

Water Wars: The Supreme Court Dodges A Decision

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Summary

The Supreme Court of the United States released its long-awaited opinion today in *Florida v. Georgia*, a case we know as part of the states' long-running Water Wars. The opinion was a 5-4 decision in favor of remanding the case to the Special Master for further findings. In other words, the Court did not render a decision and the litigation is not over. But while today's outcome may be disappointing, it is important because of the details.

Background

LLA members recall that the Special Master, Ralph Lancaster, recommended denying Florida's request for a consumption cap on Georgia. His recommendation generally turned on the issue of *redressability*, or whether Florida had proven that a cap would redress the harm to Florida of Georgia's inequitable consumption of water in the ACF. He found that, "Florida has not proven...that any additional streamflow in the Flint River...would be released from Jim Woodruff Dam...at a time that would provide a material benefit to Florida." The basis for his conclusion was that because the Corps of Engineers was not a party to the action, the Court could not order it to do anything. The Corps would, therefore, have the ability to choose whether or not to send additional water to Florida and to time any additional releases in a way that might not bring Florida any tangible benefit.

Oral Argument

The case was argued before the full Court back in January. As I reported at the time, there seemed to be a fair amount of sentiment among the justices for giving Florida relief of some sort. Several of the justices did not seem to accept one of Georgia's more important arguments - that additional water would not materially benefit Florida during non-drought times. I also observed, "It remains to be seen whether further review of the evidence and briefs will convince the justices one way or the other. But the extent to which relief would be afforded by a cap remained elusive throughout the arguments." Turns out I was right.

The Majority Opinion

The majority opinion was authored by Justice Stephen Breyer, who was joined by Chief Justice John Roberts and Associate Justices Anthony Kennedy, Ruth Bader Ginsburg and Sonya Sotomayor. Their opinion held that the Special Master applied too strict a standard in concluding that Florida failed to meet its initial burden of demonstrating that the Court can eventually fashion an effective equitable decree. The majority disagreed, and specifically held that Florida had made a legally sufficient showing on the issue of redressability. But they got caught up in a confusing discussion about whether and to what degree Florida would benefit from a cap on consumptive use of Flint River water in particular. The discussion turned on whether Corps operations would allow the water that would *not* be used by Georgia under a cap to increase the water Florida received. The majority's conclusion was that any water saved would benefit Florida by allowing shorter and less frequent drought operations (periods during which flows do not exceed 5,000 cfs). This, they felt, would benefit endangered species, Tupelo trees, and Apalachicola Bay oysters.

As a result, the Court is sending the case back to the Special Master to determine “key related matters, including the approximate amount of water that must flow into the Apalachicola River in order for Florida to receive a significant benefit from a cap on Georgia’s use of Flint River waters.” Significantly, however, the majority found that “Florida will be entitled to a decree only if it is shown that ‘the benefits of the [apportionment] substantially outweigh the harm that might result.’” This, it turns out, may be the deciding factor in the case.

The Dissent

A blistering dissent was written by Justice Clarence Thomas (a Georgia native), joined by Associate Justices Samuel Alito, Elena Kagan, and Neil Gorsuch. Wide-ranging and touching on many more specifics than the majority opinion, the dissent focused on a number of key points, including that Florida “presented no evidence of any benefits during nondroughts,” and that Georgia’s evidence showed “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.” It cited Georgia’s experts as having opined that “Metropolitan Atlanta had taken substantial steps to conserve water, reducing its consumption to levels that even Florida’s expert admitted demonstrated effective water conservation.”

Importantly, the dissent focused on Florida’s complete failure to prove that the benefits to it of a cap would outweigh the harms to existing uses. Justice Thomas wrote, “Georgia also presented evidence that Florida’s proposed caps would cost Georgia significantly more than they would benefit Florida. Georgia’s economic expert estimated that Florida’s proposed caps would impose costs of more than “\$2.1 billion for municipal and industrial water users and \$335 million for Georgia farmers . . . every single year.” The detail cited in the dissent underscored the enormous imbalance in impacts of the proposed cap:

“Georgia has 5 times the land area, 56 times the population, 80 times the number of employees, and 129 times the [gross regional product] of . . . Florida. [Yet it] consumes only 4 percent of the total waters available in the . . . Basin in an average year, and only 8 percent of the total waters available in the . . . Basin in a dry year, leaving the rest for Florida’s use.” Further, Florida’s own expert estimated that a cap on Georgia would produce only minimal benefits for Florida: Cutting 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. These additional oysters would be worth only a few hundred thousand dollars.

Finally, Georgia rebutted Florida’s assertion that, despite the Corps’ operations, Florida would actually receive the additional water that a cap on Georgia would create during droughts. Using models that accounted for the Corps’ prior operations, Georgia’s expert on the Corps, Dr. Philip Bedient, testified that Florida would receive only 5,000 cubic feet per second during droughts, no matter how much additional water was created by a cap on Georgia and regardless of whether that water flowed into the Flint or the Chattahoochee River.

And in a footnote, Thomas added, “The United States filed an amicus brief to the same effect. It confirmed that, during droughts, “[t]he Corps expects . . . that Apalachicola River flows would be very similar with or without a consumption cap [on Georgia].”

A Nod to Recreation

LLA members who have followed the Water Wars over the years are familiar with the ACF’s “authorized purposes,” a term that received extreme judicial scrutiny in the District Court and Eleventh Circuit along the way. So it was gratifying for Justice Thomas to mention those same purposes that the LLA has briefed to the lower courts over the last ten years, saying the Corps must operate its dams “in a way that achieves its congressionally authorized purposes, such as facilitating navigation, generating hydroelectric power, protecting the national defense, **promoting recreation**, maintaining the commercial value of riparian lands, and protecting the water supply for the surrounding metropolitan Atlanta area (emphasis added).”

Finally, no less an authority than the Supreme Court has acknowledged that recreation is an authorized purpose of Lake Lanier! All LLA members should celebrate.

Even better, as Justice Thomas wrote, “Providing more water to Florida does not help the Corps satisfy any of these legal requirements. It is not one of the congressionally authorized purposes, and, by dropping its lawsuit against the Corps, Florida now accepts that a minimum flow of 5,000 cubic feet per second is sufficient to comply with the Endangered Species Act.” As hesitant as I am to get too optimistic, it looks like the light at the end of the tunnel is no longer a freight train.

Equitable Apportionment and Economics

The dissent stated the bottom line succinctly: “In sum, Florida has not shown that it is ‘highly probable’ that a cap on Georgia will result in meaningful additional flows in the Apalachicola River during droughts. It is thus not entitled to an equitable apportionment on this basis.” It reinforced the severe imbalance of Florida’s proposed cap in this passage:

“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. Florida’s expert estimated that a cap on Georgia would have an “[i]ncremental [f]iscal [c]ost” of \$35.2 million per year. This figure included only additional costs that would require “the [Georgia] legislature . . . to appropriate money.” The real cost of such a cap, which includes nongovernmental costs like welfare losses, would range anywhere from \$191 million to more than \$2 billion per year. And the cap would trigger resulting losses in Georgia’s gross regional product and employment, totaling around \$322 million and 4,173 jobs annually. Regardless of the measure used, this harm dwarfs the value of Florida’s entire fishing industry in Apalachicola Bay, which produces annual revenues of \$11.7 million. And it greatly outweighs the value of the additional oysters that a cap on Georgia’s use might produce—*i.e.*, no more than a few hundred thousand dollars. Imposing an enormously high cost on one State so that another State can achieve a hollow victory is “not the high equity that moves the conscience of the court in giving judgment between states.”

Summary

Overall, the fact that the Special Master's recommendation turned on the issue of redressability seems to have given enough pause to enough justices to make them decide to send the case back for a more substantive report. As we opined back in January, the justices appeared to be signaling that they might remand the case to the Special Master to apply equitable balancing. At the time, we openly hoped that both the Special Master and the justices would have the wisdom to recognize that several *million* Georgians depend on the ACF for water - including the \$300 million Lake Lanier annual recreational economy and a multi-billion dollar agricultural industry – as compared to several *thousand* people around Apalachicola and an \$8 million dollar oyster industry. While that particular issue remains now to be argued on another day, four justices seem to have focused on what we think is the critical determining factor. All that remains is for the rest of the Court to realize the same thing.