SCOTUS RULING GIVES FLORIDA CHANCE TO PREVAIL IN WATER WAR AGAINST GEORGIA

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We previously issued an alert analyzing two interstate water compact disputes before the U.S. Supreme Court ("SCOTUS" or the "Court"): *Texas v. New Mexico and Colorado* and *Florida v. Georgia.* On June 27, the Court rejected the Special Master's report that recommended denial of Florida's request to cap Georgia's water usage from the Apalachicola-Chattahoochee-Flint ("ACF") River Basin and sent the case back to the Special Master. [1] The Court's ruling breathes new life into Florida's original jurisdiction action for equitable apportionment of ACF River Basin water.

THE ACF RIVER BASIN

Florida v. Georgia is the latest chapter in a long-running dispute among Florida, Georgia, and Alabama over allocation of water in the ACF River Basin. [2] Both Georgia and Florida rely on water from the ACF for a variety of purposes. Notably, Georgia relies on the ACF River Basin water for agriculture and for Atlanta's growing population; Florida relies on the ACF River Basin water to maintain the estuary in Apalachicola Bay, which historically has supported a rich oyster fishery.

The rivers of the ACF River Basin take the shape of a "Y." The Chattahoochee River forms the western branch while the Flint River forms the eastern branch and the Apalachicola River forms the stem. The Chattahoochee and Flint Rivers flow south from Georgia into Florida and connect at Lake Seminole to become the Apalachicola River, which continues south to Apalachicola Bay.

https://pubs.usgs.gov/gip/2006/04/htdocs/intro.html

The U.S. Army Corps of Engineers ("Corps") operates a dam and reservoir system that effectively regulates the flow of water along the Chattahoochee River. The Corps also operates the dam at the southern end of Lake Seminole, where the combined water of the Chattahoochee and Flint Rivers discharges as the Apalachicola River. The Flint River — the eastern branch of the "Y" — is not controlled by dams and flows unhindered through western Georgia to Lake Seminole.

FLORIDA'S COMPLAINT

After decades of unsuccessful negotiations and litigation about the use of the ACF River Basin water, in 2013 Florida filed an original jurisdiction action against Georgia with the Court requesting an equitable apportionment of the water. Florida seeks to cap Georgia's water usage to its level on January 3, 1992, the date on which Florida, Georgia, and Alabama (not a party to the lawsuit) signed a memorandum of agreement to study and resolve

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water disputes. Florida claims that Georgia's increasing water usage harms Apalachicola Bay and its seafood industry because Georgia diverts too much water from the river system, leaving an insufficient amount for Florida at the bottom of the ACF River Basin. Georgia has argued that any limits on its water use will undermine its economy, including the growth of the Atlanta metro region and the state's agriculture industry in southwestern Georgia. Georgia has further argued that, without an order binding the Corps, Florida cannot be assured any relief by a decree entered in this original jurisdiction proceeding because the Corps has the ability to impound water in the reservoirs it maintains in the ACF River Basin — in essence, even if Georgia's use of the Flint River is capped and the flow from the Flint River into Lake Seminole is thereby enhanced, the Corps could offset that enhancement by restricting the flow from the Chattahoochee River into Lake Seminole, or the flow out of Lake Seminole.

THE SPECIAL MASTER'S REPORT

In a report submitted to the Court in February 2017, the Special Master found that "Florida points to real harm and, at the very least, likely misuse of resources by Georgia," but still recommended that the Court deny Florida's request for relief. Because Florida's water levels largely depend on dams operated by the Corps, and because the Corps declined to be a party to the suit and would not be bound by a decree, the Special Master concluded that Florida did not sufficiently show that a cap on Georgia's water use could remedy its problem. In reaching this conclusion, the Special Master stated that Florida "has not proven by clear and convincing evidence that any additional streamflow in the Flint River or the Chattahoochee River would be released from Jim Woodruff Dam in to the Apalachicola River at a time that would provide a material benefit to Florida." [3]

THE SCOTUS DECISION

The Court rejected the report, holding that the Special Master applied too strict a standard and did not make sufficiently specific factual findings when concluding that Florida had not shown that a remedy was possible. The Court held that:

Unless and until the special master makes the findings of fact necessary to determine the nature and scope of likely harm caused by the absence of water and the amount of additional water necessary to ameliorate that harm significantly, the complaining state should not have to provide with specificity the details of an eventually workable decree by 'clear and convincing' evidence. Rather, the complaining State should have to show that, applying the principles of 'flexibility' and 'approximation'…it is likely to prove possible to fashion such a decree. [4]

The Court sent the case back to the Special Master "to conduct the equitable-balancing inquiry." The Court noted that the Special Master assumed that: "(1) Florida has likely suffered harm as a result of decreased water flow into the Apalachicola River; (2) Florida has made some showing that Georgia, contrary to equitable principles, has taken too much water from the Flint River; and (3) Georgia's inequitable use of the water may have injured Florida" but held that "more findings are needed" on each of those issues. [5] Further, the Court concluded that "an equity-based cap on Georgia's use of the Flint River would likely lead to a material increase in streamflow from the Flint River into Florida's Apalachicola River" and that "the amount of extra water that reaches the Apalachicola may significantly redress the economic and ecological harm that Florida has suffered," but held that further findings on those issues were needed as well. [6]

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In his dissent, Justice Thomas, joined by Justices Alito, Kagan, and Gorsuch, contended that the Court should have adopted the Special Master's findings. Justice Thomas noted that "[i]f we contrast the *de minimis* benefits that Florida might receive from small amounts of additional water during non-drought periods 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." [7]

CONCLUSION

The issues at the crux of *Florida v. Georgia* highlight the need for clear guidance from technical experts in determining priorities in complex allocations. There is a dearth of recent case law on equitable apportionment, particularly in Eastern states. [8] There also is a lack of precedent as to how the Court will treat considerations of ecological impacts in equitable apportionment. The outcome of this case will likely have significant impacts on future interstate water disputes and on all those who rely on waters being apportioned. We will continue to monitor this case and issue alerts with updates.

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[1] *Florida v. Georgia,* 138 S. Ct. 2502 (2018). The Court, on March 5, 2018, issued its ruling in *Texas v. New Mexico and Colorado*, as we reported in a prior alert, http://www.klgateshub.com/details/?pub=SCOTUS-Rules-United-States-May-Pursue-Its-Interstate-Water-Compact-Claims-in-Texas-v-New-Mexico-and-Colorado-03-12-2018.

[2] SCOTUS is not the only venue for the dispute over the ACF. In April 2017, three environmental groups filed suit in a D.C. federal court challenging the environmental impact statements used to update the U.S. Army Corps of Engineers' plan to manage the ACF, which could reduce even further the water flowing into Florida. Carolina Bolado, *Enviro Groups Sue Army Corps Over Water Plan for Fla., Ga.,* LAW 360 (April 27, 2017), https://www.law360.com/articles/918045?scroll=1.

[3] Report by Special Master Ralph I. Lancaster, *Florida v. Georgia*, No. 142, Orig. (Feb. 14, 2017), available here, at 47.

[4] *Florida*, 138 S. Ct. at 2516.

[5] *Id*. at 2525–26.

[6] *Id*. at 2526.

[7] *Id*. at 2547.

[8] The last time SCOTUS equitably apportioned water between Eastern states was 1931, when it resolved a conflict between New Jersey and New York. New Jersey v. New York, 283 U.S. 336 (1931).

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