

Split Water Wars Ruling Ensures Decadeslong Battle Is Far From Over

The 5-4 decision appears to be a win for Florida, which claims Georgia is overusing water in the Apalachicola-Chattahoochee-Flint River Basin.

BY R. ROBIN MCDONALD AND TONY MAURO

In a 5-4 split, the U.S. Supreme Court on Wednesday sent back to a special master the long-running interstate legal battle over Florida's claims that Georgia overuses water from the Apalachicola-Chattahoochee-Flint River Basin.

The majority, in an opinion penned by Justice Stephen Breyer, determined the special master was too strict in requiring Florida to present "clear and convincing" evidence of the workability of any future decree that would govern water use by Georgia and Florida. In doing so, the high court ensured the decadeslong battle remains far from over.

Ruling in an "original jurisdiction" dispute between the two states, the majority said it was reserving judgment on the ultimate disposition of the dispute, choosing instead to address a narrow "threshold" question: "Whether Florida has shown that its injuries can effectively be redressed by limiting Georgia's consumptive use of water from the basin without a decree binding the [U.S. Army Corps of Engineers]."

Florida has asked the Supreme Court to cap Georgia's use of water pulled from the tri-river basin along the length of the state in order to boost Florida's water flow into the Apalachicola River and Bay. Florida is seeking a more robust water flow in order to counter ecological harm that's damaging its oyster industry.

The Chattahoochee River supplies most of metropolitan Atlanta's drinking water. The Flint River supports South Georgia agriculture, while the Apalachicola River sustains a robust fishing industry centered in Apalachicola Bay.

The majority said that Florida "made a legally sufficient showing as to the possibility of fashioning an effective remedial decree."

Breyer was joined by Chief Justice John Roberts and Justices Anthony Kennedy, Ruth Bader Ginsburg and Sonia Sotomayor.



Lake Lanier in Georgia (Photo: John Disney/ALM)

Justice Clarence Thomas, a Georgian who authored the dissent, was joined by Justices Samuel Alito, Elena Kagan and Neil Gorsuch. The minority agreed with special master Ralph Lancaster, a Maine attorney appointed by the high court, that Florida "must present clear and convincing evidence that its proposed cap will benefit Florida more than it harms Georgia."

In such "original" cases the Supreme Court is the tribunal of first resort, not last. The justices appointed Lancaster of Pierce Atwood in Portland, Maine, in 2014 to build a factual record on the dispute and then send a recommendation to the court.

While acknowledging some harm to Florida from Georgia's actions, Lancaster said in his 2017 report there was no "clear and convincing evidence" a ruling in Florida's favor would produce a remedy.

Latham & Watkins partner Gregory Garre represented Florida, and Kirkland & Ellis partner Craig Primis argued on behalf of Georgia.

Georgia Gov. Nathan Deal on Wednesday called a potential cap on Georgia's water use "draconian."

"I remain confident in the state's legal position," said Deal. "Georgia heeded the special master's warning and took legislative action, which is now law, to address his concerns. I look forward to continuing to defend our position in this case."

Deal added that, while Georgia "remains committed to the conservation efforts," he and the state attorney general "remain committed to making every effort to defend Georgia's water resources for our current and future citizens."

"We look forward to obtaining a positive ruling on the merits in this case," Deal said.

Florida Gov. Rick Scott called Wednesday's ruling a huge win for his state.

"For nearly thirty years and under five governors, Florida has been fighting for its fair share of water from Georgia," he said in a press release. "We look forward to further securing a healthy Apalachicola Bay while protecting the thousands of jobs that depend on this natural resource."

Scott initiated the current suit against Georgia at the U.S. Supreme Court in 2013, saying he was doing so to save the commercial fishing industry centered in Apalachicola Bay.

Writing for the majority, Breyer noted the high court has previously ruled that both states have an equal right to make "a reasonable use" of the water.

But, he said, the special master "has not yet determined key matters" regarding a possible remedy to Florida's complaint that Georgia is depriving it of needed water.

Among the "key factors" Breyer cited is a determination as to how much water must flow into the Apalachicola River in Florida from the Chattahoochee-Flint-Apalachicola River Basin in order for Florida to benefit in any significant way from capping Georgia water use.

The special master, he said, also must make "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."

Without those findings, the majority held, Florida "should not have to prove with specificity the details of an eventually workable decree by 'clear and convincing' evidence" but rather that "it is likely to prove possible to fashion such a decree."

"To require 'clear and convincing evidence' about the workability of a decree before the Court or a Special Master has a view about likely harms and likely amelioration is, at least in this case, to put the cart before the horse," Breyer wrote.

The majority also may have been influenced by several assumptions the special master made, despite a ruling that favored Georgia.

"First, the Master assumed Florida has suffered harm as a result of decreased water flow into the Apalachicola River," Breyer noted. "Second, the Master further assumed that Florida has shown that Georgia, contrary to equitable principles, has taken too much water from the Flint River. Third, the Master assumed that Georgia's inequitable use of the water injured Florida."

"At this stage of the proceeding and in light of these assumptions, Florida made a sufficient showing that the extra water that would result from its proposed consumption cap would both lead to increased streamflow in Florida's Apalachicola River and significantly redress the economic and ecological harm that Florida has alleged," the majority concluded.

Thomas's 37-page dissent noted the special master had presided over a one-month trial involving 40 witnesses and more than 2,000 exhibits before ruling in Georgia's favor. Thomas also pointed out that, while the U.S. Army Corps of Engineers has significant control over water flows between Florida and Georgia, Florida decided not to seek any court order involving the Corps, limiting the sought-after relief to a cap on Georgia's water use.

"The Special Master in this case did not conclude that it was too difficult to calculate the amount of water that Florida should receive," Thomas wrote. Instead, the special master concluded that even if a cap on Georgia's water use generated the additional water that Florida claimed it would, "It would not appreciably benefit Florida because it would not be passed through when Florida needed it."

The majority, he concluded, was giving Florida "one more bite at the apple."

Daily Report reporter R. Robin McDonald's journalism career includes stints as a staff writer at The Atlanta Journal-Constitution, The Fort Worth Star-Telegram, The Wichita Eagle, and The Anniston Star and as a trial tracker at CourtTV and CNN. She is the author of two true crime books -- Black Widow: The True Story of the Hilley Poisonings and Secrets Never Lie: The Death of Sara Tokars. A Duke University graduate, she has won more than 50 news awards and is a five-time Pulitzer nominee.

Tony Mauro, based in Washington, covers the U.S. Supreme Court. A lead writer for ALM's Supreme Court Brief, Tony focuses on the court's history and traditions, appellate advocacy and the SCOTUS cases that matter most to business litigators. Contact him at tmauro@alm.com. On Twitter: @Tonymauro