No. 142, Original

In the
Supreme Court of the United States

STATE OF FLORIDA,

Plaintiff,

v.

STATE OF GEORGIA,

Defendant.

Before the Special Master

Hon. Paul J. Kelly, Jr.

FLORIDA'S MOTION FOR CLARIFICATION OF CASE MANAGEMENT ORDER NO. 25

In Case Management Order No. 25, the Special Master identified a list of questions that the parties should address in subsequent submissions. *See* Dkt. No. 645, Case Management Order ("CMO") No. 25 at 3-4. This list tracks the questions identified by the Supreme Court's decision in this case (*Florida v. Georgia,* 138 S. Ct. 2502, 2526-27 (2018)) almost verbatim, with one exception: the list omits the Supreme Court's reference to consideration of "reasonable modifications" the Army Corps of Engineers ("Corps") could make to its existing operating rules in assessing the additional streamflow into the Apalachicola River a consumption cap would produce. And while Case Management Order No. 25 does not explicitly prohibit the parties from briefing that issue, other sections of the Order could be read to suggest that consideration of such reasonable modifications is unnecessary to addressing the "five specific questions" identified by the Supreme Court for remand or even precluded by the Order. CMO No. 25 at 3; *see id.* at 5-6.

Accordingly, to eliminate any confusion on this important issue and ensure that the Special Master is in a position to address all the issues identified by the Court's opinion, Florida respectfully requests that the Special Master clarify that the parties should brief this issue in their forthcoming submissions. The Special Master could do so, for example, by simply amending the fourth question in Case Management Order No. 25 to read as follows: "To what extent would additional streamflow into Lake Seminole result in additional streamflow into the Apalachicola River 'under the Corps' revised Master Manual or under reasonable modifications that could be made to that Manual'? *Florida v. Georgia*, 138 S. Ct. 2502, 2527 (2018)." Doing so would ensure that the remand proceedings are "consistent with" the Court's opinion. 138 S. Ct. at 2527.

I. BACKGROUND

A central point of disagreement in this case leading up to the Supreme Court's decision was what significance to attach to the fact that the Corps, by virtue of its sovereign immunity from suit, is not a party.

From the outset of the case, Georgia argued that, because a judgment of the Court would not be formally binding on the Corps, the Court must take the Corps' current operating rules *as a given* in determining whether to enter relief. In its post-trial briefing, for example, Georgia's lead argument was that "FLORIDA CANNOT OBTAIN RELIEF WITHOUT CHANGES TO CORPS OPERATIONS." Dkt. No. 629, Georgia Post-Trial Br. 4 (argument heading). It then argued that "this case must be dismissed" because the Court could not order the Corps to make changes to its operating rules, and "*[a]bsent modification* of the Corps' current basin-wide reservoir operating rules . . . , additional water entering the system would not translate automatically into additional flow across the state line." *Id.* at 5 (emphasis added).

Special Master Lancaster ultimately concluded that the case should be decided on this premise. Although he recognized that "Florida points to real harm and, at the very least, likely

misuse of resources by Georgia," he concluded that the Court could not enter a decree in Florida's favor for one "single, discrete" reason: There was not "sufficient certainty that an effective remedy is available without the presence of the Corps as a party in this case." Dkt. No. 636, Report of the Special Master 31 ("R&R"). Because "[t]here is no guarantee that the Corps will exercise its discretion to release or hold back water at any particular time," and because "without the Corps as a party, the Court cannot order the Corps to take any particular action," Special Master Lancaster believed that Florida was not entitled to an equitable apportionment. *Id.* at 69-70.

Florida's Exceptions to the Special Master's report were specifically focused on this aspect of Special Master Lancaster's ruling. For example, Florida pointed out that the Corps has repeatedly indicated that if the Supreme Court enters a decree in this case, the Corps "would take those developments into account and adjust its operations accordingly, including new or revised [water control manuals,] new or supplemental NEPA or ESA documentation, or any other actions as may be appropriate under applicable law." Fla.'s Exceptions to Report of Special Master 44, *Florida v. Georgia*, 138 S. Ct. 2502 (2018) (No. 142, Orig.) ("Florida Exceptions") (quoting U.S. Army Corps of Eng'rs, *Record of Decision* 18 (Mar. 30, 2017)).[1] Florida acknowledged that there

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[1] It is hardly surprising that the Corps has repeatedly expressed a willingness to facilitate a decree. A Supreme Court decision ordering Georgia to reduce its consumption could only increase the amount of water flowing into the Corps' system above the level the Corps currently receives, thereby enabling the Corps to better achieve its statutory purposes. At a minimum, the Corps could be no worse off with a decree. Moreover, even at the current, historically low levels of flow into the Corps' system, Special Master Lancaster concluded that the Corps regularly makes discretionary releases. *See* R&R 55. The Corps has explained that it does so consistent with its statutory purposes, including wildlife conservation. *See* Br. for U.S. as Amicus Curiae in Supp. of Overruling Fla.'s Exceptions 26-27, *Florida*, 138 S. Ct. 2502 (No. 142, Orig.) ("U.S. Exceptions-Stage Amicus") (noting that "the Corps' release of more than the minimum flows required from Woodruff Dam at various times has historically been driven primarily by the need to serve authorized project purposes," including "fish and wildlife conservation"). Making reasonable modifications in response to a Supreme Court decree would only help, not hurt, the Corps' efforts to meet those project purposes, because even if the Corps released *all* of the new water saved by a consumption cap in Georgia to achieve conservation-related purposes in Florida,

is no *guarantee* what those modifications would look like, but argued that the equitable nature of this original action means that the Court can rely on "reasonable predictions of future conditions" in deciding whether to enter a decree. *Id.* at 30 (quoting *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1026 (1983) (*Idaho II*)). Florida also explained that any other rule would create a "chicken and the egg" problem, in which the Court could not fashion a decree without certainty about how the Corps would respond to a decree, but could not be certain about the Corps' response until a decree had been fashioned. *Id.* at 31. That sort of self-defeating circle, Florida argued, is wholly foreign to the "broad and flexible equitable concerns" that have always guided the Supreme Court's equitable apportionment jurisprudence. *Id.* at 32 (quoting *Idaho II*, 462 U.S. at 1025).

After an oral argument that focused in large part on this issue, the Supreme Court agreed with Florida. The Court's opinion repeatedly emphasizes that "[f]lexibility and approximation are often the keys to success in our efforts to resolve water disputes between sovereign States." *Florida*, 138 S. Ct. at 2527. "Consistent with the principles that guide our inquiry in this context," it held, "answers need not be 'mathematically precise or based on definite present and future conditions.'" *Id.* (citation omitted). Instead, "[a]pproximation and reasonable estimates may prove 'necessary to protect the equitable rights of a State.'" *Id.* (citation omitted). Given those considerations, the Court found that it "[could]not agree with the Special Master that the Corps' 'inheren[t] discetio[n]' renders effective relief impermissibly 'uncertain' or that meaningful relief is otherwise precluded." *Id.* at 2526 (alterations in original) (citation omitted). Because "'[u]ncertainties about the future' do not 'provide a basis for declining to fashion a decree,'" and because "the record le[d] [the Court] to believe that, if necessary *and with the help of the United*

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the same amount of water would still be available as currently exists under its Master Manual for all other project purposes.

States, the Special Master, and the parties, [the Court] should be able to fashion" a decree, the Court sent the case back for further proceedings. *Id.* at 2526 (emphasis added) (citation omitted).

Consistent with the Court's emphasis on flexibility and allowing for predictions about future conditions in determining whether Florida is entitled to a decree, the Court specifically recognized the relevance of "reasonable modifications" that could be made to the Corps' Manual. *See id.* at 2527. It did so by indicating that the determination of whether Florida is entitled to a decree under the equitable-balancing inquiry should consider not only the additional water that would flow through to Florida under "the Corps' revised Master Manual," but also the water that could flow through "under reasonable modifications that could be made to that Manual." *Id.* (indicating that the Special Master should consider: "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?" (emphasis added)).

As Case Management Order No. 25 recognizes, the Supreme Court "tasked [the Special Master] with providing findings and conclusions as to five specific questions and any questions he believed necessary." CMO No. 25 at 3. Those questions include the one quoted above.

II. DISCUSSION

The Supreme Court's decision makes clear that in deciding whether to enter a decree, the Court is not limited to reliance on "definite" conditions. *Florida*, 138 S. Ct. at 2527 (citation omitted). Instead, "[r]eliance on reasonable predictions of future conditions is necessary." *Id.* at 2514 (quoting *Idaho II*, 462 U.S. at 1026). The Court's opinion then recognizes that one "reasonable prediction" that will be relevant to determining whether Florida is entitled to a decree is a prediction of the effects of "reasonable modifications that could be made to [the Corps' Master] Manual." *Id.* at 2513-14, 2527. Thus, in deciding whether the "benefits of the [apportionment]

substantially outweigh the harm that might result," the Court indicated that it will consider not only the additional water that would result from a cap on Georgia's consumption under the Corps' Master Manual, but also the additional water that would result from "reasonable modifications that could be made to that Manual." *Id.* (alteration in original) (citation omitted). The effects of such modifications are a part of the equitable balancing analysis because it is reasonable to predict that the Corps would modify its operations accordingly in response to a decree.

The Court's reference to "reasonable modifications" in this critical passage of the opinion was no mere slip of the pen. Rather, it follows naturally from the Court's rejection of the position—advanced by Georgia and adopted by Special Master Lancaster's report—that the Court can only decide whether Florida is entitled to equitable relief based on an assumption that the Corps will *not* modify its operations. Instead, the Court emphasized, the equitable balancing here can, and should, be made based on reasonable forecasts and predictions. *See* 138 S. Ct at 2513-14, 2527. That naturally includes consideration of the impact of the reasonable modifications that the Corps would make to its Manual in response to a decree in this case.

In its response to Case Management Order No. 23 (Dkt. No. 639), the United States suggested that reasonable modifications "should be considered only after all of the other factual matters before the Special Master are resolved"—namely, "the extent of Georgia's withdrawals," "the extent of harm suffered by Florida," "the extent a cap on Georgia's consumption would increase flows in the Flint River," "the extent that increased flows in the Flint River would increase flows in the Apalachicola River without requiring changes to the Corps' operations under the current Master Manual," and "the extent to which such increased flows would ameliorate Florida's injuries." Dkt. No. 643, U.S. Statement of Continued Participation 5. But the Supreme Court plainly envisioned that the Special Master would consider—in deciding whether to enter a

decree—the impact of additional streamflow that would stem from "reasonable modifications that could be made to [the Corps' existing Master] Manual." *Florida,* 138 S. Ct at 2527.[2]

In denying Florida's request for *additional evidence* on such "reasonable modifications," Case Management Order No. 25 cites approvingly to portions of the United States' submission. CMO No. 25 at 5-6. The Order does not, however, refer to the United States' submission in setting forth the issues that the parties should brief based on the existing record. But the Order also omits any reference to "reasonable modifications" in connection with the list of issues that should be briefed, without indicating that this omission was intended to preclude briefing on this matter. To eliminate any confusion on this matter, Florida respectfully requests that the Special Master clarify whether the parties may, and should, address in their forthcoming briefs what modifications would be feasible for the Corps to adopt in order to facilitate a decree.

In Florida's view, the Special Master should direct the parties to address those reasonable modifications in their briefs due January 31, 2019, rather than wait for a subsequent round of briefing. The existing record provides evidence from which the parties can brief both what reasonable modifications are available to the Corps in response to a decree and what impact such modifications would have on additional streamflow. Among other things, that evidence makes clear that the Corps has already determined that it can meet its project purposes other than conservation by using a subset of its existing flows, and that it would be feasible for the Corps to devote additional flows generated by a decree to conservation-related project purposes. It would

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[2] The Supreme Court's opinion makes clear that the impact of reasonable modifications on streamflow bears on the question of whether Florida is "entitled to a decree." *See Florida*, 138 S. Ct. at 2527 (referring to "reasonable modifications" in explaining the issues that bear on whether Florida has a "right to cap Georgia's use of Flint River waters"). The Court's decision thus refutes any argument that reasonable modifications are relevant only *after* a decree has been entered and the Corps decides, in fact, how to respond to that decree.

be more efficient to address those considerations at the same time as the other questions identified by the Supreme Court rather than to address them in a separate, later round of briefing. The possibility that the Special Master would conclude that Florida is entitled to a decree, and that its injuries could be completely redressed, *without considering* reasonable modifications provides no reason to avoid briefing the impact of reasonable modifications now so that the Special Master would be in a position to address that issue if he sees fit. The Special Master should receive briefing on all the issues identified by the Court, and then decide how to address those issues in his report and recommendation.

Accordingly, Florida suggests that the Special Master simply modify the fourth question that Case Management Order No. 25 directed the parties to answer so that it reads as follows:

> "To what extent would additional streamflow into Lake Seminole result in additional streamflow into the Apalachicola River 'under the Corps' revised Master Manual or under reasonable modifications that could be made to that Manual'? *Florida v. Georgia*, 138 S. Ct. 2502, 2527 (2018)."

The Special Master's Order recognizes that the Supreme Court's decision "tasked [the Special Master] with providing findings and conclusions as to [the] five specific questions" identified in the Court's decision. CMO No. 25 at 3 (citing *Florida*, 138 S. Ct. at 2518, 2526-27). Addressing the Court's questions in their entirety will help ensure that the remand proceedings are "consistent with" the Court's opinion. *Florida*, 138 S. Ct. at 2527.

To be clear, Florida recognizes that any findings on this issue by the Special Master and, ultimately, the Supreme Court would not be directly and formally binding on the Corps. But that does not mean—as Georgia has argued—that answering the "reasonable modification" question posed by the Supreme Court would "serve little purpose" or be a mere "advisory opinion." Dkt. 644, Joint Mem. 27, 31 (Georgia Preliminary Statement). To the contrary, as the Supreme Court explained, factoring in reasonable modifications (and the impact of such modifications) is

directly relevant to the ultimate question of whether Florida is entitled to a decree under the equitable balancing inquiry. *See id.* at 7-9 (Florida Preliminary Statement). And the consideration of such modifications is perfectly consistent with the Court's direction that "reasonable predictions of future conditions" are appropriate in deciding whether to grant relief. *Florida*, 138 S. Ct. at 2514 (quoting *Idaho II*, 462 U.S. at 1026); *id.* at 2526. If the Court concludes that benefits of a decree in terms of the additional water that would flow to Florida under the existing Manual and reasonable modifications that could be made to that Manual would substantially outweigh any harm that would result to Georgia from a decree, then Florida would be entitled to a decree even though there is no *certainty* about how the Corps will respond.

For the foregoing reasons, Florida respectfully requests that the Special Master clarify Case Management Order No. 25 in this limited, but important, respect.

Dated: November 16, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the MOTION FOR CLARIFICATION OF CASE MANAGEMENT ORDER NO. 25 has been served on this 16th day of November 2018, in the manner specified below:

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