BE USED TO PROTECT DOWNSTREAM INTERESTS FROM DEGRADATION BY UPSTREAM CONSUMPTIVE USE .....13

CONCLUSION.....17

## TABLE OF AUTHORITIES

### Cases

<i>Amer. Elec. Power Co. v. Connecticut</i> , 564 U.S. 410 (2011).....	10
<i>Arizona Copper Co. v. Gillespie</i> , 230 U.S. 46 (1913) .....	11
<i>Arkansas v. Oklahoma</i> , 503 U.S. 91 (1992) .....	15
<i>Colorado v. New Mexico</i> , 459 U.S. 176 (1982).....	8, 9, 10
<i>Connecticut v. Massachusetts</i> , 282 U.S. 660 (1931) .....	9
<i>Georgia v. Tennessee Copper Co.</i> , 206 U.S. 230 (1907).....	11
<i>Idaho ex rel. Evans v. Oregon</i> , 426 U.S. 1017 (1983).....	13
<i>In re Tri-State Water Rights Litigation</i> , 639 F. Supp. 2d 1308 (M.D. Fla. 2009), <i>reversed and vacated</i> , 644 F.3d 1160 (11th Cir. 2011) .....	6
<i>Kansas v. Colorado</i> , 206 U.S. 46 (1907).....	7, 14
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992) .....	11
<i>Nebraska v. Wyoming</i> , 325 U.S. 589 (1945).....	9, 14
<i>Nebraska v. Wyoming</i> , 515 U.S. 1 (1995).....	10
<i>New Jersey v. New York</i> , 283 U.S. 336 (1931).....	7, 8, 10, 14
<i>Sierra Club v. Morton</i> , 405 U.S. 727 (1972) .....	11
<i>Wyoming v. Colorado</i> , 259 U.S. 419 (1922).....	13

### Administrative Decisions

<i>In re City of Moscow, Idaho</i> , 10 E.A.D. 135, 2001 WL 988721 (E.P.A. July 27, 2001) .....	15
<i>In re Dominion Energy Brayton Point, L.L.C.</i> , 12 E.A.D. 490, 2006 WL 3361084 (E.P.A. Feb. 1, 2006).....	15

### Docket Materials in the Instant Case

Pretrial Brief of Defendant, <i>Florida v. Georgia</i> , No. 142, Orig. (Oct. 12, 2016).....	6
Pretrial Brief of Plaintiff, <i>Florida v. Georgia</i> , No. 142, Orig. (Oct. 12, 2016) .....	6, 11, 12, 16, 17

Tr. of Initial Telephone Conference before Special Master, <i>Florida v. Georgia</i> , No. 142, Orig. (Dec. 1, 2014).....	7
---	---

**Federal Statutes**

33 U.S.C. § 1251(a) .....	15
33 U.S.C. § 1311(a) .....	15
33 U.S.C. § 1342.....	15
33 U.S.C. § 1342(b)(3) .....	15
42 U.S.C. § 7410(a)(2)(D) .....	14
42 U.S.C. § 7410(a)(2)(D)(i) .....	14

**Federal Regulations**

40 C.F.R. § 122.4(d) .....	15
40 C.F.R. § 122.44(d) .....	15

**State Statutes**

Fla. Stat. Ann. § 403.061(43)(a)(2).....	16
Ga. Code Ann. § 12-5-23(c)(16).....	16
Ga. Code Ann. § 12-5-30.4.....	16

**Other Materials**

ACF Stakeholders Group, <i>Sustainable Water Management Plan</i> (2015), <a href="http://acfstakeholders.org/wp-content/uploads/2015/05/ACFS-Sustainable-Water-Management-Plan-For-Release.pdf">http://acfstakeholders.org/wp-content/uploads/2015/05/ACFS-Sustainable-Water-Management-Plan-For-Release.pdf</a> .....	4, 6, 17
Am. Rivers, <i>America’s Most Endangered Rivers 2016</i> (Apr. 12, 2016), <a href="http://s3.amazonaws.com/american-rivers-website/wp-content/uploads/2016/02/20135708/MER2016_FullReport.pdf">http://s3.amazonaws.com/american-rivers-website/wp-content/uploads/2016/02/20135708/MER2016_FullReport.pdf</a> .....	5, 6
Am. Rivers & Flint Riverkeeper, <i>Running Dry: Challenges and Opportunities in Restoring Healthy Flows in Georgia’s Upper Flint River Basin</i> (Apr. 2013), <a href="http://americanrivers.org/wp-content/uploads/2016/05/running-dry-flint-river-report.pdf">http://americanrivers.org/wp-content/uploads/2016/05/running-dry-flint-river-report.pdf</a> .....	6, 12, 16

Carol A. Couch et al., U.S. Geological Survey, <i>Influences of Environmental Settings on Aquatic Ecosystems in the Apalachicola-Chattahoochee-Flint River Basin</i> (1996), <a href="http://pubs.usgs.gov/wri/1995/4278/report.pdf">http://pubs.usgs.gov/wri/1995/4278/report.pdf</a> .....	5
Chattahoochee Riverkeeper, <i>Filling the Water Gap: Conservation Successes and Missed Opportunities in Metro Atlanta</i> (2012), <a href="https://chattahoochee.org/wp-content/uploads/2013/07/FillingWaterGap.pdf">https://chattahoochee.org/wp-content/uploads/2013/07/FillingWaterGap.pdf</a> .....	16
Ga. Dep't of Nat. Res. Wildlife Div., <i>Upper Flint River Fishing Information</i> , <a href="http://www.georgiawildlife.org/Fishing/UpperFlint">http://www.georgiawildlife.org/Fishing/UpperFlint</a> .....	5
James H. Thorp et al., <i>Linking Ecosystem Services, Rehabilitation, and River Hydrogeomorphology</i> , 60 <i>BioScience</i> 67 (Jan. 2010), <a href="http://bioscience.oxfordjournals.org/content/60/1/67.full.pdf+html">http://bioscience.oxfordjournals.org/content/60/1/67.full.pdf+html</a> .....	8
J.B. Ruhl, <i>Equitable Apportionment of Ecosystem Services: New Water Law for a New Water Age</i> , 19 <i>J. Land Use &amp; Envtl. L.</i> 47 (2003).....	8, 11
Nat'l Oceanic & Atmospheric Admin. Envtl. Coop. Sci. Ctr., <i>Apalachicola National Estuarine Research Reserve</i> , <a href="http://ecsc.famu.edu/t-apalachicola-nerr.html">ecsc.famu.edu/t-apalachicola-nerr.html</a> .....	5
Nat'l Park Serv., <i>Visitor Use Statistics for Chattahoochee River NRA</i> , <a href="https://irma.nps.gov/Stats/Reports/Park/CHAT">https://irma.nps.gov/Stats/Reports/Park/CHAT</a> .....	5
<i>Nature's Services: Societal Dependence on Natural Ecosystems</i> (Gretchen Daily ed. 1997) .....	8
Stephanie K. Chase, <i>There Must Be Something in the Water: An Exploration of the Rhine and Mississippi Rivers' Governing Differences and an Argument for Change</i> , 29 <i>Wis. Int'l L.J.</i> 609 (Fall 2011) .....	14
Stephen J. Lawrence, U.S. Geological Survey, <i>Water Use in the Apalachicola-Chattahoochee-Flint River Basin, Alabama, Florida, and Georgia, 2010, and Water-Use Trends, 1985-2010</i> (Feb. 25, 2016), <a href="https://pubs.er.usgs.gov/publication/sir20165007">https://pubs.er.usgs.gov/publication/sir20165007</a> .....	4
U.S. Army Corps of Eng'rs, <i>Draft Environmental Impact Statement, Update of the Water Control Manual for the Apalachicola-Chattahoochee-Flint River Basin in Alabama, Florida, and Georgia and a Water Supply Storage Assessment</i> (Oct. 2015), <a href="http://www.sam.usace.army.mil/Portals/46/docs/planning_environmental/acf/docs/ACF%20DEIS%20Vol1.pdf">http://www.sam.usace.army.mil/Portals/46/docs/planning_environmental/acf/docs/ACF%20DEIS%20Vol1.pdf</a> .....	12
WhiteWater Express, <i>Chattahoochee</i> , <a href="http://www.whitewaterexpress.com/chattahoochee/">http://www.whitewaterexpress.com/chattahoochee/</a> .....	5

## INTERESTS OF THE AMICI CURIAE

*Amici curiae* Chattahoochee Riverkeeper, Flint Riverkeeper, and Alabama Rivers Alliance (collectively, the River Groups) respectfully submit this *amicus* brief in the above-captioned proceeding. Collectively, the River Groups work to restore and preserve the ecological health of the Apalachicola-Chattahoochee-Flint River Basin (ACF Basin) for the benefit of current and future generations of people and wildlife. Each organization has members and supporters who use and rely on the waters of the ACF Basin for income, recreation, drinking water, scientific study, support of property values, and protection of their health, food supply, and real property. As the organizations tasked with protecting rivers that will be apportioned in this dispute, the River Groups have a unique and substantial interest in the outcome of any equitable apportionment between Florida and Georgia, and they are specially qualified to highlight for the Special Master the ecological, economic, and cultural significance of the ACF Basin to Georgia, Florida, and the Southeast region.

*Amicus curiae* Chattahoochee Riverkeeper is a not-for-profit organization whose mission is to advocate for and secure the protection and stewardship of the Chattahoochee River, its lakes, tributaries, and watershed, in order to restore and preserve their ecological health for the people and wildlife that depend on the river system. Established in 1994, Chattahoochee Riverkeeper has more than 7,000 individual members, and it has had substantial and continuous involvement in the current dispute between Florida and Georgia. As a founding member and Governing Board member of the ACF Stakeholders Group, Chattahoochee Riverkeeper was involved significantly in the preparation of the group's Sustainable Water Management Plan, and it also prepared comments on the proposed revisions to the U.S. Army Corps of Engineers' (Corps') ACF Water Control Manual. Chattahoochee Riverkeeper is also a member of both the

Tri-State Conservation Coalition and the Georgia Water Coalition, two groups that work to protect water resources throughout Georgia and the ACF Basin. Chattahoochee Riverkeeper advocates before state and federal agencies and institutions for adequate flows in the Chattahoochee to protect water quality and aquatic life and monitors flow at critical places in the river, including Peachtree Creek below metro Atlanta. Through its No Time to Waste Campaign, Chattahoochee Riverkeeper educates students, businesses, local governments, and civic groups about cost-effective water saving measures.

*Amicus curiae* Flint Riverkeeper is a not-for-profit organization whose mission is to restore and preserve the habitat, water quality, and flow of the Flint River for the benefit of current and future generations and dependent wildlife. Established in 2008, Flint Riverkeeper has over 2,500 individual members, comprised of over 650 families, farms, and businesses. Flint Riverkeeper's work is focused on municipal, agricultural, and industrial reductions in consumptive use of water in the river system, and consequently Flint Riverkeeper has had substantial and continuous involvement in the dispute between Florida and Georgia. As a founding member, Governing Board member, and vice-chair of the technical oversight committee of the ACF Stakeholders Group, Flint Riverkeeper was involved significantly in the preparation of the group's Sustainable Water Management Plan. Flint Riverkeeper also prepared comments on the proposed revisions to the Corps' ACF Water Control Manual. In addition, Flint Riverkeeper has lobbied for legislation and rulemaking on improving water use in the Flint River before the Georgia General Assembly and the Georgia Board of Natural Resources, has made legal arguments to the Georgia Environmental Protection Division about endangered species and property rights concerns, and has presented on water use to over 10,000 citizens. Flint

Riverkeeper is also a member of both the Tri-State Conservation Coalition and the Georgia Water Coalition.

*Amicus curiae* Alabama Rivers Alliance (ARA) is a statewide network of over sixty groups that work to protect and restore all of Alabama's water resources through building partnerships, empowering citizens, and advocating for sound water policy and its enforcement. ARA has been working to restore and protect the rivers of Alabama for almost twenty years, and it has been involved significantly in the ongoing disputes between Florida, Georgia, and Alabama regarding the use of water in the ACF Basin as well as the Alabama-Coosa-Tallapoosa (ACT) River Basin. ARA is a founding member and Governing Board member of the ACF Stakeholders Group, representing the environmental interests of the Middle and Lower Chattahoochee River in Alabama, and is also a member of the Tri-State Conservation Coalition. ARA has been actively engaged in the development of a sustainable water management program in Alabama, and it participated as a stakeholder in developing the Corps' water control manuals for the ACF and the ACT systems. Most recently, ARA members and staff have been appointed to each of the five Focus Area Panels convened by the Governor of the State of Alabama to provide recommendations for a state water management plan.

Through this *amicus* brief, the *amici* wish to share their expertise, highlight the impact that equitable apportionment could have on the entire ACF Basin's ecological health, and encourage the Special Master to use his broad legal authority under the equitable apportionment doctrine to ensure that these ecological factors are considered and included in any recommendations.

## **BACKGROUND**

The ACF Basin is a river system comprising three major components: two tributary rivers, the Chattahoochee and Flint Rivers, and a receiving trunk and bay system, the Apalachicola River and Bay. The Chattahoochee River begins in the Blue Ridge Mountains of northeastern Georgia and flows southwest through Atlanta before turning south to form the southern half of the border between Georgia and Alabama. The Flint River originates south of Atlanta and flows through west and southwest Georgia until it reaches Lake Seminole at the Georgia-Florida state line. There, the Chattahoochee and Flint Rivers converge to form the Apalachicola River, which flows through the Florida panhandle and into the Gulf of Mexico via Apalachicola Bay. Altogether, the ACF Basin drains approximately 20,000 square miles across Georgia, Florida, and Alabama. Stephen J. Lawrence, U.S. Geological Survey, *Water Use in the Apalachicola-Chattahoochee-Flint River Basin, Alabama, Florida, and Georgia, 2010, and Water-Use Trends, 1985-2010* 1–2, 44–47 (Feb. 25, 2016), <https://pubs.er.usgs.gov/publication/sir20165007>.

The importance of the ACF Basin to each of these states cannot be overstated. The Basin is the primary source of drinking water for more than four million people, including approximately seventy percent of metro Atlanta’s population. ACF Stakeholders Group, *Sustainable Water Management Plan* 110 (2015), <http://acfstakeholders.org/wp-content/uploads/2015/05/ACFS-Sustainable-Water-Management-Plan-For-Release.pdf> (ACF Stakeholders Plan). Farmers, industries, and power generators rely on the ACF Basin and its underlying aquifers to provide water for their respective needs. *Id.* at 8–9. And, as one of the largest freshwater and nutrient sources to the Gulf Coast, the ACF Basin supports commercial fisheries valued at over \$5.8 billion, including the valuable commercial and recreational oyster fisheries in Apalachicola

Bay. Nat'l Oceanic & Atmospheric Admin. Env'tl. Coop. Sci. Ctr., *Apalachicola National Estuarine Research Reserve*, [ecsc.famu.edu/t-apalachicola-nerr.html](http://ecsc.famu.edu/t-apalachicola-nerr.html) (last visited Oct. 20, 2016); Am. Rivers, *America's Most Endangered Rivers 2016* 3 (Apr. 12, 2016), [http://s3.amazonaws.com/american-rivers-website/wp-content/uploads/2016/02/20135708/MER2016\\_FullReport.pdf](http://s3.amazonaws.com/american-rivers-website/wp-content/uploads/2016/02/20135708/MER2016_FullReport.pdf) (American Rivers Report).

The ACF Basin is also renowned for its exceptional biological diversity and world-class recreational opportunities. The Basin is home to the largest number of fish species among Gulf Coast drainages east of the Mississippi River, the highest species density of amphibians and reptiles north of Mexico, and several threatened and endangered mussels and fish, including the Gulf Sturgeon. Carol A. Couch et al., U.S. Geological Survey, *Influences of Environmental Settings on Aquatic Ecosystems in the Apalachicola-Chattahoochee-Flint River Basin* 1–2 (1996), <http://pubs.usgs.gov/wri/1995/4278/report.pdf>. State residents and tourists alike flock to the ACF Basin and its surrounding communities for its unique hiking, fishing, and paddling opportunities. The Flint River, for example, hosts a world-famous recreational shoal bass fishery, Ga. Dep't of Nat. Res. Wildlife Div., *Upper Flint River Fishing Information*, <http://www.georgiawildlife.org/Fishing/UpperFlint>, and the Chattahoochee River is home to the world's longest urban whitewater rafting venue, located between Columbus, Georgia and Phenix City, Alabama. WhiteWater Express, *Chattahoochee*, <http://www.whitewaterexpress.com/chattahoochee/>. The Chattahoochee River National Recreation Area, which features the nation's first National Water Trail, attracts more than three million visitors and generates over \$290 million annually. Nat'l Park Serv., *Visitor Use Statistics for Chattahoochee River NRA*, <https://irma.nps.gov/Stats/Reports/Park/CHAT> (last visited Oct. 20, 2016); *see also* American Rivers Report, *supra*, at 3.

Altogether, the ACF Basin and the myriad services it provides generate billions of dollars each year. *Id.*; see also ACF Stakeholders Plan, *supra*, at 121; Def.’s Pretrial Br. 21–22. But the Basin’s ability to act as an economic engine in its three constituent states is inextricably entwined with its ecological health, and today, the health of the ACF Basin is in serious jeopardy. Largely due to unsustainable water consumption in Georgia and ineffective water management policies across all three states, flow rates in the Apalachicola and Flint Rivers have been in decline for the past several decades, with both rivers experiencing low flows of historic magnitude and duration. Am. Rivers & Flint Riverkeeper, *Running Dry: Challenges and Opportunities in Restoring Healthy Flows in Georgia’s Upper Flint River Basin* 10–11 (Apr. 2013), <http://americanrivers.org/wp-content/uploads/2016/05/running-dry-flint-river-report.pdf> (Running Dry); see also Pl.’s Pretrial Br. 1–3, 18–19. The overuse and mismanagement of water in the ACF Basin, and the resultant impact on flow, has threatened the economic, ecological, and cultural benefits that naturally dynamic and sufficient streamflows would provide. *Running Dry*, *supra*, at 6. Consequently, Florida, Georgia, and Alabama, along with the Corps,<sup>1</sup> have been embroiled in nearly three decades of litigation over their respective rights to use the waters in the ACF Basin. But despite numerous attempts to compromise, the states have been unable to find a common solution, eventually leading Florida to file this original action in the Supreme Court.<sup>2</sup>

At the core of the instant dispute is the issue of consumptive use: how much water Georgia has the right to consume upstream versus the amount of flow to which Florida is entitled downstream. But the ACF Basin provides economic, ecological, and cultural benefits to all of its

---

<sup>1</sup> The Corps, while not a party to this lawsuit, has been substantially involved in past ACF disputes due to the Corps-operated reservoirs and dams along the Chattahoochee River. See *In re Tri-State Water Rights Litigation*, 639 F. Supp. 2d 1308, 1333–39 (M.D. Fla. 2009), *reversed and vacated*, 644 F.3d 1160 (11th Cir. 2011).

<sup>2</sup> For a detailed history of the litigation, see *In re Tri-State Water Rights Litigation*, 639 F. Supp. 2d at 1333–39.

users, irrespective of state lines.<sup>3</sup> Reducing consumptive use in the ACF Basin and restoring a more natural flow regime would substantially benefit Florida *and* Georgia, along with Alabama.<sup>4</sup> And while the River Groups, like the Special Master,<sup>5</sup> do not believe that equitable apportionment is the most effective way to resolve the ongoing disputes in the ACF Basin, in this *amicus* brief the River Groups will highlight ways that the Special Master can ensure that his equitable apportionment recommendation incorporates the important ecological and cultural benefits provided by the ACF Basin as a whole.<sup>6</sup>

### **ARGUMENT**

As Justice Holmes recognized in one of the first equitable apportionment decisions, “[a] river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it.” *New Jersey v. New York*, 283 U.S. 336, 342 (1931). This key concept—that rivers play a uniquely critical role in protecting the health and prosperity of humans and the environment—is a foundational element of the Supreme Court’s equitable apportionment jurisprudence. *See Kansas v. Colorado*, 206 U.S. 46, 98 (1907). Thus, in equitable apportionment actions, the Supreme Court has refused to “quibbl[e] over formulas” or establish other such rigid rules that could result in an unfair allocation of water. *New Jersey*, 283 U.S. at 343. Rather, the Court has stated repeatedly that the equitable apportionment doctrine is inherently flexible in nature, and the Court may exercise significant discretion to ensure that

---

<sup>3</sup> For further discussion on the differences between these types of benefits, see *infra* p. 8.

<sup>4</sup> Though Alabama is not a party to this suit, the equitable apportionment of the ACF Basin will inevitably affect Alabama, along with Florida and Georgia. The Special Master should ensure that his decision improves the health of the ACF Basin as a whole, so that all three states can benefit.

<sup>5</sup> Tr. of Initial Telephone Conference before Special Master at 22, *Florida v. Georgia*, No. 142, Orig. (Dec. 1, 2014).

<sup>6</sup> The River Groups firmly believe that an equitable apportionment action in the Supreme Court is neither the most efficient nor effective way to resolve the dispute between Florida and Georgia. Better methods, including setting up an interstate management authority for the ACF Basin with the ability to adaptively manage the Basin’s resources, exist. Thus, the River Groups support the Special Master’s continued urging of the parties to settle this dispute or enter into a new interstate compact. Nevertheless, the River Groups submit this brief to assist the Special Master in developing an equitable apportionment decision that is as fair and just as possible.

interstate waters are allocated in a just and fair manner. *Colorado v. New Mexico*, 459 U.S. 176, 188 (1982).

In accordance with this inherent flexibility, the Special Master in this equitable apportionment action has broad authority to decide what kinds of interests to consider and how those interests should be weighed. Historically, equitable apportionment cases have prioritized traditionally “economic” interests—namely, those that are tied to existing industrial, agricultural, or commercial economies, and whose monetary value can be quantified easily. *See, e.g., New Jersey*, 283 U.S. at 344; J.B. Ruhl, *Equitable Apportionment of Ecosystem Services: New Water Law for a New Water Age*, 19 J. Land Use & Env'tl. L. 47, 52–53 (2003). But this antiquated view does not give sufficient consideration to various “non-economic” interests that, while sometimes more challenging to translate in monetary terms, nevertheless have substantial economic value. *See* James H. Thorp et al., *Linking Ecosystem Services, Rehabilitation, and River Hydrogeomorphology*, 60 *BioScience* 67, 67 (Jan. 2010), <http://bioscience.oxfordjournals.org/content/60/1/67.full.pdf+html>. Healthy river basins provide a wide variety of important *ecological* benefits, such as flood control, erosion prevention, and climate regulation, and *cultural* benefits, such as supporting recreational, aesthetic, spiritual, or educational interests. *Id.* Modern science increasingly shows no meaningful distinction between economic injury and ecological and cultural injury; rather, healthy, vibrant ecosystems yield substantial economic benefits, and relatedly, ecological harms can cause significant economic injury. *See Nature's Services: Societal Dependence on Natural Ecosystems* (Gretchen Daily ed. 1997).

As this brief will show, there is ample flexibility within the equitable apportionment doctrine to ensure that traditional economic interests are not given unfair and unscientific priority over important ecological and cultural interests. And, in considering these interests, the Special

Master has the authority to take a Basin-wide approach that does not arbitrarily value upstream consumptive uses over other interests downstream. Indeed, the Special Master can, and must, consider the economic *and* “non-economic” values of the ACF Basin *as a whole* in order to ensure a fully informed—and thus fair—equitable apportionment decision.

**A. The Special Master Should Consider Traditionally Non-Economic Interests in the Equitable Apportionment of the ACF Basin.**

The ACF Basin provides substantial economic benefits to Florida and Georgia alike, generating billions of dollars to each state annually. But, this dispute implicates interests beyond the existing monetary uses in the Basin; it will also affect the many ecological and cultural services that the ACF Basin provides. These services also must be considered to ensure that the ACF Basin is apportioned in a just and equitable manner.<sup>7</sup> Such consideration not only comports with modern science, but is entirely consistent with the Supreme Court’s prior equitable apportionment jurisprudence.

As the Court has noted, equitable apportionment requires it to weigh the harms and benefits to competing states and exercise “an informed judgment on a consideration of many factors” in order to secure a just and fair allocation. *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945). In each equitable apportionment action, “*all of the factors which create equities in favor of one state or the other must be weighed.*” *Id.* (equitable apportionment depends “upon a consideration of the pertinent laws of the contending States *and all other relevant facts*”) (emphasis added) (citing *Connecticut v. Massachusetts*, 282 U.S. 660, 670–71 (1931)). In determining what factors to weigh, the Court has significant discretion and is not (and should not be) limited to considering only those harms and benefits that are purely economic in nature. *See Colorado v. New Mexico*, 459 U.S. at 191 (“Each state through which rivers pass has a right to

---

<sup>7</sup> As discussed *supra* p. 8, these interests are only “non-economic” in the traditional sense. Many of these interests are integrally tied to the economic value of the ACF Basin, both in the short and long term.

the benefit of the water but it is for the Court, as a matter of discretion, to measure their relative rights and obligations and to apportion the available water equitably.”). Rather, like all federal common law, the equitable apportionment doctrine is flexible and is intended to adapt to changing scientific and factual circumstances. *See id.* at 183–84; *cf. Amer. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423 (2011). Thus, in determining an equitable allocation, the Special Master has the authority to consider the ecological and cultural interests in the ACF Basin and to decide how they should be weighed against competing interests.

Several equitable apportionment actions have included consideration of such ecological and cultural interests. In *New Jersey v. New York*, for example, the Court held that sewage waste released from New York City into the Delaware River was injuring New Jersey citizens’ recreational use of the river; in its final decree, the Court enjoined the sewage discharge and ordered New York to build a sewage treatment plant to improve water quality downstream. 283 U.S. 336, 345 (1931). More recently, in *Nebraska v. Wyoming*, 515 U.S. 1 (1995), the Court went further, explicitly stating that harms to wildlife and wildlife habitat can be considered in equitable apportionment actions. *Id.* at 12. While the dispute was still before the Special Master, Nebraska submitted evidence that Wyoming’s upstream water diversions in the North Platte River were harming wildlife and wildlife habitat in Nebraska. *Id.* Wyoming objected to the use of this evidence, but the Court disagreed, holding that the Special Master was permitted to consider “a broad array of downstream interests and to hear evidence of injury not only to downstream irrigators, but also to wildlife and wildlife habitat.” *Id.* The Court did not suggest that these ecological harms were subordinate to traditional economic harms; rather, the Court stated that they should be treated as “but one equity to be balanced” in the process of fashioning an equitable apportionment decree. *Id.* Thus, the Court’s prior equitable apportionment

jurisprudence supports the consideration of ecological and cultural interests, and does not require that traditional economic interests be given priority when the apportionment decision is made.

This interpretation of equitable apportionment also aligns with how the Court weighs environmental and economic interests in other areas of law.<sup>8</sup> Public nuisance doctrine is one analogous example: public nuisance cases are equitable in nature and require courts to weigh competing harms and benefits to the parties. Public nuisance has long recognized purely environmental injuries as proper subjects for relief. *See, e.g., Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) (air pollution); *Arizona Copper Co. v. Gillespie*, 230 U.S. 46, 56–57 (1913) (water pollution). Another example is the Supreme Court’s Article III standing jurisprudence. The Court’s standing doctrine has evolved over the past sixty years to recognize that where a plaintiff suffers discrete injury to recreational or aesthetic interests in a natural resource, those injuries are legally cognizable, regardless of whether or not the plaintiff has suffered associated pecuniary losses. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992); *see also Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

Thus, ecological and cultural interests fall squarely within the range of interests that the Special Master is authorized to consider in his equitable apportionment decision here, and nothing in the doctrine requires the true value of these interests to be discounted in favor of traditional economic uses. In this case, the Special Master should account for the value of the ACF Basin as a whole, and the many ecological, cultural, and associated economic benefits that would accrue not only to Florida, but also to Georgia if upstream consumption were reduced. In its pretrial brief, Florida fully describes the various benefits it believes it will receive from such reductions. Pl.’s Pretrial Br. 37–39. To emphasize that improving the health of the ACF Basin

---

<sup>8</sup> It is worth noting that this dispute is one of the first major interstate apportionment cases to reach the Court in the “age of mature environmental statutory law.” Ruhl, *supra*, at 48–49. Thus, the instant dispute offers an opportunity to update equitable apportionment to better accommodate the U.S. environmental regulatory framework.

will benefit *all* of its constituent states, this brief will provide examples of benefits that could accrue to Georgia, and that the Special Master should also consider in his apportionment decision.<sup>9</sup> In the Flint River, reductions in consumptive use could mitigate a variety of problems that have arisen due to low flows. For example, the upper Flint River, once a premier destination for paddling, has seen decreased recreational use in recent years because of increasingly frequent and persistent low-flow periods. *Running Dry, supra*, at 11–13. Low flows have also threatened the drinking water security of cities along the Flint River; flow rates near the Flint River’s headwaters have at times been so low that municipal withdrawal pumps were rendered unusable. *Id.* at 14, 17–18. If flow rates do not improve, the Flint River could see further harms in the form of decreasing property values, damage to critical fisheries, and an unknown number of lost business opportunities. *Id.* at 13; Pl.’s Pretrial Br. 30. Though most of the flow along the Chattahoochee River is controlled by the Corps’ operations of the five federal reservoirs along the river, the Chattahoochee would also benefit from reducing consumptive uses and thereby establishing a healthier flow regime. Approximately one dozen wastewater treatment plants discharge treated sewage waste into the Chattahoochee River as it flows through the metro Atlanta area; certain minimum flows are required through this stretch of the river so that sewage waste is adequately assimilated to ensure clean water downstream. U.S. Army Corps of Eng’rs, *Draft Environmental Impact Statement, Update of the Water Control Manual for the Apalachicola-Chattahoochee-Flint River Basin in Alabama, Florida, and Georgia and a Water Supply Storage Assessment* 2-76, 4-18 (Oct. 2015), [http://www.sam.usace.army.mil/Portals/46/docs/planning\\_environmental/acf/docs/ACF%20DEIS%20Vol1.pdf](http://www.sam.usace.army.mil/Portals/46/docs/planning_environmental/acf/docs/ACF%20DEIS%20Vol1.pdf). Reducing consumptive uses

---

<sup>9</sup> The River Groups believe (1) that Georgia’s upstream consumptive use *contributes* to the unhealthy flow regime that currently exists in the ACF Basin; and (2) that reducing consumptive use would positively impact the ecological health of the Basin and its three major rivers. However, recognizing that the Special Master’s decision on these issues must be based on the trial record, this brief will not discuss causation in detail.

upstream could move the Chattahoochee and Flint Rivers closer to natural flow regimes, improving the health of the ACF Basin as a whole and thus directly benefiting Florida, Georgia, and Alabama.

In sum, the Special Master in this case has the authority to consider economic, ecological, and cultural interests in making his apportionment decision, and to decide how those interests should be weighed. To ensure that the decision is as just and fair as possible, the Special Master should not arbitrarily prioritize traditional economic uses of the ACF Basin, but rather should give significant weight to the ecological and cultural value of the ACF Basin as a whole, including the benefits that would accrue to both Florida and Georgia from reductions in consumptive use.

**B. Equitable Apportionment Can Be Used to Protect Downstream Interests from Degradation by Upstream Consumptive Use.**

When balancing the economic, ecological, and cultural interests at stake in this apportionment decision, the Special Master is not required to prioritize upstream consumptive uses over the interests of users downstream. Rather, equitable apportionment doctrine allows for—and indeed requires—a system-wide approach to decisionmaking that looks at how the different parts of a river system relate, including the effect of upstream uses on users downstream. Thus, a core tenet of the equitable apportionment doctrine is that “the upper state on [an interstate] stream does not have such ownership or control of the waters flowing therein as entitles her to divert and use them regardless of any injury or prejudice to the rights of the lower state of the stream.” *Wyoming v. Colorado*, 259 U.S. 419, 464 (1922).<sup>10</sup> In balancing the equities between states in an apportionment action, the Court has stated that two relevant factors include

---

<sup>10</sup> In *Idaho ex rel. Evans v. Oregon*, the Supreme Court determined that salmon—which swim upstream rather than downstream—were a proper subject for equitable apportionment between states because “much as in a water dispute, a State that overfishes a run downstream *deprives an upstream State of the fish it would otherwise receive.*” 426 U.S. 1017, 1024 (1983) (emphasis added).

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.” *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945) (emphasis added). For example, in *New Jersey v. New York*, the Court required New York to limit consumptive use of water in the Delaware River in order to provide the downstream Delaware Basin states with a sufficient base flow to protect recreational uses and fisheries downstream. 283 U.S. 336, 345–48 (1931). Equitable apportionment doctrine therefore can be used to require limits in upstream consumptive uses to protect uses downstream. Here, the Special Master has the authority to limit consumptive uses in Georgia to ensure that adequate flow is available to protect the many uses of the Apalachicola River as well as downstream reaches of the Chattahoochee and Flint River systems.

The use of equitable apportionment to protect downstream interests is also consistent with analogous federal and state environmental laws.<sup>11</sup> As a matter of national policy, federal law recognizes that activities benefitting one or more states to the detriment of others are unacceptable. This policy is particularly apparent in federal environmental laws that address transboundary pollution.<sup>12</sup> For example, the Clean Air Act’s “Good Neighbor Provision” directs upwind states to eliminate air emissions that contribute significantly to or interfere with a downwind state’s ability to achieve national air quality standards. 42 U.S.C. § 7410(a)(2)(D)(i). If states cannot satisfy the Good Neighbor Provision through their own plans to meet air quality standards, the Environmental Protection Agency (EPA) must promulgate a federal plan to satisfy the provision. *See id.* § 7410(a)(2)(D).

---

<sup>11</sup> In equitable apportionment cases, the Supreme Court may apply “[f]ederal law, state law, and international law, as the exigencies of the particular case may demand.” *Kansas v. Colorado*, 206 U.S. 46, 48 (1907).

<sup>12</sup> This brief will only discuss examples from U.S. federal and state law, but the issue of protecting downstream users from upstream pollution is common in international law as well. For one example discussing transboundary pollution in the Rhine River, see Stephanie K. Chase, *There Must Be Something in the Water: An Exploration of the Rhine and Mississippi Rivers’ Governing Differences and an Argument for Change*, 29 Wis. Int’l L.J. 609, 612 (Fall 2011).

The Clean Water Act also requires upstream states to meet downstream states' water quality standards. Congress passed the Clean Water Act in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, the Clean Water Act prohibits the discharge of any pollutant into "waters of the United States" from a point source without a permit issued under the National Pollutant Discharge Elimination System (NPDES). *Id.* §§ 1311(a), 1342. For federally issued NPDES permits, EPA may require a source state's discharge to comply with a downstream state's water quality standards. 40 C.F.R. §§ 122.4(d), 122.44(d); *see also Arkansas v. Oklahoma*, 503 U.S. 91, 105–06 (1992) (holding that EPA may do so because the "application of state water quality standards in the interstate context is wholly consistent with the [Clean Water] Act's broad purpose . . ."). For example, under this permit scheme, EPA has required a power plant in Massachusetts to comply with cooling water intake limits based on downstream Rhode Island's water quality standards, *In re Dominion Energy Brayton Point, L.L.C.*, 12 E.A.D. 490, 2006 WL 3361084, \*100–05 (E.P.A. Feb. 1, 2006), and required a wastewater treatment plant in Idaho to comply with Washington's water quality standards for temperature and dissolved oxygen, *In re City of Moscow, Idaho*, 10 E.A.D. 135, 2001 WL 988721, \*19–21 (E.P.A. July 27, 2001). Downstream states are also entitled to various procedural protections when the issuance of a NPDES permit may affect a downstream state's waters. 33 U.S.C. § 1342(b)(3).

Moreover, many states, including Florida and Georgia, have state laws to protect downstream users from pollution or excessive consumptive use upstream. For example, under the Georgia Water Quality Control Act (Georgia Water Act), the director of Georgia's Environmental Protection Division has the authority to establish standards to "maintain[] appropriate levels of stream flow downstream of new or expanding surface-water withdrawal

facilities,” Ga. Code Ann. § 12-5-23(c)(16), and protect downstream users from harmful discharges upstream, *id.* § 12-5-30.4. Similarly, under the Florida Air and Water Pollution Control Act, the Department of Environmental Protection may not issue a water discharge permit if the discharge will cause or contribute to the violation of water quality standards downstream. Fla. Stat. Ann. § 403.061(43)(a)(2).

Here, the Special Master should consider the harms to downstream users in the ACF Basin to ensure that his equitable apportionment recommendation results in the most just and fair decision for the people of Florida and Georgia. It is also important for the Special Master to consider the various ways in which Georgia can reasonably reduce its consumptive use. A 2012 report by Chattahoochee Riverkeeper found that metro Atlanta could save between 134 and 147 million gallons of water per day by investing in simple water conservation measures such as plumbing retrofit programs for old homes, more effective residential water pricing, and rainwater harvesting. Chattahoochee Riverkeeper, *Filling the Water Gap: Conservation Successes and Missed Opportunities in Metro Atlanta* 1 (2012), <https://chattahoochee.org/wp-content/uploads/2013/07/FillingWaterGap.pdf>. The report identified opportunities for even greater water savings with the support of financial, institutional, and political resources at the state level. *Id.* In addition, Georgia could take a variety of measures to reduce consumption in the Flint River specifically. In the upper Flint, these measures include, for example, reducing inter-basin transfers from the Flint, investing in water efficiency improvements, undertaking a consistent and comprehensive drought management planning process, setting restrictions on water use, and implementing water-saving landscaping and irrigation programs. *Running Dry*, *supra*, at 29; *see also* Pl.’s Pretrial Br. 38. In the lower Flint, modeling conducted by the ACF Stakeholders Group showed that flow impacts from agricultural water consumption could be reduced by fifteen

percent through a variety of policies and practices, such as “equipment retrofits, identification of source switching opportunities, and tillage practices including sod-based rotation.” ACF Stakeholders Plan, *supra*, at 95. Improvements in irrigation permitting and enforcement could result in further reductions. *Id.* at 95, 105–06; Pl.’s Pretrial Br. 28–31.

The Special Master should consider how upstream consumptive uses harm all downstream users in the ACF Basin, along with the availability of reasonable measures to reduce consumptive use, in his equitable apportionment recommendation for the ACF Basin.

### **CONCLUSION**

The Special Master’s decision in this equitable apportionment dispute could have wide-reaching impacts throughout the ACF Basin and its constituent states. With this *amicus* brief, the River Groups encourage the Special Master to consider the true value that the ACF Basin provides to all its states, and to ensure that his decision does not rely on unscientific distinctions between economic and ecological harms. By doing so, the Special Master can ensure that his equitable apportionment decision improves the health and vitality of the ACF Basin for the benefit of all.

Respectfully submitted,

/s/ Mindy Goldstein

Mindy Goldstein  
Director  
Turner Environmental Law Clinic  
Emory University School of Law  
1301 Clifton Rd.  
Atlanta, GA 30322  
Tel.: (404) 727-3432  
[magolds@emory.edu](mailto:magolds@emory.edu)  
Supreme Court Bar #299365

October 21, 2016

/s/ Katherine Lee

Katherine Lee  
Clinical Fellow  
Turner Environmental Law Clinic  
Emory University School of Law  
1301 Clifton Rd.  
Atlanta, GA 30322  
Tel.: (404) 727-9907  
[knlee3@emory.edu](mailto:knlee3@emory.edu)

## CERTIFICATE OF SERVICE

This is to certify that the Brief *Amicus Curiae* of Chattahoochee Riverkeeper, Flint Riverkeeper, and Alabama Rivers Alliance has been served on October 21, 2016, in the manner specified below:

<b><u>For State of Florida</u></b>	<b><u>For State of Georgia</u></b>
<u>By U.S. Mail and Email</u>	<u>By U.S. Mail and Email</u>
Gregory G. Garre Counsel of Record Latham & Watkins LLP 555 11th Street, NW Suite 1000 Washington, DC 20004 T: 202-637-2207 <a href="mailto:gregory.garre@lw.com">gregory.garre@lw.com</a>	Craig S. Primis, P.C. Counsel of Record Kirkland & Ellis LLP 655 15th Street, N.W. Washington, D.C. 20005 T: 202-879-5000 <a href="mailto:craig.primis@kirkland.com">craig.primis@kirkland.com</a>
Jonathan L. Williams Deputy Solicitor General Office of Florida Attorney General The Capital, PL-01 Tallahassee, FL 32399 T: 850-414-3300 <a href="mailto:Jonathan.Williams@myfloridalegal.com">Jonathan.Williams@myfloridalegal.com</a>	<u>By Email Only:</u>
<u>By Email Only:</u>	Samuel S. Olens Nels Peterson Britt Grant Seth P. Waxman K. Winn Allen Devora W. Allon <a href="mailto:georgiawaterteam@kirkland.com">georgiawaterteam@kirkland.com</a>
Pamela Jo Bondi Craig Varn Christopher M. Kise James A. McKee Adam C. Losey Matthew Z. Leopold Philip J. Perry Abid R. Qureshi Claudia M. O'Brien Paul N. Signarella Donald G. Blankenau Thomas R. Wilmoth <a href="mailto:floridaacf.lwteam@lw.com">floridaacf.lwteam@lw.com</a> <a href="mailto:floridawaterteam@foley.com">floridawaterteam@foley.com</a>	

**For United States of America**

By U.S. Mail and Email

Ian Gershengorn  
Acting Solicitor General  
Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530  
T: 202-514-7717  
[supremectbriefs@usdoj.gov](mailto:supremectbriefs@usdoj.gov)

By Email Only

Michael T. Gray  
[Michael.Gray2@usdoj.gov](mailto:Michael.Gray2@usdoj.gov)

James DuBois  
[James.Dubois@usdoj.gov](mailto:James.Dubois@usdoj.gov)

Respectfully submitted,

/s/ *Mindy Goldstein*

Mindy Goldstein  
Director  
Turner Environmental Law Clinic  
Emory University School of Law  
1301 Clifton Rd.  
Atlanta, GA 30322  
Tel.: (404) 727-3432  
[magolds@emory.edu](mailto:magolds@emory.edu)

October 21, 2016