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INTERSTATE WATER RIGHTS

The ACF Water Wars Final Episode: Is Florida Entitled to Greater Flow in the Apalachicola River?

CASE AT A GLANCE

This case marks the second trip to the Supreme Court for Florida’s equitable apportionment case seeking to obtain greater flows into Apalachicola Bay, the estuary of the Apalachicola-Chattahoochee-Flint (ACF) River Basin. In a 2018 decision, the Supreme Court reviewed a report of then-Special Master Ralph Lancaster recommending that the Court deny relief to Florida because of the Court’s inability to provide relief without having the Army Corps of Engineers as a party to the litigation. At that time, a 5–4 majority ruled that the Special Master had applied too demanding a standard of proof to the issues surrounding redressability and balance of the equities. The case was remanded with instructions calling for a revised standard and for making additional fact-findings requisite for application of the Court’s equitable apportionment jurisprudence. *See* 138 S. Ct. 2502, 2512–17 (2018). Subsequently, Paul Kelly Jr., a Tenth Circuit Court of Appeals judge, was appointed Special Master for the current phase of the case. Special Master Kelly’s report was succinct in its conclusions:

I do not recommend that the Supreme Court grant Florida’s request for a decree equitably apportioning the waters of the ACF Basin because the evidence has not shown harm to Florida caused by Georgia; the evidence has shown that Georgia’s water use is reasonable; and the evidence has not shown that the benefits of apportionment would substantially outweigh the potential harms.

(Report of the Special Master, December 11, 2019, at 81.)

Florida took exception to the fact-finding and conclusions of the Special Master.

Florida v. Georgia

Docket No. 142 Original

Argument Date: **February 22, 2021**

On Exceptions to the Second Report of the Special Master

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Introduction

For roughly 30 years, Florida and often the third basin state, Alabama, pursued efforts to ensure greater flows to the lower reaches of the Apalachicola-Chattahoochee-Flint Basin (ACF), particularly in times of drought. Florida

currently is seeking to have the Supreme Court’s equitable apportionment power limit Georgia’s use of ACF water to prevent the resulting low flows in the Apalachicola River, which are causing harm to Florida’s basin water resource use. The Florida uses include protecting an extraordinarily

diverse ecosystem, including the river corridor that runs through the Florida Panhandle and the river estuary, Apalachicola Bay. Beyond the bare ecological claims, Florida adds that there is an economic injury of the low flows, including on the region's tourism and on the once vibrant and acclaimed oystering fishery.

Beginning in 1990, Florida and Georgia vied in litigation that sought to force the United States Army Corps of Engineers (USACE) to operate its five major dams in the basin in a manner favorable to each state's respective interests. In the last of those battles, Florida lost when the Eleventh Circuit ruled that municipal storage was an original purpose of the Buford Dam. *See In re MDL-1824 Tri-State Water Rights Litigation*, 644 F.3d 1160 (11th Cir. 2011). That ruling effectively ensured that the northernmost USACE Dam, and the dam having the most storage capacity could continue to provide large amounts of water for municipal use in the metro Atlanta region. For Florida, that loss, coupled with its failure to obtain meaningful relief in earlier litigation on the Endangered Species Act and other theories, left it a single last resort, seeking equitable apportionment of the waters of the Apalachicola-Chattahoochee-Flint Basin (ACF) in the Supreme Court. The instant Supreme Court argument is the Court's second hearing of the case.

Questions Presented

1. Did Special Master Kelly err in failing to defer to assumptions the previous Special Master made that appear to have been accepted, at least in part, by the Court majority in the 2018 decision?
2. Did the Special Master err in using the wrong evidentiary standard when determining the losses of the respective states that are or would be incurred at different levels of flow?
3. Did Special Master Kelly err in failing to accept additional evidence beyond what Special Master Lancaster presented in the previous trial?
4. Did the Special Master premise his decision on the proper standard for redressability of Florida's injury?
5. Can the Supreme Court devise relief that will provide Florida with an effective remedy without the Army Corps of Engineers as a party to the case?

Facts

The Chattahoochee River rises in northern Georgia and flows south and west to a point where it then flows

south forming a portion of Georgia's border with Alabama before flowing into the Florida Panhandle. The Flint River rises in central Georgia and flows south and then west, where it joins the Chattahoochee just above the border with Florida. The joined rivers form the Apalachicola River, which flows through the Florida Panhandle into the Gulf of Mexico. Together this river system is usually referred to as the ACF Basin. The basin is diverse, featuring metro Atlanta at its northern end, with woodlands and farms dominating its midsections, and finally a largely rural estuary that features Apalachicola Bay, which supports tourism and a once-thriving oyster fishery. The ACF system runs approximately 385 miles from north to south and drains an area covering roughly 19,600 square miles. Georgia dominates the basin with in-basin area (74 percent), in-basin population (over 90 percent), in-basin water withdrawal (well over 80 percent), and in-basin water consumption (well over 90 percent).

The USACE operates a series of five dams on the Chattahoochee. The most downstream dam, the Woodruff Dam that forms Lake Seminole, is located at the junction of the Chattahoochee and Flint Rivers. Together these five dams are the only major structural facilities having the potential to significantly adjust the flows of water reaching the Apalachicola River. Three of the five dams have significant storage capacity, but the Woodruff Dam, the only dam that receives water from the Flint, does not. Dams lacking storage capacity typically play a major role in supporting navigation, flat-water recreation, and hydropower. While those dams do have effects on flows, they have comparatively little ability to save up water that can be used to augment low flow conditions for environmental enhancement or other purposes.

A condensed and vastly oversimplified account of the underlying dispute begins at least as far back as the early 1990s, when Atlanta's population burgeoned and the USACE began to allocate storage in Lake Lanier, created by the Buford Dam, to municipal and industrial use. This began a pattern of increasing allocations of storage to that purpose at the same time the region was beset by several years of widespread drought. The early perception of the case pitted urban Atlanta against the downstream Apalachicola Bay estuary. Over time Atlanta's improved conservation efforts and the fact that most municipal uses are not highly consumptive led to greater awareness of the far more consumptive irrigation use by farmers in Georgia's Flint River basin. The adverse impacts on flow to the estuary peak during dry and drought conditions,

due to major increases in crop irrigation in the Flint basin and holding water in Lake Lanier to ensure Atlanta's water supply. Together those dry and drought year actions caused alarming decreases in flow below the Woodruff Dam. The reduced freshwater flow increased salinity levels in Apalachicola Bay, which, combined with overfishing, resulted in a collapse of the oyster beds and that part of the Florida regional economy. The oyster fishery has yet to recover.

As noted above, once the litigation pressing the USACE to modify their actions for greater flows to the estuary in dry years had run its full course, the Supreme Court granted Florida's petition for leave to file this action. Importantly, the USACE declined to waive its sovereign immunity and, thus, could not be joined as a party in the case. The Court assigned the case to a Special Master, Ralph Lancaster Jr. On February 14, 2017, Special Master Lancaster issued a report that agreed that Florida had suffered harm from the decreased flow (Report at 31–32) and found it likely that Georgia's refusal to effectively regulate the growth of irrigation in the Flint basin was contributing to the low flows affecting Florida. (Report at 34.)

The "normal" course under the settled equitable apportionment doctrine would be to pursue those preliminary findings in greater depth to determine the magnitude of harm to Florida, the degree to which Georgia's actions were responsible for the harms Florida suffered, the details of Georgia's ability to avoid that harm, and the harm that Georgia would suffer in the event it was ordered to consume less ACF water. Instead, Special Master Lancaster moved to a different issue that is vital in equitable apportionment cases, whether an effective remedy could be framed by the Court. On that issue, the Special Master placed the burden on Florida, applying the clear and convincing evidence standard, to demonstrate that its harms were redressable by a decree that might be entered by the Supreme Court in the absence of the USACE as a party. Here, Special Master Lancaster concluded that effective relief for Florida would not be possible without affecting the operations of USACE dams in the basin, and that without the USACE as a party to the case, there was no ability to provide an effective remedy. (Report at 61.)

The case then moved to the Supreme Court. *See* 138 S.Ct. 2502 (2018). The majority, speaking through Justice Stephen Breyer, found that the clear and convincing evidence was too stringent a standard for the issue of redressability in an interstate equitable apportionment

setting and that Florida had made a sufficient *initial* showing that an equity-based cap on Georgia's use of one river in the basin could lead to a significant increase in streamflow reaching Apalachicola Bay. Justice Breyer stressed that the Special Master had made assumptions rather than evidentiary findings on issues relating to the harm Florida suffered and had not made factual findings on several issues necessary for the Court to apply its equitable apportionment doctrine to the case. Some of those findings were quantification of the harm Florida currently suffered, the amount of harm that would be imposed on Georgia by a decree ordering reductions in irrigation, and the causative relationship of the Georgia uses in relation to the Florida harms. Needing that information, the majority remanded the case to the Special Master. Four justices dissented, indicating that they would have followed the recommendation of the Special Master and dismissed the case.

Case Analysis

In its present posture, the new Special Master, Senior Judge Paul Kelly Jr. of the Tenth Circuit Court of Appeals, lists the findings the Court called on him to make. These are (1) whether Florida suffered harm caused by decreased water flow into the Apalachicola River; (2) whether Florida showed that Georgia's use of the Flint River is inequitable; (3) whether that potentially inequitable use was the cause of harm to Florida; (4) whether an equity-based cap on Georgia's use of Flint River waters would materially increase streamflow in the Apalachicola River given the Corps' operational rules or reasonable modifications that could be made to those rules; and (5) whether such additional streamflow in the Apalachicola River may significantly redress the economic and ecological harm that Florida has suffered. The Court also had made clear that Florida must show that "the benefits of the [apportionment] substantially outweigh the harm that might result." (Report of the Special Master at 3, quoting the Court, which was quoting its decision in *Colorado v. New Mexico*, 459 U.S. 176, 187 (1982).)

Far from beginning anew or supplementing the record with evidence directed toward conditions in the basin after the 2016 trial before Special Master Lancaster, Special Master Kelly limited the parties to the paper record previously compiled and permitted oral argument of only 45 minutes per side. Roughly a month later, Special Master Kelly issued his report recommending dismissal of Florida's suit:

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

Report of Special Master Kelly at 7.

There is comparatively little room for analysis here without some examination of Special Master Kelly's report. That effort, in turn, shows that the Special Master made a very thorough review of the previously collected record evidence. It is quite apparent that Special Master Kelly, a westerner familiar with water issues, was comfortable in dissecting the details of the expert testimony that had been collected in the hearings held by his predecessor on topics including water use, irrigation efficiencies, and the technicalities of modeling. One example is his explanation of why he found Georgia's ACF irrigated acreage measure and total of irrigation water applied more reliable than Florida's. In reaching that conclusion drawn from the two states' competing and quite divergent models, he delved deeply into the methodologies of the competing expert witnesses in accounting for the water Georgia farmers applied to "throw acres," which comprise the area beyond the end of the line of a center pivot irrigation system that is watered only by the end gun and, hence, receives less water than areas below the sprinkler apparatus. Florida's expert simply treated all acres as fungible. The Georgia expert's calculation did not and was found more accurate and persuasive. Similarly, the report often found Georgia's positions more concrete than those of Florida. Comparing the calculation of the harm that each respective state would suffer on receiving less water, Special Master Kelly found the empirically based full-dollar value impact of dry-year irrigation on maintaining crop yields and farm sector revenue in Georgia more persuasive than the Florida expert's estimates of ecosystem degradation losses alleged

to be linked to lower flows. He also chided the Florida expert for failing to consider other flow affecting factors, which included a USACE channel deepening project that was more likely the cause of a major example of slough dewatering that the Florida expert had attributed to the Georgia farmer's water consumption. (Report at 22–25.)

Special Master Kelly also made careful comparison of the experts' methodologies in calculating the impact of Georgia consumptive water uses on downstream flows. The Florida model claims that in recent dry and drought years, Georgia depleted streamflow by 4,000 cubic feet per second (cfs); the Georgia model claims the depletion is less than half of that amount. The report then devotes more than ten pages to its review of the experts' analyses and an explanation of why the Special Master considers the Georgia methods of calculation to be more reliable. (Report at 25–37.) He also made findings directed toward nuances of the equitable apportionment doctrine, such as the relevance of the fact that both states share a common water law based on reasonable use. (Even though Florida has moved away from common law riparianism, the linchpin of contemporary Florida water law is "reasonable beneficial use.") Special Master Kelly thereafter finds that Georgia's use would be considered unreasonable under riparian doctrine. (Report at 53.)

The report also looked closely at Florida's claims of injury to Apalachicola Bay oystering, a major point in Florida's claims of injury. As with other claims, Special Master Kelly carefully examined the record made before Special Master Lancaster. He got into the weeds (almost literally) as he scrutinized the correlation of oyster bed productivity with salinity level changes on the one hand and overfishing (computed using biomass measures of what was taken from the beds in the previous periods) on the other. Based on that comparison, Special Master Kelly found that the evidence does not support a strong causative link between salinity changes attributable to reduced freshwater inflows, whereas the data show a far stronger correlation of oystering decline with overfishing. (Report at 75–78.) On that basis and with reference to other evidence he reviewed, Special Master Kelly concluded there is little benefit to Florida caused by an increase of 1,000 cfs of inflow, whereas the cost to Georgia of providing the added inflow would far outweigh the Florida benefit.

The case now goes back to the Supreme Court on a Special Master's Report that strongly favors Georgia. The Court, of course, remains free to reject the findings and conclusions of the Special Master.

Significance

The most critical issue that faced the ACF basin, ensuring a reliable and sufficient water supply for the Atlanta metropolitan region, was decided a decade ago in 2011. As noted above, the Supreme Court declined to review the Eleventh Circuit's ruling that municipal supply was an original purpose of the Buford Dam. As time and improved understanding make clearer, the bulk of low-flow-year consumptive use in Georgia that affects flows into the Apalachicola River and Bay is the irrigation done in the Flint River Basin, not the consumption of Chattahoochee River water by metro Atlanta. This case, even if Florida wins, is not going to undercut the water security of Atlanta.

Lurking in this case is the question of how the Court should evaluate the ecological threats of disrupting river flow. That issue is likely to become more pressing due to changing precipitation patterns bringing deeper and more extended droughts. The higher temperatures predicted for almost all of the southern U.S. environments will also increase evaporative losses for the region, which has developed its unique ecologies over thousands and hundreds of thousands of years, including the Apalachicola estuary. Their resiliency is being tested by changing water flow and temperature patterns that affect local riparian ecosystems and estuaries. It is possible that future equitable apportionment cases will have more dramatic facts, where unlike here, the strongest evidence of ecological collapse, the severe decline in the oyster fishery, is as readily linked to overfishing as it is to reduced freshwater inflow.

Given the heavily fact-bound nature of this case, if the Court accepts the fact-finding of the Special Master, it is unlikely that the Court will use this case as a springboard to write a new chapter in its equitable apportionment jurisprudence. If, instead, the Court were to disagree with the Special Master's recommendations, it would signal a significant willingness to take not easily monetized ecological values into account in equitable apportionments.

On a more practical level, the Court's response to the conclusions of the Special Master will have "real and substantial" consequences for two subregional industries. Should the Special Master's recommendations be adopted, efforts to revive the Apalachicola oyster fishery face the additional obstacle of elevated salinity levels associated with continued low flows in dry years, and the Apalachicola estuary will also feel more generalized

impacts that will threaten its biological diversity. Looking in the other direction, Special Master Kelly, despite his recommendations and fact-finding, has indicated that it is likely that Georgia has "at least" some responsibility here. Should the Court reject the approach of the Special Master and adopt a standard for redressability that Florida can meet, the case almost certainly will again be sent to proceed before the Special Master, this time to craft a remedy that forces Georgia to decrease its water consumption. That task will fall most heavily on the Georgia farmers of the Flint River basin who will find themselves subject to far more stringent dry-year regulation. That will be no small matter in an increasingly volatile climate, where the recent trend is toward more frequent and deep droughts that make irrigation ever more necessary to sustain crop yields at high levels.

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