

Resolving Interstate Water Disputes: Litigation May Not Be the Answer

By Kenneth J. Warren / *The Legal Intelligencer*

Sustainable water management of river basins requires coordination of federal and state actions. Dams and reservoirs needed to supply water, control flooding or regulate flows are often constructed by the Army Corps of Engineers or the Bureau of Reclamation and operated in accordance with the project purposes specified by Congress. States likewise operate water control and storage structures, and have primary responsibility for managing groundwater and allocating private rights to utilize water. Particularly during droughts, complex problems may arise when scarce surface water or groundwater is shared by states with conflicting views on how water should be allocated and used.

One mechanism for resolving this conflict is for a state to invoke the original jurisdiction of the U.S. Supreme Court. The court has the inherent authority to equitably allocate shared waters among the states. But the court has expressed caution in exercising this authority out of respect for the sovereign rights of states, and the potential need for continuing expert administration to accommodate future conditions. The court has thus placed a heavy burden on complaining states to prove entitlement to relief.

In *Florida v. Georgia*, 141 S.Ct. 1175 (2021), Florida asked the court to allocate waters from the interstate rivers in the Apalachicola-Chattahoochee-Flint River (ACF) Basin. The surface waters of the ACF Basin are shaped like the capital letter Y, with the Chattahoochee and Flint rivers forming the western and eastern branches of the Y. Both branches flow into Lake Seminole located at the Georgia-Florida border. The Apalachicola River that forms the stem of the Y starts at Lake Seminole and flows through the Florida Panhandle, eventually emptying into Apalachicola Bay. In addition to operating several dams and reservoirs on the Chattahoochee River, the Corps operates the Jim Woodruff Dam at the southern end of the lake. Flows from the lake to the Apalachicola River are thus subject to the Corps' control.

In 2013, following the third drought within a decade, Florida commenced an original action in the U.S. Supreme Court against Georgia. Florida alleged that increased withdrawals in Georgia for agricultural irrigation had resulted in lower flows in the Apalachicola River, which harmed the river ecosystem and increased the salinity of Apalachicola Bay. According to Florida, increased salinity and the aquatic predators it promoted devastated the oyster fisheries in the bay.

No dispute existed as to the diminished productivity of the oyster fishery in the bay, but the cause of that condition was vigorously contested. The court assigned the case to a special master who heard competing evidence concerning whether Georgia's water use was reasonable, whether that water use caused the ecological injuries Florida alleged, and whether the costs of reducing Georgia's water use as requested by Florida would outweigh the benefits to Florida. But it was the Corps' role that the special master found to be determinative. The special master recommended dismissing the case, concluding that the harms were not redressable because any reduced water use in Georgia and resulting increased flows into Lake Seminole may not cause the Corps to release more water from the lake to the Apalachicola River during drought operations.

On review, in a 5-4 decision rendered in 2018, the court concluded that sufficient evidence existed that a reduction in Georgia's usage would result in increased flows in the Apalachicola River or reduce the number of days of drought operations. The court remanded the matter to a new special master who, like his predecessor, recommended denying relief to Florida.

The court's 2021 opinion reviewing the special master's recommendation emphasizes the heavy burden a state must satisfy to obtain relief from the court. Florida had the obligation to "prove a threatened or actual injury 'of serious magnitude' caused by Georgia's upstream water consumption," and that "the benefits of the apportionment substantially outweigh the harm that might result." The elements of injury and causation must be proven by clear and convincing evidence.

A unanimous Supreme Court affirmed the special master's finding that Florida had not met this burden. To be sure, collapse of the oyster population is a serious harm. Nevertheless, according to the *Florida* court, evidence showed that Florida's heavy harvesting of the oyster beds without adequately reshelling them, rather than over consumption by Georgia, caused the collapse of Florida's oyster fisheries. The court upheld the special master's recommendation on this basis without reaching the issues of whether the benefits to Florida of any potential remedy reducing Georgia's consumption would substantially outweigh the resulting harm to Georgia or whether the Corps' operation of Jim Woodruff Dam precluded effective relief.

Florida illustrates the Supreme Court's reluctance to utilize its authority to apportion water among the states absent compelling circumstances. The court expressly rejected the ordinary standard for granting injunctive relief "given the weighty and competing sovereign interests at issue in these cases," and instead imposed on Florida the "heavy burden" of proving elements of its claim by clear and convincing evidence. Where as in Florida's case a state's own conduct may have contributed to its injuries, it may have a particularly difficult time meeting its burden. It would be prudent for a state intending to seek relief from the court to undertake and document its own efforts to mitigate harm, including implementing aggressive water conservation and efficiency measures, before commencing litigation.

Because of the court's approach to resolving equitable allocation claims, the *Florida* judgment imposes no restraints on Georgia's use of ACF Basin water. Agricultural interests in Georgia may continue to increase water usage. In its brief to the court, Georgia addressed this issue stating, "Declining to issue a decree would not relieve Georgia of its responsibility to make reasonable use of the shared water resources of the ACF Basin, and Georgia will continue to take that responsibility seriously, as its decades-long conservation efforts show." But unlike the requirement for reasonable use by private water users which is ordinarily enforced under state law, Florida does not have a similar remedy for water withdrawals allowed by Georgia. To successfully challenge Georgia's "reasonable use," Florida would again be faced with a heavy burden of showing serious harm resulting from Georgia's actions and that the benefits of any remedy substantially outweigh the harms.

And the involvement of the Corps, operating reservoirs pursuant to objectives specified by Congress, presents an additional complication. If reductions in water usage by Georgia may not cause the Corps to release more water from Lake Seminole to the Apalachicola River during drought operations, and if sovereign immunity prevents joining the Corps in litigation, a meaningful judicial remedy may be unattainable.

In light of the limits of judicial review, an interstate compact may be the best institutional mechanism to apportion waters of the ACF. The design of the compact can take into account the hydrologic conditions of the basin, the various competing uses for basin waters and other factors. A compact can result in the basin states' joint development of data, modeling and other information necessary to jointly manage the basin using scientific methodologies and adaptive management techniques. A group of ACF Basin stakeholders proposed a sustainable water management plan in 2015 incorporating many of these elements.

Nevertheless, Georgia, Florida and Alabama have tried but to date have failed to enact a lasting interstate compact or otherwise implement successful cooperative management strategies. And by resolving the *Florida* litigation without placing any restraints on Georgia's water usage, the court has not provided incentives to all ACF Basin states to enact a compact. The result in *Florida v. Georgia* demonstrates that principles of sound basin management will not readily result from a litigation approach.

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