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I. INTRODUCTION

More than just an amenity, "[a river] is a treasure" noted Justice Holmes in a dispute over the waters of the Delaware River.[1] Water is a unique resource in that it is fluid and can move between borders of sovereign states. When water flows across state boundaries, there are often conflicts between the rights of the powerful upstream state and the vulnerable downstream state. Although water rights laws vary across the United States, most eastern states adopt the principle that the right to water is equal for both states.[2]

Along with the unique nature of water and the disputes that arise from its flow, droughts and their devastating consequences prove to dry up more than just water sources. Without Supreme Court precedent requiring a "but-for" standard of causation in matters of equitable apportionment, viable controversies between sovereign states will be settled in favor of the upstream state by the Court due to the existence of a drought. If the Supreme Court still believes the words of Justice Holmes that "[a river] is a treasure," a causation standard akin to a "but-for" standard will be required.

The long and tumultuous history of equitable apportionment law and the drought of cases arising in the east compared to the west has led to

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1. New Jersey v. New York (New Jersey I), 283 U.S. 336, 342 (1931).
2. Colorado v. New Mexico (Colorado I), 459 U.S. 176, 179 n.4 (1982).

the seminal importance of each and every interstate water dispute. The Supreme Court's hesitancy to reach the question of what level of causation is required in cases of equitable apportionment in the most recent iteration of *Florida v. Georgia (Florida II)*,[3] leaves a looming unanswered question in well-established equitable apportionment law. Evidence from principles of equitable apportionment law generally, the rest of the opinion,[4] other water (and other resource) disputes, and general tort law concepts may be used to predict and shape the future answer to this question.

Though there are few cases regarding equitable apportionment, the Court has adopted broad sweeping rules to address many of the issues that arise in these cases.[5] The state requesting apportionment[6] must prove an actual or threatened injury of serious magnitude caused by upstream water consumption and that state must prove that the benefits of apportionment substantially outweigh the harm that might result from the Court stepping in.[7]

In the Court's most recent equitable apportionment decision, *Florida II*, the Court explicitly refused to answer the question of what standard of causation is required for the first element—an actual or threatened injury of serious magnitude caused by upstream water consumption—for the court to equitably apportion state water use.[8] Because of the unique nature of a claim for equitable apportionment, and the reverence the Supreme Court has for mandating resource allocation among sovereign states, a high standard of causation is necessary to effectively balance the harm and the good as required by the Supreme Court's equitable apportionment precedent. Though the Court refused to decide that issue in *Florida II*, a "substantial cause" test would most effectively advance the goals articulated by the Court in other recent equitable apportionment cases.

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3. Florida v. Georgia (Florida II), 141 S. Ct. 1175 (2021).

4. *See generally Florida II*, 141 S. Ct. at 1175 (leaving the question of required standard of causation unanswered in the opinion but providing some evidence as to what could be necessary).

5. The Supreme Court has exercised its original jurisdiction powers to hear cases of equitable apportionment between states ten times. Kansas v. Colorado (Kansas I), 206 U.S. 46, 85 (1907); South Carolina v. North Carolina, 552 U.S. 804 (2007); Arizona v. California, 298 U.S. 558 (1936); Connecticut v. Massachusetts, 282 U.S. 660 (1931); *New Jersey I*, 283 U.S. at 336; Wyoming v. Colorado, 259 U.S. 419 (1922); Nebraska v. Wyoming, 295 U.S. 40 (1935); *Colorado I*, 459 U.S. at 176; Washington v. Oregon, 297 U.S. 517 (1936); *Florida II*, 141 S. Ct. at 1175.

6. The state bringing the lawsuit is usually the downstream state.

7. *Florida II*, 141 S. Ct. at 1180.

8. *Id*. at 1181 n.*.

Part II of this article will discuss background information regarding relevant principles of state sovereignty and the original jurisdiction of the Supreme Court to hear cases between states. Part III will focus on applicable equitable apportionment doctrine analysis with illustrations of seminal cases. The clear and convincing evidence standard will be analyzed in Part IV and the standard of causation of the alleged harm will follow in Part V. The Court's hesitancy to make an explicit holding on the requisite standard of causation will be noted in Part VI. An overall conclusion will reiterate the important points at the very end in Part VII.

II. STATE SOVEREIGNTY VERSUS ORIGINAL JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

A right to streamflow is a justiciable issue recognized at common law.[9] At one end of the spectrum of outcomes of state options for river use, it is within the physical power of the upstream state to completely cut off the water supply of the downstream state.[10] This extreme use of the shared resource cannot be tolerated and the sovereign rights of both the upstream and the downstream state must be reconciled.[11] A river is a finite resource that must be "rationed among those who have power over it."[12] Because of the vulnerable nature of a downstream state, the Court is tasked with predicating a state's sovereign right to use water within its borders on reasonable use.[13]

For more than a century, the Supreme Court has recognized its inherent authority to equitably apportion interstate waters between states.[14] To obtain equitable apportionment, a State must prove (1) an actual or threatened injury of serious magnitude caused by upstream water consumption and (2) that the benefits of apportionment substantially outweigh the harm that might result from the mandate.[15] The complaining State must prove injury and causation by clear and convincing evidence.[16] This burden of proof is very high and is equivalent to the statement that the evidence is substantially more likely to be true

9. *Kansas I*, 206 U.S. at 85.

10. *New Jersey I*, 283 U.S. at 342.

11. *Id.* at 342–43.

12. *Id.* at 342.

13. *Kansas I*, 206 U.S. at 100.

14. *Id.* at 98 (holding for the first time that equitable apportionment would be the doctrine employed between states even if the two states employed different water rights schemes at common law).

15. *Florida II*, 141 S. Ct. at 1180.

16. *Id.* at 1182.

than untrue.[17] For a Court to reach into a sovereign state's territory and mandate how the state may use its water, the Court must be absolutely convinced of the evidence of the harm and its cause.

A vital and sometimes scarce resource, water has been the subject of over 100 years of litigation in the Supreme Court.[18] Much of this litigation has taken place between states in the western portion of the United States.[19] This is relevant because of the differences in doctrines applicable to states in the east and the west. Differences in water scarcity and geographical makeup have driven the eastern states and the western states to follow different sets of doctrines regarding water rights.[20]

Although individual states may adopt water rights laws that apply within the state, those laws will not apply to activities in other states. Thus, when there are disputes between states regarding waters that flow between the states, as opposed to disputes between individuals in the same state, the Supreme Court is called upon to intervene, exercising its original jurisdiction to resolve disputes arising between sovereign states.[21] This authority was recognized and implemented by Article III of the United States Constitution[22] and 28 U.S.C. § 1251(a).[23] Cases between states are unique in that the Supreme Court has original jurisdiction to hear these cases.[24] This original jurisdiction brings with it different requirements and procedural obligations than those that apply to cases and disputes among non-state entities before the Court.[25] At that point, the water rights laws of the states are considered as part of a broader analysis by the Court under its own jurisprudence regarding the doctrine of equitable apportionment.[26] The underlying water rights doctrine of the state still serves as a vital, yet secondary, part of the Court's analysis.[27]

When two states are involved in interstate litigation over water rights, the extent of state sovereignty becomes relevant. Litigation must serve two goals to be an effective solution when states are parties to a suit

17. Colorado v. New Mexico (Colorado II), 467 U.S. 310, 316 (1984).

18. *Kansas I*, 206 U.S. at 87; *Colorado I*, 459 U.S. at 183.

19. *Kansas I*, 206 U.S. at 101; *Colorado I*, 459 U.S. at 184.

20. *Colorado I*, 459 U.S. at 180 n.4.

21. *Id.* at 177.

22. U.S. Const. amend. III, § 2.

23. 28 U.S.C. § 1251(a) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.").

24. U.S. Const. amend. III, § 2.

25. *Colorado II*, 467 U.S. at 315–16.

26. *Id.* at 315–17.

27. *Colorado I*, 459 U.S. at 183–84.

involving a matter of sovereign interest.[28] These twin goals are (1) ensuring that due respect is given to sovereign dignity and (2) providing a working rule for good judicial administration.[29] Neither State may impose its own legislation or policy upon the other state.[30] "Equality of right" underscores the interactions of states between each other, yet each is called to make decisions and use resources that are naturally shared between the two equal sovereigns, so some higher power must be employed.[31] Because of the unique nature of not only this shared resource but the rights held by each state to use that resource, disputes—though they may not be very common—are large in scale and require the Court to expend much time and resources.

A lawsuit between two sovereign states in the Supreme Court begins with the Court as fact finder.[32] For efficiency, the Court will appoint a Special Master to facilitate the often-tedious, time consuming, and expensive process of fact-finding.[33] The Court has the discretion to appoint the Special Master, but in cases of original jurisdiction, for the sake of efficiency the Court will often appoint this person to investigate specific claims or to advise the Court on a technical issue.[34] The Special Master reviews the evidence from both parties and makes an official report and recommendation to the Court based on the evidence presented to the Special Master. [35]

Upon reviewing the recommendation of the Special Master, the parties may object to the report and recommendation of the Special Master by filing exceptions with the Court to the recommendation of the Special

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28. South Carolina v. North Carolina, 558 U.S. 256, 266 (2010); New Jersey v. New York (New Jersey II), 345 U.S. 369, 373 (1953).

29. *South Carolina*, 558 U.S. at 266; *New Jersey II*, 345 U.S. at 373.

30. *Kansas I*, 206 U.S. at 95.

31. *Id.* at 97.

32. 28 U.S.C. § 1251(a).

33. Fed. R. Civ. P. 53.

34. *Special Master*, Cornell Legal Information Institute (2021).

35. Fed. R. Civ. P. 53. Special Masters are appointed by the Court in this capacity usually for their specific expertise in a complex area. The Supreme Court uses them in cases of original jurisdiction for two purposes: (1) to more efficiently find fact than the Court would and (2) to bring their personal expertise to a usually complex topic. For example, in *Florida I*, Special Master Lancaster had served as a Special Master three times previously. Florida v. Georgia (Florida I), 138 S. Ct. 2502 (2018); In Memorium Ralph I. Lancaster, Jr., *Pierce Atwood LLP*, (October 1, 2021) https://www.pierceatwood.com/memoriam-ralph-i-lancaster-jr. In *Florida II*, Special Master Paul Kelly is a Senior United States Circuit Court Judge of the United States Court of Appeals for the Tenth Circuit. 141 S. Ct. at 1175; Kelly, Paul Joseph, Jr., *Federal Judicial Center*, (October 1, 2021) https://www.fjc.gov/history/judges/kelly-paul-joseph-jr.

Master.[36] Because the Special Master does not officially displace or supersede the Court or its authority to settle cases and controversies between sovereign states, upon objection—or the filing of exceptions—by an involved party, the Court may review the Special Master's findings before issuing its ruling on the facts of the case.[37]

III. APPLICABLE DOCTRINES

At common law, each state has its own scheme for analyzing water rights. Split roughly between the 100th meridian of the contiguous United States, the states east of this demarcation generally employ a form of riparian rights at common law.[38] Riparian rights or riparian ownership is an "[o]wnership interest in a river or stream derived from ownership of one of the banks."[39] West of the line of demarcation, the mostly arid states usually invoke the doctrine of prior appropriation.[40] Ownership rights under this doctrine are derived from the concept that "[w]hoever appropriates water for a reasonable use has priority over later appropriators."[41] There are variations by each state, but in general, this system of division between eastern and western states is relatively consistent throughout the United States.[42] State courts may determine their own common law in respect to the doctrines of prior appropriation or riparian rights and the Court or Congress may not dictate which of these doctrines a state employs.[43]

Though English common law, originally brought to this country prior to the founding of America, followed the doctrine of riparian rights generally adopted by eastern states, most of the early disputes filed in the Supreme Court among sovereign states over equitable apportionment of shared river resources arose in the western portion of the United States.[44] Although the majority of disputes between states over water

36. Fed. R. Civ. P. 53(2).

37. *Id.*; *Colorado II*, 467 U.S. at 317; *see* Mississippi v. Arkansas, 415 U.S. 289, 291-92, 294 (1974).

38. Nisha D. Noroian, *Prior Appropriation, Agriculture and the West: Caught in a Bad Romance*, 51 Jurimetrics J. 181–215, 181 (2011).

39. *Riparian Ownership (Riparian Rights)*, Bouvier Law Dictionary (2012).

40. *Colorado I*, 459 U.S. at 180, n.4.

41. *Prior Appropriation Doctrine*, Bouvier Law Dictionary (2012).

42. *Colorado I*, 459 U.S. at 180, n.4.

43. *Kansas I*, 206 U.S. at 94.

44. *Id.* at 94–95.

apportionment have been between states in the west, currently, there is a rise of eastern state disputes.[45]

A. Equitable Apportionment

Disputes between sovereign states concerning rights to the use of water from an interstate stream are governed by the doctrine of equitable apportionment.[46] This doctrine—favoring a fair distribution of water rights as opposed to common law doctrines proscribing water rights like riparianism or the doctrine of prior appropriation—is employed by the Supreme Court when making these decisions. Multiple factors are considered by the Court when tasked with "secur[ing] a 'just and equitable' allocation" of water between states.[47] A factor of great importance for consideration is the doctrine governing the involved states' water management.[48] This factor is not conclusive, though, because individual state law is not controlling in this instance between two states; pertinent state law is merely a factor for consideration amongst other factors.[49]

Neither state may enforce its doctrines or policy upon the other; therefore, when discrepancies arise, the Supreme Court must step in.[50] In situations where the actions of one state infringe the sovereignty of another, the Court is called on to equally balance rights of each State while establishing an outcome that brings justice for both.[51] However, equitable apportionment is directed at alleviating the complaining State's present harm and preventing its alleged future harm. Equitable apportionment is not used to compensate a State for a prior injury.[52]

The Supreme Court is tasked with employing the doctrine of equitable apportionment to settle these types of disputes in an equitable and effective way.[53] In settling the first case of equitable apportionment in

45. *Id.* at 95; *Colorado I*, 459 U.S. at 183–84; *see Florida II*, 141 S. Ct. at 1175 (deciding a dispute between two eastern states in the most recent exercise of Supreme Court equitable apportionment power). Although the Supreme Court does not use the states' chosen common law doctrine to bind both parties in the dispute, each state's framework is an important factor for analysis, as discussed below. *Colorado I*, 459 U.S. at 183-84.

46. *Colorado I*, 459 U.S. at 183; *Kansas I*, 206 U.S. at 117–18; *Connecticut*, 282 U.S. at 670–71.

47. *Colorado I*, 459 U.S. at 183 (quoting Nebraska v. Wyoming (Nebraska II), 325 U.S. 589, 618 (1945)).

48. *Colorado I*, 459 U.S. at 183–84.

49. *Id.*

50. *Kansas I*, 206 U.S. at 95–96.

51. *Id.* at 97–98.

52. Idaho ex rel. Evans v. Oregon, 462 U.S. 1017, 1025–26 (1983).

53. *Kansas I*, 206 U.S. at 95–96.

the Supreme Court, in 1906, Justice Brewer noted that if the two states in conflict were independent nations, the disputes would be settled either by treaty or by war.[54] The Supreme Court cannot force a contract, or treaty, upon the sovereign states and war is not a endorsed option.[55] This leaves the Supreme Court with the daunting and sometimes very technically specific task of water allocation between sovereign entities.

B. Western States

At common law, states in the west use the doctrine of prior appropriation to efficiently and effectively divide property rights of the water that flows through the rivers.[56] Under the prior appropriation doctrine, the rights of water users are ranked by seniority—first in time to use the right—and do not depend on land ownership, but are ranked and measured by actual use of the water.[57] Most of the states located west of the 100th meridian follow this doctrine and rights to water are acquired by diverting water and using it for a beneficial purpose.[58]

Traditionally, western states are faced with a more arid climate than states in the east. The foundations of the prior appropriation doctrine are built upon the anxieties surrounding the allocation of this scarce resource.[59]

1. Kansas v. Colorado

In the case of *Kansas v. Colorado*, Kansas brought a claim under the original jurisdiction of the Supreme Court to decide a dispute between it and Colorado regarding rights to, and uses of, the water of the Arkansas River flowing between the borders of both states.[60] This was the first time the Court was required to make a ruling regarding equitable apportionment of river water between two sovereign states.[61]

At the state level, Kansas and Colorado each employed different doctrines for water rights.[62] Kansas adopted the riparian rights doctrine while Colorado employed the doctrine of prior appropriation.[63] The

54. *Id.* at 98.

55. *See Id.* (holding that there are imposed and natural limits to what the Supreme Court can do to ensure equitable water use between states).

56. *Colorado I*, 459 U.S. at 180 n.4.

57. *Id.*

58. *Id.*

59. *Id.* at 184.

60. *See generally Kansas I*, 206 U.S. at 46.

61. *Id.* at 80.

62. *Id.* at 95.

63. *Id.* at 85.

Supreme Court, however, recognized that because this controversy affected more than just local private rights to water and ultimately implicated overall state interests, the scope of the Court's inquiry encompassed more than just the question of "whether any portion of the waters of the Arkansas [River was] withheld by Colorado."[64]

The question before the Court in *Kansas I*, was more than just a simple dichotomous, factual question.[65] Instead, the question before the Court was how the Court should consider the effect of the withholding of water upon both states and adjust the outcome based on equity between Colorado's need for water to irrigate its land without depriving Kansas of its own use of the stream.[66] In answering this question, the Court set boundaries for what is, and is not, allowed for future analysis of equitable apportionment disputes.[67]

In dicta, the Court stated that if, under the facts, Colorado appropriated the entire flow of the Arkansas River, effectively cutting off access entirely to the river for Kansas, the Court could not uphold an appropriation that extreme, even if Colorado agreed to give Kansas something in return for the water.[68] The Court reasoned that ratifying this action would be akin to creating a contract between the two states, something the Court cannot do.[69] Though this hypothetical proposed by the Court is not binding precedent, it does give a glimpse into how the Court would treat a situation of this nature and what the Court views as within and outside of the scope of Supreme Court power at the heart of equitable apportionment.

Instead, looking beyond a numerical approach to deciding the amount of water each state can use, the Court in *Kansas I* set guidelines for considering what effects and uses of the water are reasonable.[70] Considering the effects of water appropriation by one state on another possessing identical and equal rights to that same source of water is an analysis the Supreme Court must frequently undertake in equitable apportionment cases.[71] When conducting that analysis, the Court often

64. *Id.* at 99–100.

65. *Id.* at 100.

66. *Id*. The early stages of the elements of a case of equitable apportionment were articulated here.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* (holding that the use of the water comports with the underlying "prior appropriation doctrine" used in the west).

71. *Id.* at 102.

examines the benefits and harms that flow from apportionment or the failure to apportion water rights.[72]

In *Kansas I*, the Supreme Court noted that although Kansas was experiencing injury because of Colorado's withdrawal of water from the Arkansas River, the benefit to Colorado was very high and the detriment to Kansas was very low.[73] Colorado had, in fact, diminished the flow to Kansas, but the overall benefit of the appropriation to the Arkansas Valley of Kansas exceeded the harm caused by Colorado's withdrawal of water.[74] Under the withdrawal rates of the Arkansas River by Colorado, the Court found the division and usage of water between the two states to be equitable and that any adjustment by the Supreme Court would disrupt the equitable apportionment of the river water between the two states.[75]

Because Kansas had failed to allege a substantial injury for the Court to remedy, the Court dismissed Kansas' action.[76] The action was dismissed without prejudice with a warning from the Court that if the facts changed and if the withdrawal of water from the Arkansas River by Colorado were to increase so much so that there was "no longer an equitable division of benefits," the Court could revisit apportionment of the waters of the Arkansas River in the future.[77]

In 1943, the Supreme Court was called upon again to revisit the question of equitable apportionment of the waters of the Arkansas River between Colorado and Kansas.[78] New factors, including an extreme increase in water withdrawal by Colorado, caused Kansas to bring suit again in the Supreme Court.[79]

Again, the Court refused to step in and equitably apportion the water withdrawal rate of Colorado.[80] The Court reasoned that because of new water storage technologies employed by Colorado and Kansas, factors had changed for both states compared to water rates in *Kansas I*.[81] The Court found the use of the Arkansas River at the time of the lawsuit to be equitably apportioned and dismissed the case.[82] Outside of Court in

72. *Id.*
73. *Id.* at 117.
74. *Id.*
75. *Id.* at 117–18.
76. *Id.*
77. *Id.*
78. Colorado v. Kansas (Kansas II), 320 U.S. 383 (1943).
79. *Id.* at 391.
80. *Id.* at 400.
81. *Id.* at 397.
82. *Id.* at 400.

1949, Colorado and Kansas successfully negotiated a contract outlining details for an agreed upon appropriation of the Arkansas River by each ratifying and agreeing to the Arkansas River Compact.[83]

C. Eastern States

In contrast to the prior appropriation doctrine adopted by western states, most eastern states employ the doctrine of riparian rights to resolve water rights disputes between individuals within the states.[84] Under the doctrine of riparian rights, a landowner has the right to have the stream or water source on his land flow by and through his land unpolluted and undiminished.[85] A landowner, under this doctrine, has the right to use the water by any use that is reasonable with respect to all others who also have a right to that water.[86] Unlike the doctrine of prior appropriation, in states that follow the doctrine of riparian rights, the rights to use water originate and are founded in ownership of the land touching or making the boundary of the water source.[87] These rights are not diminished or forfeited if they are not used by the owner.[88]

1. New Jersey v. New York

The seminal case for equitable apportionment of an eastern United States river system is *New Jersey v. New York*.[89] New Jersey brought its complaint to the Supreme Court in 1931 to enjoin New York from diverting water from a tributary branch in the Delaware River Basin in order to provide more drinking water to the people of New York City.[90] New Jersey claimed that without an injunction or an equitable apportionment by the Supreme Court, this diversion of water would cause harm to the oyster industry in the area.[91]

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83. Arkansas River Compact of 1949, https://apps.csg.org/ncic/Compact.aspx?id=11. This compact is still in force today, though there have been many iterations of negotiation between the parties. Kansas-Colorado Arkansas River Compact Fact Sheet, *Kansas Department of Agriculture*, (October 2020) https://agriculture.ks.gov/docs/librariesprovider24/iwi—-kansas-colorado-arkansas-river-compact/factsheet_20201027.pdf?sfvrsn=615593c1_0.

84. *Colorado I*, 459 U.S. at 180 n.4.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *New Jersey*, 283 U.S. at 336.

90. *Id.* at 341–42.

91. *Id.* at 343–44.

The Court appointed a Special Master to make findings on the facts of the case and to give a recommendation to the Court for how to proceed.[92] The Special Master found that a plan must be implemented between the states before the diversion of water by New York can take place.[93] New Jersey appealed the findings of the Special Master, and the Supreme Court granted a hearing on the appeal.[94]

New York proposed a new plan to provide water for its citizens by diverting water from tributaries of the Delaware River.[95] The tributaries proposed by New York for water diversion were among the headwaters of the Delaware River and flow from New York down through Pennsylvania and eventually mark the border between Pennsylvania, New York, and New Jersey until flowing into the Atlantic.[96] To increase the water supply for the citizens of New York City, New York proposed a diversion of water from the Delaware watershed to the residents of New York City.[97] This diversion had not occurred and the harm alleged by New Jersey had not happened yet, but was imminent.[98]

New Jersey argued that the Supreme Court should apply the common law rules of riparian owner rights commonly found to be relied upon in the eastern states.[99] The Court disagreed because the case involved a dispute between independent sovereigns rather than a dispute between parties residing in the same state.[100] The Court held it would not strictly apply either state's common law rules because in an action between two separate states, one state's law is not binding upon the other, no matter how similar the laws or doctrines look.[101]

The Court recognized that both states had real, substantial, and equal interests in the river and that those differences must be reconciled by the Court.[102] In order to resolve those differences, the Court stressed that it would apply the doctrine of equitable apportionment to achieve a fair allocation of use of the waters, regardless of the formula used to come to that conclusion.[103] However, the Court did hold that the underlying state

92. *Id.* at 343.
93. *Id.* at 345.
94. *Id.* at 343–46.
95. *Id.* at 341.
96. *Id.* at 341–42.
97. *Id.* at 342.
98. *Id.* at 343.
99. *Id.* at 342.
100. *Id.*
101. *Id.*
102. *Id.* at 342–43.
103. *Id.* at 343.

law should be used as a factor for consideration within an equitable apportionment analysis, but it should not be the only factor for consideration or reliance when making a decision.[104]

New Jersey alleged that the proposed diversion of the water by New York would harm New Jersey in many ways.[105] One of the harms identified and accepted by the Special Master and the Court was that New York's rerouting of water from the Delaware River Basin to New York City would cause an increase in water salinity that would irreparably injure the prominent oyster industry of the Delaware Bay.[106]

The Court found that the effect of increased salinity caused by diversion of the river would seriously harm the oysters and the river's recreation capabilities. [107] If left unchecked, the total amount of damage would be more than New Jersey should be expected to bear and, therefore, the Court stepped in and made an equitable apportionment of the waters of the Delaware River.[108]

IV. CLEAR AND CONVINCING EVIDENCE OF ALLEGED HARM: WHY USE SUCH A HIGH STANDARD?

Before the Supreme Court will order equitable apportionment of waters, two of the elements that the complaining state must prove are the elements of causation and injury.[109] The state must prove that it has suffered a serious injury caused by the withdrawal of water by an upstream state.[110] The complaining state must demonstrate the injury and causation by clear and convincing evidence.[111]

Although the clear and convincing evidence standard has been articulated by the Court for over 100 years,[112] during the controversy over the use of the water of the Vermejo River that flows between Colorado and New Mexico, the Supreme Court carefully described the burden of proving an injury in equitable apportionment cases and explained the reasoning behind such an unnaturally high standard compared to other

104. *Id.*

105. *Id.* at 343–44.

106. *Id.* at 345.

107. *Id.* at 346.

108. *Id.* at 345–46 (holding that equitable apportionment was necessary). The exact formula used by the Court to equitably apportion the water is not necessary for this analysis.

109. *Florida II*, 141 S. Ct. at 1180.

110. *Id.*

111. *Id.*

112. *Id.*

civil cases.[113] The Court has further stressed in other cases that the threat of an invasion of rights must be of such a serious magnitude for the Court to use the extraordinary power to equitably apportion water given under the Constitution to bind the actions of one sovereign state upon the suit of another.[114] Therefore, meeting a clear and convincing standard of evidence is a necessity for the Court to invoke such powers.

A. Colorado v. New Mexico (I and II)

In this controversy regarding the equitable apportionment of the Vermejo River, Colorado brought a claim in the Supreme Court against New Mexico.[115] During the previous term, the Court appointed a Special Master to make a recommendation.[116] In *Colorado I*, the Court remanded for additional factual findings regarding the recommendation of the Special Master.[117] The following term, the case came before the Court again on exceptions by New Mexico to the additional factual findings of the Special Master.[118]

The Court in *Colorado II*, explained "the standard by which [the Court] judge[s] proof in actions of equitable apportionment."[119] The Court employs a standard of proof to show the factfinder the "degree of confidence" he should have in correctness of a fact.[120] Ordinary civil cases employ a preponderance of the evidence standard, yet the Court held that the complaining state must prove the harm suffered by a clear and convincing evidence standard of proof.[121] In the case, Colorado would only be found by the factfinder to have met its substantial burden if it "could place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are" probable to a high extent." [122] The balancing scales of evidence offered between the interests of the two states must "instantly tilt[]" upon the complaining state offering their evidence of harm.[123] Because of the unique interests inherent in a water rights

113. *Colorado II*, 467 U.S. at 315–17.

114. *Id.* at 316 (citing *Colorado I*, 459 U.S. at 187–88, and n.13).

115. *Colorado II*, 467 U.S. at 312.

116. Colorado v. New Mexico, 449 U.S. 1007, n.1 (1980).

117. *Colorado II*, 467 U.S. at 312.

118. *Id.* Exemptions is the common term for objecting to the findings of the Special Master. This term is consistently used across equitable apportionment cases during times where it might usually be seen as outdated in other cases.

119. *Id.* at 315.

120. *Id.* (quoting In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J. concurring)).

121. *Id.* at 316; *Colorado I*, 459 U.S. at 187–88, n.13.

122. *Colorado II*, 467 U.S. at 316.

123. *Id.*

dispute, the Court held that this higher burden of a standard of clear and convincing evidence was not only required, but necessary.[124]

The Court finished its burdens analysis by laying out the test for whether equitable apportionment is necessary.[125] The Court will step in and equitably apportion the water only if the complaining state shows by clear and convincing evidence that "actual inefficiencies in present uses or future benefits from other uses are highly probable."[126]

Turning to apply this test to the facts at hand, the Court found that Colorado failed to meet its burden of proving by clear and convincing evidence that the injury to New Mexico from the apportionment of water would be outweighed by the benefits to Colorado as well as that reasonable water saving measures could compensate for the injury.[127]

A state can meet its burden during a case of equitable apportionment only if it presents specific evidence regarding how uses of the water might be improved or how a project is less efficient than previously thought.[128] This evidence must be specifically presented and "mere assertions" concerning efficiencies of the projects will not carry the burden.[129] To minimize the chances of the Supreme Court issuing an erroneous decision in a case with implications as enormous as in controversies requiring or merely pleading for equitable apportionment, "hard facts, not suppositions or opinions" are required to prove the alleged harm by clear and convincing evidence.[130] The Court held in *Colorado II*, that Colorado failed to provide enough evidence to meet high burden and therefore, the action was dismissed.[131]

V. STANDARD OF *CAUSATION* OF THE ALLEGED HARM

Though causation and harm must also be proved by clear and convincing evidence in cases of equitable apportionment, the requisite standard of causation is still unresolved.[132] In the most recent case of Supreme Court original jurisdiction regarding equitable apportionment, Florida brought an action in the Supreme Court over access to interstate waters and damage to Florida's prominent oyster industry.[133] It appeared

124. *Id.*
125. *Id.* at 317.
126. *Id.*
127. *Id.*
128. *Id.* at 320.
129. *Id.*
130. *Id.* at 320–21.
131. *Id.* at 321.
132. *Florida II*, 141 S. Ct. at 1181 n.*.
133. *Id.* at 1178–79.

to some speculators that the Supreme Court might clarify the causation standard that applies in equitable apportionment cases.[134] During oral argument in 2021 before the Supreme Court of the United States for the case of *Florida v. Georgia*, Chief Justice Roberts boldly started the questioning of counsel for Florida, Gregory Garre, by asking Mr. Garre:

> [H]ow should we analyze the case if we think based on the record that Georgia contributed to the collapse of the oyster harvest but not enough to cause that on its own, that the situation is like that on 'Murder on the Orient Express,' a lot of things took a stab at the fishery: drought, overharvesting, Florida regulatory policies, but also lower salinity that was caused by Georgia's use of the water. But you can't say that any one of those things [are] responsible for [killing] the fishery.[135]

The Chief Justice began the questioning by going straight to the heart of the problem of multiple-factor causation. For the Supreme Court to infringe upon a state's sovereign rights, a high burden must be met by the complaining (and usually downstream) state regarding proof of causation and damage.[136] A complaining state may have alleged a harm; however, the Court does not have the authority to exercise an extreme reach of power, infringing upon the sovereignty of a state, without being persuaded by clear and convincing evidence that the upstream state was the cause of injury to the downstream state.[137] However, nowhere under Supreme Court equitable apportionment caselaw is there a stipulated amount of causation necessary for the Court to invoke their authority over the sovereign states.[138]

The Court ultimately did not reach a conclusion to the question posed by the Chief Justice of what to do with multiple causes of harm.[139] The Court instead held that regardless of the standard of causation, Florida did not present enough evidence under any of the standards for the standard of causation to be a justiciable question under the facts in *Florida II*.[140] However, the reluctance of the Supreme Court to answer

134. Laura Fowler, *In interstate water dispute, two stories, conflicting evidence and an uncertain outcome*, SCOTUSBLOG, (Feb. 23, 2021) https://www.scotusblog.com/2021/02/in-interstate-water-dispute-two-stories-conflicting-evidence-and-an-uncertain-outcome/.

135. Transcript of Oral Argument at 5, *Florida II*, 141 S. Ct. at 1175 (2021). Due to the COVID-19 pandemic, Oral argument occurred by phone in 2020. Instead of the normal free-for-all, the Justices asked questions seriatim.

136. *Florida II*, 141 S. Ct. at 1180.

137. *Id.* at 1183.

138. *Id.* at 1181 n.*.

139. *Id.*

140. *Id.*

this question leaves a large gap in equitable apportionment caselaw. Clues from how the Court handled *Florida I* and *Florida II* and *Idaho v. Oregon*, the body of traditional equitable apportionment law, and tort law in general are indicative of what standard the Court may decide to apply in the future to multiple causes of harm.

A. History and Lead Up to Florida v. Georgia

Unless by a force of God, the rivers in this basin suddenly do not cross state lines, Florida and Georgia will be locked in battle for eternity. The Apalachicola-Chattahoochee-Flint (ACF) Basin cuts through Georgia, Alabama, and Florida before terminating in the Gulf of Mexico.[141] The three river systems come together throughout the various states and affect the industries, species, and livelihoods of those in their wake.[142]

Arising in the North Georgia Mountains, the ACF River Basin cuts through Atlanta on its way to the Gulf.[143] As of 2019, according to the Metro Atlanta Chamber, metro-Atlanta's population swelled to just over six million residents.[144] With each resident requiring water to live, the load on Atlanta's systems is a heavy burden indeed. Due to the unique geological makeup of low porosity-granite and schist rock surrounding and including Atlanta, groundwater options in Atlanta are extremely scarce.[145] Therefore, to provide for the demands of the steadily growing major city,[146] surface water from rivers, lakes, or streams must be used.

The southeastern portion of Georgia sits above the Floridan Aquifer System, one of the most productive aquifer systems in the country.[147] For this coastal and coastal-plains portion of Georgia, withdrawing groundwater from the Floridan Aquifer System satisfies the needs of

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141. Map of the ACF Basin, in Apalachicola-Chattahoochee-Flint River Basin Focus Area of Study, USGS.GOV (2018), https://www.usgs.gov/media/images/apalachicola-chattahoochee-flint-river-basin-focus-area-study.

142. *Id.*

143. *Id.* The waters of the ACF Basin wind through Georgia making this an issue that affect almost the entirety of the state.

144. Profile of Metro Atlanta, METRO ATLANTA CHAMBER, at 3 (June 30, 2020) .https://www.metroatlantachamber.com/assets/profile_of_metro_atlanta_june_30_2020_4XNEopP.pdf.

145. Granite does not make a good aquifer. Groundwater in granitic and metamorphic rocks? ENCYCLOPEDIA OF THE ENVIRONMENT (Feb. 07, 2021) https://www.encyclopedie-environnement.org/en/water/groundwater-in-granitic-and-metamorphic-rocks/.

146. Profile of Metro Atlanta, METRO ATLANTA CHAMBER, (June 30, 2020) https://www.metroatlantachamber.com/assets/profile_of_metro_atlanta_june_30_2020_4XNEopP.pdf.

147. Saving Water in Georgia, EPA, (June 2013) https://www.epa.gov/sites/default/files/2017-02/documents/ws-ourwater-georgia-state-fact-sheet.pdf.

these smaller communities.[148] However, in other parts of the state, mainly around Atlanta, for drinking water purposes and the surrounding communities for agriculture, water to meet these needs must come from surface water such as from the ACF Basin.[149]

1. The Water Wars

In 1990, the Tri-State Water Wars, as they are colloquially known, formally commenced when Alabama sued the United States Army Corps of Engineers to prevent the Corps from reallocating the water from interstate rivers that Alabama argued disproportionately favored Georgia's interests.[150] Florida followed suit a year later with a lawsuit containing similar allegations against the Corps.[151]

In 2014, Florida officially filed suit against Georgia in the Supreme Court of the United States and asked the Court to equitably apportion the waters of the ACF Basin and reduce the amount of water Georgia could rightfully use.[152]

2. Florida v. Georgia

In response to disappearing oysters in the Apalachicola Bay Area and the adverse effect the loss of this integral species has on the local ecosystem and economy, Florida filed a suit of original jurisdiction against Georgia in the Supreme Court.[153] Florida alleged that Georgia's use of the waters of the Flint River, part of the ACF Basin that empties into the Apalachicola Bay, adversely affected the oysters of the bay, and harmed the citizens of Florida in return.[154]

In the original filing of this complaint, Georgia's use of water from the Chattahoochee to provide for the needs of the citizens of Atlanta was implicated, but in subsequent filings, Florida adjusted its complaint to cover only the waters of the Flint River, which is mainly used for agricultural purposes in the southwestern part of Georgia.[155] Florida subsequently petitioned the Court and sought a decree that would

148. Ground Water Atlas of the United States: Segment 6- Alabama, Florida, Georgia, and South Carolina, U.S. DEPARTMENT OF THE INTERIOR, 12, https://pubs.usgs.gov/ha/730g/report.pdf.

149. Tri-State Water Wars Overview, ATLANTA REGIONAL COUNCIL (Feb. 2, 2021), https://atlantaregional.org/natural-resources/water/tri-state-water-wars-overview/.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Florida v. Georgia (Florida I)*, 138 S. Ct. 2502, 2509 (2018).

154. *Id.*

155. Complaint for Equitable Apportionment and Injunctive Relief at 2-3, *Florida I*, 138 S. Ct. at 2502 (No. 142 Original).

mandate Georgia to reduce its overall consumption of water from the rivers of the ACF Basin.[156]

In 2018, after the first Special Master made findings and Florida appealed those findings, the Court remanded the original action for a second time for a new Special Master to make findings and recommendations on additional, specific issues.[157] Upon gathering more facts on the issue, the second Special Master made a recommendation that the Court deny Florida's petition for relief—the main reason being that Florida "proved no serious injury caused by Georgia's alleged overconsumption."[158] Florida again filed exceptions to the recommendation of this Special Master as well and the Court independently reviewed the record accordingly.[159]

In *Florida II*, the Court held that consistent with over 100 years of precedent, the grant of original jurisdiction to the Supreme Court by the U.S. Constitution allows the Court to have the authority to equitably apportion water from rivers that run between states.[160] The Court laid out the test for what is required to obtain an equitable apportionment of interstate streams between states and what Florida must show accordingly.[161]

For this test, the Court returned to language from previous holdings in *Colorado I* and *Colorado II*.[162] First, the complaining state—usually downstream and in this case Florida—must "prove a threatened or actual injury 'of serious magnitude' caused by Georgia's upstream water consumption."[163] The second showing Florida must make is that the "benefits of [apportionment] substantially outweigh the harm that might result."[164] The Court then mentioned that because both Florida and Georgia are states that employ the doctrine of riparian rights, an essential principle for analysis is that both Florida and Georgia have "an equal right to make a reasonable use" of the waters of the ACF Basin.[165]

Florida claimed that two separate injuries arose from Georgia's overconsumption of water from the ACF Basin.[166] These two separate

156. *Florida II*, 141 S. Ct. at 1178.
157. *Florida I*, 138 S. Ct. at 2508.
158. *Florida II*, 141 S. Ct. at 1178.
159. *Id.* at 1180 (citing Kansas v. Nebraska, 574 U.S. 445, 453 (2015)).
160. *Id.* (citing *Nebraska*, 574 U.S. at 454).
161. *Florida II*, 141 S. Ct. at 1180.
162. *Id.*
163. *Id.*
164. *Id.* (quoting *Colorado I*, 459 U.S. at 187 (alteration in original)).
165. *Id.* (quoting *Florida I*, 138 S. Ct. at 2502).
166. *Id.*

injuries are (1) the failure of the Apalachicola Bay oyster industry and (2) harm to the environment and ecosystem of the implicated river systems.[167] Florida did not argue that it was required to prove the existence of the injury and its causation by clear and convincing evidence.[168]

Neither state, Florida and Georgia, argued that the collapse of the oyster industry in the Apalachicola Bay Area did not meet the standard for an injury of a serious magnitude.[169] The issue before the Supreme Court in this case focused, instead, on the cause of this agreed upon injury as opposed to the existence and extent of that injury.[170]

Through a "multistep causal chain," Florida attributed the collapse of the oyster industry in Florida to Georgia's overuse of the waters of the ACF Basin for supplying Southwestern Georgia's agricultural needs.[171] The cause Georgia points to is a much more direct cause for the collapse of the oyster fishery than Florida's chain, mismanagement of the industry by Florida.[172]

Georgia further argued that even if the Court found that low flows, and not Florida's mismanagement of the oyster industry, were the main cause of death and deterioration of the oyster industry, Georgia did not contribute to the lack of flow.[173] Georgia continued its argument by noting that although Florida may have proven some harmful changes occurred in the bay and to the oyster population, Florida failed to prove that these alleged injuries were caused by Georgia rather than the U.S. Army Corps of Engineers' involvement in the area or caused by climate factors such as drought.[174]

Although the Court mentioned that many of these important facts of river flow depend on scientific analysis, the Special Master was put in place by the Court to make a recommendation on the issue.[175] The Court ultimately agreed with the Special Master that Florida did not meet the clear and convincing burden.[176]

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167. *Id.* at 1179.

168. *Id.* at 1180.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 1180–81.

174. Georgia's Reply to Florida's Exceptions to the Report of the Special Master, No. 142 Original at 22.

175. *Florida II*, 141 S. Ct. at 1181.

176. *Id.*

For the opinion of the Court, Justice Barrett chose to focus on the number of factors that influence the flow of the Apalachicola River.[177] The Court focused on the variable amounts of precipitation, air temperature, U.S. Army Corps of Engineers' involvement, drought, and Georgia's unreasonable use of the waters of the ACF River Basin for agriculture as factors all present that influenced the flow of the Apalachicola River.[178]

In the only footnote present in the case, Justice Barrett, writing for the majority, said in response to Florida's argument that Georgia's overconsumption was the sole cause of the collapse of Florida's oyster industry or at least a substantial factor in its downfall that: "[w]e have not specified the causation standard applicable in equitable-apportionment cases. We need not do so here, for Florida has failed to establish a sufficient causal connection under any of the parties' proposed standards."[179] In addressing Florida's evidence and how it fell short of meeting the burden, the Court said:

> The fundamental problem with evidence—a problem that pervades Florida's submission in this case—is that it establishes at most that increased salinity and predation *contributed* to the collapse, not that Georgia's overconsumption *caused* the increased salinity and predation. None of these witnesses or reports point to Georgia's overconsumption as a significant cause of the high salinity and predation.[180]

Because Florida did not provide any evidence that could prove Georgia's overconsumption caused the increased salinity in the bay and in turn the collapse of the oyster population, the Court could not step in and exercise its "extraordinary authority to control the conduct of a coequal sovereign."[181] The most the Court could do with this evidence is remind Georgia that the state is under an obligation to reasonably use the water, but ultimately, the Court dismissed the case.[182] The causal chain was too tenuous for the Court to step in and equitably apportion the waters of the ACF River Basin under these facts.

VI. THE COURT'S HESITANCY TO ADDRESS THE IMPLICATIONS OF

177. *Id.* at 1179.
178. *Id.*
179. *Id.* at 1181.
180. *Id.* at 1182.
181. *Id.* at 1183.
182. *Id.*

MULTIPLE CAUSES

Though the issue of multiple causes was not ultimately pertinent to the decision in *Florida II*, this issue still remains unanswered and in desperate need of clarity from the Court.[183] Though no case of Supreme Court original jurisdiction regarding equitable apportionment of water to date has turned on the requisite standard of causation, the line of cases before Florida and Georgia is direct evidence that litigation in this area is becoming more complex. Changes in climate are affecting environmental disputes and this potential cause of injury must be distinguished from other causes of injury in disputes between two sovereign states.

Because of the unique nature of the line of cases arising from the Supreme Court's original jurisdiction, there is not a clear indication of what the Court is bound to hold regarding the threshold standard of causation required in a case of equitable apportionment. However, there is evidence that when the Court does finally approach this issue, it will require that a high standard of causation be present for a contributing cause to be worthy of invoking the Court's "extraordinary" powers of equitable apportionment.

The Court may have been hesitant to answer this question of what to do when presented with multiple causes, but the question was nonetheless at the forefront of the Court's mind during not only the opinion but oral argument as well.[184] Chief Justice Roberts framed the same question of what do about multiple causes as the one to Mr. Garre of Florida to Mr. Primis of Georgia.[185] Counsel for Georgia answered back quickly brushing aside the question of the Chief Justice.[186] "[T]he Court has not directly addressed the causation issue that you posed in its prior cases . . . [and] the Court need not actually decide it [today] . . ." stated Mr. Primis.[187] However, after a bit of back and forth between the Chief Justice and Georgia's counsel, a stance was taken by Georgia.[188] For the Court to order a potential remedy of such an "extraordinary nature," Georgia argued that the standard of causation must be akin to something high like the substantial factor analysis that is sometimes used to establish a but-for cause in tort law.[189]

183. *Florida II*, 141 S. Ct. at 1181 n.*.
184. Florida v. Georgia, 2021 WL 678125 (U.S.) (Oral Argument) (2021).
185. *Id.* at 5, 38.
186. *Id.* at 38.
187. *Id.*
188. *Id.* at 38–39.
189. *Id.* at 39.

A. Causation Standard Options

Florida argued, in *Florida II*, that Georgia's over consumption of waters of the ACF Basin was "the *sole* cause of the collapse or at least a *substantial factor* contributing to it."[190] The Court held that Florida's evidence did not prove by clear and convincing evidence that Georgia's alleged overconsumption of water "played more than a *trivial role* in the collapse."[191] These three options for standard of causation—sole cause, substantial factor, and trivial role— are all options that the Court has not explicitly ruled out per the footnote.[192] However, to clear up what standard of causation the Court should use, evidence from not only this opinion, but other equitable apportionment cases and general tort law will be employed.

1. Trivial Role: Insubstantial Contributing Cause

The standard of causation that the Court would be least likely to use in cases of equitable apportionment is the standard of "trivial role." A contributing cause is "a factor that—though not the primary cause—plays a part in producing a result."[193] Counsel for both Florida and Georgia argued for a standard higher than an insubstantial contributing cause during oral argument.[194] A causation standard higher than insubstantial contributing cause would add more certainty to not only findings by the Court but to the belief that the imposed "extraordinary" remedy of equitable apportionment would be effective at remedying the alleged harm.[195]

2. Sole Cause

A standard of "sole cause" causation would be an unnecessarily underinclusive standard. A standard this high would undoubtedly exclude causes of harm that could contribute to the damage caused by overconsumption of water, such as drought. However, if the goal of the

190. *Florida II*, 141 S. Ct. at 1181 (emphasis in original).

191. *Id.* at 1182.

192. *Florida II*, 141 S. Ct. at 1181 n.* (holding that Florida did not meet the burden of proof for this element so the court did not have to look to the amount of causation necessary here).

193. *Contributing Cause*, Black's Law Dictionary (6th ed. 2021).

194. Though Florida in oral argument argued for Georgia's actions to be treated as a substantial factor, Florida v. Georgia, 2021 WL 678125 (U.S.) (Oral Argument) at 5–6 (2021), the Court concluded that Florida had not even proven by clear and convincing evidence that Georgia's water consumption played a trivial role to the collapse. *Florida II*, 141 S. Ct. at 1182.

195. *Florida II*, 141 S. Ct. at 1183; Burrage v. United States, 571 U.S. 204, 217–18 (2014) (explaining the confusion a contributing cause standard would create in implementation).

Court is to keep all but the most egregious instances of overconsumption of water out of the Court system, this standard would be applicable and would suffice to reserve the remedy of equitable apportionment for only the rarest of instances.

By nature of meeting the high standard of sole cause causation, a downstream state would have unequivocally proven causation for their case. Cases like *New Jersey* v. *New York* are easy to spot the sound nature of a sole cause equitable apportionment. Because the only harm come from the future diversion of river water by New York an equitable apportionment much more likely.[196] Because an equitable apportionment by the Court would effectively restrain the sole cause of the alleged harm, the Court was able to issue an effective solution that would provide the downstream state with a complete remedy to their solution.[197]

i. Who Gets the Drought?

If the standard of causation is sole cause, in years of drought—when most equitable apportionment cases are raised—the downstream state will never be able to show by clear and convincing evidence that the harm they suffer is solely because of the upstream state's use of water. The United States District Court for the Northern District of Alabama held in a decision in 2006 that "[t]he court cannot hold the [Army] Corps [of Engineers] responsible for the absence of rain."[198] Following that logic, under a sole cause standard of causation, the downstream state would have the burden of proving that (1) not only did the upstream state cause the harm, but (2) the drought did not cause any harm. This unnecessarily high standard would keep all but the most egregious circumstances out of court.

The Court is called to equitably apportion water between two sovereign states and is shown to treat this remedy with reverence.[199] However, this remedy exists at the Court's disposal to step in and correct harms fairly and equitably for all states. A standard of causation akin to a but-for cause would necessarily account for other factors such as drought and would still allow for this "extraordinary" remedy to be workable and effective.

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196. *See generally New Jersey*, 283 U.S. at 336.

197. *See Id.* at 341, 345–46.

198. Alabama v. United States Army Corps of Eng'rs, 441 F.Supp.2d 1123, 1134 (N.D. Ala. 2006). If a justiciable party cannot be held responsible for a drought, where does the relief for the lack of water come from? During years of drought, the upstream state would be incentivized to use as much water as it wanted without regard for the downstream state because of the lack of repercussions or Supreme Court oversight.

199. *Florida II*, 141 S. Ct. at 1183 (extraordinary authority).

3. Substantial Factor/But-For Causation

A high standard of causation is necessary for claims of equitable apportionment because of the unique nature of the remedy sought by these cases. Because one state is asking the Supreme Court to step in and regulate the seemingly sovereign act of using water within the borders of another state, this "extraordinary measure" calls for reverence and almost absolute certainty.[200] Much like the use of the clear and convincing standard of proof for the evidence of causation and injury, the Court should employ an equal or higher standard of causation to this case as well.

The classic tort law standard of "but-for causation" would be the most effective standard of causation that the Court could employ is cases of equitable apportionment. The Restatement (Third) of Torts classifies "Factual Cause" by stating that "[t]ortious conduct must be a factual cause of harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct."[201] This test is commonly referred to as the "but-for" test for causation.[202] The existence of multiple "but-for" causes of harm does not prevent each cause from itself being a "but-for" cause.[203] Because of the ability to account for multiple causes of harm, the flexibility incorporated in this standard is an important attribute for the Court to employ.

Factual scenarios where only a sole cause of harm exists are rare in the realm of equitable apportionment[204] and if the Court is to offer a remedy for over consumption of water by an upstream state, the analysis should match the nature of the harms and causation. Therefore, the Court should employ a causation standard that is neither underinclusive, nor overinclusive but is instead flexible.

i. Idaho v. Oregon

Evidence for a higher standard of causation being not only the most optimal standard but the standard the Court will eventually adopt is found in the case of *Idaho v. Oregon*.[205] Here, the Court extended the already widely accepted doctrine of equitable apportionment of interstate river water to be the framework for the division of interstate fish

200. *Id.* (clear and convincing standard).

201. Restatement (Third) of Torts, § 26.

202. *Id.*

203. *Id.*

204. *See New Jersey*, 283 U.S. at 341. New York's diversion of river water would be the only change in circumstances affecting the people of New Jersey.

205. *Idaho*, 462 U.S. at 1017.

populations.[206] Idaho argued for Court intervention to equitably apportion the anadromous fish that move from Washington and Oregon on the Columbia-Snake River system and eventually downstream to Idaho.[207]

Idaho argued that not only do the eight constructed dams along the river system impact and deprive Idaho of their rights to the fish but overharvesting by Oregon and Washington along the river system is another factor in depleting the fish population.[208] The Special Master assigned to this case noted that the alleged cause of harm of the eight dams affected all parties and because of the necessity of the dams, it was "highly unlikely that the dams will be removed or . . . reduced."[209] He then turned to the alleged cause of overfishing by Oregon and Washington.[210]

Through looking at data collected for over a decade on fish harvesting on the Columbia-Snake River System, the Special Master concluded, and the Court confirmed, that Oregon and Washington are not *now* injuring Idaho's portion of fish by overfishing the river system.[211] The evidence also did not show by a substantial likelihood that Oregon or Washington will injure Idaho in the future.[212] Because the evidence did not prove by clear and convincing evidence that there was a present or future interest in need of redressability, Idaho did not meet its burden with respect to the parties before it in court, Oregon and Washington.[213]

Though the Court did not hesitate to apply the doctrine of equitable apportionment to cases involving interstate-flowing wildlife, it was cautious to step in and apply such an egregious use of power over the sovereignty of states if not only was the harm there, but the causation of the harm was too tenuous. For the harm to be effectively alleviated by this broad use of Supreme Court power, the Court must direct its remedy at the correct source of the injury. In *Idaho*, the eight dams along the river may have been the source of the lack of fish downstream, but an equitable apportionment of fish between Idaho, Oregon, and Washington

206. *Id.* at 1018. The court has since applied equitable apportionment principles to not only interstate water and fish disputes, but most recently to disputes regarding interstate aquifers. Mississippi v. Tennessee, No. 143 Org, 2021 U.S. LEXIS 5870* (Nov. 22, 2021).

207. *Id.* at 1023.

208. *Id.* at 1021.

209. *Id.* at 1027. This is to say that though dams along the river may be the main cause of lack of fish, their value outweighs the harm of altering the dams.

210. *Id.* at 1027–28.

211. *Id.*

212. *Id.* at 1028.

213. *Id.* at 1028–29.

binding the fish harvesting practices of the upstream states would not attach a solution to the cause that could alleviate the most harm to Idaho.[214]

ii. Evidence from Florida II

Though the Court explicitly held that it was not going to decide the issue of standard of causation under the facts of *Florida II*, the opinion and corresponding oral arguments from both parties provides evidence for how the Court may eventually hold on this issue in the future.[215] Reverence for the act of imposing an equitable apportionment as well as language pointing to the need at minimum for Georgia's use to be a significant cause come together to shed some more light on the potential standard of causation that the Court may employ in the future.

Throughout the opinion of *Florida II*, the Court mentions the authority of the Supreme Court to equitably apportion the waters between the two sovereign states.[216] This authority is described as "extraordinary" by the Court in that the act the Court would be performing would necessarily "control the conduct of a coequal sovereign."[217] Describing the act of equitable apportionment as "extraordinary" shows that the Court does not view this remedy lightly. Extraordinary authority most naturally comports with an extraordinary standard upon which the Court should attribute causation.

VII. CONCLUSION

In conclusion, though the Supreme Court has not specifically laid out a requisite standard for causation required for equitable apportionment of an interstate flowing river, evidence stemming from how the Court confronts other elements in cases of equitable apportionment and general tort law concepts come together to lay out the standard of causation that the Court should use. The pervasiveness of drought would not serve as a gatekeeper for these suits and the remedy that is an equitable apportionment would still be attainable. Causes that are substantial factors that would meet a but-for analysis would effectively accomplish the goals of the Court in equitably apportioning consumption of river water.

214. *See generally Id.*

215. *Florida II*, 141 S. Ct. at 1181 n.*.

216. *Id.* at 1180, 1183.

217. *Id.* at 1183.