

Overview of *Florida v. Georgia*, No. 142

On June 27th, the Supreme Court issued an opinion in *Florida v. Georgia*. Following are highlights of the case, the opinion and what it means to Metro Atlanta and Georgia.

Background

What is *Florida v. Georgia*?

- In 2014, Florida sued Georgia for an equitable apportionment of the Apalachicola-Chattahoochee-Flint (“ACF”) River basin.
- Florida is requesting the court impose a cap on Georgia’s water use from the basin, including groundwater withdrawals from the Upper Floridan aquifer, which is connected to surface streams in the basin.
- The case is being heard directly by the Supreme Court because that is the only court with jurisdiction to resolve suits by one state against another. The Supreme Court originally appointed a Special Master, Ralph Lancaster, Jr., to oversee evidence collection, expert testimony, the trial and to make a recommendation about how the case should be decided.
- A new Special Master, Judge Paul J. Kelly, Jr., was appointed on August 9th.
- It is important to note that the U.S. Army Corps of Engineers (“the Corps”) operates five federal, multi-purpose reservoirs within the ACF system. The Corps is not a party to the lawsuit because it declined to waive sovereign immunity, which prevents Florida from suing it directly in this case.

What was the *Special Master’s recommendation*?

- Following a 5-week trial, Special Master Lancaster issued his recommendation in February 2017.
- In very high-level terms, the Special Master recommended that Florida’s claim be denied because the Corps was not a party to the lawsuit and Florida did not prove “*that its injury can be remedied...without a decree binding the Corps.*” The Special Master reasoned that “[t]here is no guarantee that the Corps will exercise its discretion to release or hold back water at any particular time.”
- The Special Master found Florida had failed to prove it would benefit from a cap on Georgia’s water use without an order binding the Corps. As a result, he did not make any additional “factual findings” about whether Georgia’s water use is reasonable or the relative harm to Georgia from capping its water use compared to the benefit (if any) Florida might receive as a result.

The Opinion Itself

What does the *Supreme Court opinion* say?

- In a 5-4 decision, the Court remanded the case back to the Special Master for further fact finding.
- Fundamentally, the majority concluded that “*the Special Master applied too strict a standard*” when he found it would be impossible for the Court “*to fashion an appropriate equitable decree*” without the Corps being a party.
- The majority’s opinion is narrowly focused on this “threshold issue” and says nothing about whether Florida can ultimately prevail.
- The majority asked the Special Master to go back and weigh the equities of harm to Georgia against the benefit to Florida from any potential decree capping Georgia’s use.
- In the next stage of the proceeding, Florida will be required to prove that “*the benefits of the apportionment substantially outweigh the harm that might result.*”

What did the *minority opinion* state?

- Four Justices would have accepted the Special Master’s recommendation and denied Florida’s request for relief. These Justices explained that the Master applied the correct legal standard, but even if he did not, “*his misstep would not justify a remand because his findings are plainly correct and establish that Georgia should prevail under the balance-of-harms test.*”
- Writing for the minority, Justice Thomas stated:

“*If we contrast the de minimus benefits that Florida might receive from small amounts of additional water during nondroughts with the massive harms that Georgia would suffer if this Court cut its water use in half during droughts, it is clear who should prevail in this case.*”

“*Giving Florida another bite at the apple will likely yield no additional evidence, but it will be unfair to Georgia, which has already spent the time and resources to defeat the case that Florida chose to present. In short, we have all the evidence we need to decide this case now.*”

What’s Next?

Who is the *current Special Master*?

- On August 9, 2018, the Supreme Court appointed Judge Paul J. Kelly, Jr., of Santa Fe, New Mexico, to be the new Special Master overseeing the case.
- Judge Kelly is a senior judge on the 10th Circuit Court of Appeals who served with Justice Gorsuch. He was nominated to the court by George H.W. Bush in 1991 and has been a senior judge since December 2007.
- Judge Kelly will set the schedule and next steps for the case. Although not precisely known, it is expected the schedule and next steps will be set in short order.

What might the case look like going forward?

- The majority identified specific questions for the Special Master to address on remand, directing him to make “detailed factual findings” on a number of issues.
- Specifically, the majority stated that, “[i]n order to determine whether Florida can eventually prove its right to cap Georgia’s use of Flint River waters,” it may be “necessary for the Special Master to make more specific factual findings and definitive recommendations regarding such questions as:”
 - “To what extent does Georgia take too much water from the Flint River?”
 - “To what extent has Florida sustained injuries as a result?”
 - “To what extent would a cap on Georgia’s water consumption increase the amount of water that flows from the Flint River into Lake Seminole?”
 - “To what extent (under the Corps’ revised master manual or under reasonable modifications that could be made to that manual) would additional water resulting from a cap on Georgia’s water consumption result in additional streamflow in the Apalachicola River?”
 - “To what extent would that additional streamflow into the Apalachicola River ameliorate Florida’s injuries?”

What It Means

What does this mean to Georgia and Metropolitan Atlanta?

- The Court’s focus on the Flint River suggests a significant shift from municipal and industrial water consumption by urban areas to mainly agricultural water consumption.
- It remains to be seen, however, whether the Special Master will focus the remand proceedings in this manner.
- While it is regrettable that the litigation will continue, the remand provides an opportunity to establish, once and for all, that Georgia’s water consumption in the basin is reasonable.

Other Items of Interest

What additional interesting statements were in the dissent?

- Regarding metropolitan Atlanta’s water use, Justice Thomas recognized: “*Metropolitan Atlanta had taken substantial steps to conserve water, reducing its consumption to levels that even Florida’s expert admitted demonstrated effective water conservation... (showing that Florida’s Basin residents used more water per capita than residents in metropolitan Atlanta).*”
- Regarding Georgia’s total water use, which includes agricultural water use, Justice Thomas wrote: “*Florida’s own expert estimated that ... [c]utting Georgia’s water use in half would increase the oyster biomass in Apalachicola Bay by less than 0.6% in most instances, and only 1.2% during the worst droughts.*”

- *“In its defense,” the minority wrote in its dissent, “Georgia presented evidence that its current use has only a negligible impact on the amount of water that Florida receives through the Apalachicola River. Georgia’s experts showed that the State’s water use amounted to just 4% of Basin flows in an average year and 8% of Basin flows in a dry year, leaving anywhere from 92% to 96% of Basin water for Florida.... According to Georgia’s experts, the primary factor that dictates flows in the Apalachicola River is precipitation, not consumption....”*
- In discussing the remand and the need for further fact finding by the Special Master, the minority explained: *“That pointless exercise will only needlessly prolong this litigation. The Court’s subtle suggestion that Florida could present ‘additional evidence’ on remand... is not a satisfactory response. During their 18 months of discovery, the parties produced 7.2 million pages of documents, served 130 third party subpoenas, issued more than 30 expert reports, and conducted nearly 100 depositions, including 29 expert depositions. Florida thus had a more-than-ample opportunity to gather its evidence and then present it at a 1 month trial.”*

