

SUPREME COURT OF THE UNITED STATES
No. 142, Original

STATE OF FLORIDA,)
)
 Plaintiff,)
)
 V.)
)
 STATE OF GEORGIA,)
)
 Defendants.)

ORAL ARGUMENT before SPECIAL MASTER

RALPH I. LANCASTER, held at the E. Barrett Prettyman
Courthouse, U. S. Court of Appeals, 333 Constitution
Avenue, NW, Washington, D.C., on June 2, 2015,
commencing at 9:30 a.m., before Claudette G. Mason, RMR,
CRR, a Notary Public in and for the State of Maine.

APPEARANCES:

For the State of Florida:

GREGORY G. GARRE, ESQ.
PHILIP J. PERRY, ESQ.
ALLEN C. WINSOR, ESQ.
CLAUDIA M. O'BRIEN, ESQ.
ABID R. QURESHI, ESQ.
JOHN S. COOPER, ESQ.
CHRISTOPHER M. KISE, ESQ.
THOMAS R. WILMOTH, ESQ.

For the State of Georgia:

CRAIG S. PRIMIS, P.C.
K. WINN ALLEN, ESQ.
BRITT GRANT, ESQ.
ANDREW PRUITT, ESQ.
SARAH HAWKINS WARREN, ESQ.
CHRISTOPHER LANDAU, P.C.
SAM OLENS, Georgia AG
RYAN TEAGUE, ESQ.
JUDSON TURNER, ESQ.
JOHN C. ALLEN, ESQ.

For the U.S.A.:

MICHAEL T. GRAY, ESQ.

Also Present:

JOSHUA D. DUNLAP, ESQ.

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PROCEEDINGS

SPECIAL MASTER LANCASTER: Be seated,
please.

Good morning, counsel.

MR. GARRE: Good morning.

MR. PRIMIS: Good morning.

SPECIAL MASTER LANCASTER: First, a
little housekeeping. Are the acoustics good?
Can you hear me all right?

Can you hear me back there?

Okay. There is no bailiff. I have
assumed, since we are a relatively civil
group, that we don't need one. But when
you're entering your appearances, if you
disagree and you want a bailiff, just let me
know; and the clerk will arrange for it.

With me today are my case manager,
Mr. Dunlap -- Josh Dunlap -- and our
extraordinary court reporter, Claudette
Mason.

I have instructed Claudette that if she
has any trouble hearing any of you, she's to
interrupt. So keep your voices up, please,
so that she can be sure she gets you on the

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1 record.

2 Now, with that, Georgia, appearances,
3 please.

4 MR. PRIMIS: Craig Primis from Kirkland &
5 Ellis for the State of Georgia.

6 MR. ALLEN: Winn Allen from Kirkland &
7 Ellis for the State of Georgia.

8 MS. GRANT: Britt Grant, Solicitor
9 General in the Office of the Georgia Attorney
10 General for the State of Georgia.

11 MR. PRUITT: Andrew Pruitt, Kirkland &
12 Ellis, for the State of Georgia.

13 SPECIAL MASTER LANCASTER: Mr. Primis,
14 do you want to introduce the other lawyers
15 from your side who are in the audience?

16 MR. PRIMIS: Certainly, your Honor.

17 From Kirkland & Ellis I have Sarah
18 Warren and Chris Landau sitting in the front
19 row. And then from the State of Georgia we
20 are honored to have the Attorney General, Sam
21 Olens. We have executive counsel to the
22 Governor, Ryan Teague. We have the head of
23 the Environmental Protection Division, Jud
24 Turner, and a colleague from the Attorney
25 General's Office, John Allen.

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1 SPECIAL MASTER LANCASTER: Thank you.
2 Florida?

3 MR. GARRE: Gregory Garre from Latham &
4 Watkins for the State of Florida.

5 MR. PERRY: Phil Perry from Latham &
6 Watkins for the State of Georgia -- I mean,
7 State of Florida.

8 MR. WINSOR: Good morning. I'm Allen
9 Winsor from the Florida Attorney General's
10 Office for Florida.

11 MR. GRAY: I'm Michael Gray for the
12 United States of America from the Department
13 of Justice.

14 SPECIAL MASTER LANCASTER: Thank you.
15 Would you like to introduce the other
16 lawyers who are here?

17 MR. GARRE: Thank you, yes.

18 Your Honor, Claudia O'Brien from Latham
19 & Watkins, State of Florida; Abid Qureshi
20 from Latham & Watkins, State of Florida; John
21 Cooper, Latham & Watkins, State of Florida.
22 And then back there we have Chris Kise, State
23 of Florida; and Tom Wilmoth.

24 SPECIAL MASTER LANCASTER: Welcome.
25 Welcome.

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1 Okay. If my memory is correct, we have
2 an hour for each side. And Florida has ceded
3 20 minutes to the United States.

4 MR. GARRE: Yes.

5 SPECIAL MASTER LANCASTER: First, let me
6 commend counsel on the quality of your
7 briefs. They're extraordinary for both
8 parties. I say that without hesitation.

9 I also suggest to you that not much will
10 be gained by simply repeating what is in the
11 briefs. So I would suggest that we probably
12 won't need an hour, but I have assigned it.
13 And if you want to use it, you can be my
14 guest. So -- but, again, both Josh and I
15 have read thoroughly and, I think, digested
16 what you have given us.

17 So with that, Mr. Primis?

18 MR. PRIMIS: Thank you, Special Master
19 Lancaster.

20 May it please the Court, prior to the
21 argument we distributed to counsel for
22 Georgia and the United States a map which we
23 thought may be useful as a reference during
24 the proceeding.

25 SPECIAL MASTER LANCASTER: Wonderful.

1 MR. PRIMIS: May I hand one to you as
2 well?

3 SPECIAL MASTER LANCASTER: Please.

4 Thank you.

5 MR. PRIMIS: I have also provided one to
6 Mr. Dunlap.

7 This map was taken from a Fish &
8 Wildlife Service publication, and we thought
9 it provided a helpful depiction of the
10 region.

11 With that, your Honor, we appreciate the
12 opportunity to be heard here today on this
13 important issue. The issue before the Court
14 is whether to proceed with an equitable
15 apportionment action where the United States
16 plays a critical role in regulating the flow
17 of water throughout the region, yet, refuses
18 to be enjoined.

19 The Supreme Court has emphasized that an
20 equitable apportionment action requires a
21 delicate balancing among sovereign interests.
22 The Court has said it requires the
23 consideration of all relevant factors to come
24 to a just and equitable solution. It's a
25 power the Court does not undertake lightly,

1 and it should only be undertaken in an
2 appropriate case. Because of the significant
3 role the U.S. plays in regulating the water
4 flow in this basin and its refusal to be
5 enjoined, this is not such a case.

6 The United States has conceded it is a
7 required party. It had to make that
8 concession. Any decree by this Court will
9 have an impact on Corps operations and the
10 Corps' interest in the ACF basin. Those
11 interests are defined by Congress, and they
12 require the Corps to serve numerous federal
13 purposes. The only just and equitable way --
14 and that's the test the Supreme Court applies
15 -- to redress Florida's alleged harm is to
16 include in that remedy both Georgia and the
17 United States.

18 And I want to pause for one moment there
19 to be clear. Georgia denies Florida's
20 allegation that Georgia has used more than
21 its fair share of water and that Georgia's
22 water use has caused Florida's alleged harms.
23 And in any equitable apportionment case,
24 Florida has a very high burden to obtain
25 relief. But on this motion, we're taking

1 their allegations as pled. And if they are
2 to obtain any relief in this case, both the
3 United States and Georgia will have to be
4 included in the solution. It is inconsistent
5 with the very nature of an equitable
6 apportionment remedy and action to completely
7 exclude one of the critical players from the
8 solution at the outset of the case.

9 The problem then is that the United
10 States is not a party to the case. It can't
11 be enjoined against its will. And it has
12 declared that it will not waive its sovereign
13 immunity. So to avoid this fundamental
14 problem, Florida would have the Court tie its
15 hands and take a key remedy, the most obvious
16 remedy, completely off the table. That
17 remedy is a state line flow of a certain
18 amount of water at specified times when
19 Florida needs it. It's the most obvious way
20 to address Florida's alleged harm, which
21 Florida itself has identified repeatedly as
22 lower flows coming into Apalachicola River
23 during seasonal low flow or drought
24 conditions.

25 But Florida repudiates that most obvious

1 form of relief and, instead, seeks to impose
2 a highly prejudicial 1992 cap on Georgia's
3 consumption. Florida does this because it
4 knows that any remedy that requires or
5 contemplates a certain amount of water coming
6 through Woodruff Dam into Florida will
7 require an Order binding the United States.
8 But Florida's approach is completely
9 inconsistent with the fundamental notion of
10 an equitable apportionment. It ignores the
11 basic proposition that in an equitable
12 apportionment case, the Court can and, in
13 fact, must consider all relevant factors to
14 find a just and equitable solution.

15 In these circumstances, Florida is not
16 seeking an equitable apportionment, at least
17 not as recognized by the Supreme Court. It's
18 trying to gerrymander an outcome to avoid the
19 required party problem. And it does so while
20 ignoring the institutional interests of this
21 Court by excluding a key party who has the
22 levers to help solve any problem that they
23 have identified and by disclaiming the most
24 obvious remedy for its alleged harm. It's
25 Florida, not Georgia, that has created the

1 grounds for dismissal of its case.

2 And with that introduction, I would like
3 to turn to the two issues on which this
4 motion turns.

5 SPECIAL MASTER LANCASTER: Mr. Primis --

6 MR. PRIMIS: Yes, sir?

7 SPECIAL MASTER LANCASTER: -- before you
8 do that, what types of relief are available
9 in an equitable apportionment matter?

10 MR. PRIMIS: Well, the Court sits in
11 equity; and the Court is entitled to find any
12 just and equitable solution considering all
13 relevant factors. That's from Colorado
14 versus New Mexico.

15 SPECIAL MASTER LANCASTER: So we're not
16 bound then -- the Court is not bound then by
17 Georgia's prayer for -- Florida's prayer for
18 relief?

19 MR. PRIMIS: Well, Florida's prayer for
20 relief is -- well, the Court should not be
21 bound by Florida's prayer for relief. But
22 Florida's prayer for relief has two elements
23 to it. The first is it seeks an equitable
24 apportionment, which would put all remedies
25 on the table. The second is the notion of

1 the 1992 cap which, in their briefing, sounds
2 like that's the only thing that they're
3 seeking; and they have repudiated everything
4 else.

5 Now, if the Court is not going to limit
6 the relief in that way, it's clear that the
7 United States has to be involved in this
8 because any other remedy that has water
9 flowing through the five federal dams up and
10 down the Chattahoochee and that impound the
11 Flint and the Chattahoochee to the south will
12 be affected by the amount of water flowing
13 through and have federal duties that have to
14 be balanced with what Florida is seeking
15 here.

16 SPECIAL MASTER LANCASTER: How does
17 Rule 54(c) come into play here?

18 MR. PRIMIS: I'm sorry, your Honor?

19 SPECIAL MASTER LANCASTER: 54(c), I
20 think -- I don't have my book with me; but I
21 think that 54(c) says that I'm not bound --
22 the Court -- forgive me, the Court is not
23 bound by the prayer for relief.

24 MR. PRIMIS: Well, your Honor, if I
25 understand your question correctly, if the

1 Court is not bound by -- we agree that the
2 Court is not bound by Florida's prayer for
3 relief. The Court -- and that's the problem
4 we have and why we brought this motion
5 because in an equitable apportionment where
6 the Court is going to look at all the
7 relevant factors, all of the evidence, the
8 role of the United States, the impact that
9 these dams and reservoirs play on the flow of
10 water throughout the region and the impact on
11 the Apalachicola River and bay, the Court --
12 if Florida is able to meet its substantial
13 burden, the Court would then craft an
14 equitable remedy that would use all the
15 levers available in this basin to redress
16 their harm. And the redress has to be tied
17 somehow to the harm.

18 The harm here is alleged impact on
19 wildlife due to low flows during drought
20 periods. And the United States is central to
21 the management of water under those
22 conditions.

23 So if Florida is not able to limit the
24 Court's relief -- and we strongly oppose the
25 notion that they are -- then the United

1 States -- it's even clearer that the United
2 States has to be involved in this case
3 because they're critical to any solution that
4 the Corps may work.

5 SPECIAL MASTER LANCASTER: Thank you.
6 Sorry to interrupt.

7 MR. PRIMIS: Oh, no. Please.

8 So as I noted, the form of relief that's
9 the most obvious is this state line flow
10 which Florida repudiates for tactical
11 reasons.

12 But the reason that the United States is
13 so central here is not just that it has five
14 dams along the Chattahoochee River, but that
15 it operates those dams, in Florida's words in
16 their complaint, as a unified whole. So
17 water that is impounded at Lake Lanier, north
18 of Atlanta, is used to supplement flows all
19 the way down the river. And the fact that
20 the Corps has to balance all these federal
21 purposes, looking at the water supply as a
22 whole, makes them critical to any solution
23 that results in more water flowing through
24 the final dam, that being the Woodruff Dam at
25 Lake Seminole.

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1 As Florida puts it in its complaint,
2 that dams and reservoirs are managed by the
3 United States as a unified whole to achieve
4 multiple project purposes; whereas, the
5 Government put it in its Fish & Wildlife 2012
6 biop, the Corps operates the ACF reservoirs
7 as a system, and releases from Woodruff Dam
8 reflect the downstream end result of
9 system-wide operations.

10 Now, one factor that we do want to
11 emphasize today is that one of the federal
12 purposes -- and I assume the Court is
13 familiar with the various federal purposes,
14 navigation, flood control, fish and wildlife;
15 but one of the federal purposes is water
16 supply. And the 11th Circuit in the tristate
17 litigation in 2011 held that water supply for
18 metropolitan Atlanta is one of the federal
19 purposes mandated by federal law. The quote
20 from that case at 644 F.3d at 1190 is that
21 Congress is focused on the need to ensure
22 that the Atlanta area's water supply serves
23 as strong evidence of the primary role given
24 to water supply in the project. In light of
25 that finding, the 11th Circuit held that the

1 Army Corps has a statutory obligation as a
2 matter of federal law to address Atlanta's
3 water supply.

4 So the federal and state involvement
5 here cannot be separated in the way Florida
6 suggests. Under federal law, as we speak,
7 the United States Army Corps of Engineers is
8 evaluating what water supply to give to
9 Atlanta out of Lake Lanier and out of the
10 Chattahoochee River. Florida would have this
11 Court mandate different amounts of water use
12 by Atlanta taking it back to 1992.

13 Those are conflicting and cannot be
14 separated. The United States Army Corps
15 needs to be involved to determine how much
16 water Atlanta can receive and how much water
17 will flow down the Chattahoochee River
18 ultimately making its way into Florida.

19 These facts together make the United
20 States a required party under 19(a). The
21 dams and the reservoirs are operated together
22 as an integrated whole to deliver different
23 amounts of water to different parts of the
24 basin at different times of the year.

25 And I do want to focus on that last

1 point just for a minute. We're not just
2 talking about the volume of water, but it's
3 also the timing of water. And that's a
4 critical factor here because these dams
5 impound substantial amounts of water,
6 millions of -- millions and millions of
7 gallons of water and millions of acres of
8 storage.

9 SPECIAL MASTER LANCASTER: Is the Flint
10 River regulated by the Corps?

11 MR. PRIMIS: The Flint River is
12 unregulated by the Corps with a couple of
13 caveats or asterisks I would put on that.
14 The flows from the Flint River are calculated
15 as part of the Corps' overall management of
16 the dams and reservoirs on the Chattahoochee
17 River, and so it does play a factor. And
18 additional water on the Flint does not
19 necessarily mean additional water to Florida.
20 It may mean additional water that's impounded
21 up north for various federal purposes.

22 The second point is that the Flint
23 merges with the Chattahoochee at the Florida/
24 Georgia line. And the river is impounded at
25 that point. It flows into Woodruff Dam and

1 is impounded at Lake Seminole.

2 SPECIAL MASTER LANCASTER: Isn't
3 Woodruff a flow-through facility?

4 MR. PRIMIS: At times of the year it is.
5 But there is a lake -- and you can see it on
6 the map -- Lake Seminole. It doesn't have
7 substantial storage, but it has some storage.
8 And when flows are low or in times of
9 drought, the water there needs to be
10 supplemented by water from the Chattahoochee
11 River. And those flows come either from the
12 Lake Lanier or West Point Lake and flow
13 south. So it is managed as an integrated
14 whole. While you don't have the same dam and
15 reservoir system on the Flint as you do on
16 the Chattahoochee, there is a dam at the end
17 of the Flint; and it's integrated into the
18 entire ACF Basin system.

19 So the timing issue is critical because,
20 as you look at the complaint from Florida,
21 they do complain about low flows. And they
22 complain in particular about times of drought
23 and seasonal low flows. And that is when the
24 Army Corps' influence in the basin is at its
25 zenith. That's when all that water that is

1 impounded north of Atlanta and Lake Lanier
2 and by the West Point Dam needs to be
3 released and allowed to flow down to achieve
4 various federal purposes resulting in more
5 flow to Florida.

6 Given the United States' admission that
7 it's a required party, then the issue that
8 has really been enjoined here is whether in
9 equity and good conscience the case should
10 proceed in the absence of the United States.
11 And Georgia submits that it should be
12 dismissed now for two principal reasons.
13 First, the United States is essential to
14 crafting any meaningful remedy for Florida's
15 alleged harms; and, second, Florida's
16 pleading to keep the United States out of the
17 case creates significant prejudice for
18 Georgia and really undermines the nature of
19 an equitable apportionment action.

20 With regard to the remedy, I just want
21 to take a quick step back and focus on what
22 Florida will need to prove to obtain any
23 remedy in this case. As the Supreme Court
24 said in Idaho versus Oregon, a state seeking
25 equitable apportionment under our Original

1 jurisdiction must prove by clear and
2 convincing evidence some real and substantial
3 injury or damage. That's a high burden.

4 And when we look at the complaint to
5 find out what Florida's grievance is, it's
6 inadequate flows from Georgia through the
7 Woodruff Dam, which is operated by the Army
8 Corps of Engineers. That alone should be
9 enough to require bringing the United States
10 into the remedy. It's the lever that
11 controls what water flows down the
12 Chattahoochee and through Woodruff Dam, and
13 it makes absolutely no sense to exclude them
14 from the outset. To the contrary, if the
15 Corps wants to ensure that Florida gets the
16 water it seeks here, the Corps has to be
17 involved in that solution. And this is not
18 news to Florida or any of the players
19 involved in this.

20 It's notable that Florida has picked
21 1992 as the date at which it wants to go back
22 and cap Georgia's use. In 1992 Florida and
23 Georgia entered into a Memorandum of
24 Agreement to engage in a comprehensive study
25 of water use in the region. Florida alleges

1 that in paragraph 9 of its complaint. What
2 Florida left out of paragraph 9 of its
3 complaint is that the Army Corps was a party
4 to the 1992 Memorandum of Agreement. In
5 other words, the Army Corps was involved in
6 forging the agreement and was a party to the
7 agreement that Florida now just used to
8 justify its cap request.

9 And then in 1997 as a result of that
10 initial Memorandum of Agreement, Florida and
11 Georgia entered into an ACF Compact, right?
12 And the Corps was, once again, included as a
13 party to that. The Corps sat on the ACF
14 Commission. The United States had input into
15 decision making. It had a -- it was able to
16 veto what was proposed by the three states to
17 that Compact.

18 So if we ironically look back at the
19 1992 agreement that Florida bases its relief
20 on, the Army Corps was involved. The Army
21 Corps was involved when there was a Compact.
22 This new approach to exclude the Army Corps
23 is driven solely by the need to avoid this
24 required party problem.

25 With regard to prejudice, we do want to

1 underscore how prejudicial what Florida is
2 proposing is to Georgia. Now, if the Court
3 were to determine that Florida's pleading of
4 its relief is not binding and that it is not
5 going to have its hand tied in terms of
6 relief, then the case, as I said, should be
7 dismissed because the United States would
8 clearly be necessary and indispensable.

9 But just to indulge the argument for a
10 moment, if Florida is allowed to proceed in
11 the fashion it has identified, they are
12 picking a highly prejudicial form of relief
13 to Georgia. This is an equitable
14 apportionment case, and that animates the
15 entire analysis. It informs the Rule 19
16 analysis. And if we focus on all relevant
17 factors necessary to secure a just and
18 equitable allocation, it's clear that by
19 eliminating the most obvious forms of relief,
20 by eliminating the principal lever to deliver
21 more water --

22 SPECIAL MASTER LANCASTER: Excuse me.

23 MR. PRIMIS: Yes?

24 SPECIAL MASTER LANCASTER: That's why I
25 asked you about Rule 54(c), because I -- as I

1 read the rule, I am not bound by their prayer
2 for relief. So I'm not bound by the
3 consumption cap.

4 MR. PRIMIS: I understand, your Honor.

5 Then if -- all I was trying to
6 underscore was the inconsistency with the
7 notion of an equitable apportionment action
8 to proceed the way they have suggested. But
9 if the Court is not bound, then it brings me
10 back to my principal argument, which is that
11 in these circumstances if the Court is, in
12 fact, going to indulge all potential
13 solutions, we submit the case needs to be
14 dismissed because we cannot proceed without a
15 critical player that is animated by federal
16 purposes, that is involved in both the flow
17 of water into Florida under the Endangered
18 Species Act at certain levels, that is
19 focused on and mandated to look at Atlanta's
20 water supply, all of these issues that are in
21 play in this case, are currently being
22 evaluated and updated and changed by the Army
23 Corps. And we need to have the Army Corps
24 bound and involved in any solution if Florida
25 is able to obtain any redress for its

1 grievances.

2 I'll reserve the balance of my time
3 unless the Court has any further questions.

4 SPECIAL MASTER LANCASTER: No, that's
5 fine. Thank you very much.

6 MR. PRIMIS: Thank you, your Honor.

7 MR. GARRE: Thank you, your Honor, and
8 good morning.

9 SPECIAL MASTER LANCASTER: Good morning.

10 MR. GARRE: Your Honor, Georgia has not
11 met the heavy burden that it must meet to
12 secure dismissal of this case at the very
13 outset. Much of what you have just heard,
14 No. 1, goes to the merits of the equitable
15 apportionment action that will be tried
16 before this Court after hearing from experts
17 on both sides about the impact of the
18 reduction of Georgia's consumption of water
19 that Florida seeks on the harm that Florida
20 is suffering today and will continue to
21 suffer in the future, the ecological,
22 environmental, and economic harm caused by
23 Georgia's increasing consumption of water
24 upstream. And, secondly, much of what you
25 have just heard is precisely the same

1 arguments that Georgia made to the Supreme
2 Court just months ago urging the Court not to
3 allow this case to proceed at all.

4 Now, if I can go to address Georgia's
5 arguments in more depth here, No. 1, let me
6 begin with the remedy. The remedy that
7 Florida is seeking in this case is a -- is an
8 equitable apportionment of the resource,
9 water, that both Florida and Georgia share.
10 They're seeking a cap -- Florida is seeking a
11 cap on Georgia's consumption of water which
12 is going to result in more water flowing into
13 Florida and redressing the harms that Florida
14 complains about. I think that --

15 SPECIAL MASTER LANCASTER: Let me ask
16 you the same question I asked Mr. Primis.
17 What's your interpretation of Rule 54(c)?

18 MR. GARRE: Your Honor, I'm going to
19 confess that I have not studied that rule for
20 this hearing; so I don't want to speak
21 definitively on it. But what I would say is
22 this; I think the Court's -- the Supreme
23 Court's decision in Idaho versus Oregon
24 speaks almost directly to the situation of
25 whether -- of how the way in which Florida

1 has crafted its complaint should bear on the
2 question of whether the action should be
3 dismissed for failure to enjoin the United
4 States. In the Idaho versus Oregon case,
5 your Honor, that dealt with an equitable
6 apportionment action concerning the resource
7 of fish, as opposed to water in this case.
8 And in that case, Idaho, like Florida here,
9 chose not to seek relief with respect to the
10 operation of the dams that the fish had to
11 cross to get from Idaho -- from Oregon to
12 Idaho. Instead, Idaho, like Florida here,
13 sought an equitable apportionment of the
14 resource.

15 And what the Supreme Court said in
16 denying -- in holding that the Special Master
17 should deny the motion to dismiss for failure
18 to enjoin the United States was, quote -- and
19 this is on page 392 of the decision --
20 Idaho's narrow complaint is a two-edged
21 sword. It has sidestepped the need to enjoin
22 the United States as a party by seeking only
23 a share of the fish now being caught by
24 nontreaty fishermen in Oregon and Washington,
25 but it now must bear the burden of proving

1 its case.

2 And Florida is in the exact same
3 position here. Florida is not seeking any
4 relief whatsoever with respect to the
5 operations of the dams, just like Idaho did
6 not in the Idaho case. Florida is not
7 seeking a minimum flow regime at the Woodruff
8 Dam at the border. It's not seeking any
9 relief asking the Corps to control the dams
10 or pull the levers in any specific way.
11 Florida is seeking a reduction in the
12 consumption of Georgia's -- Georgia's
13 consumption of water.

14 And that is critical because any water
15 that Georgia has consumed is water that is
16 never going to reach Florida. It's water
17 that is never going to reach the Corps' dams.
18 And the premise of Georgia's case before you
19 today is that the only way that Florida can
20 secure relief is through relief with respect
21 to the operations of the dams. And that's
22 just -- that's just flat wrong.

23 Intuitively we can all accept -- and I
24 think even Georgia has to acknowledge to some
25 degree -- that any consumption of water by

1 Georgia is water that will never reach
2 Florida. And then -- and so then one must
3 confront Georgia's argument, well, the water
4 has to flow through the Woodruff Dam before
5 it reaches Florida. Well, that argument
6 fails in a number of different respects.

7 First, let's take the Flint River, one
8 of the two major waterways at issue before
9 the Court. And the Court can see it on the
10 map before you. The Flint River -- the
11 capping the depletions on the Flint River
12 itself, a river that is entirely unregulated
13 by the Corps, as my friend just acknowledged,
14 in itself could redress Florida's harms.
15 That is to say that the additional water
16 flowing into Florida as a result of
17 depletions -- capping depletions on the Flint
18 River could -- may, in itself, be able to
19 redress Florida's harms. Our experts at
20 trial will address that.

21 Now, Georgia's response is, well, wait.
22 The water still has to flow through Woodruff.
23 And the answer to that is precisely what your
24 Honor recognized. Woodruff is a pass-through
25 facility. It has, as my friend conceded, not

1 substantial, not significant storage
2 capacity.

3 What that means is that water reaching
4 Woodruff is water that is going to go through
5 Woodruff. It's a pass-through facility.
6 Georgia has acknowledged that. The Corps has
7 explained that to the Court.

8 So then --

9 SPECIAL MASTER LANCASTER: Is it
10 Florida's position that if I -- on behalf of
11 the Court, after we actually have some
12 evidence in, because we don't at this stage,
13 if I found that a consumption cap was not the
14 proper remedy, that I should dismiss the
15 action?

16 MR. GARRE: Well, I think what your
17 Honor -- well, No. 1, there are three facets
18 to the relief. I would answer the question
19 one is the equitable apportionment; one is
20 the cap; and the other is the appropriate
21 relief. But I think, ultimately, if you
22 conclude after a trial that caps on
23 consumption will not redress Florida's harm,
24 then Florida will not have proved its case.
25 I think fundamentally that's an issue that

1 goes to the merits whether Florida has met
2 its burden.

3 We recognize we have a burden. We're
4 asking for the opportunity to put that case
5 on at a trial.

6 SPECIAL MASTER LANCASTER: But if I
7 found, after the evidence was in, that a
8 minimum flow requirement made more sense than
9 a consumption cap, would Florida not be happy
10 with that result?

11 MR. GARRE: Well, your Honor, of course,
12 Florida would be happy with relief that would
13 redress its harm; but I don't want to back
14 away from the complaint that the Court --
15 Florida has brought to the Court, which is
16 fundamentally a complaint about seeking a
17 reduction of Georgia's consumption.

18 Now, there is a relationship ultimately
19 between water flowing through the Corps'
20 facilities and the relief that Florida seeks.
21 We have to recognize that. But what this
22 means is not calibrating any specific minimum
23 flow regime which is going to require the
24 Corps to pull the levers in any particular
25 way to let the water pass through. What it

1 means is more water coming into the system is
2 going to result in greater flows at Woodruff
3 as well as all along the waterways of the
4 Flint and the Chattahoochee. And more water
5 into the system is going to result in fewer
6 days in which the Apalachicola Basin is in
7 the red, the days where the flows are so
8 low -- this is in the summer and fall months
9 where the real harm is being done in the
10 region. And more water in the system is
11 going to reduce the frequency, severity, and
12 duration of that red zone period and,
13 therefore, redress Florida's harms.

14 That's what our experts are going to
15 show at a trial, your Honor. We're entitled
16 to put on that case.

17 And, again, much of Georgia's argument
18 before the Court today really goes to the
19 merits of whether Florida can prove that the
20 reduction in consumption that it seeks is
21 going to redress the harms that it's
22 suffering in Florida today and it's going to
23 continue to suffer in the future as Georgia's
24 water consumption, by its own admission,
25 doubles by the year 2040. That's an issue

1 that goes to the merits.

2 And we're prepared to meet our burden,
3 your Honor; but that will entail presenting
4 expert testimony to you. That would entail
5 you hearing the evidence and then deciding
6 whether we're entitled to the relief that we
7 seek.

8 SPECIAL MASTER LANCASTER: But you're
9 not suggesting that I'm bound by your prayer
10 for relief?

11 MR. GARRE: Well, your Honor, I must
12 confess that the notion that a Court could
13 grant relief that the parties hadn't
14 requested and that the parties specifically
15 and essentially had disavowed, we have made
16 very clear we're not seeking a minimum flow
17 regime operation of the Corps. I think it's
18 a little bit surprising. But we're prepared
19 to prove the case that we have made. I think
20 this Court is not going to be in a position
21 to assess what relief is appropriate until
22 the end of the day.

23 I think as Rule 19 contemplates, I think
24 ultimately the Court can and should shape the
25 relief in a way that will not interfere with

1 the Corps operations. It may be that at the
2 end of the case after we have had a trial and
3 we see the evidence from both sides and even
4 input from the United States as amicus that
5 the relief will come into sharper focus; but
6 I don't think any of us are in a position to
7 know precisely what the nature of the case is
8 going to look like after a trial today.

9 SPECIAL MASTER LANCASTER: And I'm not
10 suggesting that. I'm just pressing you on
11 54(c), which is perhaps unfair. But take a
12 look at it when you're finished.

13 MR. GARRE: Your Honor, I will. And
14 I'll be happy to submit a short response to
15 that if your Honor would permit it.

16 But I think, you know, if your Honor
17 concludes that you have the authority to
18 grant additional relief, then let me submit
19 today that that would provide no basis for
20 dismissing this action and denying Florida an
21 opportunity to prove that it's entitled to
22 the relief that it seeks.

23 And, again, ultimately I think we can
24 all agree that the -- if Florida proves its
25 case, your Honor would be in a position to

1 and ought to shape the decree in a way that
2 would avoid impact to the United States. The
3 Corps has come before you in the briefing and
4 has suggested that we would be willing to
5 work with the Corps if we got to that point
6 in shaping a relief that would eliminate the
7 need to impact Corps operation. So I think,
8 you know, ultimately we're not going to be in
9 a position to resolve that until following a
10 trial.

11 But, today, I think the Court is in the
12 same position that the Supreme Court was, the
13 Special Master was, in the Idaho versus
14 Oregon case. And in that case -- and that
15 was a case where the United States was urging
16 the Supreme Court and the Special Master to
17 actually dismiss for failure to enjoin it
18 because it did operate the eight dams on the
19 Snake River and the Columbia River in the
20 Idaho case. And the Special Master granted
21 that motion. The Supreme Court reversed,
22 concluding that the United States was not an
23 indispensable party in that action because of
24 the way in which Idaho had framed its
25 complaint to seek only an equitable

1 apportionment.

2 Now, in this case the United States is
3 here supporting Florida in its position that
4 the United States ultimately is not an
5 indispensable party. I'll tell you that
6 we're not aware of a single case in which the
7 Special Master or, frankly, another Court has
8 held that the United States is an
9 indispensable party over the United States'
10 own position that it is not an indispensable
11 party. And I think that that would be truly
12 an extraordinary conclusion to reach.

13 We talked a little bit about the Flint
14 River. I would like to emphasize that
15 because it's the -- it's the 500-pound
16 gorilla that Georgia does not want to talk
17 about today. It's one of the two waterways
18 at issue. It in itself may provide Florida
19 the relief that it seeks.

20 Again, Georgia's response is, No. 1,
21 that the Corps can still impound water at
22 Woodruff. And that fails because Woodruff is
23 a pass-through facility with insignificant
24 storage capacity.

25 Georgia's other response is that the

1 more water is coming in through the Flint,
2 then the Corps is going to use more water
3 upstream on the Chattahoochee. And I think
4 most telling on that is the United States'
5 response on page 3 and 19 of its brief where
6 it says that that's speculation, i.e., that
7 the Corps will use additional water coming in
8 from the Flint upstream on the Chattahoochee
9 is, in the United States' words, entirely
10 unfounded.

11 And, again, that's another reason why
12 Georgia has failed to present a sufficient
13 case today to meet its heavy burden that this
14 case should be dismissed at the very outset.

15 At a trial, Georgia is entitled to put
16 on a defense that the increased -- that the
17 limits on depletions and consumption that
18 Florida seeks on the Flint, which is where
19 uses are fundamentally irrigation; and those
20 irrigation uses are at their heart in the
21 summer months leading into the red zone
22 period that we have talked about. Georgia is
23 entitled to put on a defense and say that
24 limiting its increasing consumption of water
25 is not going to redress Florida's harm, which

1 is tied directly to the decrease in water
2 flowing into this ecological treasure, the
3 Apalachicola Basin. Georgia could put on
4 that defense, but that's a defense for trial.
5 It goes to the merits of whether or not
6 Florida has made its case that Georgia's
7 increasing consumption has caused the injury
8 that Florida has complained about. It's not
9 a basis for this Court to dismiss this action
10 at the very outset.

11 Georgia -- my friend from Georgia
12 referred to the master manual, which is being
13 subject to revision. Of course, that was the
14 essence of the United States' suggestion to
15 the Supreme Court a few months ago that this
16 case should not proceed. The Supreme Court
17 overlooked that and this Court should, too.

18 Fundamentally, nothing that the Corps
19 says in the master manual is going to impact
20 Georgia's consumption of water in the first
21 place. And the reason that is is that, as
22 the United States and even Georgia concedes,
23 the United States does not own the water in
24 the Chattahoochee or the Flint. It does not
25 appropriate the water. It doesn't have the

1 authority to apportion the water.

2 And in that respect, this case is
3 fundamentally unlike Arizona versus Colorado,
4 the principal Supreme Court case that Georgia
5 relies upon. In Arizona versus Colorado,
6 that dealt with the fight over water in the
7 Colorado River Basin. All of the water in
8 that basin was appropriated to federal uses.
9 And that meant, as the Supreme Court said in
10 its decision in that case, that it was
11 impossible for the Court to grant relief in
12 that case without involving the Corps because
13 any new apportionment of the water in the
14 Colorado River Basin necessarily was going to
15 require the Corps to rejigger the contracts
16 appropriating the use of that water. And
17 that's why this case is fundamentally
18 different from Arizona versus Colorado. The
19 Corps does not own, does not apportion --
20 have the authority to apportion the water in
21 the Chattahoochee, much less the Flint River.

22 And so this Court can grant the relief
23 that Florida seeks of capping Georgia's
24 consumption of water without involving the
25 Corps in any way.

1 I think I would conclude, your Honor,
2 just by stressing the harms that Florida
3 faces and the reason why Florida brought this
4 action. There was much litigation that
5 preceded this case, administrative litigation
6 against the Corps and involving other parties
7 in which Florida was complaining about
8 similar harms, but was told time and again
9 the real complaint, what you really need to
10 be seeking is an equitable apportionment of
11 the water. And the way to get that and the
12 only way to get that is go to the Supreme
13 Court, file an Original action; and that's
14 where you should seek your relief.

15 And when it comes to equity and good
16 conscience and whether this action should
17 proceed, I really think it would be the
18 height of inequity to permit Georgia to do as
19 it has done thus far is to complain in the
20 other administrative actions that the place
21 Florida should go to get relief is an
22 equitable apportionment action with the
23 Supreme Court, and then come to find out that
24 the Supreme Court correctly allows this
25 action to proceed only to have Georgia say

1 that Florida's real relief and secure relief
2 is in an administrative action challenging
3 particular actions of the Corps or other
4 federal entities.

5 That's not what this case is about, your
6 Honor. This case is about an equitable
7 apportionment of the resource. It's about
8 Florida's attempt to save the economy,
9 ecology, and environment of a treasured
10 region, not only in Florida, of this country.

11 The Supreme Court allowed this action to
12 proceed. Georgia has provided no basis for
13 this Court to conclude that it's met its
14 admittedly high burden of establishing that
15 the action should be dismissed at the very
16 outset before Florida has had an opportunity
17 to prove its case.

18 Thank you, your Honor.

19 SPECIAL MASTER LANCASTER: Thank you
20 very much.

21 The United States?

22 MR. GRAY: Good morning, your Honor.

23 SPECIAL MASTER LANCASTER: Good morning.

24 MR. GRAY: May it please the Court, it's
25 our position that Georgia's motion to dismiss

1 for failure to enjoin the United States
2 should be denied because while the United
3 States is a required party, it remains
4 possible that the Court would be able to
5 provide adequate relief to Florida while
6 shaping the judgment so as not to prejudice
7 the interests of the United States.

8 I think I'll start with the question of
9 whether you are bound by the complaint and
10 the relief that the complaint seeks. And I
11 think that you are not bound and that the
12 complaint itself seeks broader relief than
13 just the consumption cap. I think that's why
14 the United States is a required party here.
15 But I don't think that that means that the
16 case ought to be dismissed.

17 What you are constrained by is Rule 19
18 and a failure to enjoin the United States.
19 And the relief of a -- of a minimum flow
20 requirement, as we have described, may have a
21 power to impede the United States' interest
22 in the basin as a practical matter. So I do
23 not think under Rule 19 that relief would be
24 available.

25 And Rule 19 is a flexible doctrine. And

1 the Courts have gone to great lengths to
2 provide relief without dismissing a case that
3 would impair a nonparty's interest even to
4 the extent of, for example, revising
5 judgments after they have been entered and it
6 becomes clear that -- that the judgment would
7 prejudice a nonparty's interest.

8 So I think you take the flexibility
9 inherent in Rule 19 and the flexibility that
10 is inherent in an equitable apportionment
11 action, and you combine the two with what
12 Florida says in its papers that it's seeking,
13 which is a consumption cap, and the case
14 begins to look a lot like the Idaho V. Oregon
15 case.

16 And I do think that most of the
17 objections that Georgia has made at this
18 point really do go to the merits. And the
19 last passage of the Idaho V. Oregon case
20 quoted by Mr. Garre is the correct way to
21 look at this. Florida is entitled to file a
22 complaint that seeks narrow relief; but it's
23 a double-edged sword, as the Court said,
24 because it makes the case harder to prove.
25 And in Idaho V. Oregon, Idaho wasn't able to

1 prove its case.

2 But I do think that our position is that
3 those considerations go to the merits of the
4 case and not to dismissal at this point in
5 time.

6 SPECIAL MASTER LANCASTER: Can complete
7 relief be afforded to Florida absent the
8 U.S.?

9 MR. GRAY: I believe so. I think it's
10 probably so because the relief that they seek
11 is directed against Georgia. They seek no
12 relief against the United States. They do
13 not try to enjoin the United States to
14 operate in any way. And so I believe that if
15 Florida is able to prove its case that it is
16 harmed by Georgia's consumption and that a
17 cap on Georgia's consumption will remedy the
18 harm, then it will have complete relief
19 vis-a-vis Georgia.

20 Now, if -- Georgia may well be correct
21 that Florida will not be able to prove its
22 case. And at that point, judgment should
23 enter in Georgia's favor just as in the
24 Idaho V. Oregon case. But that's not a
25 reason to prevent the case from going forward

1 at the outset.

2 SPECIAL MASTER LANCASTER: Would a
3 consumption cap order avoid prejudice to the
4 United States?

5 MR. GRAY: We believe so. And we -- and
6 we -- of course, it's hard to know exactly at
7 this point in the proceedings what that Order
8 would look like or how the case might morph
9 between now and when such an Order is issued.
10 And we would use our amicus participation to
11 help advise the Court on whether there is
12 prejudice. But at this point in time, as we
13 said, because it does not seek any action by
14 the Corps or by the United States in any way
15 to implement, we believe that it would not
16 prejudice the United States' interests.

17 And I'll give -- I do think that its
18 merits -- it is our position that it's a
19 merits question. But by doing it, it would
20 be helpful to give you one example of how a
21 consumption cap might result in more water
22 under some conditions; and that's if you --
23 if you look at Buford and West Point Dams,
24 they both are flood -- part of their purposes
25 is flood control. And you maintain flood

1 control purpose by maintaining empty space on
2 the reservoir. So at Buford, they maintain
3 the reservoir during the winter at 1,070 feet
4 of elevation; and at West Point, I believe
5 it's 628 feet of elevation. And they
6 maintain that lake level, and they release
7 water that comes in above that level. So
8 if -- if the -- if the top of the
9 conservation pool is being held at that level
10 to preserve the flood storage space and a
11 consumption cap causes the water inflows to
12 increase, that water is going to be released
13 by the Corps.

14 And I think that's just one example, in
15 addition to the Flint, which has been
16 discussed greatly, about how it might work.

17 And so at this point in the proceedings,
18 we do not think that it would be impossible
19 for Florida to prove its case. But as the
20 Court said in the Idaho case, it's chosen to
21 go narrowly; and I think it will have to live
22 with that choice.

23 If there is nothing else, I think that's
24 all for the United States.

25 SPECIAL MASTER LANCASTER: Thank you

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1 very much.

2 MR. GRAY: Thank you.

3 SPECIAL MASTER LANCASTER: Mr. Primis?

4 MR. PRIMIS: Thank you, Special Master
5 Lancaster.

6 I heard Mr. Garre to say that Florida is
7 not seeking a flow; it's just seeking a
8 reduction in consumption by Georgia. But
9 there is no such thing as a cap cause of
10 action under the Supreme Court's doctrine.
11 It's an Equitable Apportionment Doctrine.
12 And if we go back to the first principles of
13 equitable apportionment and look at how it
14 has unfolded over the years, it's clear that
15 the Court is not to be limited. The Court is
16 to look at all of the evidence. It's to have
17 before it all the players who are going to
18 play a role in solving the problem if the
19 burden can be met. And Florida confirmed
20 here today that that's not what they're
21 seeking. They're not seeking an equitable
22 apportionment as it's known to the Supreme
23 Court. And we don't need evidence to know
24 that the full panoply of relief is not before
25 the Court if we proceed along the lines that

1 Florida and the Army Corps are suggesting
2 without the Corps as a party.

3 I did want to respond to the point that
4 this has already been argued to the Supreme
5 Court and resolved by the Supreme Court. Not
6 so. The issue of whether the United States
7 is a required party has never been briefed to
8 the United States Supreme Court; and none of
9 the prior briefing ever addressed whether --
10 addressed the situation where the U.S.
11 invoked sovereign immunity and refuses to be
12 bound. So that issue is squarely before the
13 Court, never before briefed or resolved.

14 And if the U.S. would just join the case
15 and agree to be bound, we wouldn't have these
16 fundamental problems. We wouldn't have
17 Florida struggling to create a case where
18 they gerrymander relief that seems
19 counterintuitive. We wouldn't have the
20 United States taking the very odd position
21 that the case may or may not be able to just
22 proceed, and they will just wait and see and
23 come back and tell you later. That's not the
24 way that this is supposed to work, and it's
25 not the way that an equitable apportionment

1 action should be -- should proceed.

2 With regard to the cases cited, I would
3 just simply note that in Idaho versus Oregon,
4 it could not be a more different situation.
5 The United States didn't have any federal
6 purposes in impounding and storing fish.
7 They didn't need to release fish
8 strategically at certain times of the year to
9 ensure that people got fish. That's the
10 situation we have in the basin in Georgia and
11 Florida.

12 And while it's true that the United
13 States doesn't own the water, the United
14 States and Georgia and Florida and the ACF
15 Basin has mandated federal statutory
16 responsibilities that don't give them
17 discretion -- they have no discretion to
18 ignore it. They might have some discretion
19 as to how they employ it, but they don't have
20 the discretion to ignore it. So in a
21 fundamental sense, the case is much more
22 similar to the Arizona versus California
23 doctrine.

24 Just a few more points. The consumption
25 cap that they have said that they want, it

1 does at some point need to be tied to the
2 alleged harm, which is the flow of water
3 across the state line and its effect on the
4 wildlife in Apalachicola Bay. But in drought
5 times, which are alleged throughout the
6 complaint, significant federal statutory
7 purposes kick in. And those don't have any
8 direct relationship to Florida. And we know
9 that under the existing manual, which
10 admittedly is under review, that in times of
11 drought, Florida gets a specified amount of
12 water and no more. And if Florida wants more
13 in this case, it needs the Army Corps to
14 release it in times of drought. We know
15 that.

16 With regard to the United States' view
17 and their position that the case can proceed
18 without them, we don't believe that's
19 entitled to great weight because the United
20 States has an interest in avoiding this
21 litigation. We can understand that. But
22 they don't have any interest in the prejudice
23 that this would cause to Georgia if we
24 proceed along these lines. And I don't think
25 they're adequately taking into account the

1 institutional interest of the United States
2 Supreme Court which is being told to proceed
3 on a case, and the executive branch will just
4 come in later and pull the plug or ask to
5 have the plug pulled if it becomes
6 inconvenient for them.

7 When the Court asked if the United
8 States could get complete relief, I noticed
9 that Mr. Gray hesitated. If they could get
10 complete relief without the United States, he
11 hesitated and closed his statements by saying
12 we do not think it would be impossible for
13 Florida to get that relief. Well, that's
14 not, we submit, the question in an equitable
15 apportionment action, which is to take the
16 most prejudicial form of relief, a
17 gerrymandered case, and then wait and see if
18 it's possible to achieve that. That's not
19 the purpose of what we're doing here.

20 In conclusion, while Georgia believes
21 that it wins under Rule 19, I would just
22 underscore that Rule 19 is only a guide in an
23 Original action case. I know the Special
24 Master is well aware of that. And we submit
25 that the Rule 19 factors should be evaluated

1 in the context of the Court's broader
2 Equitable Apportionment Doctrine of
3 jurisprudence. And we believe that when the
4 Court does that, it's clear that the Court
5 should not have its hands tied; and Georgia
6 should not have to labor under the threat of
7 a prejudicial form of relief all to avoid a
8 required party problem.

9 Unless the Court has any questions of
10 Florida -- Georgia, Georgia is complete.

11 SPECIAL MASTER LANCASTER: Thank you.

12 We're going to take a 10-minute recess
13 to allow counsel to confer among themselves
14 to see if you have anything that you want to
15 add to what we have discussed at this point.
16 Then we'll come back in. And if not, we're
17 done.

18 Thank you.

19 (A short recess was taken.)

20 SPECIAL MASTER LANCASTER: Please be
21 seated.

22 Mr. Primis?

23 MR. PRIMIS: Yes. Thank you, your
24 Honor. Just two quick points.

25 We did have a chance to go back and look

1 at Rule 54(c). And we just want to
2 underscore that 54(c) is exactly our argument
3 is that the Court is not bound -- whether it
4 rules -- uses 54(c) as a guide or whether it
5 looks to the Equitable Apportionment
6 Doctrine, the Court cannot be bound by this
7 prejudicial cap in form of relief that
8 Florida seeks. And once we're out of that
9 regime, it's unambiguously clear that the
10 United States has to be enjoined.

11 Second, one thing that the United States
12 said we wanted to comment on that we may
13 be able to get through this case without
14 prejudice to the United States; and that may
15 not be impossible. But I want to focus on
16 this prejudice point. Neither Rule 19 nor
17 the Court's Equitable Apportionment Doctrine
18 looks solely at the prejudice to the absent
19 party. And I do want to underscore -- we
20 talked about this in my opening statements;
21 but I left it somewhat quickly. The
22 prejudice to Georgia here is significant of
23 going the way Florida has suggested and also
24 fundamentally the interest of the Supreme
25 Court in having available to it all the forms

1 of relief in an equitable apportionment
2 action. There is significant prejudice to
3 the Court in a case of this type to proceed
4 as the United States is suggesting.

5 Thank you, your Honor.

6 SPECIAL MASTER LANCASTER: Before you
7 sit down --

8 MR. PRIMIS: Yes, sir?

9 SPECIAL MASTER LANCASTER: -- at this
10 stage of the proceeding where I have no
11 evidence in front of me, what evidence do I
12 have of the prejudice that you're suggesting?

13 MR. PRIMIS: Well, we know -- what the
14 Court does have before it is the statutory
15 mandates to the U.S. Army Corps of Engineers.
16 It has the 11th Circuit decision. We have
17 submitted the scoping report, which is
18 properly before the Court. So it's not like
19 there is an absence of information.

20 And what we do know and what is
21 nonspeculative is the role that the Army
22 Corps can play in providing more water at
23 critical times throughout the entire region.
24 That's known and it's a fact. And the other
25 known fact is that by excluding them, we take

1 that possibility off the table entirely. You
2 don't need to speculate or take evidence on
3 that. The Army Corps will not be bound by
4 whatever this Court does if they're not a
5 party.

6 SPECIAL MASTER LANCASTER: Thank you.

7 MR. PRIMIS: Thank you, your Honor.

8 MR. GARRE: Thank you, your Honor. Just
9 a few brief things.

10 First, with respect to the question of
11 whether or not a cap on consumption is
12 appropriate in an equitable apportionment
13 action, I point you to page 11 of the United
14 States brief where the United States said,
15 quote, an equitable apportionment undoubtedly
16 can take the form of a limitation on water
17 consumption by an upstream state, end quote,
18 citing the Colorado River Compact.

19 Second, the notion that Florida's
20 complaint is somehow jerry-rigged I think is
21 fundamentally false. A cap on consumption is
22 precisely the relief that Florida needs in
23 order to save this region. And that's why
24 it's the relief that it's seeking. And,
25 frankly, if Georgia's consumption of water,

1 which, again, by Georgia's own estimate is
2 expected to double by the year 2040 -- if the
3 consumption of that water is not capped, then
4 there is no reason at all to tinker with the
5 flow regimes at the border. There is going
6 to be very little water in the basin at all.

7 So that's the reason why Florida is
8 seeking a cap on consumption. It makes
9 perfect sense because no one can do anything
10 with the water that Georgia consumes before
11 it reaches the Corps' dams and before it
12 reaches Florida. So the relief that it's
13 seeking is not jerry-rigged; it makes perfect
14 sense. And Florida is entitled to seek that
15 relief in this case.

16 And then, finally, with respect to the
17 question of prejudice, I think even with the
18 further elaboration that my friend has
19 provided, there is no concrete evidence that
20 Florida will be prejudiced. One can
21 certainly understand why Florida would not
22 want caps on its consumption; but the notion
23 that Florida -- that Georgia would be
24 prejudiced by a proceeding in which Florida
25 is seeking an opportunity to prove that it is

1 entitled to caps on consumptions, that's not
2 prejudice that entitles this Court to dismiss
3 this case at the outset.

4 This Court can grant complete relief
5 without involving the United States. And
6 that's because Florida is not seeking any
7 relief against the United States. It's not
8 seeking any particular flow regime. This
9 Court can grant the relief without the Corps.
10 Any added flexibility that Rule 54(c) gives
11 to this Court is flexibility that this Court
12 should take into account after it's heard all
13 the evidence, after Florida has an
14 opportunity to present its case and both
15 sides have had experts raising the issue as
16 to the amount of water Georgia is
17 increasingly using beyond its fair share of
18 the waters at issue.

19 Thank you, your Honor.

20 SPECIAL MASTER LANCASTER: Thank you.

21 MR. GRAY: Unless the Court has
22 questions for the United States, we're happy
23 to rest on what we said.

24 SPECIAL MASTER LANCASTER: Thank you.

25 Counsel, thank you very much for your

1 excellent and abbreviated arguments. As you
2 can appreciate, I will turn to this promptly
3 and get you a decision just as soon as I can.
4 In the meantime, I suggest that you proceed
5 as if the motion is not granted so that we
6 don't have any additional delays.

7 The quality of the briefing and the
8 quality of the argument has been
9 extraordinary, and I mean that sincerely.
10 And it will be very helpful to us.

11 You will not be surprised that as I
12 finish up, I urge you, again, to try to
13 settle this matter. I assume we have some
14 media in the room, and so we won't get into a
15 discussion on that; but whatever the result
16 is, whatever the Court does with this case
17 after I make my report, we're talking a lot
18 of money and a result that I suggest neither
19 one of you may be very happy with. So,
20 again, and again, and again, I'm going to
21 urge you to discuss settlement seriously.

22 Thank you very much. We are adjourned.

23 MR. PRIMIS: Thank you.

24 MR. GARRE: Thank you.

25 (Oral arguments concluded at 10:37 a.m.)

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CERTIFICATE

I, Claudette G. Mason, a Notary Public
in and for the State of Maine, hereby certify
that the foregoing pages are a correct
transcript of my stenographic notes of the
Proceedings.

I further certify that I am a
disinterested person in the event or outcome
of the above-named cause of action.

IN WITNESS WHEREOF, I subscribe my hand
this 8th day of June, 2015.

/s/ Claudette G. Mason
Claudette G. Mason, RMR, CRR
Court Reporter

My Commission Expires
June 9, 2019.

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