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## Boundaries and Jurisdiction of the State HR 4

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## STATE GOVERNMENT

### *Boundaries and Jurisdiction of the State: Proposing a Settlement of the Boundary Dispute Between the State of Georgia and the State of Tennessee; and for Other Purposes*

CODE SECTION: O.C.G.A. § 50-2-3<sup>1</sup>  
BILL NUMBER: HR 4  
SUMMARY: The Act proposes the settlement of a longstanding border dispute between Georgia and Tennessee. The United States established Georgia's border with Tennessee at the thirty-fifth parallel north, but an erroneous land survey in 1818 misplaced Georgia's northern border approximately one mile south of the correct mark. The Act proposes remedying this dispute by negotiating a settlement with Tennessee that would enable Georgia to access water from the Tennessee River. If a settlement is not reached, the Act directs the Attorney General to file suit to secure Georgia's northern border at the thirty-fifth parallel of northern latitude.

EFFECTIVE DATE: May 8, 2013

#### *History*

When Georgia first joined the United States of America in 1788, its western border stretched to the Mississippi River and Congress set the northern border at the thirty-fifth parallel.<sup>2</sup> A little less than a decade later, in 1796, Tennessee became a state and Congress fixed

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1. O.C.G.A. § 50-2-3 (2013) recognizes Georgia's border with Tennessee and North Carolina at the thirty-fifth parallel north. HR 4 does not amend this code section.

2. Crews Townsend et al., *Crossing the Line: Does the Georgia Plan to Redraw the Tennessee-Georgia Border Pass Legal Muster?*, TENN. B.J., May 2008, at 14, 15.

its southern border at the thirty-fifth parallel.<sup>3</sup> When Georgia relinquished the Mississippi Territory to the United States in 1802, Georgia's cession agreement with the United States described Georgia's border as reaching and crossing the Tennessee River at Nickajack.<sup>4</sup>

In a joint effort to clearly mark the true boundary between Georgia and Tennessee, both the State of Georgia and the State of Tennessee passed legislation in 1817 appointing surveyors to measure and mark the thirty-fifth parallel boundary.<sup>5</sup> Georgia-appointed mathematician James Camak and Tennessee-appointed mathematician James Gaines convened at Nickajack in the summer of 1818 to survey the land and place an engraved marker at the thirty-fifth parallel of northern latitude.<sup>6</sup> Rather than placing the marker on the northern bank of the Tennessee River as the 1802 agreement required, Camak and Gaines placed the marker on the southern bank of the Tennessee River.<sup>7</sup> As a result, the surveyors misplaced the border about one and a half miles south of the true thirty-fifth parallel.<sup>8</sup>

While the State of Tennessee accepted the misplaced marker set by Camak and Gaines as the border between the two states, Georgia

3. *Id.*

4. *Georgia Cession*, in 1 AMERICAN STATE PAPERS: PUBLIC LANDS 113, 114 (1834), available at <http://memory.loc.gov/cgi-bin/ampage?collID=llsp&filename=028/llsp0028.db&recNum=4>; HARRY TOULMIN, THE STATUTES OF THE MISSISSIPPI TERRITORY, REVISED AND DIGESTED BY THE AUTHORITY OF THE GENERAL ASSEMBLY 463 (1807) (noting that the agreement placed Georgia's western border from the Chattahoochee River "in a direct line to Nickajack" and "crossing" the Tennessee River). Stating that the state line is to cross the Tennessee River at Nickajack suggests that Georgia's northern border would be located on the northern bank of the Tennessee River at Nickajack. See Interview with Rep. Harry Geisinger (R-48th) (May 17, 2013) [hereinafter Geisinger Interview].

5. CHARLTON E. BATTLE, THE GEORGIA-TENNESSEE BOUNDARY DISPUTE 16–17 (1902). Tennessee passed an Act authorizing this geographical survey on November 10, 1817, and Georgia passed a reciprocal Act on December 16, 1817. *Id.*

6. *Id.* at 17.

7. *Id.* at 18.

8. Townsend, *supra* note 2, at 14, 16. Rep. Geisinger (R-48th) offers two main theories explaining why Camak and Gaines placed the marker on the southern bank, rather than the northern bank. The first theory takes into account the tension between the settlers and the Cherokee at the time of the survey. Perhaps out of nervousness or fear of the Cherokee, the surveyors chose to remain on the southern bank of the Tennessee River. The second theory suggests that the river was at flood stage during the time of the survey. The surveyors placed the marker near the top of Nickajack Mountain, further suggesting that the water level may have been high. Flooding may have prevented Camak and Gaines from placing the marker where it truly belonged—on the northern bank. Video Recording of House Proceedings, Feb. 12, 2013 at 1 hr., 14 min., 17 sec. (remarks by Rep. Harry Geisinger (R-48th)), <http://www.gpb.org/lawmakers/2013/day-16> [hereinafter House Video 1]; Geisinger Interview, *supra* note 4.

maintained that the thirty-fifth parallel marked the true border.<sup>9</sup> Camak surveyed the border for a second time in 1826 and determined that the thirty-fifth parallel was actually situated farther north than the marker he and Gaines placed in 1818.<sup>10</sup> The State of Georgia maintains that the line between Georgia and Tennessee sits at “the thirty-fifth parallel of north latitude.”<sup>11</sup>

Since the erroneous land survey of 1818, numerous legislative efforts by the Georgia General Assembly reflect Georgia’s conviction that the thirty-fifth parallel marks the true border between Georgia and Tennessee.<sup>12</sup> The Georgia Legislature passed an act in 1887 that again called for a commission to establish Georgia’s border with Tennessee.<sup>13</sup> Georgia again passed legislation calling for the resolution of the border dispute in 1898.<sup>14</sup> Georgia and Tennessee engaged in similar discourses throughout the first half of the twentieth century.<sup>15</sup> In 1947, Georgia authorized the Attorney General of Georgia to file suit against Tennessee in the United States Supreme Court to resolve the boundary dispute.<sup>16</sup> Although Georgia Governors from 1948 to 1971 “contemplated authorizing the Attorney General to bring suit,” Georgia did not sue Tennessee.<sup>17</sup> During Jimmy Carter’s service as Georgia Governor in 1971, the Georgia General Assembly, in a joint resolution, established the Georgia-Tennessee Border Line Commission to resolve Georgia’s boundary dispute with Tennessee.<sup>18</sup>

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9. Townsend, *supra* note 2, at 15–16. Today, Tennessee still recognizes the border as marked during the 1818 survey by Camak and Gaines. TENN. CODE ANN. § 4-2-105 (West, Westlaw through 2013) (“The boundary line between this state and the state of Georgia begins at a point in the true parallel of the thirty-fifth degree of north latitude, as found by James Carmack [sic], mathematician on the part of the state of Georgia, and James S. Gaines, mathematician on the part of this state . . .”).

10. Camak reported that he was “using imperfect instruments” during the 1818 survey, which may have resulted in errors with the initial measurements. BATTLE, *supra* note 5, at 19–20.

11. O.C.G.A. § 50-2-3 (2013) (“The boundary between Georgia and North Carolina and Georgia and Tennessee shall be the line described as the thirty-fifth parallel of north latitude, from the point of its intersection by the River Chattooga, west to the place called Nickajack.”).

12. Jack Brian Hood, *Georgia’s Northern Boundary*, 8 GA. ST. B.J. 197, 200–02 (1971).

13. Tennessee responded with legislation expressing “grave doubts” about the state line and authorizing a commission to determine the true border. *Id.* at 200.

14. Tennessee again responded by enacting legislation comparable to that introduced in 1889. *Id.*

15. *Id.*

16. *Id.* at 201. Under the U.S. Constitution, the Supreme Court has original jurisdiction over cases involving a state as a party. U.S. CONST. art. III, § 2, cl. 2.

17. Hood, *supra* note 12, at 201.

18. *Id.*; Video Recording of Senate Proceedings, Mar. 25, 2013 at 1 min., 29 sec. (remarks by Sen. David Shafer (R-48th)), <http://www.gpb.org/lawmakers/2013/day-38> [hereinafter Senate Video].

In 2008, the Georgia General Assembly introduced and passed Senate Resolution (SR) 822, recognizing Georgia's border with Tennessee at the thirty-fifth parallel and "north of the southernmost bank of the Tennessee River."<sup>19</sup> SR 822 authorized the Georgia Attorney General to "take appropriate legal action to correct Georgia's northern border at the [thirty-fifth] parallel."<sup>20</sup> Despite these efforts, the boundary dispute between Georgia and Tennessee remains unresolved.

In yet another effort to resolve the boundary dispute between Georgia and Tennessee, Representative Harry Geisinger (R-48th) introduced House Resolution (HR) 4 during the 2013 Georgia General Assembly Session.<sup>21</sup> If Tennessee accepts the settlement described in HR 4, then Georgia could gain access to the Tennessee River at Nickajack.<sup>22</sup> Access to the Tennessee River would "take care of [Georgia's] water supply for the next hundred years."<sup>23</sup>

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Georgia does not stand alone in recognizing the thirty-fifth parallel as the true border between Georgia and Tennessee. A 1981 decision by the Federal Energy Regulatory Commission recognized that Georgia possessed sole jurisdiction over the disputed land surrounding the thirty-fifth parallel for the purpose of natural gas sales. *Atlanta Gas Light Co.*, 15 FERC 61240 (1981). The Federal Energy Regulatory Commission granted Georgia sole jurisdiction for supplying gas to customers in the disputed area under the Natural Gas Act. *O'Day et al.*, *Wars Between the States in the 21st Century: Water Law in an Era of Scarcity*, 10 VT. J. ENVTL. L. 229, 262 (2009). In a 1974 decision, the U.S. Court of Appeals discussed the dispute between Georgia and Tennessee, anticipating that the two states would be able to "resolve this 19th century dispute before the 21st century begins." *Atlanta Gas Light Co. v. Fed. Power Comm'n*, 495 F.2d 1070, 1073 (D.C. Cir. 1974).

19. SR 822, as passed, p. 1, ln. 4–5, 2008 Ga. Gen. Assem. SR 822 was sponsored in the Senate by David Shafer (R-48th), Jeff Mullis (R-53rd), Kasim Reed (D-35th), Chip Pearson (R-51st), Preston Smith (R-52nd), and Don Thomas (R-54th). Representative Harry Geisinger (R-48th) sponsored the resolution in the House. See Georgia General Assembly, SR 822, Bill Tracking, <http://www.legis.ga.gov/Legislation/en-US/display/20072008/SR/822>.

20. SR 822, as passed, p. 4, ln. 27–28, 2008 Ga. Gen. Assem.

21. HR 4, as introduced, 2013 Ga. Gen. Assem.

22. See Geisinger Interview, *supra* note 4.

23. *Id.* The Nickajack Reservoir is owned and controlled by the Tennessee Valley Authority (TVA), a federally-owned operation that provides electricity to the southeastern United States. *Nickajack Reservoir*, TENN. VALLEY AUTH., <http://www.tva.gov/sites/nickajack.htm> (last visited May 25, 2013). In a 2004 Environmental Impact Study (EIS), the TVA concluded that transferring one billion gallons of water per day out of the Tennessee River would have no effect on reservoir water levels. TENN. VALLEY AUTH., INTER-BASIN TRANSFERS: A SENSITIVITY ANALYSIS app. D9 (2004); O'Day, *supra* note 18, at 258. One billion gallons per day could provide Georgia with 264 million gallons, Birmingham with 180 million gallons, and the Tennessee-Tombigbee Waterway with 600 million gallons every day. House Video 1, *supra* note 8, at 1 hr., 14 min., 17 sec. (remarks by Rep. Harry Geisinger (R-48th)). The Tennessee River is well-equipped to handle such large transfers, because its average flow is nearly fifteen times greater than that of the Chattahoochee River at Buford Dam. O'Day, *supra* note 18, at 258.

*Bill Tracking of HR 4**Consideration and Passage by the House*

Representatives Harry Geisinger (R-48th), Jan Jones (R-47th), Larry O'Neal (R-146th), Stacey Abrams (D-89th), Edward Lindsey (R-54th), and Carolyn Hugley (D-136th) sponsored HR 4.<sup>24</sup> The House read the resolution for the first time on February 4, 2013.<sup>25</sup> Speaker of the House David Ralston (R-7th) assigned the resolution to the House Judiciary Committee.<sup>26</sup> The House read the resolution for the second time on February 5, 2013.<sup>27</sup> The House Judiciary Committee made no amendments to HR 4 during its February 7, 2013 meeting and favorably reported the resolution on February 8, 2013.<sup>28</sup> After reading the resolution for the third time on February 12, 2013, the House adopted HR 4 as introduced by a vote of 171 to 2.<sup>29</sup>

*Consideration and Passage by the Senate*

Senator David Shafer (R-48th) sponsored HR 4 in the Senate, and the resolution was first read on February 13, 2013.<sup>30</sup> Lieutenant Governor Casey Cagle (R) assigned the resolution to the Senate Judiciary Committee.<sup>31</sup> On February 21, 2013, the Senate Judiciary Committee favorably reported HR 4.<sup>32</sup> The Senate read the resolution a second time on February 22, 2013.<sup>33</sup> When HR 4 was read for a third time on March 25, 2013, it included a floor amendment added

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24. See Georgia General Assembly, HR 4, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20132014/HR/4>.

25. State of Georgia Final Composite Status Sheet, HR 4, May 9, 2013.

26. *Id.*

27. *Id.*

28. Video Recording of House Judiciary Meeting, Feb. 7, 2013 at 52 min., 51 sec. (remarks by Rep. Wendell Willard (R-51st), [http://media.legis.ga.gov/hav/13\\_14/2013/committees/judi/judi020713EDITED.wmv](http://media.legis.ga.gov/hav/13_14/2013/committees/judi/judi020713EDITED.wmv) [hereinafter House Committee Video]; State of Georgia Final Composite Status Sheet, HR 4, May 9, 2013.

29. House Video 1, *supra* note 8, at 1 hr., 13 min., 48 sec. (remarks by House Clerk); Georgia House of Representatives Voting Record, HR 4 (Feb. 12, 2013).

30. See Georgia General Assembly, HR 4, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20132014/HR/4>; State of Georgia Final Composite Status Sheet, HR 4, May 9, 2013.

31. State of Georgia Final Composite Status Sheet, HR 4, May 9, 2013.

32. *Id.*

33. *Id.*

by Senator Shafer (R-48th).<sup>34</sup> The floor amendment set a deadline for Tennessee's acceptance of Georgia's offer, instructed the Georgia Attorney General to file suit if Tennessee declines to resolve the matter by the completion of Georgia's 2014 legislative session, and preserved Georgia's claim to all disputed land south of the thirty-fifth parallel if settlement efforts fail.<sup>35</sup> The Senate passed resolution and adopted the amendments suggested by Senator Shafer by a vote of 48 to 2.<sup>36</sup> The House agreed to the amendments and adopted HR 4 by a vote of 157 to 13 on March 26, 2013.<sup>37</sup> The House sent HR 4 to Governor Nathan Deal on April 3, 2013.<sup>38</sup>

### *The Resolution*

The resolution expresses the Georgia General Assembly's desire to settle the nearly two-hundred-year-old boundary dispute with the State of Tennessee.<sup>39</sup> The resolution begins with a statement recognizing the thirty-fifth parallel of north latitude as Georgia's northern border.<sup>40</sup> Next, it notes the incorrect placement of the boundary during the 1818 survey and that numerous actions recognizing the error by both states failed to resolve the dispute.<sup>41</sup> The resolution proposes a compromise between the State of Georgia

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34. *Id.*

35. Senate Video, *supra* note 18, at 1 hr., 36 min., 45 sec. (remarks by Senate Secretary); Interview with Mr. Brad Carver, Partner and Senior Managing Director of Government Affairs, Hall Booth Smith, P.C. (May 17, 2013) [hereinafter Carver Interview]. Mr. Carver indicated that Sen. Shafer's (R-48th) floor amendment was a response to some Senators' concerns that Georgia's compromise gave Tennessee "too much." *Id.*

36. Georgia Senate Voting Record, HR 4 (Mar. 25, 2013). During the Senate's discussion of HR 4, Sen. Charlie Bethel (R-54th) stressed the fact that Georgia's boundary with Tennessee has been a subject of controversy for many years and urged Tennessee to carefully consider Georgia's offer of settlement. Senate Video, *supra* note 18, at 3 min., 29 sec. (remarks by Sen. Charlie Bethel (R-54th)). Senator John Wilkinson (R-50th) also spoke before the Senate, stressing that HR 4 would decrease strain on the Savannah River, protect agriculture, and help drought-proof Georgia. *Id.* at 12 min., 13 sec. (remarks by Sen. John Wilkinson (R-50th)).

37. Georgia House of Representatives Voting Record, HR 4 (Mar. 26, 2013).

38. State of Georgia Final Composite Status Sheet, HR 4, May 9, 2013.

39. HR 4, as passed, 2013 Ga. Gen. Assem.; Video Recording of House Proceedings, Mar. 26, 2013 at 1 hr., 15 min., 33 sec. (remarks by Rep. Harry Geisinger (R-48th)), <http://www.gpb.org/lawmakers/2013/day-39,PM1> [hereinafter House Video 2]; *Legislative Terms Associated with the Georgia General Assembly*, GEORGIAINFO, <http://georgiainfo.galileo.usg.edu/legchart/legterms.htm> (last visited July 17, 2013).

40. HR 4, as passed, p. 1, ln. 3–6, 2013 Ga. Gen. Assem.

41. *Id.* p. 1, ln. 7–13.

and the State of Tennessee wherein the states would adopt the border set by the flawed 1818 survey with the exception of an area approximately one and one-half miles long, which would allow Georgia's riparian access to the Tennessee River at Nickajack.<sup>42</sup>

The resolution next describes the Georgia General Assembly's desired steps for proceeding with settlement.<sup>43</sup> If the State of Tennessee accepts the State of Georgia's settlement offer, the respective legislatures will adopt resolutions establishing the new boundary and submit the resolutions for approval by the United States Congress.<sup>44</sup> If the State of Tennessee rejects the State of Georgia's offer or does not promptly take official action, House Resolution (HR) 4 reserves the State of Georgia's claim to the boundary at the thirty-fifth parallel north latitude.<sup>45</sup> The resolution urges the State of Tennessee to act to resolve the issue on these mutually beneficial terms.<sup>46</sup> If the states do not reach an agreement by the end of the 2014 Georgia General Assembly regular session, the resolution authorizes and directs the Attorney General of Georgia to seek final resolution by filing suit in the United States Supreme Court.<sup>47</sup> The resolution concludes by directing the Clerk of the House of Representatives to send a copy of HR 4 to the governors of both states.<sup>48</sup> On May 8, 2013, HR 4 became effective without the Governor's signature.<sup>49</sup>

### *Analysis*

#### *Georgia's Water Concerns*

As Representative Harry Geisinger (R-48th) spread the Nickajack area map on the table during the House Judiciary Committee's discussion of HR 4, he noted that placing a water bottle on the map's

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42. *Id.* p. 1–2, ln. 16–30.

43. *Id.* p. 2, ln. 31–56.

44. *Id.* p. 2, ln. 31–34.

45. *Id.* p. 2, ln. 35–41.

46. HR 4, as passed, p. 2, ln. 42–48, 2013 Ga. Gen. Assem.

47. *Id.* p. 2, ln. 49–53.

48. *Id.* p. 2, ln. 54–56.

49. State of Georgia House of Representatives Final Composite Status Sheet, HR 4, May 9, 2013.



edge to hold it open was appropriate.<sup>50</sup> North Georgia faces an impending water shortage.<sup>51</sup> Given current supply levels, experts estimate that North Georgia will reach water usage limits within the next ten to twenty years.<sup>52</sup> With continued rapid growth expected in the North Georgia region, securing a reliable and sufficient water source will enhance economic opportunity for the State of Georgia.<sup>53</sup>

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50. House Committee Video, *supra* note 28, at 24 min., 34 sec. (remarks by Rep. Harry Geisinger (R-48th)).

51. WILLIAM BRADLEY CARVER, DARGAN “SCOTT” COLE, SR., & CHAD A. WINGATE, TAPPING THE TENNESSEE RIVER AT GEORGIA’S NORTHWEST CORNER: A SOLUTION TO NORTH GEORGIA’S WATER SUPPLY CRISIS I (2011), available at <http://www.gwri.gatech.edu/sites/default/files/files/docs/2011/3.5.3Carver.pdf>. Georgia legislators are well aware of North Georgia’s water supply concerns because of the dispute between Georgia, Alabama, and Florida regarding the Apalachicola-Chattahoochee-Flint and Alabama-Coosa-Tallapoosa river basins, known as the “Tri-States Water War,” an ongoing concern for more than twenty years. House Committee Video, *supra* note 28, at 28 min., 28 sec. (remarks by Rep. Harry Geisinger (R-48th)). Ultimately, HR 4 may help ease the tension between Georgia and her neighbors, as water drawn from the Tennessee River would eventually make its way downstream to Alabama and Florida. *Id.* at 30 min., 8 sec. (remarks by Brad Carver Hall, Booth, Smith, P.C.). See generally O’Day, *supra* note 18. See also Greg Bluestein & Daniel Malloy, *Tri-State Battle*, ATLANTA J.-CONST. June 15, 2013, at A1, available at 2013 WLNR 14679862 (reporting that the United States Congress will “consider a sweeping water bill” this session that may result in restrictions on Atlanta’s access to federal reservoirs).

52. Carver, *supra* note 51, at 1. During testimony before the House Judiciary Committee, Mr. Carver stated that predictions for exhaustion of Georgia’s water supply vary depending on conservation measures and allocations from Lake Lanier and Lake Allatoona. House Committee Video, *supra* note 28, at 30 min., 8 sec. (remarks by Mr. Brad Carver, Hall, Booth, Smith, P.C.). The granite of Stone Mountain underlies North Georgia, making access to aquifers difficult. Carver Interview, *supra* note 35. Although the Blue Ridge Mountains of North Georgia receive more annual rainfall than anywhere else in the Continental United States, rainwater flows from Georgia soil into the Tennessee River. *Id.* Water flowing from Georgia constitutes approximately 7% of the Tennessee River. House Committee Video, *supra* note 28, at 30 min., 8 sec. (remarks by Mr. Brad Carver, Hall, Booth, Smith, P.C.). Georgia has “the most stringent water conservation measures in the South.” See Carver Interview, *supra* note 35 (referring to the GA. WATER COUNCIL, GEORGIA COMPREHENSIVE STATE-WIDE WATER MANAGEMENT PLAN 7 (2008), available at [http://www.georgiawatercouncil.org/Files\\_PDF/water\\_plan\\_20080109.pdf](http://www.georgiawatercouncil.org/Files_PDF/water_plan_20080109.pdf), and the Georgia Water Stewardship Act of 2010, 2010 Ga. Laws 732 (codified at O.C.G.A. §§ 12-5-4, -4.1; 12-5-7, -31, -105, -180.1 (2012); 8-2-3, -23 (Supp. 2013)). Rep. Brian Thomas (D-100th), who voted against HR 4 during both House votes, noted that Georgia adopted water conservation measures only because of the Tri-State Water Rights litigation. Telephone Interview with Rep. Brian Thomas (D-100th) (May 17, 2013) [hereinafter Thomas Interview]. For the 2010 Water Stewardship Act’s legislative history and for background regarding the Tri-States Water Rights litigation, see Kristen Bolden & Crystal Genteman, *Conservation and Natural Resources*, 27 GA. ST. U. L. REV. 185 (2010).

53. Mr. Carver testified that Tennessee officials realize the State of Tennessee benefits economically from not resolving this issue with the State of Georgia. House Committee Video, *supra* note 28, at 43 min. (remarks by Brad Carver, Hall, Booth, Smith, P.C.). The Atlanta area’s water woes caused “[s]ome companies . . . [to be] hesitant to move to or expand in Atlanta.” Bill Rankin, Scott Trubey & Greg Bluestein, *High Court Grants Georgia Water-Wars Victory*, ATLANTA J.-CONST. June 26, 2012, available at 2012 WLNR 28602438. Georgia must address the water issues or adopt a “zero growth policy.” See Carver Interview, *supra* note 35.

Data from the TVA and water experts indicate that interbasin transfers from the Tennessee River could solve Georgia's water problems for the foreseeable future.<sup>54</sup> Although the State of Georgia must meet additional hurdles beyond confirming that the state boundary extends to the Tennessee River at Nickajack before Georgia can withdraw water from the Tennessee River, confirming its riparian access to the river is an important step toward that end.<sup>55</sup> The bipartisan support for HR 4 reflects Georgia legislators' concerns both for supplying North Georgia with the water it needs for growth and protecting other regions' water sources from infringement by Metropolitan Atlanta.<sup>56</sup> Opponents of the resolution also recognize this need but disagree with HR 4's principles or tactics.<sup>57</sup>

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54. See *supra* note 23 and accompanying text. Tennessee's Inter-Basin Water Transfer Act of 2000 provides evidence that the state recognizes Georgia's interest in water from the Tennessee River. TENN. CODE ANN. §§ 69-7-201 to -212 (West, Westlaw through 2013)); O'Day, *supra* note 18, at 259. Tennessee's argument for "restrict[ing] interbasin transfers] from the Tennessee River to Georgia" presumes that Georgia does not have riparian rights to the river. Carver, *supra* note 51, at 2.

55. After the States of Georgia and Tennessee enter into an interstate compact agreeing to the compromise, the United States Congress must approve the agreement. House Committee Video, *supra* note 28, at 42 min., 2 sec. (remarks by Brad Carver, Hall, Booth, Smith, P.C.). Next, Georgia must obtain a permit from the TVA to withdraw the water. *Id.* Once the TVA approves the withdrawal, a public-private partnership would construct a pipeline to supply Lake Lanier, Lake Allatoona, and three proposed regional reservoirs: the Glades Project, the Calhoun Creek Project, and the Dawson Forest Project. Carver Interview, *supra* note 35.

56. See Thomas Interview, *supra* note 52. At least some of HR 4's bipartisan support resulted because the resolution offers a source of water for the Atlanta area without taking water from other areas of Georgia, a concern that prompts rural Georgia legislators to vote against large interbasin transfers. *Id.* See also House Committee Video, *supra* note 28, at 47 min., 8 sec. (remarks by Brad Carver, Hall, Booth, Smith, P.C.). Sen. Wilkinson (R-50th) testified before the Georgia Senate that HR 4 "protect[s] the Savannah River . . . [from] interbasin transfers . . . to provide water for Metro Atlanta" and provides water for agriculture. Senate Video, *supra* note 18, at 12 min., 13 sec. (remarks by Sen. John Wilkinson (R-50th)). Experts predict that both Alabama and Florida also would receive increased water flow. House Committee Video, *supra* note 28, at 40 min., 7 sec. (remarks by Brad Carver, Hall, Booth, Smith, P.C.).

57. Representative Brian Thomas (D-100th) expressed concern that the resolution distracts the Georgia General Assembly's focus from addressing Georgia's water problems and noted that large interbasin transfers can negatively affect the environment. See Thomas Interview, *supra* note 52. Representative Thomas also thought HR 4 could damage relationships with Tennessee and prevent Georgia from working with its neighbors to resolve water concerns. *Id.* Other legislators found HR 4 either too accommodating to Tennessee in releasing Georgia's claim to most of the disputed area or too aggressive because of the threat to file suit. See *infra* notes 68, 76, and 84.

*HR 4 Distinguished from Its Predecessors*

HR 4 represents the desire of the Georgia General Assembly to settle the border issue but does not change any current Georgia statute.<sup>58</sup> SR 822 from 2008 remains valid, and HR 4 addresses only the dispute between the State of Tennessee and the State of Georgia, with no mention of the border dispute with the State of North Carolina.<sup>59</sup> HR 4 is distinguishable from all prior Georgia General Assembly resolutions regarding the boundary issue in two important ways. For the first time, the General Assembly proposes a specific compromise wherein the State of Georgia would release its claim to most of the disputed land.<sup>60</sup> Second, the resolution sets a specific deadline for the State of Tennessee to accept the proposed compromise, whereas no prior resolution contained a deadline.<sup>61</sup>

HR 4 provides the Governor of Georgia with a carrot to bring the State of Tennessee to the negotiating table.<sup>62</sup> After the 2008 resolution, lawmakers in the State of Tennessee scoffed at attempts by the State of Georgia to settle the boundary issue.<sup>63</sup> Tennessee's

58. House Video 2, *supra* note 39, at 1 hr., 15 min., 20 sec. (remarks by Rep. Brian Thomas (D-100th)), 1 hr., 15 min., 33 sec. (remarks by Rep. Harry Geisinger (R-48th)).

59. HR 4, as passed, 2013 Ga. Gen. Assem. (repealing no prior resolutions regarding the issue); SR 822, as passed, 2008 Ga. Gen. Assem. (noting the disputed borders with both the State of Tennessee and the State of North Carolina).

60. HR 4, as passed, p. 1–2, ln. 16–48, 2013 Ga. Gen. Assem. Previous Georgia General Assembly resolutions regarding the border dispute called for commissions, surveys, studies, joint tribunals, committees, communication, and negotiations to settle the issue, but did not offer to release any claim. See SR 822, as passed, p. 2–4, 2008 Ga. Gen. Assem., for a summary of Georgia's various legislative actions from 1887–1971. *See also* 1971 Ga. Laws 791; 1947 Ga. Laws 1729; 1941 Ga. Laws 1850; 1922 Ga. Laws 1139; 1916 Ga. Laws 1042; 1906 Ga. Laws 1160; 1898 Ga. Laws 402; 1897 Ga. Laws 595; 1886 Ga. Laws 105.

61. HR 4, as passed, p. 2, ln. 49–53, 2013 Ga. Gen. Assem. The 1971 resolution, HR 288-981, applied a time limit related only to expense reimbursements for Boundary Line Commission members. 1971 Ga. Laws 791, p. 795–96.

62. HR 4, as passed, p. 2, ln. 16–48, 2013 Ga. Gen. Assem. In his testimony before the House Judiciary Committee, Mr. Carver noted that the State of Tennessee would not agree to settle in 2008 because the State of Georgia did not offer "something on the table to benefit Tennessee." House Committee Video, *supra* note 28, at 38 min., 40 sec. HR 4's compromise provides Georgia with the riparian access it needs but does not affect the residency status of any Tennessee citizen living in the disputed area. *Id.* at 25 min., 1 sec. (remarks by Rep. Harry Geisinger (R-48th)).

63. During his testimony on the Senate floor, Sen. Bethel recounted that Tennessee's previous responses to Georgia's attempts to resolve the boundary issue include "laughing or ignoring" Georgia's requests. Senate Video, *supra* note 18, at 3 min., 29 sec. (remarks by Sen. Charlie Bethel (R-54th)). In 2008, the Mayor of Chattanooga delivered a truckload of bottled water to the Georgia General Assembly following enactment of SR 822, along with a proclamation expressing concern that next Georgia would want Tennessee's whiskey. Cameron McWhirter, *In Latest War Between the States, Georgia Says*

reluctance to negotiate likely stems from more than water issues. The disputed area involves approximately sixty-eight square miles, 30,871 residents,<sup>64</sup> and property valued at more than \$2 billion in 2008,<sup>65</sup> so the compromise would offer Tennessee a favorable outcome. In addition to reserving Georgia's claim to the disputed area, the deadline set for Tennessee's acceptance of Georgia's offer provides a sense of urgency because Tennessee risks losing all of the disputed area if the State of Georgia files suit in the United States Supreme Court.<sup>66</sup> Georgia risks only the costs of litigation by filing suit because resolution of the boundary issue is required for Georgia to exercise riparian rights to the Tennessee River.<sup>67</sup>

By not only authorizing but also "directing" the Attorney General of Georgia to initiate suit in the Supreme Court if negotiations fail, the General Assembly communicates its desire to finally resolve the issue.<sup>68</sup> This is not the first time, however, that the Georgia General Assembly "directed" the Attorney General to file suit.<sup>69</sup> In 1947, SR

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*Tennessee Is All Wet*, WALL ST. J., Apr. 10, 2013, <http://online.wsj.com/article/SB10001424127887324000704578388472029592836.html>.

64. McWhirter, *supra* note 63.

65. Townsend, *supra* note 2, at 20. Tennessee Governor Bill Haslam recently said that the State of Tennessee is "very satisfied with the situation the way it is now for, good reason." *Tennessee Governor Dismisses Border Dispute with Georgia*, 11ALIVE.COM, July 16, 2013, <http://www.11alive.com/news/article/298716/40/Tennessee-governor-dismisses-border-dispute-with-Georgia> [hereinafter 11Alive.com].

66. See Geisinger Interview, *supra* note 4; Carver Interview, *supra* note 35; and *infra* notes 80–85 and accompanying text.

67. Senate Video, *supra* note 18, at 1 hr., 37 min., 30 sec. (remarks by Sen. David Shafer (R-48th)). See also Carver Interview, *supra* note 35.

68. House Video 2, *supra* note 39, at 1 hr., 15 min., 6 sec. (remarks by Rep. Harry Geisinger (R-48th)) (noting that "it's time for the State of Georgia to take some action."). The stronger language added by the Georgia Senate setting a deadline for settlement and directing suit if settlement efforts fail, however, may have prompted eleven members of the Georgia House of Representatives who voted for the original version of HR 4 to vote against the amended version. See Georgia House of Representatives Voting Record, HR 4 (Feb. 12, 2013); Georgia House of Representatives Voting Record, HR 4 (Mar. 28, 2013); Carver Interview, *supra* note 35. Additionally, Sen. Jeff Mullis (R-53rd), who co-sponsored SR 822 in 2008 but voted against HR 4, disagreed with the Georgia General Assembly "saying 'we're going to lawyer up and sue you if you don't work with us.'" Todd Rehm, *From Insider Advantage, Senator Jeff Mullis Discusses Tennessee*, as reposted by GEORGIA PUNDIT (May 3, 2013, 6:09 AM), <http://gapundit.com/2013/05/03/from-insideradvantage-senator-jeff-mullis-discusses-tennessee/>. Many of Sen. Mullis's constituents work in Tennessee. *Id.* Tennessee lawmakers awarded Sen. Mullis with a "signed coffee cup" for opposing the resolution. *Tenn. Lawmakers Cheer Opposition to Border Resolution*, DAILY REPORT, Apr. 10, 2013, <http://www.dailyreportonline.com/PubArticleFriendlyDRO.jsp?id=1202595565540&slreturn=20130522235541>.

69. See *infra* note 70. Sponsors wanted to add the "direct" language to SR 822 in 2008, but they did not have time to make the amendment before *sine die*, the end of the legislative session. See Carver

15 “authorized and directed” the state Attorney General to resolve the issue in federal court if a Georgia Commission’s settlement efforts failed.<sup>70</sup> No settlement resulted, and twenty-four years later, in 1971, the Georgia General Assembly passed another resolution creating a commission to “establish, survey[,] and proclaim the true boundary line” and to take additional action the commission found necessary to establish the boundaries between the States of Georgia and Tennessee.<sup>71</sup> Thus, history demonstrates that the Georgia Attorney General does not always respond to direction from the Georgia General Assembly.<sup>72</sup> Voters independently elect the Georgia Governor and Attorney General but political considerations encourage the officials to work together.<sup>73</sup> For example, SR 822 authorized the Georgia Attorney General to institute proceedings in the United States Supreme Court to resolve the border issue, but then-Georgia Governor Sonny Perdue did not want to initiate additional litigation because Georgia was embroiled in the Tri-State Water War.<sup>74</sup>

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Interview, *supra* note 35.

70. 1947 Ga. Laws 1729, at 1730.

71. 1971 Ga. Laws 791, at 793. Senator Jason Carter’s questions directed to Sen. Shafer before the Senate vote highlighted that no resolution resulted from the 1971 act signed by his grandfather, Jimmy Carter, who was then the Governor of Georgia. *See* Senate Video, *supra* note 18, at 51 sec., 1 min., 18 sec. (remarks by Sen. Jason Carter (D-42nd)); Senate Video, *supra* note 18 at 1 min., 2 sec., and 1 min., 29 sec. (remarks by Sen. David Shafer (R-48th)).

72. Georgia’s Constitution empowers the state’s legislature to “prescribe” powers to the Attorney General, but does not grant general authority over the executive officer. GA. CONST. art. V, § 3, para. 3. In interpreting the Georgia Constitution, the Georgia Supreme Court held “that the legislature may require an appeal to the U.S. Supreme Court” for the limited purpose of executing an apportionment plan. *Perdue v. Baker*, 277 Ga. 1, 14–15, 586 S.E.2d 606, 616 (2003). *See* Erin L. Penn, Comment, *Perdue v. Baker: Who Has the Ultimate Power Over Litigation on Behalf of the State of Georgia—The Governor or the Attorney General*, 21 GA. ST. U. L. REV. 751 (2005) for an analysis of the separation of powers issues implicated by the decision.

73. O.C.G.A. § 45-15-1 (2002) (providing that the state’s Attorney General “be elected at the same time, for the same term, and in the same manner as the Governor.”). Georgia Code provides that the Governor may “direct the Attorney General” to take action in the state’s name, and the Governor may “appoint a special attorney general” to take such action if the Attorney General does not act. O.C.G.A. § 45-15-18 (2002). The Georgia Supreme Court noted that the officials “share the responsibility to guarantee that the State vigorously asserts and defends its interests in legal proceedings.” *Perdue*, 277 Ga. at 5, 586 S.E.2d at 609–10.

74. House Committee Video, *supra* note 28, at 45 min., 39 sec. (remarks by Rep. Harry Geisinger (R-48th)). Representative Geisinger noted the expense kept the state from pursuing additional water litigation at that time. *Id.* at 45 min., 56 sec.

### *The Next Steps*

Discussion and negotiation between the Governors and officials of the respective states is the next requirement for resolving the border issue.<sup>75</sup> Although HR 4 became effective without Georgia Governor Nathan Deal's signature, advocates for the resolution indicate that Governor Deal supports the compromise.<sup>76</sup> If Georgia and Tennessee reach an agreement regarding the boundary and both states' legislatures ratify the agreement, the states will submit the resolutions for Congressional approval as an interstate compact.<sup>77</sup> The United States Congress's approval will officially establish Georgia's border as reflected in the interstate compact.<sup>78</sup> If the states fail to reach an agreement by the end of the 2014 regular Georgia legislative session, HR 4 urges the Georgia Attorney General seek final resolution in the United States Supreme Court.<sup>79</sup>

### *Potential Resulting Litigation*

Advocates for HR 4 believe the State of Georgia has a strong case should the Georgia-Tennessee boundary issue reach the United States Supreme Court.<sup>80</sup> The initial hurdle Georgia must clear is to establish that the United States Supreme Court has original jurisdiction in the issue.<sup>81</sup> The negotiations and compromise authorized by HR 4 may

75. HR 4, as passed, p. 2, ln. 42–48, 2013 Ga. Gen. Assem.

76. See Geisinger Interview, *supra* note 4; Carver Interview, *supra* note 35. Rep. Thomas (D-100th), who voted against HR 4, noted that the Governor might have thought signing a resolution containing a threat to file suit would be counterproductive for negotiations with the Tennessee Governor. See Thomas Interview, *supra* note 52. See also Rehm, *supra* note 68 (quoting Sen. Mullis's statements that Georgia should take "a softer approach"). During a recent interview, Governor Deal said he plans to "approach [Tennessee Governor] Haslam at a conference of Republican governors about negotiations." 11Alive.com, *supra* note 65.

77. U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State."); HR 4, as passed, p. 2, ln. 31–34, 2013 Ga. Gen. Assem.

78. House Committee Video, *supra* note 28, at 42 min., 2 sec. (remarks by Brad Carver, Hall, Booth, Smith, P.C.).

79. House Video 2, *supra* note 39, at 1 hr., 15 min., 33 sec. (remarks by Rep. Harry Geisinger (R-48th)). See Carver Interview, *supra* note 35 (noting the language "direct[ing]" the Attorney General "basically means we strongly urge you").

80. Carver, *supra* note 51, at 2–5.

81. O'Day, *supra* note 18, at 259–60. U.S. CONST. art. III, § 2, cl. 1 extends the Supreme Court's power "to Controversies between two or more States." U.S. CONST. art. III, § 2, cl. 2 provides original jurisdiction to cases "in which a State shall be Party."

strengthen Georgia's position by lending further support to the existence of controversy and demonstrating that Georgia exhausted "every medium of settlement."<sup>82</sup>

The United States Supreme Court uses a "fact-specific inquiry" to resolve state boundary disputes, considering both "issues of acquiescence and equity."<sup>83</sup> HR 4's supporters claim the State of Georgia should prevail, a position supported by one of two Georgia Senators who voted against the resolution.<sup>84</sup> The State of Tennessee, however, likely would claim that its long governance of the disputed area indicates the State of Georgia's acquiescence.<sup>85</sup> Mr. Carver believes the Georgia-Tennessee boundary dispute could be one of the most important boundary disputes settled by the United States Supreme Court in the country's history.<sup>86</sup>

### Conclusion

Proponents of HR 4 hope it is the penultimate resolution adopted by the Georgia General Assembly regarding the Georgia-Tennessee boundary dispute, to be followed only by a resolution affirming the settlement agreement. By offering a specific and generous compromise to the State of Tennessee, Georgia's HR 4 provides the opportunity to finally resolve the boundary issue on terms favorable

82. See Carver Interview, *supra* note 35. Mr. Carver believes the United States Supreme Court is almost certain to accept original jurisdiction to resolve the dispute. *Id.*

83. O'Day, *supra* note 18, at 261–63 (predicting that Georgia would argue that moving the border requires Congressional consent; that history supports setting Georgia's boundary with Tennessee at the thirty-fifth parallel north; that the 1981 Federal Energy Regulatory Commission's determination that the boundary lies at the thirty-fifth parallel north; and that Georgia's multiple legislative actions indicate the state did not acquiesce to the flawed survey). Carver, *supra* note 51, at 3–5, presents a detailed argument in support of Georgia's legal claim.

84. Senator Bill Cowsert (R-46th), who voted against HR 4, reportedly said the issue "would be a slam dunk of a lawsuit." Martha Zoller, *Sen. Jeff Mullis and Tennessee/Ga Water*, ZPOLITICS, Apr. 10, 2013, <http://zpolitics.com/sen-jeff-mullis-and-tennesseega-water/>. See also Carver Interview, *supra* note 35 (noting that Mr. Carver does not regard Sen. Cowsert's vote as a "no" because Sen. Cowsert believes Georgia should pursue its claim to all of the disputed land).

85. O'Day, *supra* note 18, at 263–65 (predicting that Tennessee would argue that it acquired the disputed area under the doctrine of prescription and determining the issue "will be a difficult question for the Court").

86. See Carver Interview, *supra* note 35. See also Kyle Wingfield, *Most Important Bill of 2013? A River Runs Through It*, ATLANTA J.-CONST., Mar. 28, 2013, available at 2013 WLNR 7599139 (recognizing that HR 4's potential for resolving the boundary issue and "answer[ing] a question hanging over our future," i.e., how the State of Georgia will supply North Georgia with water, make the resolution critical for the state.).

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to both states' citizens. Whether HR 4 will accomplish this purpose or become another recitation in the preamble of future resolutions is uncertain, but the compromise and deadline imposed by the Georgia General Assembly provide notice to the State of Tennessee that the Georgia legislature intends to seek rapid resolution of the issue. Given North Georgia's impending water shortage and continuing concerns regarding the Water Wars agreements, HR 4's proponents hope the eleventh resolution is the charm.

*Susan Haynes & Elizabeth A. Hornbrook*



