

LITIGATION

***Florida v. Georgia*/Equitable Apportionment**

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On February 22, the U.S. Supreme Court heard oral arguments in *Florida v. Georgia* (#22O142). On remand, the second Special Master determined that Florida's harm was caused by many factors (such as oyster over harvesting) not solely attributable to Georgia's use of water on the Apalachicola-Chattahoochee-Flint River. At the hearing, Justice Samuel Alito said: "This is about the most fact-bound case that we have heard in recent memory, and we have two comprehensive reports by two outstanding masters and they are not – to put the point perhaps mildly – not entirely consistent on a number of key points. What do we do with that?" The Justices raised questions about conflicting evidence on oyster harvesting, salinity levels in the Florida bay, the amount of water Georgia is using, and the amount of water the Corps of Engineers could release from the reservoir under the control manual.

Justice Neil Gorsuch noted that in order to succeed, "Florida has to show that the benefits of an apportionment decree would substantially outweigh the harm that would result.... Judge Kelly found that the decree would cost about \$100 million a year in drought years for Georgia on the one hand and that the entire oyster industry generates about \$6.6 million a year before the collapse. Even assuming that Judge Kelly was mistaken by several orders of magnitude, why doesn't that preclude or at least pose a problem for you?"

Gregory Garre, attorney for Florida, argued that "...each state has an equal right to the reasonable use of the waters," and that the Special Master's comparison of costs didn't take into consideration the hundreds of millions of dollars Florida has invested in preserving its ecological treasure. He also argued that most of the additional 500 cubic feet per second Florida is seeking would cost Georgia nothing. "[W]e're talking about eliminating illegal irrigation, you know, over 90,000 acres that have no permits at all, enforcing existing permit terms, that would cost zero. Simply eliminating overwatering, such as using center pivots to water outside of the fields, scheduling irrigation to maximize impact, reducing farm pond evaporation."

Craig Primis, attorney for Georgia, disagreed. "To remedy [its] self-inflicted wound, Florida asks the Court to impose draconian caps on Georgia. But a 50% cut in irrigation would cost hundreds of millions of dollars to Georgia and all for an increase in oysters of about 1%.... Georgia is home to more than 90% of the population, 98% of the jobs, and 99% of the economy in the ACF basin. The vast majority of the water in this basin already flows into Florida every year, and Georgia puts the relatively small amount it consumes to highly productive uses. The Court's earlier opinion in this case reaffirmed that a complaining state must have not merely some technical right to more water but a right with a corresponding benefit. Here, Florida has neither."

Chief Justice John Roberts asked Georgia: "Even if you're not a sufficient cause, how do you analyze the case if we conclude the record supports the idea that you were a contributing cause? In other words, are you off the hook if you alone did not cause the harm to the fishery?" Primis argued that even if the Court had to reach the causation issue, Georgia's contribution to the issue should be at the "but-for" causation level of at least 50% to be considered sufficient for an equitable apportionment.

In responses to a question about the "disappearing water" from Justice Clarence Thomas, Primis argued that it's not disappearing anywhere; rather, the Corps operations have changed the flows, and the basin experienced "three back-to-back droughts that did not exist in the historic record."

Justice Sonia Sotomayor asked about the changes that could be made to Georgia's agricultural practices. Primis responded: "I think you hit on a key point when you said that the evidence in the record does show that 80% are not overwatering. In fact, they're underwatering, which suggests that the fact that the grandfathered permits don't have limits is not causing the massive problem that Florida suggests. And what the Court's precedents suggest is that the Court will not intervene unless a state can show by clear and convincing evidence that the benefits substantially outweigh the harms. And I think what the Court might be walking into here is becoming a bit of a local water regulator and focusing on...how [Georgia] handles its permits and...metering program.... [E]ven if the Court were to limit these allegedly wasteful practices, it would still result in no benefit to Florida...and now the Court will be involved in managing decrees on local water issues."

In his closing arguments, Garre said: "Without a decree, Georgia will just continue to consume more and more and the Apalachicola will be irreversibly lost. The solution here can't be to do nothing to stop this."

***Mississippi v. Tennessee/*Groundwater**

On February 22, Mississippi and Tennessee both filed exceptions to the Special Master's report, submitted to the Supreme Court in November 2020 (*Mississippi v. Tennessee*, #22O143). The Special Master disagreed with Mississippi's claims that a complex hydrology creates a distinct aquifer that only underlies Mississippi and is not an interstate resource. Following the evidentiary hearing, he concluded: "Water is finite. Especially the usable kind. And the Middle Claiborne Aquifer holds lots of it. Unsurprisingly, both Mississippi and Tennessee want it. Luckily, instead of war, the law requires they share it. But Mississippi has not sought equitable apportionment. Therefore, the Special Master recommends that the Supreme Court dismiss Mississippi's complaint with leave to file an amended complaint."

Mississippi asserted that the aquifer is not like a free-flowing river in a channel or an underground lake; principles that apply to surface waters are inapplicable to the in situ groundwater at issue; and that Tennessee's forcible groundwater pumping (of water that would otherwise slowly creep a mile over hundreds of years) is an intentional invasion of Mississippi's sovereign territory, taking over 4 billion gallons of Mississippi groundwater between 1965 and 2016. "The question presented in Mississippi's Original Action is whether Mississippi holds exclusive retained territorial sovereign authority and right to preserve, protect and control groundwater located within its borders to the exclusion of Tennessee, making Defendants' intentional cross-border pumping of Mississippi groundwater a violation of the United States Constitution. In rejecting Mississippi's claim, the Special Master erroneously held that the federal common law remedy of equitable apportionment is the only relief the Court may award in this original action. But that remedy is appropriate only to resolve disputes between States involving interstate rivers and streams, where the water flows generally unencumbered from State-to-State. It is an inappropriate vehicle for addressing one State's use of pumping stations on the border to acquire groundwater located in another State."

Tennessee agreed with the Special Master that the complaint should be dismissed, but with prejudice. Tennessee argued that an amended complaint would be improper, particularly given Mississippi's past inability to demonstrate to the Court a threshold injury serious enough to merit equitable apportionment as well as the Court's original jurisdiction. "Mississippi cannot satisfy this Court's standard for amending pleadings in original actions. That is because allowing Mississippi to add an equitable apportionment claim would expand this action far beyond the scope contemplated by the Court's order authorizing Mississippi to file its Complaint. The Court granted Mississippi leave to pursue only tort claims that rest on the (faulty) premise that Mississippi inherently owns certain portions of the Aquifer. Because Mississippi disclaimed equitable apportionment, Mississippi cannot assert equitable apportionment in an amended complaint. Further, equitable apportionment differs radically from Mississippi's current claims and requires the Court to balance competing state interests and related equitable factors. An equitable apportionment also may involve some or all of the other six States overlying the Aquifer, whose rights and interests could be affected by any resulting decree." Any new claim from Mississippi, Tennessee argued, would have to "show a material change in circumstances leading to a substantial injury."