

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.

CASE MANAGEMENT ORDER NO. 25

November 6, 2018

CASE MANAGEMENT ORDER NO. 25

In Case Management Order No. 23, the parties were directed to address the following questions:

- a. Whether the existing record is sufficient to resolve this case as to the merits of each issue identified by the Supreme Court upon remand;
- b. Whether additional discovery is needed and, if so, what specific issue(s) the proposed discovery would address;
- c. Whether stipulations are possible as to operative facts, especially as to the relative economic issues;
- d. Whether any additional hearings, evidentiary or non-evidentiary, would be beneficial;
- e. Whether settlement possibilities have been and will be explored fully; and
- f. Whether any other issues should be brought to the attention of the Special Master.

CMO No. 23 at 2–3.

Having reviewed the parties' Joint Memorandum of October 2, 2018, the Special Master finds as follows:

- a. The existing record is sufficient to resolve this case as to the merits of each issue identified by the Supreme Court upon remand.
- b. No additional discovery is needed.
- c. Stipulations as to significant operative facts are not possible according to the parties.
- d. An additional non-evidentiary hearing may be beneficial; a decision on an additional hearing will not be made until proposed findings of fact and conclusions of law and supplemental briefing is completed.
- e. The parties have been unable to settle this matter though there have been

unsuccessful settlement negotiations.

f. The parties do not believe there are any other issues that need to be brought to the attention of the Special Master at this time.

On the narrow issue before it, the Supreme Court held that Florida made a legally sufficient showing that it would be possible to fashion an effective remedial decree depending on the answers to evidentiary and legal questions not initially addressed by the Special Master. Florida v. Georgia, 138 S. Ct. 2502, 2527 (2018). Ultimately, Florida must prove by clear and convincing evidence that the benefits of an equitable apportionment decree substantially outweigh any harm that might result. Colorado v. New Mexico, 459 U.S. 176, 187 (1982); Florida, 138 S. Ct. at 2527. The Special Master was tasked with providing findings and conclusions as to five specific questions and any other questions he believed necessary. Florida, 138 S. Ct. at 2518, 2526–27. Under that instruction, the Special Master would like to answer the following questions:

- (1) Has Florida suffered a substantial invasion of rights of a serious magnitude resulting from decreased water flows in the Apalachicola River?
 - a. What injuries constitute that invasion of rights (described concisely)?
 - b. To what extent were those injuries caused by Georgia’s consumptive use of water?
 - c. Concerning salinity in the Apalachicola Bay, what are the effects from
 - i. The Sikes Cut through St. George Island?
 - ii. Construction of dams by the Army Corps of Engineers (Corps)?
 - iii. Deepening channels and ditching and draining swamp areas?
- (2) Does Georgia, contrary to equitable principles, take too much water from the Flint

River?

- a. What is Georgia's approximate consumptive use of Flint River water?
- b. If Georgia takes too much water, to what extent? How much is "too much"?

(3) To what extent would an equity-based cap (please quantify) on Georgia's water consumption result in additional streamflow from the Flint River into Lake Seminole?

(4) To what extent would additional streamflow into Lake Seminole result in additional streamflow into the Apalachicola River given the Corps' Master Water Control Manual operational rules?

(5) What is the approximate amount of water that must flow into the Apalachicola River during drought conditions for Florida to receive a significant benefit from a cap on Georgia's use of water? In other words, how much streamflow in the Apalachicola will significantly ameliorate Florida's alleged harms? The more specific, the better. For instance, what flow rates are needed to adequately address each alleged harm?

(6) To what extent have the conservation steps currently employed by Georgia resulted in additional streamflow into the ACF basin; specifically, what additional measures are being suggested, and how much additional flow can reasonably be expected to reach Florida during drought conditions?

(7) What costs would an equity-based consumption cap impose on Georgia, and would those costs nevertheless be justified by the benefits to Florida?

Given these questions, by January 31, 2019, the parties should file: (1) proposed findings and conclusions (not to exceed 20 pages) and (2) supplemental briefs (not to exceed

40 pages). By February 28, 2019, the parties may file response briefs (not to exceed 20 pages). The parties should cite record testimony and evidence in these pleadings. All text must be double-spaced, but quotations more than two lines long may be indented and single-spaced, and headings and footnotes may be single spaced. Font size should be 13-point type.

The Special Master has considered Florida's position that the existing record is insufficient (and additional discovery is needed) to resolve (1) whether an equity-based cap on Georgia's consumption would significantly increase the streamflow from the Flint River into Florida's Apalachicola River, and (2) whether the amount of extra water that reaches the Apalachicola River would significantly redress Florida's alleged harms. Jt. Memo. at 18–23. To that end, Florida seeks to supplement its case with more recent evidence of Georgia's water consumption particularly for agricultural uses, the effect of the Corps' Revised Master Manual (finalized in 2017) and any reasonable modifications the Corps might make, and additional information about oyster declines experienced in subsequent years when average flow was relatively high. *Id.* at 21–22.

Given the voluminous record in the case resulting from virtually unlimited discovery and a lengthy trial, additional discovery will only lengthen the proceedings, delay the outcome, and increase litigation costs. There is ample evidence in the record pertaining to Georgia's water use in the ACF basin, *see, e.g.*, Updated Pre-Filed Direct Testimony of Dr. Hornberger; Pre-Filed Direct Testimony of Dr. Lettenmaier, and Florida has not explained why a material change since 2016 appears likely. *See* Jt. Memo. at 22. As for the effect of the revised manual, both the prior Special Master and the United States indicated that the revised manual was unlikely to change relevant flow conditions. Brief for United States as Amicus Curiae at 12, *Florida*, 138 S. Ct. 2502; Prior Special Master's Report at 45–46. Evidence on potential reasonable modifications to the manual would be entirely speculative

because the United States is not a party and cannot be bound by any final decree. Instead, the United States has respectfully suggested the Special Master proceed with the major factual questions identified by the Court, noting that any manual modifications would be driven by a variety of interests and only subsequent to a consumption cap incorporated in a final decree. United States Statement of Continued Participation at 5–6.

Finally, a major focus of the prior trial was the 2012 oyster fishery collapse and its causes; though Florida says that there is more information from 2016–2018 that might justify increased streamflow, there is ample lay and expert evidence in the record about these issues. See, e.g., Pre-Filed Direct Testimony of Mr. Ward; Updated Pre-Filed Direct Testimony of Dr. Kimbro; Joint Exhibit No. 167. The Special Master is not persuaded that more evidence pertaining to this harm is merited because the likely additional value of such evidence is outweighed by the significant cost and delay that will accompany producing and presenting it.

In an Amended Order, the Supreme Court authorized the Special Master to retain a legal assistant in this matter, the cost to be borne by the parties as the Court directs. Florida v. Georgia, No. 142, Orig., 2018 WL 4568527 (Sept. 25, 2018). The parties are advised that Joshua D. Dunlap, Esquire, Pierce Atwood LLP, Portland, Maine, is appointed as a legal assistant to the Special Master.

IT IS SO ORDERED.

Dated: November 6, 2018

/s/ Paul Kelly, Jr.
Paul J. Kelly, Jr.
Special Master

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