

State and Regional Water Management and Planning

Florida Water Laws Seminar
Webinar: 8/20/20

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Outline

- ▶ Surface water resources
- ▶ Groundwater resources
- ▶ Regional water planning
- ▶ *Florida v. Georgia*
- ▶ *Mississippi v. Tennessee*

▶ Legal Disclaimer: There will be a test



Florida's Constitution

- ▶ “It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources.” Art. II, § 7, Fla. Const.



The regulation of surface water

▶ Surface water discharges

▶ FDEP

▶ Chap. 403, Florida Statutes

▶ 403.0885, Florida Statutes

- ▶ In October 2000, EPA authorized the Florida Department of Environmental Protection (DEP) to implement the NPDES stormwater permitting program in the state of Florida. FDEP's authority to administer the NPDES program is set forth in [Section 403.0885, Florida Statutes](#). The NPDES stormwater program regulates point source discharges of stormwater into surface waters of the state of Florida from certain municipal, industrial and construction activities.

▶ Permits required

▶ Surface water withdrawals

▶ WMDs (or FDEP)

▶ Chap. 373, Florida Statutes

▶ Chap. 40, Florida Administrative Code

▶ Permits required



The regulation of groundwater

- ▶ Groundwater discharges
 - ▶ FDEP
 - ▶ Chap. 403, Florida Statutes
 - ▶ Chap. 62-520, Florida Administrative Code
 - ▶ Permits required
- ▶ Groundwater withdrawals
 - ▶ WMDs
 - ▶ Chap. 373, Florida Statutes
 - ▶ Chap. 40, Florida Administrative Code
 - ▶ Permits required



Regional water planning

- ▶ 373.709, Florida Statutes
 - ▶ Sets forth the requirements for Regional Water Supply Plans (RWSP)
 - ▶ RWSP are updated every 5 years and cover a 20 year planning period
 - ▶ The plan itself sets forth a framework for water supply management decisions.



Florida v. Georgia

Original Action No. 142



We are not talking about ...



FLORIDA v. GEORGIA ORIGINAL ACTION NO. 142

- ▶ **Florida v. Georgia**
 - ▶ Original Action No. 142
 - ▶ Timeline
 - ▶ ACF Basin
 - ▶ Georgia's Consumptive Use
 - ▶ The Special Master's Report
 - ▶ SCOTUS Decides (?) the Issue
 - ▶ The Second Special Master's Report



Florida v. Georgia

Original Action No. 142

- ▶ “In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.” U.S. Const. art. III, § 2, cl. 2.



Florida v. Georgia Timeline

- ▶ October 1, 2013 - Florida files for leave to file a bill of complaint
- ▶ November 3, 2014 - SCOTUS grants the motion
- ▶ October 31, 2016 - Trial begins in Portland, Maine
- ▶ February 14, 2017 - Special Master issues report
- ▶ January 8, 2018 - Oral arguments
- ▶ June 27, 2018 - Opinion by the United States Supreme Court
- ▶ August 9, 2018 - Assignment of new Special Master
- ▶ December 11, 2019 - New Special Master issues report



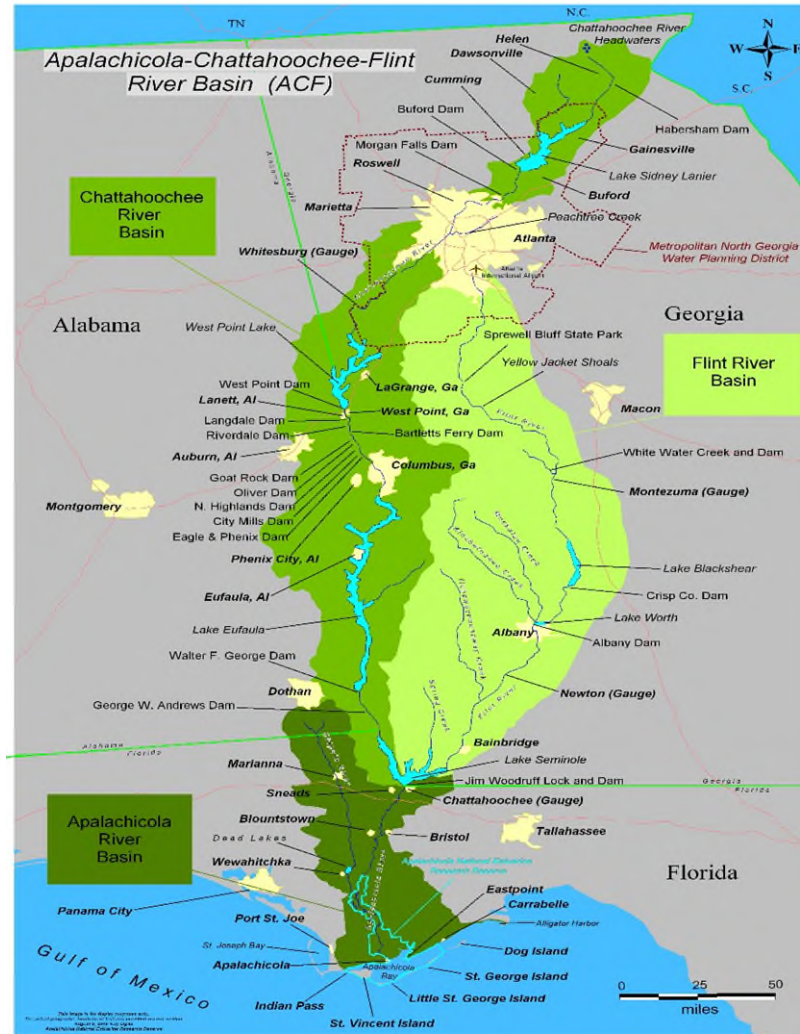
ACF Basin

Includes the Chattahoochee River, Flint River and Apalachicola River.

Five Dams on the Chattahoochee River, beginning at Buford Dam above Atlanta

Enters Florida at the confluence of the Chattahoochee and Flint Rivers, flowing through Jim Woodruff Dam

Flows down to Apalachicola Bay



Governor Scott Announces Suit

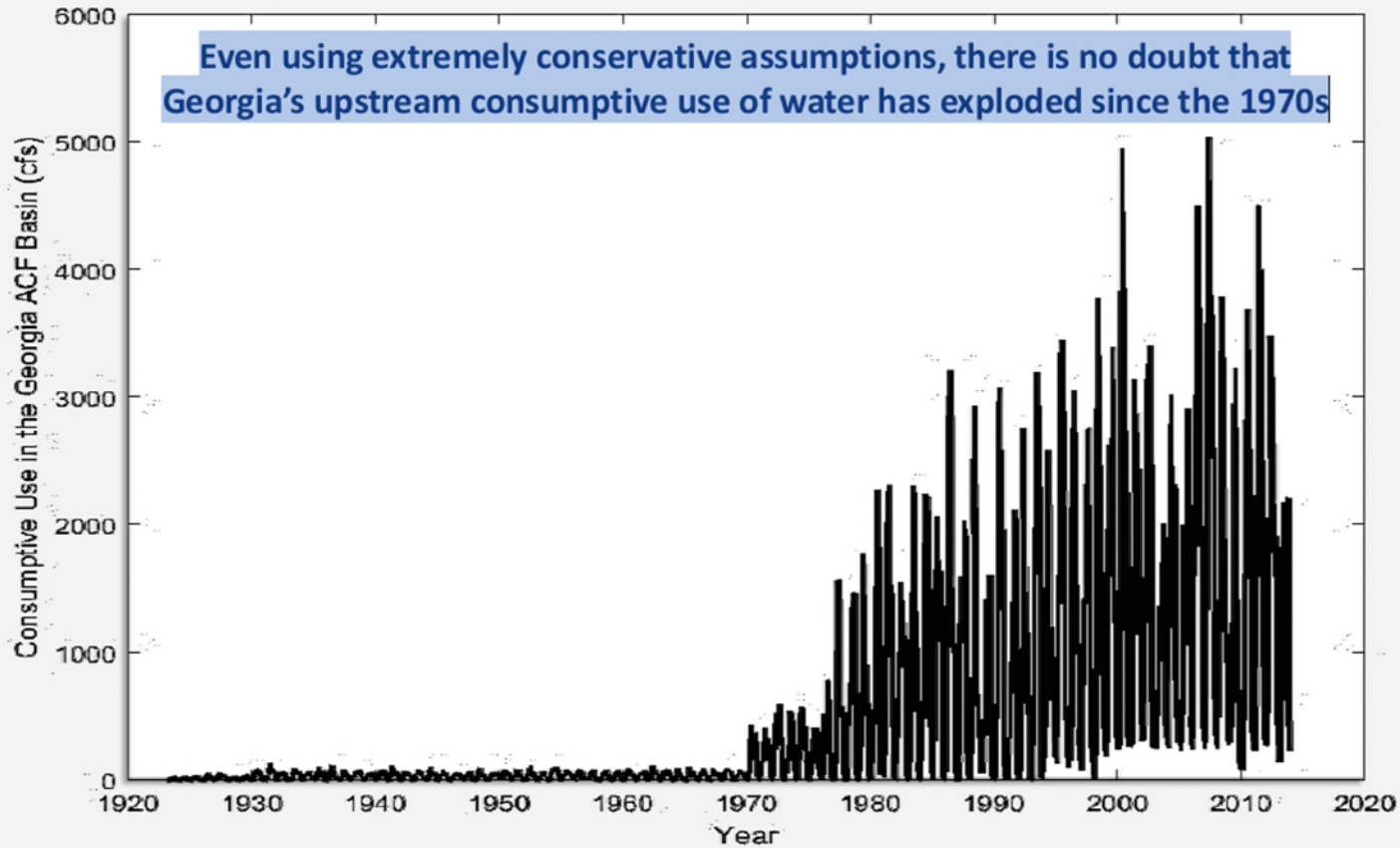


- ▶ Governor Rick Scott said, “Because Georgia has not negotiated in good faith to fairly share the waters that flow between our two states, we are announcing today that Florida will bring suit in the U.S. Supreme Court next month to stop Georgia’s unchecked consumption of water that threatens the existence of Apalachicola fisheries and the future economic development of this region.”

▶ Gov. Scott Press Release, 8/13/13

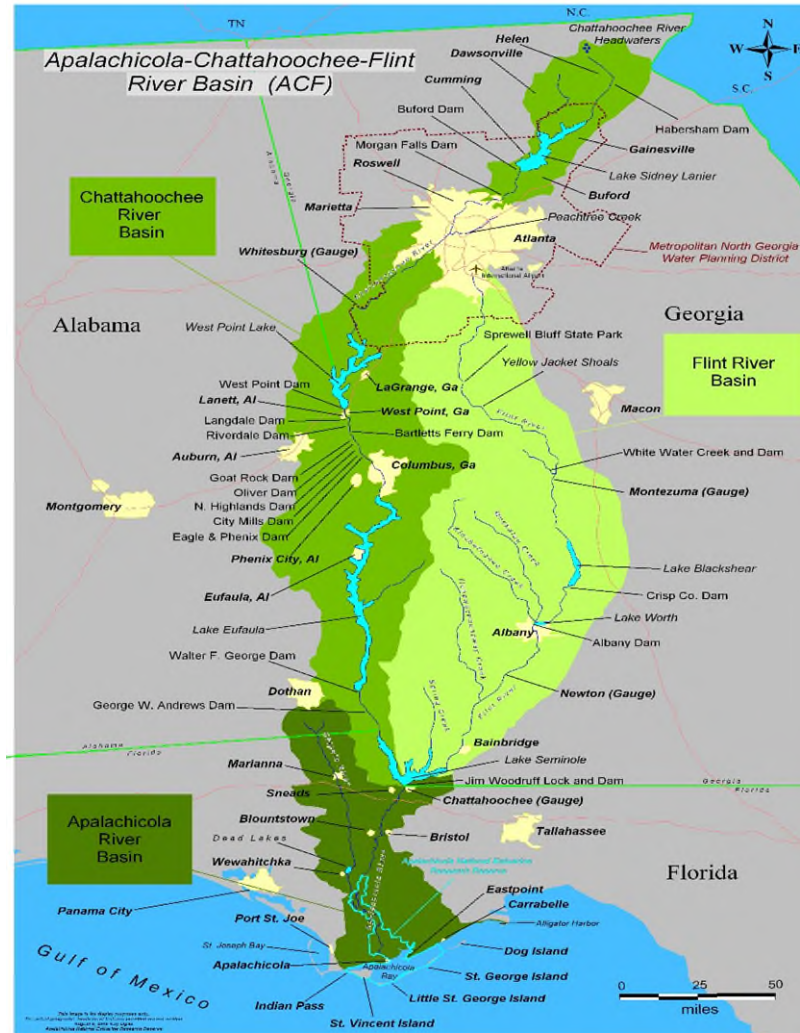


Georgia's Consumptive Use



Who's consuming the water?

1. Metro Atlanta
2. Upper Flint
3. Lower Flint



Lower Flint River Basin



Consumption's Impact to Stream Flow



USGS 02358000 APALACHICOLA RIVER AT CHATTAHOOCHEE FLA

00060, Discharge, cubic feet per second,												
YEAR	Monthly mean in ft ³ /s (Calculation Period: 1928-10-01 -> 2016-01-31)											
	Calculation period restricted by USGS staff due to special conditions at/near site											
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
1928										19,550	13,800	14,170
1929	22,810	38,370	171,600	37,240	36,240	23,850	19,440	15,820	13,790	37,510	28,200	28,150
1930	27,170	35,040	38,620	31,420	18,560	14,340	11,280	11,790	14,910	11,560	28,990	23,420
1931	23,430	19,990	20,210	21,800	19,580	8,898	9,010	11,590	7,235	5,980	5,524	14,870
1932	29,050	28,660	23,490	18,980	15,750	15,470	14,670	17,530	9,827	12,390	15,370	27,350
1933	37,090	43,010	41,050	37,990	21,400	13,810	14,360	12,190	11,380	8,111	7,888	8,906
1934	10,750	11,230	31,040	17,740	17,490	21,200	14,730	13,440	10,030	14,200	8,658	10,580
1935	12,020	13,850	27,450	20,690	14,500	8,905	11,030	11,690	12,670	7,056	9,299	9,688
1936	62,470	64,920	32,760	72,170	20,080	12,860	14,030	24,600	11,710	20,850	12,160	24,790



Consumption's Impact to Stream Flow



USGS 02358000 APALACHICOLA RIVER AT CHATTAHOOCHEE FLA

00060, Discharge, cubic feet per second,												
Monthly mean in ft ³ /s (Calculation Period: 2000-01-01 -> 2016-01-31)												
YEAR	Period-of-record for statistical calculation restricted by user											
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
2000	11,550	16,650	14,570	17,330	8,413	4,826	5,117	5,806	5,889	5,659	6,361	10,300
2001	14,690	11,990	57,190	30,860	11,560	18,600	11,150	9,585	7,173	6,130	5,975	7,337
2002	9,036	13,770	14,770	13,890	8,326	6,578	6,084	5,735	6,991	8,206	17,300	20,130
2003	15,860	23,760	48,700	32,950	43,040	37,120	35,360	25,700	13,970	12,050	13,310	16,790
2004	17,680	30,020	16,390	11,510	9,885	9,458	12,740	9,998	28,410	16,400	20,490	24,730
2005	21,100	24,350	41,760	71,790	21,740	25,520	56,320	32,350	15,090	10,360	11,840	18,430
2006	25,040	23,450	26,530	16,120	13,770	6,953	5,773	5,738	6,969	6,169	12,120	9,153
2007	21,310	18,940	19,490	13,540	6,869	5,153	5,351	5,154	5,343	5,133	4,976	5,981
2008	14,770	28,410	24,020	18,240	9,048	5,405	5,863	13,520	8,945	7,415	10,630	29,420
2009	17,650	11,400	37,120	66,960	22,220	14,520	8,245	8,641	21,890	22,640	36,440	74,950
2010	54,220	61,170	41,840	19,460	29,570	14,130	9,203	8,097	5,977	7,158	7,724	9,836
2011	10,820	20,050	21,960	19,640	7,521	4,781	6,244	5,484	5,734	5,346	5,651	5,196
2012	11,310	11,050	16,240	9,513	5,352	5,525	5,498	5,438	5,212	5,381	5,316	5,418
2013	8,890	45,380	38,270	22,010	21,270	15,220	37,090	32,960	14,870	10,090	9,465	26,760
2014	32,740	35,710	30,270	61,730	29,560	13,490	11,280	8,968	8,759	9,992	10,230	16,630
2015	25,190	20,350	24,850	28,190	16,070	13,080	9,486	8,474	8,723	10,330	28,280	49,810
2016	67,800											
Mean of monthly Discharge	22,300	24,800	29,600	28,400	16,500	12,500	14,400	12,000	10,600	9,280	12,900	20,700



Special Master's Report

- ▶ “The facts presented at trial demonstrate the gravity of the dispute between Florida and Georgia. As the evidentiary hearing made clear, Florida points to real harm and, at the very least, likely misuse of resources by Georgia.” Pg. 38
- ▶ “There is little question that Florida has suffered harm from decreased flows in the River.” Pg. 38
- ▶ “Georgia’s position - practically, politically, and legally - can be summarized as follows: Georgia’s agricultural water use should be subject to no limitations, regard-less of the long-term consequences for the Basin.” Pg. 41



Special Master's Report

- ▶ “I find that Florida has not proven by clear and convincing evidence that any additional streamflow in the Flint River or in the Chattahoochee River would be released from Jim Woodruff Dam into the Apalachicola River at a time that would provide a material benefit to Florida (i.e., during dry periods), thereby alleviating Florida’s injury.” Pg. 54



Special Master's Conclusion & Recommendation

VII. CONCLUSION

... Florida has failed to show that a consumption cap will afford adequate relief. The testimony and evidence submitted at trial demonstrates that the Corps can likely offset increased streamflow in the Flint River by storing additional water in its reservoirs along the Chattahoochee River during dry periods. The evidence also shows that the Corps retains extensive discretion in the operation of those federal reservoirs. As a result, the Corps can release (or not release) water largely as it sees fit, subject to certain minimum requirements under the RIOP. There is no guarantee that the Corps will exercise its discretion to release or hold back water at any particular time. Further, Florida has not shown that it would benefit from increased pass-through operations under normal conditions. Finally, without the Corps as a party, the Court cannot order the Corps to take any particular action. Accordingly, Florida has not proven by clear and convincing evidence that any additional streamflow in the Flint River resulting from a decree imposing a consumptive cap on Georgia's water use would be released from Jim Woodruff Dam into the River at a time that would provide a material benefit to Florida.

VIII. RECOMMENDATION

Because Florida has not met its burden, I recommend that the Court deny Florida's request for relief. A proposed decree embodying my recommendation is attached as Appendix J.



SCOTUS Issues Its Opinion

- ▶ “[W]e conclude that the Special Master applied too strict a standard when he determined that the Court would not be able to fashion an appropriate equitable decree.”
- ▶ “Our ‘independent examination of the record,’ leads us to conclude that, at this stage, Florida has met its ‘initial burden’ in respect to remedy. But, we also believe that a remand is necessary to conduct the equitable-balancing inquiry.”



The Five Questions

- ▶ *First*, has Florida suffered harm as a result of decreased water flow into the Apalachicola River? (The Special Master assumed “yes.”)
- ▶ *Second*, has Florida shown that Georgia, contrary to equitable principles, has taken too much water from the Flint River (the eastern branch of the Y-shaped river system)? (Again, the Special Master assumed “yes.”)
- ▶ *Third*, if so, has Georgia’s inequitable use of Basin waters injured Florida? (The Special Master assumed “yes.”)
- ▶ *Fourth*, if so, would an equity-based cap on Georgia’s use of the Flint River lead to a significant increase in streamflow from the Flint River into Florida’s Apalachicola River (the stem of the Y)? (This is the basic question before us.)
- ▶ *Fifth*, if so, would the amount of extra water that reaches the Apalachicola River significantly redress the economic and ecological harm that Florida has suffered? (This question is mostly for remand.)



Dissent

- ▶ “The Special Master applied this balance-of-harms standard and, after presiding over a 1-month trial involving 40 witnesses and more than 2,000 exhibits, found that Florida had not met its burden. Because that finding is well supported by the evidence, I would have over-ruled Florida’s objections to the Special Master’s Report(Report) and denied Florida’s request for relief.”



New Special Master's report

- ▶ Given my factual findings, I recommend denying Florida's request for a decree because it has not proved the elements necessary to obtain relief. Florida has pointed to harm in the oyster fishery collapse, but I do not find that Georgia caused that harm by clear and convincing evidence. Next, although Georgia's use of the Flint and Chattahoochee Rivers has increased since the 1970s, Georgia's use is not unreasonable or inequitable. Last, I have determined that the benefits of an apportionment would not substantially outweigh the harm that might result. This is especially true given that the Army Corps' reservoir operations on the Chattahoochee River would prevent most streamflow increases from reaching Florida during the times when more streamflow is needed to alleviate Florida's alleged harms.



New Special Master's report

- ▶ Because very little of the additional streamflow generated by a decree would result in increased Apalachicola flows at the times when Florida needs them, I find that Florida would receive no appreciable benefit from a decree. For Florida to be entitled to an equitable apportionment, it must be “shown that ‘the benefits of the [apportionment] substantially outweigh the harm that might result.’ ” Florida, 138 S. Ct. at 2527 (alteration in original) (quoting Colorado I, 459 U.S. at 187). Consequently, I conclude that Florida is not entitled to a decree equitably apportioning the waters of the Flint and Chattahoochee Rivers.



Mississippi v. Tennessee Original Action No. 143



Mississippi v. Tennessee

Original Action No. 143

- ▶ Mississippi v. Tennessee
 - ▶ Original Action No. 143
 - ▶ Timeline
 - ▶ Complaint
 - ▶ Post-hearing briefing



Mississippi v. Tennessee Timeline

- ▶ June 6, 2014 - Mississippi files for leave to file Complaint
- ▶ June 29, 2015 - Motion granted
- ▶ November 10, 2015 - The case is referred to the Honorable Eugene E. Siler, Jr. of the Sixth Circuit
- ▶ May 21, 2019 - Five-day trial commences
- ▶ September 19, 2019 - Post-hearing briefs filed
- ▶ October 21, 2019 - Responses to Post-hearing briefs filed



Mississippi's Complaint

- ▶ Mississippi sues Tennessee and the City of Memphis and Memphis, Light, Gas & Water Division (“MLGW”)
- ▶ In 1985, Mississippi enacted the “Omnibus Water Rights Act,” which acknowledged the State’s ownership of all of the groundwater resources
- ▶ At issue: MLGW’s construction of a well field near the Mississippi-Tennessee border and pumping of water from under Mississippi’s sovereign lands
 - ▶ “By their actions, Defendants have invaded Mississippi’s sovereign territory, committed trespass against Mississippi, converted Mississippi natural resources, and intentionally violated Mississippi water law.” Comp., Pg. 5
- ▶ Mississippi alleged that “[t]his case does not fall within the Court’s equitable apportionment jurisdiction” because this case involved a groundwater resource that would not otherwise flow into Tennessee but for MLGW’s pumping of groundwater



Prayer for Relief

- ▶ A. That the Court enter a decree declaring Mississippi's ownership of and exclusive dominion and control over groundwater located naturally in the Sparta Sand formation underlying the sovereign borders of Mississippi;
- ▶ B. That the Court enter a decree finding that the actions of Defendants described hereinabove constitute a violation of Mississippi's retained sovereign rights under the United States Constitution and a wrongful and actionable trespass upon, and conversion, taking, and misappropriation of, property belonging to Mississippi and its people;



Prayer for Relief

- ▶ C. That the Court enter a decree against Defendants, jointly and severally, (1) awarding Mississippi damages for retroactive periods from 1985 through the present in an amount equal to the value of the groundwater taken wrongfully by Defendants from Mississippi, plus prejudgment interest thereon; and/or (2) requiring Defendants to render an accounting and disgorge and pay over to Mississippi all profits, proceeds, consequential gains, saved expenditures, and other benefits realized by Defendants, or any of them, due to their nonconsensual taking of and interference with Mississippi's property, plus prejudgment interest thereon;
- ▶ D. That the Court require Defendants to prospectively take all actions necessary to eliminate the subject cone of depression *vis-à-vis* Mississippi, including, *inter alia*, the funding, construction and modification or restructuring of Memphis-MLGW's groundwater pumping systems and/or the development of systems using Mississippi River water as an alternate or supplemental source of water supply; and
- ▶ E. For such other or further relief as the Court may deem proper.



Post-hearing briefing

- ▶ Tennessee asserts:
 - ▶ The aquifer at issue is an “interstate resource”
 - ▶ As an “interstate resource,” it is subject to equitable apportionment
 - ▶ Most importantly, equitable apportionment applies ‘when ‘the action of one State reaches through the agency of natural laws into the territory of another State.’” Tenn., Post-hearing Brief, Pg. 3
 - ▶ “Mississippi’s ownership theory conflicts with that well-established framework for resolving disputes over interstate water resources.” Tenn., Post-hearing Brief, Pg. 4
 - ▶ Tennessee also asserts that Mississippi’s theory would impinge on Tennessee’s right to control the use of a natural resource within its own borders





LLW

**LEWIS
LONGMAN
WALKER**

Questions?