LAUREN D. BERNADETT*

Equitable Apportionment in the Supreme Court: An Overview of the Doctrine and the Factors Considered by the Supreme Court in Light of *Florida v. Georgia*

* Ms. Bernadett is the 2014 California Sea Grant Fellow at the California State Lands Commission and a 2014 LL.M. Candidate in Agricultural & Food Law at the University of Arkansas School of Law. She received her J.D. from UCLA School of Law in 2013. She would like to thank Professor Allen Olson, an agricultural lawyer in Georgia, for his inspiration for this Article and multiple rounds of extensive edits.

INTRODUCTION

In October 2013, the state of Florida filed a complaint against the state of Georgia in the U.S. Supreme Court.[1] Florida alleged that Georgia had been extracting an increasing amount of water from interstate rivers to meet its agricultural, industrial, and municipal demand for water.[2] Florida alleged that the increasing water extraction was drying up the Apalachicola River, Apalachicola-Chattahoochee-Flint Basin, and floodplains.[3] The Apalachicola River region hosts Florida's largest river floodplain forest; the greatest number of freshwater fish species in Florida; over one hundred species that are endangered, threatened, or of concern under federal or state law; the second largest national estuarine research reserve; and, until recently, twelve percent of the nation's eastern oyster harvest.[4] Florida asked the Supreme Court to equitably apportion the Apalachicola-Chattahoochee-Flint Basin water, to enjoin Georgia "from interfering with Florida's rights," and to cap Georgia's water uses at 1992 levels.[5]

Equitable apportionment cases are not new to the Supreme Court. In 1907, the Supreme Court first articulated its power of equitable apportionment in *Kansas v. Colorado*.[6] The Supreme Court has also heard an equitable apportionment case involving harm to oyster fisheries in eastern riparian states. In 1931, the Supreme Court decided *New Jersey v. New York*,[7] which involved New York's

1 Florida's Motion for Leave to File a Complaint, Complaint, and Brief in Support of Motion, Florida v. Georgia, 134 S. Ct. 1509 (2014) (No. 220142) [hereinafter Florida's Complaint], *available at* http://www.nationalaglawcenter.org/wp-content/uploads/2013/10/ACF-Complaint.pdf.

2 *Id.* at 3.

3 *Id.*

4 *Id.* at 10–12.

5 *Id.* at 21.

6 Kansas v. Colorado, 206 U.S. 46 (1907).

7 New Jersey v. New York, 283 U.S. 336 (1931).

growing diversions from the Delaware River and, among many other issues, its injurious effects on New Jersey's oysters.[8] The Court limited New York to 440 million gallons per day—a level that would avoid harm to New Jersey's recreation and oyster fisheries.[9] The Supreme Court has heard eight other equitable apportionment cases.[10] Whether the states involved are Western prior appropriation states or Eastern riparian states affects the factors that the Supreme Court will consider and apply. The Court tends to incorporate state law, also called local law by the Court,[11] into its equitable apportionment decisions. However, the Court reserves the right to displace state law and has done so in earlier cases.

This Article addresses the history of equitable apportionment cases in the Supreme Court. It also analyzes factors that the Court has considered and applied in making equitable apportionment decisions in hopes of casting light on factors that the Court may consider if it takes Florida's case against Georgia.

I
ORIGINAL JURISDICTION

Every state has a right to an equal share of interstate waters.[12] When states dispute the share of water to which they are entitled, the dispute can be resolved by interstate apportionment compact, Congressional apportionment, or an equitable apportionment suit with the Supreme Court.[13] Equitable apportionment cases arise under the Court's original and exclusive jurisdiction.

Original jurisdiction allows states to file a lawsuit directly with the Supreme Court rather than starting at a district court, appealing to a

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8 *Id.* at 343.

9 *Id.* at 345.

10 The Court did not decide any equitable apportionment cases between 1945 and 1982. A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 10:19 (2014 ed. 1988).

11 This research memorandum will use only the term "state law" in order to avoid confusion.

12 TARLOCK, *supra* note 10, at §§ 10:1–10:2. Interstate waters are waters that "cross state lines of form state boundaries." Douglas L. Grant, *Interstate Water Allocation*, *in* 3 WATERS AND WATER RIGHTS § 43.01 (Amy K. Kelley ed., 2014).

13 TARLOCK, *supra* note 10, at § 10:3. Grant, *supra* note 12, at § 43.02 (also noting that states may decide to regulate interstate water export or simply cooperate in the absence of an interstate compact).

circuit court, and appealing again to the Supreme Court.[14] Further, when the lawsuit is between multiple states, as in an equitable apportionment case, the Supreme Court has exclusive jurisdiction.[15] A state that is being sued cannot claim sovereign immunity to avoid an original jurisdiction action because Article III of the U.S. Constitution acts as a waiver of any state sovereign immunity.[16]

In an equitable apportionment lawsuit, state citizens are the beneficiaries of any relief granted by the Supreme Court. But the Eleventh Amendment prohibits citizens from suing another state over interstate water rights.[17] Thus, to avoid violating the Eleventh Amendment in equitable apportionment cases, states act in a *parens patriae* capacity even though state citizens are the ultimate beneficiaries.[18] Indian tribes can also be parties to equitable apportionment cases because of their quasi-sovereign interests.[19]

II
EQUITABLE APPORTIONMENT

Equitable apportionment is a doctrine that was created by the Supreme Court to ensure that each state can enforce its right to an equal share of common waters.[20] The doctrine can be traced back to 1907, when Kansas sued Colorado over Colorado's use of the Arkansas River.[21] Even though Kansas's complaint was dismissed and the case was not heard on the merits,[22] the Court announced its power to equitably apportion interstate waters:

> Colorado denies that it is in any substantial manner diminishing the flow of the Arkansas river into Kansas. If that be true, then it is in no way infringing upon the rights of Kansas. If it is diminishing that flow, has it an absolute right to determine for itself the extent to

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14 States have this right because, under Article III of the U.S. Constitution, the Supreme Court has original jurisdiction over all cases in which a state is a party. U.S. CONST. art. III, § 2, cl. 2.

15 28 U.S.C. § 1251(a) (2012); Grant, *supra* note 12, at § 45.02(a).

16 TARLOCK, *supra* note 10, at § 10:3; Principality of Monaco v. Mississippi, 292 U.S. 313 (1934).

17 The Eleventh Amendment prohibits "suits by citizens of one state against another state." TARLOCK, *supra* note 10, at § 10:7; U.S. CONST. amend. XI.

18 TARLOCK, *supra* note 10, at § 10:10; Grant, *supra* note 12, at § 45.03(a).

19 TARLOCK, *supra* note 10, at § 10:13.

20 *Id.* at § 10:2.

21 Kansas v. Colorado, 206 U.S. 46 (1907).

22 *Id.* at 117 ("[W]e are not satisfied that Kansas has made out a case entitling it to a decree.").

> which it will diminish it, even to the entire appropriation of the water? And if it has not that absolute right, is the amount of appropriation that it is now making such an infringment [sic] upon the rights of Kansas as to call for judicial interference? Is the question one solely between the states, or is the matter subject to national legislative regulation? and [sic], if the latter, to what extent has that regulation been carried? Clearly this controversy is one of a justiciable nature. The right to the flow of a stream was one recognized at common law, for a trespass upon which a cause of action existed.[23]

Since *Kansas v. Colorado*, the Supreme Court has exercised its power of equitable apportionment in eight other cases.[24]

In characterizing equitable apportionment, the Court has stated that "the effort always is to secure an equitable apportionment without quibbling over formulas."[25] The Court has also repeated that equitable apportionment is "a flexible doctrine which calls for 'the exercise of an informed judgment on a consideration of many factors.'"[26]

The body of Supreme Court equitable apportionment case law is limited to nine different rivers:[27]

- Arkansas River—*Kansas v. Colorado*[28] (riparian state v. appropriation state);
- Catawba River—*South Carolina v. North Carolina*[29] (riparian states);

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23 *Id.* at 85.

24 *See infra* footnotes 28–36.

25 New Jersey v. New York, 283 U.S. 336, 343 (1931); *see also* Colorado v. New Mexico, 459 U.S. 176, 183 (1982); Grant, *supra* note 12, at § 45.01.

26 Colorado v. New Mexico, 459 U.S. 176, 183 (1982) (quoting Nebraska v. Wyoming, 325 U.S. 589, 618 (1945)); *see also* Grant, *supra* note 12, at § 45.01.

27 There are nine true Supreme Court equitable apportionment cases. *See* Grant, *supra* note 12, at § 45.01. Additionally, some water rights disputes between states in the Supreme Court were over interstate apportionment compacts and thus did not call on the Supreme Court's power of equitable apportionment.

28 Kansas v. Colorado, 185 U.S. 125 (1902) (overruling Colorado's demurrer to the bill of complaint); Kansas v. Colorado, 206 U.S. 46 (1907) (dismissing bill of complaint because Kansas failed to show inequitable division of benefits); Colorado v. Kansas, 320 U.S. 383 (1943) (finding that Colorado's water use had not materially increased since the original litigation and enjoining a Kansas association from suing individual water users in Colorado); Colorado v. Kansas, 322 U.S. 708 (1944) (issuing decree based on 1943 opinion).

29 South Carolina v. North Carolina, 552 U.S. 804 (2007) (granting motion for leave to file bill of complaint); South Carolina v. North Carolina, 558 U.S. 256 (2010) (only addressing intervention by three non-sovereign entities, not apportioning water).

- Colorado River—*Arizona v. California*[30] (prior appropriation states);
- Connecticut River—*Connecticut v. Massachusetts*[31] (riparian states);
- Delaware River—*New Jersey v. New York*[32] (riparian states);
- Laramie River—*Wyoming v. Colorado*[33] (prior appropriation states);
- North Platte River—*Nebraska v. Wyoming*[34] (prior appropriation states);
- Vermejo River—*Colorado v. New Mexico*[35] (prior appropriation states);
- Walla Walla River—*Washington v. Oregon*[36] (prior appropriation states).

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30 Arizona v. California, 298 U.S. 558 (1936) (denying petition for leave to file bill of complaint because the United States was an indispensable party and had not consented to the lawsuit); Arizona v. California, 373 U.S. 546 (1963) (holding equitable apportionment did not apply because Congress has made a statutory apportionment).

31 Connecticut v. Massachusetts, 282 U.S. 660 (1931) (holding Connecticut has not proved injury or threat of injury by clear and convincing evidence); Connecticut v. Massachusetts, 283 U.S. 789 (1931) (dismissing bill of complaint).

32 New Jersey v. New York, 283 U.S. 336 (1931) (finding equitable apportionment relief for New Jersey and Pennsylvania); New Jersey v. New York, 283 U.S. 805 (1931) (issuing decree based on 1931 opinion); New Jersey v. New York, 345 U.S. 369 (1953) (denying Philadelphia leave to intervene in 1931 decree amendment proceedings); New Jersey v. New York, 347 U.S. 995 (1954) (modifying 1931 decree).

33 Wyoming v. Colorado, 259 U.S. 419 (1922) (specifying apportionment and issuing decree based on opinion); Wyoming v. Colorado, 260 U.S. 1 (1922) (modifying 1922 decree to fix an error); Wyoming v. Colorado, 286 U.S. 494 (1932) (interpreting decree and denying motion to dismiss); Wyoming v. Colorado, 298 U.S. 573 (1936) (interpreting decree and partially granting Wyoming's request for injunctive relief); Wyoming v. Colorado, 309 U.S. 572 (1940) (denying Wyoming's request to hold Colorado in contempt for violating decree); Wyoming v. Colorado, 353 U.S. 953 (1957) (granting parties' request to vacate and replace 1922 decree).

34 Nebraska v. Wyoming, 295 U.S. 40 (1935) (denying motion to dismiss the bill of complaint); Nebraska v. Wyoming, 325 U.S. 589 (1945) (specifying apportionment); Nebraska v. Wyoming, 325 U.S. 665 (1945) (issuing decree based on 1945 opinion); Nebraska v. Wyoming, 345 U.S. 981 (1953) (modifying decree based on party stipulation); Nebraska v. Wyoming, 507 U.S. 584 (1993) (denying summary judgment motions); Nebraska v. Wyoming, 515 U.S. 1 (1995) (allowing states to amend their pleadings); Nebraska v. Wyoming, 534 U.S. 40 (2001) (modifying decree and replacing 1945 decree and 1953 modifications by stipulation of parties).

35 Colorado v. New Mexico, 459 U.S. 176 (1982) (remanding Special Master's report for further findings); Colorado v. New Mexico, 467 U.S. 310 (1984) (finding Colorado had not proved facts entitling it to an apportionment).

36 Washington v. Oregon, 297 U.S. 517 (1936) (holding Washington had not proved injury or threatened injury by clear and convincing evidence).

The Court entered decrees based on equitable apportionment in *Wyoming v. Colorado*, *New Jersey v. New York*, and *Nebraska v. Wyoming*.[37] In the other cases, the Court declined to apportion the interstate rivers for various reasons.[38] Although the Supreme Court can use its original jurisdiction to equitably apportion interstate waters, it is not required to.[39] The Supreme Court has made it clear that it will exercise original jurisdiction sparingly.[40]

A. Barriers to Relief: Procedural

Equitable apportionment case law, though limited, establishes procedural barriers that can prevent a state from obtaining an apportionment decree.[41] Foremost, the aggrieved state must file a motion for leave to file a complaint.[42] However, the Supreme Court could reject that motion.[43] Rejection would hinder a state's chance to obtain an apportionment decree from the Court. When considering a state's motion, the Court considers two factors.[44] First, it considers whether the state's interest is of "sufficient seriousness and dignity."[45] Second, the Court considers whether there is an alternative forum in which to resolve the dispute.[46] Although the Court does not articulate its reasons for denying leave to file a complaint, some believe this second factor caused the Court to deny South Dakota's motion for leave to sue three states over the Missouri River.[47] Because South Dakota was already in litigation with the United States—the party

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37 Grant, *supra* note 12, at § 45.07(a).

38 *Id.* These were "the Arkansas River, the Colorado River, the Connecticut River, the Vermejo River, and the Walla Walla River." The Court has yet to decide whether it will apportion the Catawba River at issue in *South Carolina v. North Carolina*.

39 TARLOCK, *supra* note 10, at § 10:9.

40 *Id.* (citing Utah v. United States, 394 U.S. 89 (1969)).

41 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, 404 (2004).

42 *Id.* at 404.

43 *Id.*

44 *Id.* at 405.

45 *Id.* One commentator suggests that apportionment disputes generally meet this threshold because the Court has regularly accepted apportionment cases. *Id.*

46 *Id.*

47 *Id.* at 405–06.

actually at the base of the controversy—there was an appropriate alternative forum for the dispute.[48]

Additionally, because the United States has sovereign immunity, the Court must dismiss the state's suit if the United States is an indispensable party and does not consent to the lawsuit.[49] Unless Congress gives the United States' blanket statutory consent in equitable apportionment suits, the United States cannot be sued without its consent.[50]

The state's suit for equitable apportionment will also fail if Congress previously allocated the river at issue.[51] The Court's apportionment cannot supplant Congress's apportionment.[52] In *Arizona v. California*,[53] the Court stated that Congress had provided its method for water allocation through the Boulder Canyon Project Act, which created a system of dams and public works to conserve and distribute water in the Lower Basin States.[54] "Where Congress has so exercised its constitutional power over waters courts have no power to substitute their own notions of an 'equitable apportionment' for the apportionment chosen by Congress."[55] However, the Court in *Arizona v. California* clarified—and later cases affirmed—that if permitted by an action of Congress, states can "do things not inconsistent with the Project Act or with federal control of the river."[56]

The Court may also use the doctrine of ripeness to decline hearing equitable apportionment cases.[57] The concept of ripeness typically requires that the case presents a question of law rather than a question of fact, and that the controversy warrants judicial intervention due to

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48 *Id.*

49 *Id.* at 408; Grant, *supra* note 12, at § 45.03(d).

50 Grant, *supra* note 41, at 408.

51 *Id.* at 409 (citing Arizona v. California, 373 U.S. 546, 564–65 (1963)).

52 *Id.*

53 Arizona v. California, 373 U.S. 546 (1963).

54 *Id.* at 552, 565. The "Lower Basin States," as used in the Colorado River Compact and Boulder Canyon Project Act, include California, Arizona, Nevada, New Mexico, and Utah.

55 *Id.* at 565; *see also* Texas v. New Mexico, 462 U.S. 554, 564 (1983) ("[U]nless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms.").

56 Arizona v. California, 373 U.S. at 588; California v. United States, 438 U.S. 645, 67429 (1978).

57 TARLOCK, *supra* note 10, at § 10:14; Idaho *ex rel.* Evans v. Oregon, 462 U.S. 1017, 1024 (1983) (extending equitable apportionment analysis to rights over interstate anadromous fish runs, declining to apportion due to lack of ripeness).

an actual or imminent legal dispute. But, because a state's quasi-sovereign interests are at stake in an equitable apportionment suit, the suing state "must meet a higher standard of proof of injury compared to a private water rights holder."[58]

The ripeness requirement was first articulated in *Missouri v. Illinois*,[59] where Missouri tried to invoke the common law riparian right to a stream flow "unimpaired in quality and quantity."[60] The Court stated that "[b]efore this court ought to intervene, the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all consideration on the other side."[61] The Court cited an equitable apportionment case, *Kansas v. Colorado*,[62] to support this standard.[63] The Court dismissed Missouri's case for failing to present evidence that adequately supported its allegations.[64]

Douglas Grant expounded the rule from *Missouri v. Illinois* into three requirements: "The invasion of rights must be (1) threatened, (2) of serious magnitude, and (3) clearly proved."[65] Notably, the "clearly proved" requirement needs to be proved by clear and convincing evidence.[66] This is a greater standard of proof than what is required for a party "seeking an injunction in a suit between private parties."[67]

In *Colorado v. New Mexico*, the state of New Mexico needed to prove serious injury to prevent Colorado's diversion.[68] Once the Court determined that New Mexico successfully met its burden, the burden of proof shifted to Colorado "to show by clear and convincing

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58 TARLOCK, *supra* note 10, at § 10:14.

59 Missouri v. Illinois, 200 U.S. 496 (1906). This case was an interstate water pollution case and not an equitable apportionment case, as Missouri was asking for an injunction, not apportionment.

60 TARLOCK, *supra* note 10, at § 10:14.

61 Missouri v. Illinois, 200 U.S. at 521 (citing Kansas v. Colorado, 185 U.S. 125 (1902)); *see also* Grant, *supra* note 12, at § 45.04.

62 Kansas v. Colorado, 185 U.S. 125 (1902).

63 Missouri v. Illinois, 200 U.S. at 521.

64 *Id.* at 526.

65 Grant, *supra* note 12, at § 45.04.

66 *Id.* at § 45.04(c).

67 Connecticut v. Massachusetts, 282 U.S. 660, 669 (1931); *see also* Grant, *supra* note 12, at § 45.04(c).

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

evidence that its proposed diversion was permissible under the doctrine of equitable apportionment."[69] This was the first case where the Court specifically "articulated and applied a rule shifting the burden of proof."[70] It is not clear whether this burden-shifting rule will apply to all equitable apportionment cases or just to cases involving requests for apportionment for future uses.[71]

Though the Court is consistently reluctant "to exercise original jurisdiction where ripeness is not demonstrated" and the Court repeats the rule from *Missouri v. Illinois* in most subsequent equitable apportionment cases, the Court's dicta surrounding the heightened standard has been inconsistently applied.[72]

For example, in *Nebraska v. Wyoming*,[73] the Court stated that the record's statistics did not show exactly the extent or existence of actual damage to Nebraska, but that "deprivation of water in arid or semiarid regions cannot help but be injurious."[74] The Court came to this finding even after explicitly recognizing the higher standard to prove an invasion of rights articulated in *Missouri v. Illinois*.[75] The Court stated that Nebraska's evidence might not be enough to enjoin threatened injury in a hypothetical equity suit, but that it was enough to support justiciability in an equitable apportionment suit.[76] Additionally, the Court clarified that it apportioned the Laramie River in *Wyoming v. Colorado* when the only evidence of "injury or threat of injury was the inadequacy of the supply of water to meet all appropriate rights."[77] Because of the Court's uncertain and possibly inconsistent use of the heightened standard of proof of injury for ripeness in equitable apportionment cases, it is unclear how this standard would be applied in *Florida v. Georgia*, or if it would be used to dismiss the lawsuit.

Equitable apportionment cases have expressed different standards for proof of injury when a state asks the Court to enforce a decree.[78] In *Nebraska v. Wyoming*, the Court stated that "the only question is

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69 Grant, *supra* note 12, at § 45.04(c).

70 *Id.*

71 *Id.*

72 TARLOCK, *supra* note 10, at § 10:14; Grant, *supra* note 12, at § 45.04.

73 Nebraska v. Wyoming, 325 U.S. 589 (1945).

74 *Id.* at 610.

75 *Id.* at 608.

76 *Id.* at 610.

77 *Id.*

78 TARLOCK, *supra* note 10, at § 10:14.

whether [the] conduct violates a right established by the decree"[79] and the state must show "it is injured by the administration of [the decree]."[80] On the other hand, the Court in *Kansas v. Colorado* indicated that the standards for enforcing an interstate decree and an interstate compact are the same.[81] Asking the Court to modify a decree requires a slightly lower standard than equitable apportionment, as the state need only establish "substantial injury."[82] The jurisprudence surrounding decrees is less relevant here because there is no decree at issue in *Florida v. Georgia*.

B. Principle of Fair Allocation

The modern principle of equitable apportionment is one of fair allocation rather than necessarily adhering to state laws or expectations.[83] However, the Supreme Court "has incorporated [state] law into the doctrine of equitable apportionment" and applied shared state water laws if the party states share water law systems.[84] If all party states are riparian states, the Court has typically applied riparian principles, and if all party states are prior appropriation states, the Court has typically applied prior appropriation principles.[85]

The Court reserves the power to displace state laws but has only done so when a state tried to use its laws to gain an unfair advantage over another state.[86] In other words, the Court has traditionally applied shared state water law unless one state will suffer substantial prejudice.[87] Thus, state law has been the Court's preferred method of

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79 Nebraska v. Wyoming, 507 U.S. 584, 592 (1993).

80 TARLOCK, *supra* note 10, at § 10:14.

81 TARLOCK, *supra* note 10, at § 10:14.

82 *Id.* (citing Nebraska v. Wyoming, 507 U.S. 584 (1993)).

83 *Id.* at § 10:15; New Jersey v. New York, 283 U.S. 336 (1931).

84 TARLOCK, *supra* note 10, at § 10:15.

85 *Id.*

86 *Id.*; *see also* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) (reversing a decree granted by Colorado that appropriated all of a river's flow to Colorado users, leaving none for users in New Mexico).

87 TARLOCK, *supra* note 10, at § 10:18. The Supreme Court has found prejudice substantial enough to displace state law in three instances: (1) "when the established economies would be disrupted," (2) "when a call by a downstream state would be futile[,]" and (3) "when a minor modification of priority would maximize the use of water among all parties to the litigation." *Id.*; Nebraska v. Wyoming, 325 U.S. 589 (1945) (deviating from prior appropriation and subordinating Nebraska's priority to protect Colorado's existing economy); Washington v. Oregon, 297 U.S. 517 (1936) (holding for Oregon in

allocation.[88] But again, the Court reserves the power to displace state law in favor of fair allocation.[89]

So, if the Court reserves the right to displace state law and apply fair allocation doctrine, what are the tenants of fair allocation? The Court has used fair allocation to consider a wide variety of relevant factors, but it has primarily focused on protecting established uses.[90] The Court applies fair allocation principles in Western prior appropriation states differently than in Eastern riparian states.

III
FACTORS IN EQUITABLE APPORTIONMENT CASE LAW

In October 2013, the state of Florida filed an equitable apportionment action against the state of Georgia in the Supreme Court.[91] Georgia then filed its response in January 2014.[92] Subsequently, Florida filed a reply in February 2014.[93] Shortly thereafter, Florida's petition was distributed for conference.[94] The conference process determines whether the Court will take Florida's case. The Court asked the United States for its view on the dispute.[95]

Guesses about what factors the Court would consider, should it take Florida's case, are based on equitable apportionment precedent. Some factors that the Court has historically considered differ based on whether the states are Western prior appropriation states or Eastern riparian states, while some factors are common between both types of states.

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part because Washington's priority call would be futile because any water gained would be lost in the channel's deep gravel); Nebraska v. Wyoming, 325 U.S. 589 (1945) (slightly displacing priority by following the Special Master's recommended 75%-25% split).

88 TARLOCK, *supra* note 10, at § 10:18.

89 *Id.* at § 10:15.

90 *Id.* at § 10:16.

91 Florida's Complaint, *supra* note 1.

92 State of Georgia's Opposition to Florida's Motion for Leave to File a Complaint, Florida v. Georgia, 134 S. Ct. 1509 (2014) (No. 220142), *available at* http://static-lobbytools.s3.amazonaws.com/press/65588_14_georgia_response_in_u_s_supreme_court_to_florida_lawsuit.pdf.

93 *Florida v. Georgia*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/22o142.htm (last visited Feb. 17, 2014).

94 *Id.*

95 Lyle Denniston, *Court Grants Five Cases*, SCOTUSBLOG (Posted Mon, Mar. 3. 2014 10:06 am), http://www.scotusblog.com/2014/03/court-grants-five-cases/.

A. Factors in Case Law for Both Types of Water Law Systems

The Supreme Court held in *Nebraska v. Wyoming* that "all of the factors which create equities in favor of one state or the other must be weighed."[96] Factors that the Court has considered include a comparison of harms and benefits, measures that could improve efficient water use and enhance supplies of water, protection of existing economies that use the water, the size of party states' river basin drainage areas and their contributions to in-stream flows, and the availability of alternative water supplies.[97]

While these factors are present, "[t]he Supreme Court has said little about how it weighs conflicting apportionment factors, and what it has said leaves much room for interpretation."[98] Generally, the Court has stated that equitable apportionment is "a flexible doctrine which calls for 'the . . . consideration of many factors.'"[99] Some think that this leads to near-total discretion for the Court in equitable apportionment cases.[100]

1. Harm-Benefit Comparison

The Supreme Court has undertaken a comparison of harms and benefits regardless of the water law system followed by the party states.[101] It seems to be the most frequently, explicitly, and extensively considered factor.[102] In *Colorado v. New Mexico*,[103] the Court indicated its willingness to allow the harm-benefit comparison to override other factors, including priority of appropriation.[104]

In its first equitable apportionment case, the Court balanced a narrow set of harms and benefits.[105] It considered evidence regarding irrigation development by analyzing "population changes, acreage

96 Nebraska v. Wyoming, 325 U.S. 589, 618 (1945) (quoting Colorado v. Kansas, 320 U.S. 383, 394 (1943)).

97 Grant, *supra* note 41, at 413-14413; Grant, *supra* note 12, at § 45.06(c)(4).

98 Grant, *supra* note 41, at 425.

99 Colorado v. New Mexico, 459 U.S. 176, 183 (1982).

100 Grant, *supra* note 41, at 426.

101 *Id.* at 414.

102 Grant, *supra* note 12, at § 45.06(c)(1).

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

104 Grant, *supra* note 41, at 415–16. This possibility is discussed more extensively in Part C.

105 Grant, *supra* note 12, at § 45.06(c)(2).

cultivated, bushels produced, and value of crops produced."[106] Later, in *New York v. New Jersey*, the Court apportioned the river to protect oyster fisheries and recreational uses but not to alleviate other alleged harms including "injury to navigation, shad fisheries, municipal water supply, future water power development, and cultivated lands adjoining the river."[107] However, one should not assume that these uses are irrelevant to a future harm-benefit comparison. The Court in *New York v. New Jersey* and in *Connecticut v. Massachusetts* declined to protect uses or include them in the harm-benefit comparison when the state failed to show that those interests were seriously threatened.[108] Thus, if a state can show that a use is seriously threatened by the diversion, the use could be weighed in the harm-benefit comparison.

The Court declined to protect Colorado's projected future uses in *Colorado v. New Mexico* in part because Colorado's projected future uses were too uncertain, and Colorado had not undertaken any type of long-range planning and analysis.[109]

2. Protection of Existing Economies

In *Colorado v. New Mexico*, the Supreme Court stated that "the equities supporting the protection of existing economies will usually be compelling. The harm that may result from disrupting established uses is typically certain and immediate, whereas the potential benefits from a proposed diversion may be speculative and remote."[110] The Court has been reluctant to divert water away from an established economy that uses the water supply.[111]

An analysis of *Wyoming v. Colorado*, *Colorado v. New Mexico*, *Nebraska v. Wyoming*, and *Washington v. Oregon* indicates "that avoiding harm to an existing economy is a weighty factor in comparing harms and benefits."[112]

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106 *Id.*

107 *Id.*

108 *Id.* at § 45.06(c)(2), (c)(2) n.297.

109 Colorado v. New Mexico, 467 U.S. 310, 321–22 (1984).

110 Colorado v. New Mexico, 459 U.S. 176, 187 (1982).

111 Grant, *supra* note 41, at 420.

112 Grant, *supra* note 12, at § 45.06(c)(1).

3. Size of River Basin Drainage Areas and Contributions to In-Stream Flows

The role that the size of party states' river basin drainage areas and contributions to in-stream flows is uncertain.[113] It is certainly not as strong of a factor as the three above. The Supreme Court asked for information regarding this factor in *Kansas v. Colorado*[114] and alluded to them in the apportionment in *New Jersey v. New York*.[115] But the Court in *Colorado v. New Mexico* stated that the source of the disputed water should be irrelevant to the states' claims for apportionment.[116]

4. Availability of Alternative Water Supplies

The Supreme Court in *Colorado v. New Mexico* instructed the Special Master to analyze the availability of alternate water sources available to either state.[117] The availability of substitute water would mitigate harms to water users in either state. For the purposes of the case, neither state had alternate water supplies that factored into the Court's decision.

The Court also considered substitute water supplies in *Connecticut v. Massachusetts*.[118] The Court, however, determined that the suggested alternate water supplies were not realistic options because the waters were inferior for a number of quality and quantity reasons.[119]

B. Factors in Western (Appropriation) States

Due to the drier nature of Western states, the Supreme Court has heard more equitable apportionment cases between western states than between eastern states. These cases include *Wyoming v.*

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113 Grant, *supra* note 41, at 422.

114 Kansas v. Colorado, 185 U.S. 125, 141–45, 147 (1902); *see* also Kansas v. Colorado, 206 U.S. 46 (1907) (stating nothing about how the information about the drainage area affected the Court's decision).

115 *See* New Jersey v. New York, 283 U.S. 336 (1931) (failing to explain why its apportionment was measured in cubic feet per second per square mile, which linked the appropriation to the size of the drainage area and contributions to stream flow).

116 Colorado v. New Mexico, 467 U.S. 310, 323 (1984).

117 Colorado v. New Mexico, 459 U.S. 176, 189 (1982).

118 Grant, *supra* note 12, at § 45.06(c)(4).

119 *Id.*

Colorado (1922), *Washington v. Oregon* (1936), *Nebraska v. Wyoming* (1945), *Arizona v. California* (1963), and *Colorado v. New Mexico* (1984).

1. Priority of Appropriation

In a 1911 case, the Supreme Court articulated that states that adopt the same water law estop themselves from ignoring water priorities of the other state.[120] The Court upheld this logic in *Wyoming v. Colorado*[121] in 1922 when the Court "adopted prior appropriation as the standard of equitable apportionment among western states."[122] Colorado made the riparian-esque argument that it could more beneficially use the water, but the Court upheld Wyoming's priority.[123] In *Nebraska v. Wyoming*, a case between two prior appropriation states, the Court said that "[p]riority of appropriation is the guiding principle."[124] Indeed, priority of appropriation is an important factor that the Court will consider in equitable apportionment cases between prior appropriation states.[125]

In *Nebraska v. Wyoming*, the Court provided its most complete list of factors relevant to equitable apportionment in addition to priority of appropriation:[126]

> [P]hysical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative not an exhaustive catalogue.[127]

2. Departure from Prior Appropriation

Though the Supreme Court has generally stated its ability to depart from state law since *Connecticut v. Massachusetts*,[128] the Court has

120 TARLOCK, *supra* note 10, at § 10:17; Bean v. Morris, 221 U.S. 485, 487 (1911).

121 Wyoming v. Colorado, 259 U.S. 419 (1922).

122 TARLOCK, *supra* note 10, at § 10:17; *see also* Wyoming v. Colorado, 259 U.S. at 495.

123 TARLOCK, *supra* note 10, at § 10:17.

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

125 Grant, *supra* note 41, at 415.

126 Grant, *supra* note 12, at § 45.06(a).

127 Nebraska v. Wyoming, 325 U.S. at 618.

128 Connecticut v. Massachusetts, 282 U.S. 660 (1931).

indicated its willingness to depart from prior appropriation doctrine based on specific facts in two cases.[129] The Court departed from priorities in *Nebraska v. Wyoming*[130] to protect the junior use of an existing economy—ranching and irrigated hay and pasturage fields—in Colorado.[131] In *Colorado v. New Mexico*,[132] the Court expressed that a harm-benefit comparison could justify a departure from priorities,[133] but did not depart from priorities in that case.[134] "[I]t appears that harm-benefit comparison can more readily supplant priorities when the conflict is between two groups of long-continued, existing uses than when it is between proposed uses and existing uses."[135] So although priority of appropriation principles can be overcome, particularly by a harm-benefit comparison, it is difficult to do so, and prior appropriation states have not had much success in overcoming the prior appropriation doctrine.[136]

3. Conservation Measures and the Harm-Benefit Comparison

In more recent equitable apportionment cases between prior appropriation states, the Supreme Court has indicated that it may be moving toward incorporating water conservation principles into prior appropriation law.[137] In *Colorado v. New Mexico*,[138] the Court indicated that it may consider "whether reasonable [water] conservation measures in the downstream state might offset any

129 Grant, *Interstate Water Allocation*, *supra* note 12, at § 45.06(b).

130 Nebraska v. Wyoming, 325 U.S. 589 (1945).

131 *Id.* at 621–22.

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

133 *Id.*

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

135 Grant, *supra* note 12, at § 45.06(c)(1).

136 *Id.*; *see also* Wyoming v. Colorado, 259 U.S. 419, 469 (1922) (rejecting Colorado's allegation that Wyoming's uses of the water was relatively unproductive when Colorado used the water for similar uses and productivity); Colorado v. New Mexico, 467 U.S. 310, 324 (1984).

137 TARLOCK, *supra* note 10, at § 10:19; *see also* Harrison C. Dunning, *State Equitable Apportionment of Western Water Resources*, 66 NEB. L. REV. 76, 78 (1987) (stating that the emphasis of the prior appropriation system "has shifted to better management of our developed water supply" because of the increased difficulty of building contemporary water projects). The Court first showed its concern with conservation in *Wyoming v. Colorado*, where in its apportionment it required conservation measures and analyzed the efficiency of water uses that existed on the river. Grant, *supra* note 12, at § 45.06(c)(3).

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

injuries suffered [due to] the upstream diversion."[139] The Court stated that apportionment need "not focus exclusively on the priority of uses along the river, and that other factors—such as waste, availability of reasonable conservation measures, and the balance of benefit and harm from diversion—could be considered in the apportionment calculus."[140] This was the first time that the Court indicated that water users have a duty to conserve water in order to successfully claim an equitable apportionment of the disputed water.[141]

In *Colorado v. New Mexico*, Colorado asked the Supreme Court to equitably apportion the Vermejo River, which was completely appropriated by New Mexico users.[142] The Court stated "that Colorado's proof would be judged by a clear-and-convincing-evidence standard," which, in the Court's words, meant that "a diversion of interstate water should be allowed only if Colorado could place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are 'highly probable.'"[143] The Court ruled for New Mexico because Colorado had not shown with clear and convincing evidence that the Court should permit Colorado's diversion.[144] The Court identified two areas where Colorado failed to show with clear and convincing evidence that the proposed diversion should be permitted.

First, Colorado alleged that New Mexico could compensate for Colorado's proposed diversion by implementing reasonable conservation measures.[145] New Mexico proved that it would be injured by Colorado's diversion, so the burden of proof switched to Colorado, the diverter, "to show that reasonable conservation measures exist."[146] Although the water conservancy district in New Mexico was less efficient than some other districts in New Mexico, Colorado failed to identify specific conservation measures that New Mexico could take to conserve the disputed water supply.[147]

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139 TARLOCK, *supra* note 10, at § 10:19 (citing Colorado v. New Mexico, 459 U.S. 176, 187 (1982)).

140 Colorado v. New Mexico, 467 U.S. at 310.

141 TARLOCK, *supra* note 10, at § 10:19.

142 Colorado v. New Mexico, 467 U.S. at 310.

143 *Id.* at 316 (citing C. MCCORMICK, LAW OF EVIDENCE § 320 (1954)).

144 TARLOCK, *supra* note 10, at § 10:19 (citing Colorado v. New Mexico, 467 U.S. 310 (1984)).

145 Colorado v. New Mexico, 467 U.S. at 318–19.

146 *Id.* at 321.

147 *Id.* at 318–19; TARLOCK, *supra* note 10, at § 10:19 (citing Colorado v. New Mexico, 467 U.S. 310, 318 (1984)).

Second, Colorado had the burden to show that injury to New Mexico from the diversion would be outweighed by the benefits to Colorado.[148] Colorado failed to make this showing by clear and convincing evidence because it had not implemented long-term planning or analysis for the diverted water, so benefits could not be studied or predicted.[149] The Court indicated that long-term state planning would decrease the uncertainty of equitable apportionment judgments because it would allow a state to show that its economy, existing or future, could use water more efficiently than another state.[150] This portion of the case helped establish that a state will have to produce hard evidence of injury or need in order to supplant the water rights of states with legitimate priority claims.[151]

Additionally, the Court gave no weight to the fact that the water originates in Colorado.[152] Where the water originates is irrelevant to determining equitable apportionment in prior appropriation states.[153]

Importantly, the Court referred to water conservation measures and the harm-benefit comparison as "relevant factors" that states seeking a diversion must prove.[154] In sum, in addition to priority of appropriation considerations in equitable apportionment suits between prior appropriation states, the state seeking a diversion must show: (1) "the extent to which reasonable conservation measures can adequately compensate for the reduction in supply due to the diversion" and (2) "the extent to which the benefits from the diversion will outweigh the harms to existing users."[155]

C. Factors in Eastern (Riparian) States

Few Supreme Court equitable appropriation cases between riparian states exist. These cases are *New Jersey v. New York*[156] (1931),

148 Colorado v. New Mexico, 467 U.S. at 321–22.

149 *Id.* at 322–23.

150 *Id.* at 322.

151 TARLOCK, *supra* note 10, at § 10:19.

152 Colorado v. New Mexico, 467 U.S. at 323.

153 *Id.*

154 *Id.*

155 *Id.* at 323–24.

156 New Jersey v. New York, 283 U.S. 336 (1931).

Connecticut v. Massachusetts[157] (1931), and *South Carolina v. North Carolina*[158] (2010). As the Court has not yet discussed apportionment in *South Carolina v. North Carolina*, the existing riparian cases that shed light on what factors the Court may use in an equitable apportionment case between two riparian states, such as Florida and Georgia, are dated by almost a century.

1. Riparian Doctrine

In equitable apportionment cases in eastern states, as in western states, the Supreme Court tends to base its decisions on state law.[159] *New Jersey v. New York*,[160] decided in 1931, was an early major equitable apportionment case in which the Supreme Court's apportionment between the riparian states (1) reflected riparian principles and (2) expressly declined to apply prior appropriation doctrine.[161]

The Court in *Connecticut v. Massachusetts* dismissed Connecticut's action largely because the state failed to show any injury.[162] A. Dan Tarlock asserts that this is actually in line with "the more 'modern' common law rule that only transwatershed diversions that actually caused injury to downstream riparians were actionable."[163] This modern common law rule prohibits lawsuits regarding diversions that do not cause injury to downstream riparians. Thus, any modern equitable apportionment case between riparian states might also apply the same precedent and principle.

2. Departures from Riparian Doctrine

The Supreme Court has departed from riparian doctrine in some cases because riparian common law includes doctrines that frustrate

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157 Connecticut v. Massachusetts, 282 U.S. 660 (1931). Tarlock cites to Missouri v. Illinois, 200 U.S. 496 (1906), to illustrate "[t]he importance of riparian principles and marginal reductions in base water levels" but this is not a true equitable apportionment case as Missouri was seeking an injunction, not apportionment. Tarlock, *supra* note 10, at § 10:21.

158 South Carolina v. North Carolina, 558 U.S. 256 (2010). Thus far, the Court in *South Carolina v. North Carolina* has addressed intervention of three non-sovereign parties but has not addressed the apportionment issue. The case will not feature prominently in this analysis.

159 TARLOCK, *supra* note 10, at § 10:20.

160 New Jersey v. New York, 283 U.S. 336 (1931).

161 TARLOCK, *supra* note 10, at § 10:21.

162 Connecticut v. Massachusetts, 282 U.S. 660, 674 (1931).

163 TARLOCK, *supra* note 10, at § 10:22.

the concept of equitable apportionment between riparian states.[164] The Court has declined to follow at least some of these doctrines.[165] For example, enforcing the natural flow doctrine in an equitable apportionment case could prevent states from holding and distributing its apportioned share because the doctrine prevents upstream state impoundments.[166] The Court declined to follow the natural flow doctrine in *New Jersey v. New York*.[167]

Riparian common law also includes a rule that uses outside of the watershed are *per se* unreasonable.[168] The Court declined to follow that rule in *Connecticut v. Massachusetts*[169] because it would have prevented Massachusetts from using some proportion of the disputed waters.[170] In expressing its willingness to depart from riparian doctrines, the Court stated "riparian rights . . . do not necessarily constitute a dependable guide or just basis for the decision of controversies such as that here presented."[171]

3. Contribution to Stream Flow

Some commentators think that the Supreme Court's comparison between riparian and appropriative rights in *Colorado v. New Mexico*—stating that contribution to stream flow is irrelevant in appropriation states—might have left the door open for contribution as a relevant factor in riparian states.[172] The commentators think that because the Court indicated that riparian rights are tied to land ownership, this indicated that contribution might matter.[173] But consider the fact that much of a state's snow and rain that contributes to stream flow originates on non-riparian land. This analysis, too, is complicated by the hydrology and interconnectedness of groundwater

164 Grant, *supra* note 12, at § 45.06(b) (citing Connecticut v. Massachusetts, 282 U.S. 660, 670 (1931)); TARLOCK, *supra* note 10, at § 10:22.

165 *Id.*

166 *Id.*

167 Catherine L. Dirck, Comment, *Federal Reserved Rights and the Interstate Allocation of Water*, 13 LAND & WATER L. REV. 813 (1978).

168 TARLOCK, *supra* note 10, at § 10:22.

169 Connecticut v. Massachusetts, 282 U.S. 660 (1931).

170 TARLOCK, *supra* note 10, at § 10:22

171 Connecticut v. Massachusetts, 282 U.S. 660, 670 (1931).

172 Colorado v. New Mexico, 467 U.S. 310, 323 (1984); Grant, *supra* note 41, at 424.

173 Grant, *supra* note 41, at 424.

and surface water.[174] The flow and availability of surface water is affected by withdrawals of connected groundwater.[175] This interconnectedness may be a relevant legal consideration in *Florida v. Georgia* because the waters at issue are subject to extensive groundwater withdrawals. Others think that as in cases involving prior appropriation states, contribution to stream flow will not be a relevant factor in equitable apportionment cases involving riparian states.[176]

4. Thoughts on Conservation Measures in Equitable Apportionment Cases Between Riparian States

One question about *Florida v. Georgia*, if it is taken by the Supreme Court, is whether the court will include analysis of conservation measures as it has in prior appropriation cases. In *Colorado v. New Mexico*, the Court stated that factors such as waste and possible conservation measures could be included in the equitable apportionment determination.[177] As competition for water resources in the East intensifies, might the Court include this factor even for an analysis among riparian states?

Colorado v. New Mexico was decided in 1984. This was the first time the Court made water conservation measures an explicit requirement for states to claim an equitable apportionment.[178] The last equitable apportionment case between riparian states was in 1931, so the Court did not have the example of *Colorado v. New Mexico* to follow. There is the possibility that because competition for water resources is intensifying in riparian states, the Court may decide to follow *Colorado v. New Mexico* in future cases and include conservation measures in the analysis.

This line of thinking could be rebutted by the fact that the Court first showed its concern with conservation in *Wyoming v. Colorado* in 1922.[179] In its apportionment, the Court required conservation measures and analyzed the efficiency of water uses that existed on the river.[180] *Wyoming v. Colorado* was decided before the equitable

174 J. David Aiken, *Hydrologically-Connected Ground Water, Section 858, and the* Spear T Ranch *Decision*, 84 Neb. L. Rev. 962, 965–74 (2006) (explaining the hydrology and interconnectedness of groundwater and surface water).

175 *Id.* at 972.

176 Grant, *supra* note 41, at 424.

177 Colorado v. New Mexico, 467 U.S. at 313–14.

178 TARLOCK, *supra* note 10, at § 10:19.

179 Grant, *supra* note 12, at § 45.06(c)(3).

180 *Id.*

apportionment cases between riparian states, so the Court, if it had wanted to include conservation aspects into its decision, did in fact have a precedent. The Court, however, did not include water conservation aspects in its decision in *New Jersey v. New York* or *Connecticut v. Massachusetts*, which possibly indicates that it prefers to omit conservation considerations from equitable apportionment cases between riparian states.

D. Modern Environmental Law Considerations: No Precedent in Equitable Apportionment Case Law

Most of the equitable apportionment cases were decided before the advent of modern environmental law in the 1970s. The most recently decided case, *Colorado v. New Mexico*,[181] was decided in 1984, and the Supreme Court did not discuss the impact of environmental laws, if any, on its decision.[182]

Modern environmental laws factor into non-equitable apportionment water law cases. These environmental laws function to maintain in-stream flows, protect endangered and threatened species, preserve aquatic ecosystems and habitats, and protect other environmental values. Some of these decisions have been very controversial when environmental laws take precedence over other water uses like agriculture.[183]

Considering the significant role that modern environmental law can play in water law cases, it is possible that the Court would factor considerations from environmental law into an equitable apportionment case. This may be especially relevant in *Florida v. Georgia*, as Florida's complaint emphasizes the ecology, diverse wildlife, aquatic habitat, and endangered and threatened species in the Apalachicola Region threatened by decreasing water resources.[184] However, there is no precedent in equitable apportionment cases indicating that modern environmental law would factor into an equitable apportionment analysis today.

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

182 *Id.*

183 *See, e.g.*, Natural Resources Defense Council v. Kempthorne, 2007 WL 4462395, at *1 (E.D. Cal. Dec. 14, 2007) (recounting the court's preliminary injunction protecting the delta smelt in California).

184 Florida's Complaint, *supra* note 1, at 10–13, 15–16, 19–20, 21.

CONCLUSION

With little case law regarding equitable apportionment between riparian states, attempting to predict what factors the Supreme Court would consider in *Florida v. Georgia* is difficult. Moreover, this difficulty is amplified by the fact that the two finalized equitable apportionment cases between riparian states were decided almost a century ago.

Nonetheless, one can postulate several points. First, the Court likely would apply riparian law, as both Florida and Georgia are riparian law states. Second, the Court might depart from doctrines of riparian law that hinder its ability to fairly apportion. Third, the Court would likely compare the harms and benefits of the proposed apportionment. Fourth, the fact that existing economies depend on the water to be apportioned would likely weigh into the harm-benefit comparison. For instance, two relevant facts would be that Georgia's irrigated agriculture uses more water than its industrial and municipal uses combined, and Florida's existing economies include the oyster industry, tourism, and recreational uses.[185] The Court would have an interesting question regarding the value of the natural resources and wildlife refuge as an existing economy or compared to existing traditional economies. Fifth, the Court would likely analyze the availability of possible alternate water supplies.

One can only surmise what other, if any, modern environmental law considerations would factor into the Court's equitable apportionment analysis. Most of the equitable apportionment case law was decided before modern environmental law and the Court does not address such issues in the most recently decided case. Even though modern environmental laws can play a significant role in water law cases and Florida has a unique ecosystem at stake, no equitable apportionment precedent indicates that these laws would factor into an equitable apportionment decision today.

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185 *Id.* at 10–13.