Interstate Water Dispute Nears Decision by Supreme Court

As our changing climate threatens to exacerbate drought conditions in parts of the country, disputes between states over rights to water are likely to become far more common, and to have far higher stakes. Early this year, the Court heard arguments in two separate water apportionment cases—one involving a dispute between Texas and New Mexico over the waters of the Rio Grande, and one involving a dispute between Florida and Georgia over the waters of the Apalachicola-Chattahoochee-Flint River Basin (the "ACF Basin").

The Rivers and the Basin

The ACF Basin, which is drained by the Apalachicola, Chattahoochee, and Flint Rivers and their tributaries, includes parts of Georgia, Alabama, and Florida. The Chattahoochee River has its source in northeastern Georgia and flows south along the Georgia-Alabama border to Lake Seminole on the Florida-Georgia state line. The Flint River has its source near the Atlanta metropolitan area, and flows through agricultural land in southwestern Georgia until it meets with the Chattahoochee at Lake Seminole. The Apalachicola River flows out of Lake Seminole, across the Florida panhandle, and into Apalachicola Bay in the Gulf of Mexico.

The waters of the Basin are heavily used. Municipal and industrial water supplies in the metropolitan Atlanta area rely on water from the Chattahoochee, and water from the Flint is used for extensive agricultural irrigation in southwestern Georgia. Florida asserts that Georgia's excessive use of the waters in the Basin has resulted in reduced flows in the Apalachicola River, which causes serious harm to Florida's ecology and economy, particularly in Apalachicola Bay.

Apalachicola Bay is a wide, shallow estuary along the Gulf Coast, and is one of the most productive estuaries in the northern hemisphere. The bay is home to a major oyster fishery. It produces 90 percent of Florida's oyster harvest, and 10 percent of the oyster harvest of the United States as a whole. The oyster fishery has significant commercial value, and supports a distinctive local culture and economy. The health of the oyster fishery is directly impacted by the salinity of Apalachicola Bay, which is turn is primarily determined by the level of flows in the Apalachicola River. The river itself is also home to a unique ecosystem, boasting the highest species density of amphibians and reptiles in North America and supporting hundreds of endangered or threatened animal and plant species.

The Army Corps of Engineers is also involved in the management of water in the ACF Basin. The Corps operates a series of dams on the Chattahoochee and Flint Rivers, including the Jim Woodruff Dam on Lake Seminole, which is at the source of the Apalachicola River. The Corps controls the amount of water released from those dams in the course of managing its multiple objectives for the region, including navigation, hydroelectric power generation, national defense, recreation, conservation, and industrial and municipal water supply.

The Legal Dispute

The dispute over the waters of the ACF Basin has spanned decades and has at various points involved Georgia, Florida, Alabama, and the Corps. There have been multiple lawsuits, several temporary negotiated settlements and, ultimately, failed negotiations to reach a long-term solution.

Proceedings before the Special Master.

This latest installment in the saga originated when Florida asked the Supreme Court to exercise its exclusive, original jurisdiction over disputes between two or more states, and to equitably apportion the waters of the ACF Basin between it and Georgia. Specifically, Florida asked the Court to cap Georgia's consumption of water from the ACF Basin. As is its practice in original jurisdiction cases, the Court appointed a Special Master to hear evidence and prepare a written recommendation. Ralph Lancaster, of Pierce Atwood in Portland, Maine, was appointed Special Master, and proceedings before Lancaster began December 1, 2014.

Georgia filed a motion to dismiss the suit under Federal Rule of Civil Procedure 12(b)(7) for failure to join the United States—representing the Army Corps of Engineers—as a required party, arguing that the activities of the Corps in the ACF Basin made it impossible to remedy Florida's alleged injury without an order that also binds the Corps. Because the United States had not waived its sovereign immunity to suit, it could not be joined as a party. Florida was therefore careful to request relief that would only require an order binding Georgia, and not the Corps. The Special Master denied the motion to dismiss, saying that Georgia had not met its burden of proof in showing that a remedy was impossible without binding the Corps. The Special Master noted, however, that Florida was now stuck with its limited remedy, and would bear the burden of proof going forward that an order only binding Georgia, and not the Corps, would afford it adequate relief.

After approximately 18 months of discovery, an evidentiary hearing was held before the Special Master from October 31 to December 1, 2016. The evidence consisted of more than 1,800 pages of testimony and 2,400 exhibits. The case generated significant interest from third parties, with eleven *amicus curiae* briefs being submitted from organizations such as the National Audubon Society, the Metro Atlanta Chamber of Commerce, and the Georgia Farm Bureau Federation, as well as the states of Alabama and Colorado.

The Special Master's Report.

The Special Master filed his 137-page report on February 16, 2017, recommending that the Court deny Florida's claim for relief because Florida had not met its burden of proof in demonstrating that an order binding only Georgia, and not the Corps, would afford it adequate relief.

The Special Master found that Florida established that it suffered harm from the decreased flows in the Apalachicola River, primarily due to damage to the oyster fishery in Apalachicola Bay. The Master also found that Georgia's agricultural use of water from the Flint River has been and continues to be largely unrestrained. There has been a large increase in the state's use of water for irrigation, and Georgia has taken few—and "remarkably ineffective"—measures to limit that use. The report noted that Georgia apparently felt that its "agricultural water use should be subject to no limitation, regardless of the long-term consequences for the Basin."

Despite these findings, however, the report concluded that Florida's claim should be denied. The Special Master found that Florida failed to demonstrate by clear and convincing evidence that a cap on Georgia's agricultural use of water from the Flint River would necessarily increase flows in the Apalachicola during drought periods, because the Corps may offset increased flows from the Flint by storing more water from the Chattahoochee, thereby negating any increases in flows from Lake Seminole through the Woodruff Dam and into the Apalachicola. Critically, the Special Master found that any relief to Florida would be speculative because the actions of the Corps, which cannot be predicted, have the potential to undermine the requested remedy.

Timing is critical to the Special Master's recommendation. The Special Master noted that Florida's evidence focused on harm caused to it by low flows in the Apalachicola during drought conditions. The Corps has special operating procedures that go into effect during drought conditions, and it is those operating procedures that the Special Master relied on in determining that a remedy would be speculative without constraining the actions of the Corps. As the United States noted in its *amicus* brief, a cap on Georgia's consumption would decrease the frequency and severity of drought conditions by increasing the overall amount of water available in the system, regardless of the actions of the Corps. The Special Master found, however, that this fact was not sufficient to save Florida's claim, because Florida had not demonstrated that fewer and shorter drought periods would alleviate its injury; Florida's evidence was instead focused on the need to increase flows in the Apalachicola during drought conditions.

The burden of proof is central to this case: Florida's complaint initially survived dismissal because at that stage Georgia bore the burden of proving that no possible remedy applying only to it, and not the Corps, could redress Florida's injury. But the Special Master ultimately recommended that Florida's claim be denied because of the very same issue. On the merits, the burden of proof shifted to Florida to show that its remedy would be effective without binding the Corps. The difference in the allocation of the burden of proof was therefore dispositive to the Special Master's recommendation.

Oral Argument Before the Court

Florida filed exceptions to the Special Master's report, and the case was argued before the Supreme Court on January 8, 2018. Gregory Garre of Latham & Watkins LLP argued for Florida, Craig Primis of Kirkland & Ellis LLP argued for Georgia, and Deputy Solicitor General Edwin Kneedler argued for the United States as *amicus curiae*.

Florida's argument focused on the standard of redressability that applies to its claim. In its exceptions to the report, Florida argued that the Special Master incorrectly applied a heightened standard, requiring Florida to show that its proposed cap on Georgia's consumption was "guaranteed" to alleviate Florida's injury by improving the situation in Apalachicola Bay. At oral argument, Florida asserted that a cap would result in more water in the system overall, which would in turn reduce the frequency and severity of drought conditions.

Justice Kagan remarked that Florida seemed to have common sense on its side: having more water in the system means more water will reach Florida. But she and Justice Sotomayor both raised questions regarding the evidence introduced before the Special Master, and whether there was enough to establish that increased flows during non-drought times would alleviate Florida's injury.

Justice Gorsuch raised the burden of proof, pointing out that Florida, as the one seeking to change the status quo, bore the ultimate burden to show that the benefits of apportionment would outweigh the costs. Florida responded that the Special Master had not made a full determination of the costs and equities because the report only focused on the effect of a consumption cap during times of drought.

Georgia's argument focused on the role of the Corps, and argued that the Special Master was correct that Florida had failed to establish that a consumption cap alone, without any action by the Corps, would result in a material increase in water during times of drought. Chief Justice Roberts pushed back, saying Florida's argument was premised on the fact that the Corps would take an apportionment decree into account when managing the region's water. Justices Ginsburg and Gorsuch also pointed out that a cap would increase the amount of water in the system during non-drought periods. Georgia maintained that Florida had failed to show at the evidentiary hearing that a cap during drought periods would help, and that any relief was speculative to the extent it depended on the actions of the Corps.

Justice Ginsburg seemed skeptical of portions of the Special Master's report, noting that "one of the problems" with it was that the Special Master seemed to think the benefit from the cap must be immediate, though it seemed clear that any water saved in Georgia would eventually reach Florida.

The United States, on behalf of the Corps, acknowledged that the Corps would likely take a decree into account, but reiterated that the Corps had not waived its sovereign immunity and would not be bound by an apportionment decree. The Corps argued that Congress had given it control over the allocation of water in the region.

Justice Breyer seemed especially interested in the role of the Corps, asking the government why it did not just waive sovereign immunity and try to help the Special Master reach the most equitable solution. Justice Breyer later wanted to know what the Corps would do in this case, if it were sitting in his shoes.

What to Watch for from the Court's Decision

The correct standard of redressability is the issue that has the most potentially far-reaching consequences. In its exception to the report,

Florida argues that it should not be required to prove redressability by clear and convincing evidence. Instead, Florida asserts that once it establishes an injury and causation, it must merely show that its suggested remedy would be likely to provide partial redress.

The standard of redressability issue prompted Colorado to file an *amicus* brief before the Supreme Court. Colorado is home to the headwaters of numerous major rivers, including the Rio Grande, the Colorado, the Platte, and the Arkansas. For that reason, it has been involved in many court proceedings and negotiations with respect to equitable apportionment, usually as the party defending against apportionment petitions. Colorado argues that a complaining state in an apportionment case rightly bears a heavy burden to prove its injury and its right to relief, because an apportionment has a major disruptive effect on established uses of, and possessory interests in, water. Colorado stresses the need for consistency in the Court's approach to apportionment, given how a change could disrupt the many existing apportionment decrees and compacts in place today.

If the Court does agree with Florida that the Special Master's recommendation is flawed, it will probably be careful to word its decision in such a way as to minimize any perceived change in the standard of proof used to judge an equitable apportionment case.

What's at Stake

If the Court ultimately accepts the Special Master's recommendation to deny Florida's claim, Florida will be left with a situation in which it proved that it has suffered an injury, and that Georgia's unreasonable consumption was probably the cause of that injury, but it is nonetheless unable to obtain any remedy. Unless the United States decides to waive its sovereign immunity, Florida cannot sue to obtain relief in court. Throughout the process, the Special Master repeatedly urged the two parties to settle the case and reach a negotiated agreement. The parties did participate in mediation both before and after the evidentiary hearing, but failed to reach an agreement. Given the grounds for the Special Master's decision, Georgia now has no incentive to participate in settlement negotiations, and Florida has no leverage to encourage a change in Georgia's water use. A combination of jurisdictional doctrine and the burden of proof essentially will give Georgia a license to use as much water from the ACF Basin as it pleases, regardless of the environmental and economic consequences to Florida and the Apalachicola Bay.

On the other hand, if the Court does not accept the Special Master's report, its decision has the potential to mark a dramatic shift in the standard by which water apportionment cases are judged, which could have far-reaching effects for not only the water apportionment decrees and negotiated compacts in existence today, but also future disputes over increasingly scarce water resources.

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