

Florida's Fight to Save the Apalachicola: An Environmental and Cultural Treasure at Risk

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The Apalachicola River and Bay are extraordinary natural resources within the State of Florida that the state has invested enormous resources in protecting and preserving. The waters of the Apalachicola nourish a rare and exemplary ecosystem that has been recognized repeatedly by state, national, and international bodies for its untouched character and diverse plant and animal species. The Apalachicola region is one of only 28 federally designated National Estuarine Research Reserves in the United States and has been named a Biosphere Reserve by the United Nations Educational, Scientific, and Cultural Organization. In addition to its extraordinary environmental significance, it has immense social and cultural value. The Apalachicola supports the local population of Franklin County and the surrounding region, which is highly dependent on the natural resources. This interdependent relationship between man and the environment has created over many decades a regional economy and a unique way of life that have evolved around the seafood and coastal industries. Most notably, until recent times, the bay supported a thriving commercial oyster fishery. Unfortunately, the Apalachicola's resources are under threat, primarily due to upstream consumption of water in the State of Georgia that prevents the necessary river flows from reaching Florida. Georgia's current water use is the cause of the harm to the Apalachicola, and if these uses continue to increase the results will be devastating for the region. For example, the year 2012 set a record for the least amount of water delivered to the Apalachicola Bay since record-keeping first began in 1923, although this was not the year with the least rainfall. This harm is particularly felt in the drier summer months, when consumption reaches its peak. At those times, Georgia uses can deprive the river of almost one-half the total flow it would otherwise receive. Georgia now uses more than 90 percent of the water withdrawn from the river system connected to the Apalachicola according to data published by the U.S. Geological Survey in 2005. The metro-Atlanta area alone uses three times the amount of water for public supply than all 16 counties and all municipalities of the Florida Panhandle communities combined. By its own estimates, Georgia anticipates doubling Chattahoochee withdrawals by 2040, if not sooner. In 2012, this harm became acute. The Apalachicola system experienced a drastic reduction in flow leading to harmful effects to the

ecosystem and abrupt changes in the habitat for oysters in Apalachicola Bay, most notably an increase in the salinity of surrounding waters. As a result, the Apalachicola oyster industry collapsed and the timing for recovery is uncertain. The situation was dire enough to lead the U.S. Department of Commerce to declare a commercial fishery *failure* due to a “fishery resource disaster” under the Magnuson-Stevens Fishery Conservation and Management Act. In response to these events and Georgia’s unrelenting water consumption, Florida Governor Rick Scott and Attorney General Pam Bondi took the extraordinary step of suing Georgia directly in the U.S. Supreme Court on October 1, 2013. This rare form of legal action has occurred fewer than 200 times in U.S. history, but Florida officials believe that if they do not take all reasonable measures to stop Georgia’s overconsumption now, the Apalachicola that Floridians have known and relied on in years past may be no more. Simply put, Florida’s position is this: Georgia must pay for the cost of its own growth by finding alternative water supplies, without foisting those costs on its downstream neighbor and sacrificing a unique ecosystem and community. **The ACF system**

Florida, Georgia, and Alabama share a river system formed by three rivers: the Apalachicola, Chattahoochee, and Flint Rivers (ACF). The Chattahoochee River originates in the Blue Ridge Mountains north of Atlanta. The Flint River originates to the south of Atlanta. The Chattahoochee joins the Flint River at the Jim Woodruff Dam near the Florida state line, forming the Apalachicola River. The Apalachicola River flows south unimpeded to the Apalachicola Bay and the Gulf of Mexico. H.L. Edmiston, *A River Meets the Bay: A Characterization of the Apalachicola River and Bay System* (2008). The U.S. Army Corps of Engineers (Corps) has built dams and reservoirs within the ACF system. Over time, the City of Atlanta came to rely upon one of those reservoirs for existing uses and anticipated further growth. Additionally, irrigation interests in the Flint River basin have made extensive use of groundwater sources and surface waters, depleting water that otherwise would contribute to the Flint River’s flows. Altogether, Georgia’s alteration of the natural hydrologic regime has caused substantial harm to the Apalachicola system, including harm to at least three species listed as endangered or threatened under the Endangered Species Act and harm to the oyster population in the Bay. In an attempt to mitigate the harms caused by upstream consumption, Florida has invested heavily in the protection of the Apalachicola region. For example, the Water Management District responsible for regulating Florida’s portion of the ACF basin has adopted rules that effectively prohibit the consumptive use of withdrawals from the Apalachicola River and its smaller tributaries within the state of Florida. Under the Clean Water Act, Florida has designated areas within the lower 29 miles of the river, the adjoining floodplain, and the Apalachicola Bay as Outstanding Florida Waters, leading to stringent protection of activities that affect water quality. Beyond that, the state, the federal government, and private interests have acquired enough conservation lands within the ACF basin to cover an area more than twelve times the size of the District of Columbia. **Previous efforts to resolve the ACF dispute**

From 1990 through 2012, the affected states attempted to resolve their differences through negotiation and challenges to the Corps’ operation of water structures within the ACF system. In 1992, Florida, Georgia, and Alabama entered into a memorandum of agreement providing for a joint study of the ACF system. Congress then passed a unique compact in 1997, which each of the states

ratified after passage. Under the compact, the states deferred resolution by agreeing to develop an allocation formula for the equitable apportionment of ACF basin waters. After the states voluntarily extended the compact's deadlines several times, the compact failed in 2003. After over 24 years and extensive expenditure of resources, the states have been unable to resolve their differences by agreement. In a series of lawsuits culminating in two federal courts of appeals decisions, downstream users and the state of Georgia contested the Corps' obligations under the Endangered Species Act, the National Environmental Policy Act, and other statutes addressing the authority of the Corps to operate structures and control water flow within the ACF system. *Southeastern Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316 (D.C. Cir. 2008); *In re MDL-1824 Tri-State Water Rights Litig.*, 644 F.3d 1160 (11th Cir. 2011). Those decisions ultimately led to a remand to the Corps for additional agency action, without a resolution of the downstream users' underlying complaints. Those decisions did not purport to address the equitable apportionment of water rights among the affected states. **The original action seeking an equitable apportionment**

Ultimately, the litigation over the Corps' operation of the reservoir system on the Chattahoochee could never guarantee the water needed to protect the Apalachicola ecosystem. Thus, Florida was left with one option to resolve this dispute with finality: asking the U.S. Supreme Court to equitably apportion the waters of the ACF basin. The doctrine of equitable apportionment is based on federal common law, not federal or state statutes. Specifically, "States have an affirmative duty under the doctrine of equitable apportionment to take reasonable steps to conserve and even to augment the natural resources within their borders for the benefit of other States." *Idaho v. Oregon*, 462 U.S. 1017 (1983). To obtain an equitable apportionment, the plaintiff has the burden to prove, by clear and convincing evidence, that the opposing state has caused "real and substantial injury or damage" or a "substantial likelihood of injury." *Idaho*, 462 U.S. at 1027-28. States are left to a rare forum: the original jurisdiction of the Supreme Court. Under Article III, Section 2 of the U.S. Constitution, the Supreme Court "shall" have original jurisdiction over cases "in which a State shall be Party." However, the Court has not interpreted Article III to mandate the exercise of original jurisdiction in all cases. While original jurisdiction is not exercised in every instance, interstate water disputes are among the class of cases that the Court takes up regularly. Interestingly, the Court has in the past granted jurisdiction over a dispute that contains some of the same elements Florida has alleged. In *New Jersey v. New York*, 283 U.S. 336 (1931), New Jersey contended, among other things, that New York's proposed diversion of water in the Delaware River would "increase the salinity of the lower part of the River and of Delaware Bay to the injury of the oyster industry there," "injure the shad fisheries," and "injuriously affect the River for recreational purposes." *Id.* at 343-44. As the Supreme Court is not set up to be a trier of factual disputes, it has delegated certain functions to special masters. So, in an original action, the plaintiff commences the proceeding by filing a motion for leave to file the complaint, the complaint, and a supporting brief. The opposing party may file a brief in opposition to the motion. If the Court accepts jurisdiction, the matter is referred to a special master, who resolves factual disputes and issues a report containing recommendations for the Court's review. **The issues presently before the Supreme Court**

In October 2013, Florida, finding the ACF dispute "intractable," filed a complaint against Georgia

alleging that withdrawals of upstream surface and ground water have harmed wildlife, habitat, threatened and endangered species, and commercial and recreational activities within the Apalachicola River and Bay. Georgia responded by filing a brief opposing the exercise of the Supreme Court's jurisdiction. The Court then requested that the United States submit a brief expressing its views on whether jurisdiction is warranted. The Court is awaiting that brief, and Florida is eagerly awaiting the Court's decision on whether to hear the case and equitably apportion the waters of the ACF basin. The case is ripe, the issue is properly before the Court, and the stakes for the environment and the Apalachicola community could not be higher. ***Republished with permission by the American Bar Association***

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