

## Supreme Court Backs Fla. In Water Fight With Ga.

By **Carolina Bolado**

*Law360 (June 27, 2018, 10:45 AM EDT)* -- The U.S. Supreme Court on Wednesday rejected a special master's report that denied Florida's request to cap Georgia's water usage from a Southeastern river basin, ruling that Florida had sufficiently shown that a remedy is possible and sending the case back to the special master.

Special master Ralph Lancaster Jr. of Pierce Atwood LLP said the court is powerless to cap Georgia's water use from the Apalachicola-Chattahoochee-Flint River basin because the water levels largely depend on dams run by the U.S. Army Corps of Engineers, which, as a nonparty, can't be bound by court order and hasn't said whether it would change its operation protocols in response to a cap.

But in a 5-4 decision authored by Justice Stephen Breyer, the Supreme Court said the special master applied too strict a standard when he determined that. The majority said Lancaster has not yet determined several key remedy-related matters, including how much water needs to flow into the Apalachicola River for Florida to see any improvements downstream at its depleted oyster fisheries.

"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 prove with specificity the details of an eventually workable decree by 'clear and convincing' evidence," the court said.

Justice Breyer was joined by Chief Justice John Roberts, Justice Anthony Kennedy, Justice Sonia Sotomayor and Justice Ruth Bader Ginsburg in the majority opinion.

In his dissent, Justice Clarence Thomas said "the balance of harms cannot tip in Florida's favor" and said he would have deferred to the judgment of the special master, who wrote his report after a one-month trial with more than 40 witnesses and 2,000 exhibits.

Florida had sued Georgia to cap its water use from the Apalachicola-Chattahoochee-Flint River basin and help preserve a depleted oyster fishery in Apalachicola Bay.

The Corps has said that it has other things to worry about — such as issues involving water quality, flood control and hydropower — and can't commit to operating its dams in a way that redresses Florida's concerns about its oyster fishery.

That position appeared to frustrate various justices during oral argument in January, including Justice Breyer, who asked why the Corps couldn't just waive sovereign immunity and get involved in the litigation to help the special master reach an equitable solution.

The dispute between the states stretches to 1989, when the Corps recommended that water flowing through a dam on the Chattahoochee in northern Georgia be used for Atlanta's water needs. The Chattahoochee flows south into Florida, where it connects with the Flint River to become the Apalachicola River. That river ends in Apalachicola Bay, creating brackish water that is an ideal breeding ground for oysters.

Florida's current suit, filed in October 2014, claims that Georgia's "unchecked and growing" water consumption is depleting the flow into Apalachicola Bay, damaging fisheries and threatening northwest Florida's economic future. The state asked for a cap on Georgia's water usage to its level on Jan. 3, 1992, when the two states along with Alabama signed a memorandum of agreement to study and resolve the matter.

In February 2017, Lancaster said that without the ability to bind the Corps to the suit, he did not think the court could give Florida the relief it was seeking.

Though the report was a blow to Florida, Lancaster did reject Georgia's contention that its neighbor's problems in Apalachicola Bay are entirely due to mismanagement and overfishing, not water issues. The special master said there is little question that Florida has suffered harm because of Georgia's upstream water usage and noted the evidence presented shows that increased salinity, not mismanagement, in Apalachicola Bay caused the unprecedented collapse of oyster fisheries in 2012.

On Wednesday, Florida Gov. Rick Scott called the Supreme Court's decision "a huge win for the entire state of Florida."

"For nearly 30 years and under five governors, Florida has been fighting for its fair share of water from Georgia," Scott said. "I am glad that the court ruled in Florida's favor today, and we look forward to further securing a healthy Apalachicola Bay while protecting the thousands of jobs that depend on this natural resource."

Katherine Zitsch, natural resources manager at the Atlanta Regional Commission, said the commission is disappointed the litigation will continue but is confident Georgia will prevail. She said metro Atlanta is a "national leader in water conservation" and has cut its water usage by more than 10 percent since 2000 even as the region has added more than 1 million residents.

"We appreciate the state of Georgia's vigorous defense of our water use, and look forward to a time when we can move beyond litigation and cooperatively manage the basin's water," she said.

Georgia Gov. Nathan Deal was also optimistic about the state's position in the litigation.

"Georgia remains committed to the conservation efforts that make us amicable stewards of our water resources and Attorney General Chris Carr and I remain committed to making every effort to defend Georgia's water resources for our current and future citizens," Deal said. "We look forward to obtaining a positive ruling on the merits in this case."

Florida is represented by Pamela Jo Bondi, Amit Agarwal and Jonathan Glogau of the Office of the

Attorney General, Frederick L. Aschauer Jr. of the Florida Department of Environmental Protection, Gregory G. Garre, Philip J. Perry, Jamie L. Wine, Claudia M. O'Brien, Abid R. Qureshi and Paul N. Singarella of Latham & Watkins LLP, Christopher M. Kise, James A. McKee and Adam C. Losey of Foley & Lardner LLP and Matthew Z. Leopold of Carlton Fields.

Georgia is represented by Christopher M. Carr and Sarah H. Warren of the Office of the Attorney General, W. Ryan Teague of the Office of the Governor and Craig S. Primis, K. Winn Allen and Devora W. Allon of Kirkland & Ellis LLP.

The case is State of Florida v. State of Georgia, case number 142, in the Supreme Court of the United States.

--Additional reporting by Jimmy Hoover. Editing by Rebecca Flanagan.