

No. 142, Original

**In The
Supreme Court of the United States**

STATE OF FLORIDA,
Plaintiff

v.

STATE OF GEORGIA
Defendant

Before the Special Master

Hon. Paul J. Kelly, Jr.

UNITED STATES' STATEMENT OF CONTINUED PARTICIPATION

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The Special Master has invited the United States to indicate whether “it can or intends to provide any further information that would bear on any of the issues identified by the Supreme Court on remand.” At this time, the United States intends to continue its participation as *amicus curiae* in accordance with the United States’ Statement of Participation, previously filed at Docket Number 35. As explained there and elsewhere, the Corps of Engineers’ projects play an important role in managing the flows of the ACF Basin. The Corps operates the system of dams in the ACF Basin pursuant to a Master Water Control Manual (“Master Manual”) governing all federal projects in the Basin and separate reservoir regulation manuals for each individual federal dam. In addition to operating the dams to accomplish their congressionally authorized purposes, the Corps operates the system to comply with the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, and other federal statutory requirements. In doing so, the Corps takes a proactive approach to storing water in drought operations so as to preserve for as long as possible its ability to retain enough water in the system to meet all project purposes, as well as a flow into Florida sufficient to comply with the ESA’s requirements and to protect the threatened and endangered species in Florida from the effects of the drought.

The Supreme Court’s opinion remanding to the Special Master largely takes the Corps’ operations under the current Master Manual as a given around which the Master should attempt to form any decree, should one prove justified. The Court

structured the section of its opinion on evidentiary determinations around a list of five questions:

First, has Florida suffered harm as a result of decreased water flow into the Apalachicola River? (The Special Master assumed “yes.”)

Second, has Florida shown that Georgia, contrary to equitable principles, has taken too much water from the Flint River (the eastern branch of the Y-shaped river system)? (Again, the Special Master assumed “yes.”)

Third, if so, has Georgia’s inequitable use of Basin waters injured Florida? (The Special Master assumed “yes.”)

Fourth, if so, would an equity-based cap on Georgia’s use of the Flint River lead to a significant increase in streamflow from the Flint River into Florida’s Apalachicola River (the stem of the Y)? (This is the basic question before us.)

Fifth, if so, would the amount of extra water that reaches the Apalachicola River significantly redress the economic and ecological harm that Florida has suffered? (This question is mostly for remand.)

Florida v. Georgia, 585 U.S. ___, *slip op.* at 19-29 (2018). The fourth question is the only one that might implicate the Corps, and in its discussion of that issue, the Court assumed that the Corps would be “acting in accordance with its own revised Master Manual,” *Slip Op.* at 24, before concluding, based on its reading of the record, that Florida would likely receive material amounts of water from a consumption cap on Georgia (or, at least, more proceedings on the question are necessary), *id.* at 24-29. Only after taking the Corps’ operations as a given in its analysis did the Court note that fashioning a decree might involve “the help of the United States,” and even that statement is tempered by the Court’s observation that the “Corps will work to accommodate any determinations or obligations the Court sets forth if a *final decree* equitably apportioning the Basin’s waters proves

justified in this case.” *Florida v. Georgia*, 585 U.S. ___, *slip op.* at 34 (emphasis added).

Thus, the Court’s non-exhaustive list of factual matters that may need to be resolved by the Special Master must be understood in that context. That list is as follows:

To what extent does Georgia take too much water from the Flint River? To what extent has Florida sustained injuries as a result? To what extent would a cap on Georgia’s water consumption increase the amount of water that flows from the Flint River into Lake Seminole? To what extent (under the Corps’ revised Master Manual or under reasonable modifications that could be made to that Manual) would additional water resulting from a cap on Georgia’s water consumption result in additional streamflow in the Apalachicola River? To what extent would that additional streamflow into the Apalachicola River ameliorate Florida’s injuries?

Florida v. Georgia, 585 U.S. ___, *slip op.* at 36. The United States believes that it may be possible for the Special Master to resolve all relevant factual issues on remand without further direct participation of the United States, and that the Master should structure further proceedings so as to allow it to do so. In the United States’ view, most of the factual issues identified by the Court do not appear to directly implicate the interests of the United States and logically precede any questions that might implicate the United States’ interests. The Special Master, the Court, and the United States would therefore benefit from the resolution of those remaining factual issues in the first instance.

The Supreme Court’s aside suggesting that it may be necessary for the Special Master to consider the extent to which flow could be increased in the

Apalachicola River with “reasonable modifications” to the Corps’ Master Manual is, both logically and practically, a question that should be considered only after all of the other factual matters before the Special Master are resolved. The Special Master must first solidify factual findings on the extent of Georgia’s withdrawals, the extent of harm suffered by Florida, the extent a cap on Georgia’s consumption would increase flows in the Flint River, the extent that increased flows in the Flint River would increase flows in the Apalachicola River without requiring changes to the Corps’ operations under the current Master Manual, and the extent to which such increased flows would ameliorate Florida’s injuries. For example, if the Special Master were to conclude that a cap on Georgia’s consumption would not produce sufficient additional streamflow to ameliorate Florida’s injuries even if all of the additional streamflow were to reach Florida at all times, it would be unnecessary to consider any possible modifications to the Master Manual. It would similarly be unnecessary to consider modifying the Master Manual if the Special Master were to conclude that a cap would produce enough additional streamflow to ameliorate Florida’s injuries without any further action by the Corps.

Whether it would be possible for the Corps to implement particular, as-yet-undefined modifications to the existing Master Manual that might provide redress to Florida, and the process, review, or congressional authorization any such modifications would require, are matters bearing on obvious interests of the United States. But those questions cannot be resolved within the bounds of this proceeding. Whether a particular modification to the Master Manual is reasonable is a matter

within the Corps' purview in the first instance. As the Supreme Court recognized, the Corps "must take account of a variety of circumstances and statutory obligations" before making a decision to modify the Master Manual, *Florida v. Georgia*, 585 U.S. ___, *slip op.* at 35, including required public involvement, *see, e.g.*, Eng'r Reg. 1110-2-240, at 1-2 (May 30, 2016) ("[W]ater control plans for projects owned and operated by [the Corps] shall be developed in concert with all basin interests which may be impacted by or influence project regulation, and public involvement in the development or significant revision of water control plans shall be provided for as required under this regulation."); *id.* at 5-2 ("Public involvement in the development or significant revision of water control plans, as well as certain deviations from those water control plans, is required under this regulation."); *see also* 42 U.S.C. 4332 (NEPA). The Corps' statutory and regulatory obligations reinforce the Court's observation that the Corps would attempt to accommodate a *final decree* if possible. *Florida v. Georgia*, 585 U.S. ___, *slip op.* at 34. Thus, the Court's opinion contemplates not a unilateral modification of the Master Manual by a decree from the Court, but instead that the Corps will consider modifications to the Master Manual to accommodate any consumption cap encompassed in a final decree to the extent necessary to effectuate the cap.

At this time, therefore, the United States does not expect to submit, *sua sponte*, further information bearing on remand issues. The United States has not, however, had the benefit of seeing the submission of the parties on further proceedings. The United States will examine the submissions of the parties in

response to Case Management Order 23 and will monitor all future proceedings and Case Management Orders to evaluate the specifics of its further participation as remand proceedings develop. To the extent the United States determines its participation in the briefing or arguments on motions or other proceedings is appropriate to address the interests of the United States and provide assistance to the Court, the United States anticipates participating as *amicus curiae*. Cf. Sup.Ct. R. 37(4).

CONCLUSION

At this time, the United States expects to monitor the remand proceedings and to participate as *amicus curiae* where necessary and appropriate to protect its interests. We do not expect federal participation to impose any undue burdens on the parties, and we are hopeful that the United States' participation will provide assistance to the Court in resolving this case.

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CERTIFICATE OF SERVICE

This is to certify that the foregoing United States' Statement of Continued Participation has been served this 2d day of October, 2018, in the manner specified below:

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