

1 NO. 142, ORIGINAL

2 IN THE SUPREME COURT OF THE UNITED STATES

3
4 STATE OF FLORIDA,

5
6 Plaintiff,

7 vs.

No. 142, Original

8 STATE OF GEORGIA,

9 Defendant.

10
11 TRANSCRIPT OF PROCEEDINGS

ORAL ARGUMENT

12 BEFORE THE HONORABLE PAUL J. KELLY, JR.

SPECIAL MASTER

13 THURSDAY, NOVEMBER 11, 2019, 10:00 A.M.

14 ALBUQUERQUE, NEW MEXICO

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ORAL ARGUMENT

(Court in session at 10:00 a.m.)

LAW CLERK ROBERT TEPPER: All rise.

THE COURT: Good morning. You may be seated.
Could we have appearances for the record, please.

MR. PERRY: Good morning, Your Honor. Phil
Perry for Florida.

THE COURT: Mr. Perry.

MR. GARRE: Good morning, Your Honor. Gregory
Garre on behalf of Florida.

THE COURT: All right.

MR. PRIMIS: Should I approach?

THE COURT: You may.

MR. PRIMIS: Good morning, Your Honor. Craig
Primis from Kirkland & Ellis for the State of Georgia.
And I did want to let the Court know that we have some
officials from Georgia here today, our Attorney General,
Chris Carr; our Solicitor General, Andrew Pinson; and
Executive Counsel to the Governor, David Dove.

THE COURT: Very good. And welcome.

All right. We're here for arguments, and we
have given each side 45 minutes. And if you wish to
reserve time for rebuttal, please let us know, and we
will try to keep the clock for you.

And with that, I think we can begin.

1 MR. GARRE: Thank you, Judge Kelly. May it
2 please the Court.

3 THE COURT: Counsel.

4 MR. GARRE: I would like to begin this morning
5 by very briefly discussing some of the key legal
6 principles governing this remand. And then my
7 colleague, Mr. Perry, will spend the bulk of our time
8 discussing why we think the evidence establishes why
9 Florida is entitled to relief under these principles.

10 THE COURT: Okay.

11 MR. GARRE: With Your Honor's permission, we
12 would like to reserve ten minutes of time for rebuttal.

13 THE COURT: Ten minutes. Very good.

14 MR. GARRE: Thank you, Your Honor.

15 The Supreme Court's equitable apportionment
16 decisions, including its June 2018 decision in this
17 case, established several important guide posts for this
18 proceedings. To begin with, the Court has already
19 determined that both Florida and Georgia have an equal
20 right to the reasonable use of the waters at issue; and
21 that Georgia, like all states, has an obligation to take
22 reasonable steps to preserve that resource for the
23 benefit of other states, including Florida. Ultimately,
24 this case is about Georgia's failure to heed that
25 obligation.

1 Second, the Supreme Court has already
2 concluded, based on its own independent examination of
3 the record, that Florida has met its initial burden in
4 establishing that it has suffered a substantial injury
5 and invasion of rights due to Georgia's upstream
6 consumption, and this case has therefore shifted to --

7 THE COURT: Right, that they assumed that,
8 just as the Special Master did, and focused on the
9 Special Master's lack of ability to give relief.

10 MR. GARRE: Right. Well, Your Honor, I think
11 on Page -- and I'm pointing to Page 2518 -- the Court
12 did say that Florida had met its initial burden in this
13 framework, based on its own independent examination. I
14 think you are quite right that the Court called on Your
15 Honor to make further findings as necessary.

16 THE COURT: The Court also said that the
17 Master assumed Florida has suffered harm; the Master
18 further assumed that Florida has shown that Georgia,
19 contrary to equitable principles, has taken too much
20 water; and third, the Master assumed that Georgia's
21 inequitable use of the water injured Florida.

22 MR. GARRE: Yes. You are absolutely right,
23 Your Honor. My point is only that the case has moved to
24 the equitable balancing stage, and I think even the
25 dissent on the Supreme Court --

1 THE COURT: Well, I think that the case has
2 not moved past the stage of my having to determine the
3 findings and conclusions based on the evidence as to
4 each of the elements.

5 MR. GARRE: I agree, Your Honor. And I think
6 in conducting the balancing, Your Honor would make
7 findings as to each of the inquiries the Court had
8 pointed to that Your Honor would find relevant to that
9 determination. I think ultimately, the question for
10 this Court is whether or not Florida has shown that the
11 benefits of a decree substantially outweigh the cost of
12 a decree, while making any attendant findings that Your
13 Honor deems appropriate.

14 Third, in conducting the equitable-balancing
15 inquiry, the Supreme Court has stressed several
16 considerations, and I would like to highlight just three
17 of those here today.

18 Number one. Flexibility and approximation are
19 key to this inquiry, including when it comes to making
20 judgments about future conditions. This was one of the
21 central themes of the Court's decision in this case.
22 And in making this point about the flexibility, the
23 Court specifically pointed to its prior decision 85
24 years ago in the New Jersey v. New York case, which has
25 direct parallels to this case in terms of the nature of

1 the harm, to oysters in particular, and the ultimate
2 outcome of the balancing.

3 Number two. The Supreme Court's decision
4 makes clear that in conducting this equitable-balancing
5 inquiry, the Court must assume, and do so based on the
6 premise that the Army Corps of Engineers will work to
7 accommodate any decree that this Court enters in the
8 case. This was one of the central points of contention
9 between the parties, as well as the majority and
10 dissenting opinion on the Court. And while Georgia has
11 continued to insist that the Court would not facilitate
12 a decree, the opinion for the Court, as well as the
13 statements of the Army Corps of Engineers in its record
14 of decision, directly refutes that contention.

15 Number three. The Supreme Court has stressed,
16 in determining whether the benefits of a decree outweigh
17 the harms of a decree, one of the important
18 considerations -- and here, I'm quoting from Colorado v.
19 New Mexico, 459 U.S. 188 -- is whether the existing
20 users could offset the demands of the decree by
21 reasonable conservation measures to prevent waste. This
22 principle is especially important here, because as
23 Special Master Lancaster explained in his report, a
24 major reason Florida finds itself in this predicament is
25 Georgia's unrestrained and mismanaged agricultural uses

1 along the Flint River.

2 The last point I would make in my introductory
3 remarks here today, Your Honor, is that we submit,
4 respectfully, that applying these principles should lead
5 this Court to the conclusion that the benefits of an
6 equitable apportionment, which include saving one of the
7 nation's iconic oyster industries and fisheries and the
8 communities that have depended on those fisheries for
9 way of life for centuries, substantially outweighs the
10 cost of a decree which boiled down to preventing waste
11 and mismanagement in agricultural practices by Georgia
12 by adopting the same sort of reasonable conservation
13 measures that Georgia's own officials, in their more
14 candid moments, have proposed.

15 With that, I would like to turn it over to Mr.
16 Perry to dive into the evidence more deeply.

17 THE COURT: Very good. Thank you.

18 MR. GARRE: Thank you, Your Honor.

19 MR. PERRY: Your Honor, if I might, I would
20 like to start with our slide set, and in particular
21 Slide Number 14, which is a satellite photo of
22 Apalachicola Bay. And you can see there that it's also
23 a photo of part of Apalachicola River. And so if I
24 could invite your attention, Your Honor, on that slide,
25 to the area just adjacent to where the river empties

1 into the bay.

2 And if I might step to the map, Your Honor, I
3 can certainly show you.

4 THE COURT: You may, but keep your voice up.
5 Okay?

6 MR. PERRY: Thank you, Your Honor.

7 So here on the map, this is Apalachicola Bay.
8 The river extends up northward. This area here under
9 the bridge is called East Bay. This is a particularly
10 sensitive area, an area where you have juvenile species
11 of oysters and fish and blue crab and shrimp. It's
12 particularly important for generating the fisheries out
13 here in the Gulf. It's particularly important because
14 it's a refuge for oysters, meaning that if you have
15 predators, drills, conchs, sometimes stone crabs, that
16 would normally be at the periphery of the bay, if after
17 a period of very low fresh water flows those particular
18 predators get into East Bay where that population of
19 oysters would take refuge normally, then you have a real
20 problem.

21 For all of recorded history, Florida has never
22 seen that happen. For millennia, we think, it has never
23 happened until 2012.

24 And what we can see, Your Honor, if I might
25 step further and get the flow chart, is the cost for

1 this.

2 THE COURT: Well, what number is that? My
3 eyes aren't good enough to see that far away.

4 MR. PERRY: Your Honor, that's at the very
5 back of the slide set at Slide 48.

6 THE COURT: Okay.

7 MR. PERRY: And it's a little hard to see on
8 the slide set, which is why I was going to try to
9 narrate from the actual big graph.

10 THE COURT: It's very hard to see.

11 MR. PERRY: Yes. That's the problem. It's a
12 lot of data, difficult to get on one slide.

13 So if I might, Your Honor, these are the flows
14 at a U.S. Geological Survey gage at the state line. So
15 where Lake Seminole, which is part of Georgia, empties
16 into the Apalachicola River, which is part of Florida,
17 that is the flow that proceeds along the Apalachicola
18 River and reaches this bay.

19 These yellow marks here, this is all of
20 recorded history since 1928. These yellow marks here
21 are extreme low flows, the way we have defined them
22 throughout trial, which means lower than 6,000 cubic
23 feet per second. So the Rio Grande is at about 800
24 cubic feet per second right now.

25 This river is a huge river. But the flows, as

1 you can see from the yellow boxes, have rarely been
2 below 6,000 cfs, cubic feet per second, until we hit --
3 I'm going to hold this up so you can see.

4 THE COURT: Until what?

5 MR. PERRY: Until we end up in a modern
6 period. And you can see there are a range of yellow
7 boxes down here, all representing the same low flows as
8 above.

9 The worst drought in history in this area was
10 right here. Another very bad drought here. These
11 droughts down in this area, in 2000 through 2012, not as
12 bad. In this year, where oyster fishery crashed, which
13 was 2012, 2011 and 2012. At the end of 2012 is when it
14 became apparent it had crashed. There was 18 percent
15 more rain during that period than here but, as you can
16 see from the yellow marks, substantially worse flows.

17 So it's not a rainfall problem, Your Honor.
18 It's a problem with something else happening up north.
19 And that, Your Honor, we proved at trial was Georgia's
20 consumption, principally for irrigation.

21 Now, if I might return to the slide set and go
22 to Slide 15, again behind Tab 2, this, as you can see,
23 is the map I was just describing. There's a couple
24 important elements, if I might, Your Honor, here. A
25 good portion of our proof in this case dealt with those

1 extreme low flows that I just described. That's not the
2 only problem. The problem is that flows have been
3 lower across the board every year during drought and
4 non-drought periods. So I don't think this is
5 reasonably disputed, Your Honor, that the flows have
6 been lower.

7 I would suggest that there's two things that
8 the Court can look at to make sure that is quite
9 evident. One, I'm going to cite now to one of Georgia's
10 experts. His name is Panday. In his pre-filed direct
11 testimony at Page 30, he attached a table.

12 THE COURT: Page 30 or Paragraph 30?

13 MR. PERRY: Good question. Page 30.

14 THE COURT: Okay.

15 MR. PERRY: And the table there shows that
16 average flows have reduced -- this is on the
17 Apalachicola River -- since 1992 by about 3,000 cfs;
18 median flows a little bit more than that. And our
19 experts, of course, have testified when you compare
20 periods before 1970 to periods after irrigation began in
21 earnest, what you have in that context is about 3,000 to
22 4,000 or even 5,000 cfs impact from upstream
23 consumption. So that fundamentally changes this system.

24 What it means is that you have less water
25 coming down the 106-mile river. And the 106-mile river

1 has floodplains on either side. The floodplains are
2 very important for multiple reasons. Fish breed there,
3 amphibians, all sorts of stuff. But they also carry
4 nutrients to the bay.

5 And if I might step here again? Those
6 nutrients, for what makes this a productive estuary, is
7 sufficient flow to create brackish water that's a
8 refuge, plus the nutrients coming down the river. When
9 you have substantially less flow in all years and even
10 worse low flows, you have a problem.

11 And what happened here, as you can tell from
12 Slide 16, Your Honor, is that predators invaded the bay.
13 Here are some pictures. We had our expert out in the
14 bay beginning in 2013 to try and diagnose what had
15 happened, and we discovered these predators were
16 everywhere, drills, conchs, snails, stone crabs.

17 The next slide, Your Honor, is 17. And on
18 that slide, you can see graphically what the problem is.
19 You've got predators, because of the extreme low flows
20 over a very long period of time, essentially living
21 their entire life cycle in the bay, getting into the
22 refuge area and extinguishing our oysters.

23 We had a range of witnesses. You can see some
24 of them pictured here, with the citations from where you
25 can find them. But it was just night and day between

1 the history of this bay and what you're seeing here.
2 Essentially, the bay was becoming part of the Gulf, no
3 longer a unique estuary where you have a mix of flows
4 that produce these unique places where juvenile fish and
5 oyster can breed.

6 And, of course, when our oysters crash, when
7 they can no longer re-populate, when they can't re-seed
8 because the refuge has been compromised, then we have a
9 real problem. And they are, in essence, a canary in a
10 coal mine for the other types of species that rely on
11 that unique area.

12 So, Your Honor, on Slide 18 we have the
13 citations to record evidence explaining what I've just
14 described in some great detail.

15 And then at Slide 19, if I might, I would like
16 to answer the question I think your order posed in part,
17 and that is, "How much water is needed to fix this
18 problem?"

19 And so if I might step over to the chart
20 again, Your Honor? I'm going to focus right now at the
21 bottom of the chart, and I will step back to the monitor
22 to show you what I mean.

23 THE COURT: This is on Page 19? Slide 19?

24 MR. PERRY: It's on Page 19, Your Honor. All
25 right. So you have here excerpts --

1 THE COURT: That chart does not look like my
2 chart at 19.

3 MR. PERRY: Let me explain, Your Honor,
4 because these are excerpts from the bottom part of this
5 chart.

6 THE COURT: Okay.

7 MR. PERRY: So what we have here, Your Honor,
8 from 2010 to 2012 is the period of time -- that's the
9 bottom part of this chart -- in which we had our crash;
10 in other words, where the oyster population essentially
11 died.

12 There is a potential we can now recover. It
13 could happen. But we cannot have these flows again. If
14 these flows happen again, predators will get back in the
15 bay, and we'll have a repeat of this ahistorical
16 circumstance where the bay was essentially crushed and
17 where the oysters all died.

18 So when you think about the question, "What
19 types of flows do you need to prevent this from
20 happening again, so we don't cross the tipping point?"
21 -- the answer is, "Let's see what low flows we were able
22 to survive in the past, what types of drought
23 situations, compounded by upstream consumption of water,
24 did not produce a crash."

25 And the answer, Your Honor, lies in the two

1 sections just above the bottom. So you can see from
2 1999 to 2002, that was a remarkable drought period, too.
3 And, in fact, 1999 through 2001 had the same amount of
4 rainfall upriver as 2010 to 2012.

5 One of the differences during 1999 to 2002 is
6 that Georgia did something very helpful. This is the
7 bright spot in this story. Georgia exercised what it
8 called the Flint River Drought Protection Act, and it
9 bought back irrigation rights for part of that drought
10 period. We did not have a crash during that period.
11 The flows are different during that period than you
12 can see between 2010 and 2012. In that latter period
13 when we had a crash, they did not exercise their
14 authority.

15 Special Master Lancaster described this series
16 of events on Pages 33 through 34 of his report.

17 We also didn't have a crash in 2009 after
18 another round of very low flows. In fact, the oyster
19 population was severely stressed during that period by
20 predators, but not enough to crash.

21 So what we can glean from this and other
22 periods on the map is that there is a tipping point you
23 can't cross. If you cross that tipping point, our
24 population dies. That's what happened in 2012.

25 But you can see that, if you look at our

1 proposed remedies in this case, we propose three types
2 of drought year remedies. One, 1,000 additional cubic
3 feet per second. These are all addressed in Dr.
4 Sunding's pre-filed direct and in his testimony on
5 redirect. At 1,000, we get into a situation where you
6 do not have -- you have not crossed the tipping point.
7 You can compare these flow graph sections here and
8 discern that. At 1500 cfs, we not only avoid the
9 tipping point, but we start returning our bay to the way
10 it used to be before this period of extreme upstream
11 consumption of water, principally from irrigation. And
12 at 2,000 cfs, we are not only helping the bay, but we
13 are also helping the river and its floodplains, which
14 are essential for life in the bay.

15 And, Your Honor, if I might just at this point
16 add a few things? I said our case is not just about low
17 flow years; it's also about drought years. And there
18 has been some confusion about this, so with your
19 indulgence, Your Honor, I would like to identify some
20 very specific records cites showing what we put on as
21 evidence about non-drought years and how we're harmed.

22 THE COURT: Well, let me ask you one question.
23 Have you abandoned the argument from trial that the
24 burden should shift to Georgia to show that the cost of
25 apportionment would exceed the benefits?

1 MR. PERRY: No. No.

2 THE COURT: Well, where in your post-trial
3 briefing, in the remand briefing, do you make that
4 argument?

5 MR. PERRY: I think it's in both the
6 post-trial brief and in our actual --

7 THE COURT: Can you give me a page citation?

8 MR. PERRY: I wish I had the brief up here
9 where I can give you a page citation, Your Honor, but on
10 rebuttal I might be able to.

11 THE COURT: Okay. Or you can just send it to
12 me at a later time. That's fine.

13 MR. PERRY: Yes. Thank you very much.

14 But with your indulgence, I would now identify
15 a few cites that showed -- at trial, we put on evidence
16 about harm we suffer in non-drought years, and the first
17 bit of evidence I would --

18 THE COURT: Are you talking about non-drought
19 years now or drought years?

20 MR. PERRY: We put on evidence about harm in
21 drought years, but now I'm going to give you citations
22 for non-drought years, how we're harmed in periods even
23 when there is no drought.

24 THE COURT: But I thought that your concern
25 was with drought years. I didn't think that non-drought

1 years were involved.

2 MR. PERRY: Well, Your Honor, that's why I'm
3 trying to make this point, because we actually put on
4 evidence of both. And the concern was, in Special
5 Master Lancaster's report, that we had only focused on
6 drought years. And of course we did primarily focus on
7 drought years, but there is a significant amount of
8 evidence about non-drought years, and that's what I
9 would like to lay out now if I might.

10 THE COURT: All right.

11 MR. PERRY: So, Your Honor, this is going to
12 be cite heavy.

13 Dr. Kimbro, principally at Paragraph 7 in 107.
14 Dr. Glibert throughout her testimony, and in particular
15 at Paragraph 71. Exhibit FX-379. Mr. Berrigan's
16 testimony from Paragraphs 51 to 63. Dr. Allan's
17 testimony about the floodplains and the river, which
18 focused on flows from about 14,000 to 18,000; those are
19 non-drought year flows. His testimony at Pages -- not
20 Paragraphs, but Pages 44, 45; and in his expert report
21 which is record evidence, too, and that's FX-790 and
22 Figure 23.

23 In addition, I would cite Your Honor to an
24 exhibit that is the EPA's and U.S. Fish and Wildlife's
25 guidance about how much water should be flowing down to

1 retain a healthy river for the Apalachicola. That's
2 FX-599. And we analyzed that in Dr. Hornberger's
3 testimony at Paragraph 65, Paragraphs 90 to 92, and 115
4 through 117.

5 So with that, Your Honor, I would like to turn
6 back to Tab 1, if I might. And in particular, I would
7 like to start with Slide 6, which is the third slide in
8 after Tab 1.

9 And here, I'm focused on the evidence we put
10 on about unreasonable and inequitable conduct upstream.
11 So what we did -- and this can be found in the
12 voluminous FX series of exhibits. Basically, every
13 exhibit between 1 and about 49 addressed these issues.

14 I'm starting here with the slide, Your Honor,
15 though, about specifically the Flint River Drought
16 Protection Act.

17 And I say that was the bright spot in this
18 story. The reason it was the bright spot is because
19 Georgia recognized there was something it needed to do
20 to address the growing consumption.

21 The first quote on this page refers to
22 Georgia's Environmental Protection Division. They knew
23 there was a problem. And this was no mystery to
24 anybody. All these folks knew there was a problem.
25 Exhibits FX-1 through FX-9 show this in vivid detail.

1 And the solution, of course, was to buy
2 irrigation rights from these farmers in times when
3 drought is predicted. And that happened twice, as I
4 noted, in 2001 and 2002, and we had no crash during
5 those periods. So what happened next, though, is also
6 instructive because this problem persisted. The problem
7 with irrigation persisted, and our flows just got worse
8 over time.

9 So what happens next is a critical part of our
10 story. If you look at Slide 7, that is a list of the
11 number of permits and permitted acreage that Georgia
12 granted over time. And although the evidence shows that
13 they knew they were beyond their safe permitted acreage
14 for these areas, these farm areas in the Flint Basin in
15 1999, they continued to grant permits. And they granted
16 40 percent more acreage worth of permits after that
17 point, which of course produced significant additional
18 consumption of water.

19 And we regulate agricultural irrigation in
20 Florida. We do it through several different means,
21 including many of the means I'm going to get to in a
22 minute when I talk about specific forms of a remedy.
23 But Georgia didn't.

24 So the next step in this timeline about
25 consumption is found on Slide 8. It's a copy of a

1 report put out by a number of people in Georgia who were
2 attempting to find a solution to this problem. And they
3 recognized, again, that agricultural irrigation is
4 compounding the effect of drought and that there was a
5 solution that was required.

6 So the solution, of course, was to exercise
7 the Flint River Drought Protection Act and buy back
8 irrigation rights when drought is predicted. But that
9 never happened again, so it was never funded. They had
10 no money to buy them.

11 And part of what Special Master Lancaster
12 identified in the analysis section, Pages 33 through 34
13 of his report, is what actually happened. And so that's
14 part of the story.

15 Another part of the story is in 2010 through
16 2011 when, under Georgia law, the various different
17 regional water boards are going out to try to determine
18 what they should do, and they engaged in modeling, they
19 engaged in analysis, and they determined that although a
20 certain amount of irrigation is appropriate -- and this
21 is on Slide 10, Your Honor -- Georgians, farmers in the
22 Flint Basin, were using far too much water. They
23 published that result.

24 And they also at that time -- and this is
25 going to be important to our remedies proposals --

1 identified a number of steps that could be taken to fix
2 that problem. And there, you can find those steps in
3 Florida Exhibit 24 at 6-5 to 6-9. There are a whole
4 range of things. They include building reservoirs.
5 They include exercising the Flint River Drought
6 Protection Act, which is in the second box. They
7 include things that we think are appropriate exercises
8 of regulatory authority that we indeed already do in our
9 part of the basin and throughout Florida, including
10 something called aquifer storage, whether you
11 essentially build an underground reservoir.

12 THE COURT: Uh-huh.

13 MR. PERRY: We do all those things. Georgia
14 hasn't. We limit the amount of actual irrigation water
15 that can be applied in a drought. Georgia hasn't.

16 So if I might, Your Honor, now --

17 THE COURT: Well, you agree that Florida has
18 the burden of showing that the benefits of a decree
19 would substantially outweigh the harms, correct?

20 MR. PERRY: Yes, Your Honor, and that's what
21 I'm moving to at this moment.

22 THE COURT: Okay.

23 MR. PERRY: So if I might turn to Tab 8, which
24 is Slide 40 in your book, and I would like to address
25 what we did to show that the harm we suffered, the loss

1 of our oyster fishery, can be readily justified, and
2 that the substantial benefit we would receive is
3 outweighed -- or outweighs the cost.

4 So what we did is, we took a look at what
5 Georgia itself had said. We did discovery. We found
6 our own analysis. We looked at what measures they
7 thought they could actually accomplish. And then we
8 went through and we did an analysis of how that could be
9 done. And, in fact, it's readily possible. And our
10 expert is a person who represents the State of
11 California, is involved in water issues in Oregon. He's
12 involved in a whole range of cases where these sorts of
13 remedies are employed, and he knows about how these can
14 work.

15 And so what we did was, we took a look at menu
16 options that we thought were appropriate and
17 responsible. Not that we wanted to dictate to Georgia
18 exactly how to accomplish its result, but we wanted to
19 show that they could accomplish the result.

20 And so, as Mr. Garre explained, there are
21 documents that we have put forward here, including this
22 Exhibit, JX-154, which show what Georgia thinks when
23 they're talking frankly to their own citizens and
24 stakeholders. They know they can fix the problem, and
25 they can do it at a reasonable price, too.

1 And so now I would like to take a moment to
2 rebut what their expert said at trial about the cost of
3 these things. And I would suggest, Your Honor, that the
4 cross-examination of their expert is very important
5 because you can see exactly what he looked at, what he
6 didn't look at, whether he actually did something that
7 was a genuine assessment of the measures Georgia knows
8 it can take. And he didn't. And that's what's found at
9 Slide 41.

10 And these are almost all costs to the Georgia
11 government, and not costs that would have a significant
12 burden on farmers themselves. These are things that we
13 do in Florida, in part, and other states do when they
14 have serious issues with the availability of water for
15 farming.

16 So, as you can see here, the list starts with
17 aquifer storage recovery, and it goes on from there.
18 And this is perhaps a change in culture for the farmers
19 in the Flint Basin. They are not used to being
20 regulated in this way. But we regulate in this way.
21 States all over the country regulate in this way. And
22 when you encounter a problem with a shortage of water,
23 this is what regulated riparian regimes do. You have to
24 make the water use reasonable under the circumstances.
25 And with these low flows we've encountered over the last

1 20 years, it is no longer reasonable to allow the same
2 irrigation practices to persist.

3 The following slides after that walk through
4 the very specific instances where Georgia's expert, we
5 think, made errors in his calculations. One example, to
6 our point to acquire irrigation rights permanently, we
7 went and looked at how much it would cost. U.S.D.A.
8 puts out data for the cost of irrigation rights plus the
9 equipment on the land. And Georgia's expert multiplied
10 that number by ten.

11 And, in addition, as we do in Florida, during
12 droughts we regulate how much irrigation water can be
13 applied. That is sometimes called deficit irrigation
14 and sometimes called limited irrigation. But you don't
15 lose your entire yield from reducing the amount of
16 water. There are also efficiency matters that the state
17 can help people employ in their irrigation systems. But
18 just reducing water use does not destroy your crop.
19 It's not as if you are not using irrigation water. And
20 certainly there is insurance, federally subsidized, in
21 case you lose yield.

22 But it's not appropriate what Georgia's expert
23 did. And in some analyses, he assumed there would be
24 zero irrigation; in some analyses, he assumed there
25 would be no productive use of the land.

1 And, in fact, about half of all of the
2 farmland in Georgia is not irrigated, so it's not
3 impossible to make a living.

4 So I would suggest also that one thing Georgia
5 has said quite a bit is that it has a large population
6 and it's only using 48 percent of the water. In fact,
7 at Slide 45 you can see both our view and Georgia's real
8 view of how much water Georgia is using during these
9 drought years in the summer.

10 So that brings me, Your Honor, to our approach
11 to costs and benefits more generally. Our targeted
12 remedies go to farmers.

13 THE COURT: I'm sorry? Go to what?

14 MR. PERRY: Our targeted remedies go to
15 controlling how farmers conduct their business, not in a
16 way that's draconian. We do it. Other states do it.
17 It's something that you have to do to minimize waste and
18 mismanagement. And the farmers are obviously experts at
19 how to manage water, but right now Georgia puts no
20 constraints at all in any effective way on them. Almost
21 all the permits have no constraints as to how to use
22 water.

23 So when you look at costs and benefits, we're
24 focused on targeted remedies as to a very small number
25 of people in relative terms. We're talking about a few

1 thousand farmers and the people that work on the farms.
2 And we're not talking about eliminating the crops.
3 We're talking about more efficient use of water. We're
4 talking about different ways to ensure that your crops
5 rotate in a way that uses less water. All of this is in
6 the cross-examination of Georgia's expert, Dr. Stavins.

7 But there are really two ways to balance this.

8 One is, you pit that reasonable regulation,
9 which we think is required in a riparian regime, of
10 those farm uses against the other side of the balance
11 which, one, it's a widely recognized unique natural
12 system. There are very few people that live in the
13 Apalachicola. It has been preserved by the Florida
14 government for a very long time. It's a 106-mile river.
15 It's a unique bay. It's recognized by the United
16 Nations. There's a federal and state estuarine reserve
17 there. It's a beautiful place in the country.

18 And so one way to balance this is the
19 inconvenience to those particular farmers, which can be
20 borne by the government, against this beautiful natural
21 area.

22 THE COURT: What is the population of this
23 area that you're speaking of?

24 MR. PERRY: A few thousand, Your Honor. About
25 10,000, 15,000, depending on which part of the area.

1 But let me address that.

2 Because if you just were to step back and look
3 at the economic impacts, what we have is a few thousand
4 farmers and their businesses upstream that we think can
5 be reasonably regulated without really imposing
6 significant financial impact to them, if any. And then
7 we have a series of a couple thousand people in the
8 Apalachicola. They are not people, in general, of
9 significant means. They have relied on this oyster
10 fishery for generations to make a living. They have
11 been careful stewards of this fishery, and they live up
12 and down the river and fish on the river.

13 And so if you are just looking only at the
14 economic comparisons, it's a few thousand people here
15 and a few thousand people there. But I would suggest
16 that this environmental --

17 THE COURT: It's a few million people there
18 and a few thousand people here.

19 MR. PERRY: Well, Your Honor, here's the point
20 we're making. This remedy we're talking about is not a
21 million people. This remedy is much more narrow. It is
22 targeted. We know Georgia can do it because we've seen
23 their internal documents. We are not trying to take
24 water away from Atlanta. All right? They can do -- all
25 we're asking them to do is don't allow people to water

1 their lawns when there's a drought in the basin, which
2 is already part of their law.

3 Now, we are not imposing any significant
4 basin-wide impact on the millions of people. This is
5 about a very small number of farmers and a very small
6 number of people in Apalachicola. It's that balance on
7 the economic side, but the overlay is this incredibly
8 unique ecological area that is fundamentally changing.

9 So, Your Honor, with my remaining two minutes,
10 I would like to, if I could, invite your attention to
11 Slide Number 20 at Tab 3. And there, Your Honor, at
12 Slide Number 20 and 21 are two examples of what Georgia
13 and Georgians have determined is a reasonable balance in
14 the past, and this is evidence that was put on at trial.

15 So Slide 20 is evidence from Georgia's own
16 witnesses about settlement proposals they have made in
17 the past. Their point was that we should have accepted
18 their settlement proposals and that they made them.

19 But in particular, at the bottom of the slide,
20 it says, "Georgia considered bringing Glades Reservoir
21 online." And then further, "groundwater augmentation"
22 and "flow support reservoirs." Those latter two are
23 things we proposed. They were willing to do it, and
24 this was in 2012. This is something they thought was a
25 reasonable and, more importantly, feasible solution.

1 The truth of what can be done is right here on
2 this slide. This is 1,000 cfs remedy.

3 THE COURT: Well, where do we look at the
4 respective costs, for example, of the Glades Reservoir,
5 what it would cost to put it in, how it would affect
6 anything?

7 MR. PERRY: Well, Your Honor, they have said
8 their cost would be \$803 million, but they proposed it.
9 They proposed that as part of their solution in 2012.

10 We're not asking them to do Glades Reservoir.
11 We have those targeted measures just as to farming.
12 We're not asking them to spend hundreds of millions of
13 dollars.

14 In fact, what we're asking them to do is far
15 less expensive than what they have proposed.

16 So, Your Honor, if I might, the next page,
17 Slide 21, is a document created by a consensus group
18 that was looking for a solution. It didn't involve the
19 government of Florida or the government of Georgia, at
20 least the state government. It involved the Atlanta
21 Regional Commission, it involved representatives of
22 Flint Basin farmers. And there was a whole range of
23 solutions that they put together in a consensus
24 proposal, but one of those measures was to send more
25 water to Florida.

1 This can be done. This is reasonable. And
2 Georgia, I'm sure that they've got their views. They
3 disagree with us. But I think that the evidence shows
4 it can be done and it should be.

5 THE COURT: Thank you.

6 MR. PERRY: Thank you.

7 MR. PRIMIS: May I have a moment just to get
8 set up, Your Honor?

9 THE COURT: Certainly.

10 MR. PRIMIS: Thank you. Judge Kelly, may it
11 please the Court. Craig Primis for the State of
12 Georgia.

13 To be entitled to an equitable apportionment
14 in this case, Florida must prove by clear and convincing
15 evidence that the benefits of its proposed remedies
16 substantially outweigh the harm that might result.

17 In remanding the case, the Supreme Court asked
18 for specific answers to a number of questions before the
19 Court could determine whether Florida had met that
20 burden.

21 Following the Court's direction, Your Honor
22 entered Case Management Order Number 25, which posed
23 those same questions, and Your Honor asked the parties
24 to be specific. As Your Honor put it, the more
25 specific, the better.

1 Florida either cannot or will not answer with
2 specificity the most important questions that the Court
3 and Your Honor posed. Florida's case fails in multiple
4 levels, and we have addressed all of those in our
5 briefs.

6 In my time today, however, if the Court would
7 allow -- or I'm certainly happy to answer any questions
8 the Court has -- I would like to focus on three critical
9 questions, the answers to which will confirm that
10 Florida has not proved its case.

11 The first question is: How much water does
12 Georgia actually use, and how much would Florida receive
13 from a cap?

14 The second: Are there any ecological benefits
15 from any additional water Florida might receive?

16 And three: What are the costs to Georgia, its
17 economy, and its citizens were the Court to award the
18 relief Florida seeks, and does that benefit to Florida
19 substantially outweigh the costs?

20 Florida urges Your Honor and the Supreme Court
21 to forgive its inability to answer these questions with
22 evidence and facts, with appeals to flexibility and
23 approximation and to reasonable estimates. And while
24 there may be flexibility in the doctrine, flexibility is
25 not a substitute for evidence.

1 As the Supreme Court has put it, the state
2 seeking an apportionment must present hard facts in
3 support of its case. That's Colorado v. New Mexico II.
4 That, Florida has completely failed to do.

5 On this record, we respectfully submit that
6 the Court cannot possibly find that the benefit to
7 Florida would substantially outweigh the cost to
8 Georgia.

9 So now I would like to turn to the first
10 question, which we think is central to resolving this
11 dispute, and it is disputed by the parties. The
12 starting point is: How much water does Georgia actually
13 use? How much is available to even go to Florida?

14 On this point, Georgia's estimates of its own
15 consumptive use are the only reliable data in this case.
16 Using those data, we know that Georgia's consumption is
17 a fraction of the amount estimated by Florida. Florida
18 made no argument on the amount that we use here today,
19 no citations to the record in the presentation today.
20 And we know that Florida's estimates are wrong because,
21 unlike Georgia's which rely on actual real data, they
22 are based on litigation-driven models of their experts,
23 and they have inherent flaws.

24 So let's start with Georgia's data. Where
25 does it come from? Georgia is the only entity, federal

1 or state, that keeps accurate statewide water use data.
2 The state has a dedicated team of hydrologists, trained
3 professionals, and most of them have Ph.D.s, and all
4 they do for their living is track water usage, water
5 consumption, and water availability.

6 That data is then supplied -- I'm going to go
7 through how they do it, briefly. That data is then
8 supplied to federal regulators like the Army Corps, Fish
9 and Wildlife, U.S. Geological Survey, and those entities
10 rely on Georgia's data. No one from the Corps, Fish and
11 Wildlife, or U.S.G.S. has ever raised the kinds of
12 criticisms of Georgia's consumptive use data that
13 Florida has advanced in this case, and no one has ever
14 said what Florida is saying, which is that Georgia
15 understates its use by 50 percent.

16 Now, the best source for all of this evidence
17 and testimony is the written direct testimony and the
18 trial testimony of Dr. Wei Zeng, Z-E-N-G. He's the
19 chief hydrologist for the State of Georgia, and he
20 walked through in detail how Georgia does this. He has
21 more than 20 years of experience, he has a Ph.D. from
22 the University of Georgia, and he's a licensed
23 professional hydrologist at the American Institute of
24 Hydrology. He knows what he's doing.

25 Georgia maintains a comprehensive database

1 that tracks Georgia's municipal and industrial use,
2 that's up around Atlanta, and the agricultural
3 consumptive use in the ACF Basin. And while this remand
4 is --

5 THE COURT: Let me ask you a question on that.

6 MR. PRIMIS: Yes.

7 THE COURT: Do they read those meters in the
8 agricultural area annually or monthly?

9 MR. PRIMIS: There are two types of meters.
10 Most of them are read annually. There is a subset of
11 about 70 or 80 that are read monthly, that they then use
12 to estimate monthly variation.

13 THE COURT: Wouldn't it be more accurate to do
14 it monthly for everybody?

15 MR. PRIMIS: I think more data is generally
16 more accurate, yes, Your Honor, but the professionals
17 who do this for a living feel that the current blend of
18 extensive annual meter reading, combined with the
19 monthly data that's available, and historical knowledge,
20 is sufficient to give them reliable estimates.

21 So while the remand is principally focused on
22 the Flint, it is worth just noting that in Atlanta, they
23 have very detailed -- the water providers have very
24 detailed records of what is used and, more importantly
25 or equally importantly, what is returned into the basin.

1 That's an important concept because even though Atlanta
2 might pull out a lot of water, it puts back 70 percent
3 or more of that water. And they have data from 300
4 withdrawing facilities and 1,000 discharging facilities.

5 Now, on the agricultural side -- you
6 anticipated some of what I was going to say -- but
7 Georgia has a network of people who collect this data,
8 state agencies, universities, water contractors, the
9 water planning districts, and Georgia has invested
10 heavily in this technology and in expanding this
11 program.

12 THE COURT: How do you respond to the
13 suggestion of 90,000 acres of unpermitted irrigation
14 going on in Georgia?

15 MR. PRIMIS: Yes, Your Honor. For the purpose
16 of actually estimating how much Georgia uses in the
17 Flint, that point is really not relevant because the way
18 Georgia determines how much water is pumped or is taken
19 from the Flint River is through its wetted acreage
20 database. And as its name suggests, they actually had
21 people go out and do field surveys for wetted acreage
22 apart from the permitting.

23 So, true, we don't want people watering
24 unpermitted acres, but in terms of counting or
25 accounting for that water that is used on unpermitted

1 acres, it is in the consumptive use database, and
2 Georgia is able to estimate and track it.

3 THE COURT: But if it's unpermitted, wouldn't
4 it make a difference at some point with how much water
5 could go downstream?

6 MR. PRIMIS: Well, no, not for present
7 purposes because Georgia already accounts for it. We
8 know.

9 THE COURT: I mean, let's say it's one gallon
10 an acre, so you have got 90,000 acres, or gallons, that
11 might not be used otherwise. Doesn't that --

12 MR. PRIMIS: Certainly if the unpermitted
13 acres, to the extent that they are actually used for
14 groundwater pumping, if you said, "Don't do that
15 anymore," that would reduce the groundwater pumping in
16 that area, for sure.

17 The impact on the stream flow is a very
18 complex question of how close it is to the river, the
19 interaction with the river. So it doesn't necessarily
20 mean that if you took out those unpermitted acres, all
21 of that, 100 percent, goes into the river. In fact, I
22 think it's highly likely it would not. It would be some
23 smaller fraction of that.

24 But just in terms of how much water is
25 available if a cap were put on and the reduction were

1 ordered, we're already accounting for those unpermitted
2 acres, and they go into the total amount that is
3 advanced as our consumptive use in this case. So it's
4 not like they are undetected or lost. We know how much
5 it is.

6 And so what they do is, they have the wetted
7 acreage database which I've described, and then they
8 have the meter readings, both the blend of annual and
9 monthly. And from all of that data, they are able to
10 determine how many inches of water the farmers in
11 Georgia are using at any particular point in time. They
12 can multiply that by the wetted acreage information and
13 come up with reliable, dependable information about
14 Georgia's groundwater use.

15 Now, Florida -- this matters because when Mr.
16 Perry says, "We just want 2,000 cfs," well, we do
17 genuinely believe, and we put in the record our
18 position, with facts and evidence, that that's not
19 possible. 1500, not possible. And so it is an
20 important determination that needs to be made to
21 determine whether it's worth doing all of this to
22 Georgia. Is it going to get any benefit to Florida?

23 Now, Florida's experts used what they call the
24 rainfall runoff models -- I'm not going to go into great
25 detail on that -- and they advanced those in their

1 brief. I did want to just say, with regard to that,
2 Florida's brief says that the rainfall runoff models are
3 used by various federal agencies for various purposes.
4 I think there was a suggestion that they were used to
5 determine consumptive use. That's not true. This model
6 is not used to determine consumptive use.

7 What Florida did was take a model that is used
8 to determine how much rainfall through runoff will get
9 into the river, and try to back into consumptive use
10 numbers by using that model. But no federal agency has
11 used it for consumptive use. Indeed, the federal
12 agencies use Georgia's data to determine what Georgia is
13 using.

14 And Florida's experts, both of them, admitted
15 at trial, and it's all spelled out in Dr. Bedient's
16 testimony, that the rainfall runoff models they used
17 have an inherent error that is very, very large. In
18 fact, as far as experts attribute the difference between
19 their model and the actual stream flows, everything in
20 there to Georgia's water consumption, the error inherent
21 in their model is larger than the amount that they
22 attribute to Georgia. It could be 100 percent error.
23 They never made any estimation or determination that in
24 fact it was Georgia's consumption, and not error, that
25 was yielding their results.

1 So when you get back to the data, the actual
2 real data, again, this is laid out in detail in Wei
3 Zeng's testimony and also Dr. Bedient's testimony. But
4 on an annual basis in non-drought years, Georgia
5 consumes an annual average of 540 cfs; and in dry years,
6 an annual average of 750 cfs.

7 Now, I do want to be clear. We also always
8 look at this data on a monthly or a seasonal basis
9 because it is true that there is more irrigation in the
10 summer when it's dry and there will be more irrigation
11 in a drought when it's dry because the farmers need the
12 water for their crops.

13 THE COURT: Uh-huh.

14 MR. PRIMIS: And so we have always been very
15 up front that it is higher. But even when you get to
16 the highest amounts that ever get used, the most extreme
17 consumptive use on the Flint was 1400 cfs, and that was
18 one time. And so it's just not possible to achieve the
19 types of water savings, even if you have draconian
20 complete elimination of Georgia's agriculture use.

21 THE COURT: Let me ask you this.

22 MR. PRIMIS: Yes.

23 THE COURT: Let's say that Georgia doesn't
24 waste any water and that they are very efficient when
25 its consumption continues to increase. At what point

1 does the consumption become unreasonable, assuming no
2 waste and very efficient?

3 MR. PRIMIS: Well, Your Honor, there's a lot
4 that goes into that question, and that is just one
5 subpart of the overall broader question that was
6 remanded to this Court.

7 THE COURT: Right.

8 MR. PRIMIS: Which is: The harm to Florida,
9 is it substantially -- does that substantially outweigh
10 the cost to Georgia to fix it?

11 And so with regard to Georgia and its
12 agricultural water usage, I just want to say as a
13 predicate that they have taken steps to improve
14 efficiency, to meter, to use better technology that
15 mandate highly efficient center pivot irrigation units.
16 So Georgia is taking action, and there's a lot of
17 funding at the University of Georgia extension school to
18 assist farmers in those efforts.

19 But if Georgia were to increase, were to look
20 and see what is the actual effect on stream flow into
21 the Flint, and then it may not be that much because
22 Georgia uses a lot less than Florida contends, and the
23 impact is really dependent upon where that water is
24 pumped. If it's not near the river or it's coming from
25 a different aquifer or it doesn't interact with the

1 river in a significant way, it may have very little
2 impact.

3 THE COURT: Well, suppose it does.

4 MR. PRIMIS: Okay.

5 THE COURT: At some point do you say to
6 Florida, "Well, I'm sorry, there's no more water for you
7 because we're using it all efficiently, and that's just
8 the way it is"?

9 MR. PRIMIS: Well, I don't think we're going
10 to get there because there is not -- I don't even think
11 there's enough farmland left to do that. There is a
12 moratorium right now on new permits.

13 THE COURT: I understand that.

14 MR. PRIMIS: And so it's a difficult
15 hypothetical to address because under current planning,
16 we don't foresee that ever happening. And I do just
17 want to say briefly that some of Florida's more alarmist
18 arguments come from some documents that were drafted
19 nearly 30 years ago, two decades ago. The data was very
20 poor, the models were very crude. There is no current
21 belief that under the current amount of farming, that
22 Georgia could dry out the Flint. That's just not going
23 to happen. In addition, the Army Corps is supplementing
24 with 5,000 cfs from its network of reservoirs and dams
25 under its current water control manual. So Florida is

1 going to receive that water regardless.

2 Now, in terms of what the cuts to Georgia's
3 water use could mean for additional stream flow, Mr.
4 Perry talked about Dr. Sunding and his estimates as to
5 what could be achieved. The first thing I just want to
6 note is, Dr. Sunding is an economist. He's not a
7 hydrologist. And another thing I want to point out is
8 that none of the remedy scenarios that Florida presented
9 at trial were tied to Dr. Sunding's estimate. That's
10 just not the way they tried the case. So there is no
11 evidence of what benefit might come to the ecology of
12 Apalachicola Bay from anything that Dr. Sunding did.

13 The other thing I want to point out is, he has
14 been a moving target throughout this case. He literally
15 started out in his expert report by saying that you
16 could get 2,000 at a certain price, and then he said,
17 "No, I'm sorry, 1,000 at a certain price." And then he
18 doubled that at trial and said you could get 2,000 at
19 half the price.

20 And we have laid out in detail Dr. Stavins'
21 testimony, but also in the cross-examination of Dr.
22 Sunding, just why his estimates are so unreliable and
23 how he could have such wild swings. He just excludes
24 costs, he excludes impacts, and he overstates how much
25 actual groundwater pumping Georgia is doing.

1 So through all of those errors, that's the
2 only way they can even approximate what he suggests.

3 And the one other point I would make is that
4 Mr. Perry here said today their focus is on the Flint.
5 But when Dr. Sunding talks about 2,000, 1500, I think
6 something like a quarter or a third of those estimates
7 are actually based on reductions to metropolitan Atlanta
8 and high water use, so it even further reduces even his
9 approach what Florida is able to accomplish.

10 And so you have Georgia's data, which we
11 contend is highly reliable and is much lower than what
12 Florida estimates. And then you have the role of the
13 Army Corps. The Army Corps has a water control manual,
14 and we have demonstrated that under its present
15 operations, the additional water in a drought will not
16 get through to Florida. We put that on at trial, and
17 it's still true today.

18 The starting point is with the Corps'
19 operational rules. The Corps operates, as Your Honor
20 knows, five federal dams and reservoirs, and those
21 reservoirs have multiple project purposes. It's not
22 just, "Give us extra water and we'll shoot it down to
23 Florida for the oysters." That's not how it works. The
24 Corps has to constantly balance water supply to Atlanta,
25 flood control, navigation, water quality, and, to be

1 sure, endangered species. That is part of their
2 mandate, which is why they had a 5,000 cfs minimum flow,
3 which has been reviewed and signed off on by the United
4 States Fish and Wildlife Service, which has assessed and
5 determined that that is adequate to protect their
6 endangered species.

7 And when Special Master Lancaster found this,
8 and we believe the Army Corps has confirmed this in all
9 of its filings, when they're in drought operations or
10 when basin inflow is very low, their mandate is to send
11 5,000 or approximately 5,000 cfs down to Florida and to
12 put the rest into storage so that it can continue to
13 balance all of these project purposes for as long as
14 possible.

15 And one remarkable thing about this part of
16 the case is that Florida's own expert, Dr. Hornberger,
17 did the same modeling that we did. He used the Corps'
18 model, ResSim, and he determined that this water was not
19 going to get to Florida. Now, he didn't put that in his
20 expert report, but they turned over his analysis and we
21 were able to find it in his data, and his results were
22 the same as ours. And that's something that Special
23 Master Lancaster noted.

24 And so it was only then that Florida came up
25 with this new model, the Lake Seminole model, which just

1 models only one reservoir, Lake Seminole. As a result,
2 it doesn't account for any offsetting that the Army
3 Corps may do upstream, and the model basically just
4 forces every drop of water saved through to Florida, but
5 we know from the Corps and from the reliable modeling
6 that that is not how it works.

7 And so when you add all that up, there just is
8 not enough additional water coming in under the Army
9 Corps' operations to make any meaningful difference in
10 terms of flows to Florida.

11 And there were questions from the Supreme
12 Court about whether it might shorten drought operations
13 if more water was coming in. Georgia is the only party
14 that put on any evidence on that question, and that
15 evidence showed that it would not. And the reason why
16 is, if you can't generate enough water on the Georgia
17 side, and even if you could -- to make a difference --
18 and even if you could, the Army Corps only assesses
19 drought operations one day every month, so even if you
20 got 20 extra days, it wouldn't make any difference to
21 Florida because --

22 THE COURT: That would be because they
23 wouldn't go into their drought operations until the
24 following -- the beginning of the next month?

25 MR. PRIMIS: Correct. They just do it once a

1 month.

2 THE COURT: Could they change that?

3 MR. PRIMIS: Well, the Army Corps could change
4 that, and that is one issue that I wanted to make sure I
5 address, the question of reasonable modifications. The
6 Army Corps could change it, but in order to change it,
7 it would have to go through a full administrative
8 process, and it has already said in its filing in this
9 Court about a year ago that it's not going to do
10 anything until this Court and the Supreme Court rule and
11 enter a final decree. And even then, all they said is
12 that they will consider it.

13 And so I know there has been a lot of debate
14 and discussion about what the Army Corps will do and
15 predictions about the future. Even after the Supreme
16 Court entered its ruling, when they filed their brief in
17 this Court, all they said was, "You-all do all your
18 work, and we'll consider it when you're done," which is
19 not an emphatic endorsement that they are on the cusp of
20 making any reasonable modifications of the kind that
21 Your Honor suggests.

22 And the one thing I want to say, in conclusion
23 on this point -- sorry. I just want to see how much
24 time I've got. The one thing I want to say in
25 conclusion on this point is that Florida asked,

1 specifically filed a brief in this Court, saying: Your
2 Honor, we need to brief this issue of reasonable
3 modification. We want to argue what our facts are on
4 that so you can have it for your balancing test.

5 Florida put on no evidence of any reasonable
6 modification, and their brief doesn't discuss any
7 reasonable modification.

8 THE COURT: That's of the Army Corps'
9 procedure?

10 MR. PRIMIS: Correct. Exactly. And so to the
11 extent they are hinging their case or saying that they
12 have met their burden of proof by clear and convincing
13 evidence because the Army Corps is going to do
14 something, Florida has neither argued nor pointed to any
15 evidence to support the contention that the Army Corps
16 is actually going to take action to make the changes
17 they need based on a final decree from this Court.

18 What I would like to turn to now is the second
19 question I identified, which is: What ecological
20 benefit is Florida going to get from its requested cap?

21 So I described what Florida's plan here was.
22 They had a remedy scenario which was created by Dr.
23 Hornberger, and that entailed elimination of 50 percent
24 of the irrigation on the Georgia side of the border.
25 And then they had a number of experts assess what would

1 that do, what ecological benefit or impact would they
2 have on that.

3 Now, in terms of -- Your Honor asked for
4 specific evidence on this. What I just described I'll
5 get to in a minute, but it's not specific at all to any
6 particular species or any particular time or flow. We
7 asked for that in our interrogatory during discovery.
8 We specifically said, "Identify the minimum volumetric
9 flow rate, including the timing and duration of such,
10 that Florida contends must be maintained to prevent or
11 alleviate any harm to any species of wildlife."

12 And they just never answered the question.
13 They never said specific amounts and specific times with
14 specific species that would benefit. And that's
15 notwithstanding having 20 experts on their side.

16 And then Your Honor said, "I want you to
17 answer that question, too, the more specific, the
18 better."

19 So we were waiting for where the specifics
20 were, and neither in the briefing nor today did we get
21 any specific species that will benefit by any amount,
22 reasonable approximation or otherwise, at any particular
23 time from any particular flow.

24 THE COURT: Let me ask you this.

25 MR. PRIMIS: Yes.

1 THE COURT: In your opinion, does the
2 population, the various populations, impact this whole
3 situation?

4 MR. PRIMIS: Yes. And I think we're talking
5 human population, correct?

6 THE COURT: Yes.

7 MR. PRIMIS: Okay. Georgia has argued that
8 human population and animal populations are both
9 relevant, and we don't deny or in any way suggest that
10 if they had a case on ecological benefit, that that
11 should be considered. But human population, certainly.
12 I mean, the amount of production and livelihoods and
13 existing economies that exist on the Georgia side are
14 staggering when compared to what's occurring on the
15 Florida side.

16 And so you have on the Florida side an oyster
17 industry of six to eight million dollars a year at its
18 high point. And in Georgia, you have billions of
19 dollars of agricultural production every year that would
20 be at stake from an order from this Court. And when I
21 say six to eight million, I'm talking about revenue, so
22 the profit on that would be even significantly lower.
23 So we're talking about very, very small economies on the
24 Florida side, as compared to massive economies on the
25 Georgia side, and that is something that Dr. Stavins did

1 address in detail.

2 But part of what this Court was asked to
3 resolve from the Supreme Court on remand was, okay, if
4 we take that -- let's look at the oysters, for instance.
5 If we put all this extra water into Florida, what's the
6 benefit to the oysters? Are they actually going to
7 improve?

8 And what's remarkable on this front, this is
9 Florida's evidence. Florida's own expert said if we
10 take the water from Dr. Hornberger and put water
11 resulting from 50 percent in cut of agriculture, and
12 assuming that Georgia uses all the water that Florida
13 sends, twice what we believe or three times what we
14 believe, put all that into the bay, Dr. White, Dr.
15 Wilson White for Florida, he said that would have a
16 maximum benefit of 1.4 percent in terms of increase of
17 oyster biomass.

18 THE COURT: What would it do to the salinity?

19 MR. PRIMIS: Well, it has virtually no impact
20 on the salinity, either. Just for the record, I'll cite
21 Dr. White, Figures 14 and 15 in his written direct
22 testimony.

23 On the salinity, Florida put forward Dr.
24 Greenblatt, and her job was to take all this water from
25 Dr. Hornberger and measure salinities. And if you look

1 at her report, what's interesting about her report is,
2 she has a series of charts that look just like
3 Apalachicola Bay, and she said, "I'm going to put color
4 code where there are changes in salinity."

5 And if you flip through these charts attached
6 to her written direct testimony, they're all white.
7 There is no color. It's remarkable. There is virtually
8 no change. One part per thousand. And, again, that's
9 Florida's evidence. Georgia had its own experts on both
10 of these issues who came to roughly similar conclusions.
11 But this is Florida trying to meet its burden of proof,
12 and its oyster expert says it's like one and a half
13 percent benefit to the oysters. The bay salinity expert
14 says with a 50 percent cut to agriculture, it's about
15 one part per thousand throughout the bay.

16 She even assumed a scenario where you
17 eliminate all water from Georgia, and I think that only
18 got up to two or three parts per thousand. And our
19 expert, Dr. Menzie, and I believe even their experts
20 confirmed that that will have no positive biological
21 impact, changes that are that small.

22 Now, they have tried to take some testimony
23 from Dr. Glibert to suggest that there will be some
24 benefit because of the nursery function in East Bay, but
25 if you want specifics, she didn't count or estimate the

1 number of actual fish that would benefit. Florida has
2 no evidence on how many fish will benefit, how many
3 shrimp will benefit, how many of the other myriad of
4 things that live in Apalachicola Bay -- they just didn't
5 do that. They didn't measure that at all.

6 And then finally, I just want to address
7 benefit to the river. With regard to benefit to the
8 river, this is where they went with Dr. Allan, and Dr.
9 Allan measured 15 different scenarios as to whether
10 additional water -- again, using Hornberger's remedy
11 scenario with 50 percent ag cut -- what would that look
12 like for the river species. And he found on 12 out of
13 15, that there would only be less than a two and a half
14 percent benefit to all of the species over a 16-year
15 period.

16 THE COURT: Over a 16-year period?

17 MR. PRIMIS: Correct. And that testimony --
18 we used a demonstrative on his cross-examination which I
19 believe is in the record. We provided all of that to
20 Special Master Lancaster. That was Demonstrative 2.
21 And then when Dr. Allan was asked, "Well, less than two
22 percent, that doesn't seem like very much, and you're
23 putting in all this water. Is that significant?"

24 And his testimony was that those changes were,
25 quote, "very small," end quote, and probably not

1 biologically significant. That's 409 to 410 of the
2 trial transcript.

3 He also admitted, Dr. Allan did, that the
4 changes he projected for the tupelo trees -- these are
5 the trees that benefit from the inundation -- that he
6 did not know whether the remedy scenario would have any
7 impact at all on those trees. And I believe that was
8 another one where it showed a very small positive change
9 that would not be biologically significant.

10 And then finally, Florida talked about these
11 sloughs. They're spelled S-L-O-U-G-H.

12 THE COURT: Right.

13 MR. PRIMIS: Not everyone knows how to
14 pronounce it. I did not before I got involved in this.

15 THE COURT: Right.

16 MR. PRIMIS: But they say even just a couple
17 hundred cfs will help the sloughs. But that was an
18 after-thought because no one, not Dr. Allan, ever went
19 and measured how many mussels were in the sloughs; how
20 many more mussels might be in the sloughs from these
21 amounts.

22 In fact, Dr. Allan never made any
23 determination whether mussel populations or sturgeon
24 populations were increasing, decreasing, or were stable.
25 He just didn't do that as part of his analysis.

1 The Fish and Wildlife Service looked at that
2 in their biological opinion, and they concluded both
3 mussels -- in fact, the fat threeridge mussel, there are
4 18 million of them now, like 18 times what they thought
5 previously, and that the sturgeon are doing just fine.

6 So finally, let me just conclude. When we get
7 to the balancing test of how much is it going to cost
8 Georgia and how much will it benefit Florida, I've
9 already touched on this, so I don't think I need to
10 dwell on it too long.

11 But the economies on the Georgia side are
12 significant. They are very significant, 4.7 billion in
13 agriculture-related economies, 1.7 billion in row crops,
14 and a lot of people depend on those businesses for their
15 livelihood. And our expert, Dr. Stavins, assessed an
16 additional 680 million in gross regional product from
17 industries that use agricultural production as
18 commodities for inputs for their business.

19 You know, Georgia has five times the land
20 area, 56 times the population, 80 times the number of
21 employees. And our expert actually went through their
22 models that economists use to assess the impact, and he
23 went through and he used the IMPLAN model and the REMI
24 model -- it's all laid out in Dr. Stavins' testimony --
25 and he assessed that cutting that much business, that

1 much of the southwest Georgia economy, would have ripple
2 effects throughout the economy that would cost, just
3 from Dr. Sunding's proposal, 330 million in direct costs
4 per drought year, an additional 322 million in lost
5 gross regional product, and then 15 and a half million
6 in lost tax revenue -- these are in Stavins' direct at
7 Paragraphs 65 and 90 -- 4,000-plus job loss. That's
8 what would be going on, on the ag side, plus billions
9 more for these M&I, municipal and industrial changes
10 that they've advocated for Atlanta.

11 And even Dr. Sunding, even under his erroneous
12 and underestimated costs -- remember, I described how he
13 got twice as much for half the money. Even under his
14 analysis, it would still cost \$105 million per drought
15 year to implement what he wants, what he suggests. That
16 would eliminate, in our view, 100 percent of agriculture
17 on our side -- even if we use their numbers, it's still
18 70 -- and it would have an additional \$69 million in
19 indirect economic cost, which Dr. Sunding testified to
20 at 2801 of the transcript.

21 So in conclusion, Your Honor, the test the
22 Supreme Court laid down is whether the benefits to
23 Florida substantially outweigh the cost to Georgia. I
24 believe Mr. Perry agreed that the burden is on Florida
25 to show that.

1 Given the amount of water Georgia actually
2 consumes, the fact that the Army Corps under its current
3 system is not going to pass any of those savings
4 through, but will hold it in drought, the fact that
5 Florida presented no evidence on reasonable
6 modifications to the Army Corps operations, the absence
7 of any meaningful benefit even using their own
8 testimony, and the massive cost to Georgia in terms of
9 economics and disruption, we ask that Your Honor enter a
10 report that finds that Florida has not met its burden.

11 THE COURT: Let me ask you one additional
12 question.

13 MR. PRIMIS: Yes, Your Honor.

14 THE COURT: Florida concedes it carries the
15 burden. What is the standard of proof that you think
16 should be applied?

17 MR. PRIMIS: Your Honor, we think
18 unequivocally it's a clear and convincing standard.

19 THE COURT: And that's across the board? Or
20 just on the showing as to harm?

21 MR. PRIMIS: Yes. Well, it certainly applies
22 to their obligation or burden to show that they have
23 suffered a significant harm or injury, but we also
24 believe, and we think the Supreme Court has been quite
25 clear, it also pertains to the ultimate balancing test.

1 So not any particular piece of it, but just
2 whether the benefit will substantially outweigh the
3 harm, that is a clear and convincing test, and we think
4 that's clear from Colorado v. New Mexico.

5 THE COURT: But it doesn't apply to the
6 remedy?

7 MR. PRIMIS: That's what the Supreme Court
8 held in this case, correct. And that was a narrow
9 question, and I think Justice Breyer, in his opinion,
10 was quite clear about that, that what they were
11 addressing was whether Florida had to show at the outset
12 of the case, as a threshold matter, that they could
13 create a remedy by clear and convincing evidence. He
14 said that's too high a burden.

15 THE COURT: So what is the burden that should
16 be enforced?

17 MR. PRIMIS: Clear and convincing evidence
18 that the benefit to Florida will substantially outweigh
19 the harm to Georgia, and that burden rests with Florida.

20 THE COURT: All right. Thank you.

21 MR. PRIMIS: And I would just say, Your Honor,
22 we think that that's clear from Colorado v. New Mexico,
23 I and II. And Justice Breyer, in his majority opinion,
24 did cite to that part of Colorado. In fact, he quoted
25 part of the sentence.

1 And we think it would be highly unusual to
2 think that the Supreme Court overturned, sub silentio, a
3 decision that it was citing and actually quoting from
4 the very same sentence.

5 THE COURT: Thank you.

6 MR. PRIMIS: Thank you, Your Honor.

7 MR. PERRY: Your Honor, if I might, I would
8 like to spend eight of my ten minutes, and invite my
9 colleague --

10 THE COURT: Spend it however you wish.

11 MR. PERRY: -- to address the burden issue.

12 First, Your Honor, we had a five-week trial,
13 and there was extensive cross-examination, including of
14 Mr. Zeng, who Mr. Primis mentioned, and of Mr. Stavins.
15 And I think if the Court were to focus, as Special
16 Master Lancaster did, on those, including Special Master
17 Lancaster's questions for Mr. Zeng, I think that would
18 shed light on the credibility determinations to make and
19 how to look at this.

20 And to that end, if I might, I would like to
21 invite your attention to Page 27 of the slide set, which
22 is behind Tab 5. And this is, Your Honor, really
23 directed to Mr. Primis' first argument, and that's about
24 how much water is actually being used upstream. And I
25 want to be practical about this, because Mr. Zeng, who

1 he identified, his estimate of the number of acres that
2 were being irrigated was 582,000. All right? That's
3 the lowest estimate they've had in 15 years of the
4 number of acres that were being irrigated.

5 Our estimate, which we went out and compiled
6 using satellite data from U.S.D.A., is 824,000.

7 THE COURT: But how much of that is from
8 different aquifers, or is not being irrigated, or wasn't
9 being irrigated, but it has been within the parameters
10 of the wetted acreage?

11 MR. PERRY: So let me refer to the map here,
12 if I might, Your Honor, because it's a question that is
13 addressed in the briefs. So you can see here, this is
14 the Flint River. It comes down here. And there is just
15 extensive irrigation in here. And the aquifer, if
16 they're not withdrawing from the river, they're almost
17 all withdrawing from the Upper Florida Aquifer. The
18 Claiborne and Clayton Aquifers underlie by some degree,
19 but they're much closer to the surface up here than they
20 are down here. And so if you're irrigating up here and
21 you're using the Claiborne Aquifer, it can have a big
22 effect on flows of the river. But not down here.

23 So, in fact, part of the remedy that we
24 proposed, that Georgia itself was discussing internally,
25 was: Can they, down in this area, in the southern part

1 of the Flint Basin, drill down deeper, withdraw water in
2 a way that doesn't affect river flow?

3 And absolutely they can do it. They did, in
4 FX-56, an analysis where they can take an enormous
5 number of acres from the Lower Flint, move them to lower
6 aquifers, and just remove the impact on the river
7 system.

8 One other issue here while I'm working with
9 the map. One of these issues that we talked about at
10 trial is called impact factor.

11 THE COURT: Uh-huh.

12 MR. PERRY: So if you take people out of
13 irrigation from the aquifer or from withdrawing just
14 from the river in the way I just described, replace that
15 irrigation, the state can fund it from a lower aquifer,
16 the question is: How much impact does it have?

17 Well, if you're over here, not so much impact.
18 If you're right along the river, a very significant
19 amount of impact.

20 So the question is: What is the right part of
21 the equation to use?

22 Because a gallon withdrawn over here towards
23 the western side, or over here that's pretty far from
24 the river, it will eventually have an effect on river
25 flow. It might take 1,000 days, it might take a couple

1 of months, but it's all -- almost all of it, 90 percent,
2 is going to affect river flow. It's just a question of
3 when.

4 So there are documents in the record where
5 Georgia's own technical experts are highly skeptical
6 about what Georgia's analytical approach is for this,
7 and about their acreage totals. And one example is
8 Exhibit 49-R, where their technical expert basically
9 says none of the data that Georgia is using in adding up
10 acres, in calculating impact, is actually reliable.

11 Your Honor, if I might just return to this
12 question about the acre estimate, if you look at that
13 which I just described, the 300,000-acre difference, if
14 they just went back to the number that they said in 2006
15 was the maximum amount of acreage they would irrigate in
16 droughts, it was about 450,000. That's in JX-21. That
17 would provide enough water to solve this problem. I
18 mean, there is a bright line solution that Georgia
19 endorsed in 2006 that can solve our problem.

20 Now, they'll say, "Well, you know, that might
21 cause these effects on farmers."

22 And we have, by looking at their menu of
23 potential solutions, come up with our own costs that
24 don't affect the entire basin, that don't affect Atlanta
25 in any significant way. All they do is require that

1 Georgia take the types of steps we take in Florida, and
2 other states, too.

3 And so when Mr. Primis was up here saying,
4 "This is catastrophic, it's going to destroy the
5 availability of water in Atlanta or elsewhere," it's
6 not. These are limited, specific, targeted reforms that
7 Georgia's own people, when they talk to each other in a
8 candid format, say are necessary.

9 So the other reasons why Georgia is wrong
10 about its own estimations of how much it's consuming,
11 apart from the acreage total, is because they don't
12 account at all for the effect of 20,000 farm ponds in
13 the basin. Now, you have evaporative loss from those
14 ponds. Now, those ponds could essentially be used in
15 lieu of irrigating from the river or irrigating from the
16 aquifer in droughts. They don't use them that way.
17 What happens is, the water evaporates. Internally,
18 Georgia's own analysis says this is a real problem.

19 They did not put on any evidence about how
20 much of a problem that is. They withheld it as
21 privileged. We didn't get to see what their numbers
22 were. Their own experts say it could be 1,000; it could
23 be 1,000 cubic feet per second impact. To give you a
24 sense of that, it's 64,000 square acres of farm ponds
25 and small impoundments. That amount of water is almost

1 the same size as Lake Seminole and Lake Lanier combined.
2 That's a profound amount of water that wasn't in
3 Georgia's estimates anywhere. That's one of the reasons
4 why their numbers are so low.

5 Also, the multi-year impact of removing acres.

6 So if you prevent a farmer from withdrawing
7 from the Florida Aquifer here and use another solution,
8 that eventually is going to have a cumulative impact on
9 the flows. So the idea that you, in a multi-year
10 drought, don't count that cumulative impact means you
11 depress the total amount of flow impact that's having,
12 that is being had, and that's something that Georgia
13 didn't account for, that cumulative impact, pumping at
14 great speed, year after year after year after year.

15 That's what I was showing you on the chart.
16 That's how we got such bad flows towards the end.
17 You're depleting the aquifer.

18 FX-82 is an important document to look at.
19 That is Wei Zeng, the person that Mr. Primis referred
20 to, and that person is saying, "We didn't understand how
21 the aquifer was being affected."

22 It was stunning, what we found. That's 2011,
23 right before the crash. I mean, this type of evidence,
24 this type of cross-exam we did at trial shows that these
25 numbers don't hold up.

1 But apart from all that, we also looked at
2 objective measurements. It's not all modeling. In
3 fact, Slides 27 through 29 examine that issue
4 specifically and show all of the confirmatory evidence
5 which included, but was not limited to, modeling; plus,
6 the analysis of Georgia's own experts that said that
7 here at Newton on the Flint, because of irrigation,
8 there was 2600 cfs in long-term flow reduction. That's
9 a lot of water. That's irrigation.

10 So Georgia counts all those acres and says,
11 "We couldn't possibly have done it."

12 Their own experts internally say they did,
13 Your Honor.

14 So if I might, before turning over the podium
15 to Mr. Garre, just briefly address Slides --

16 THE COURT: You have two minutes.

17 MR. PERRY: One minute, Your Honor. We think
18 that the Court has made a finding it has enough water.
19 That's on Slide 20. It doesn't need the additional
20 water. It does not need to seize water that the Supreme
21 Court apportions to Florida in order to meet its needs.
22 It has made a finding. And, in fact, on the following
23 pages of that particular range of slides are the things
24 they have said about not prejudicing the Supreme Court's
25 decision.

1 MR. GARRE: Thank you, Your Honor.

2 I have three very quick points.

3 First, on the burden of proof, we addressed it
4 in our opening brief on remand, Page 4, Note 1, in our
5 response brief, Page 4, Note 1, where we explain that in
6 this case, Georgia occupies the same position as
7 Colorado as the diverting party.

8 Second, Mr. Primis said that the Supreme Court
9 held that we bore the burden of clear and convincing
10 evidence on the balancing. You will look for that in
11 the Court's opinion, but you won't find it. What you
12 will see is that the Court's --

13 THE COURT: What burden of proof should we
14 utilize?

15 MR. GARRE: I believe it would be a
16 preponderance, ultimately, on the balancing. But the
17 Court, when the Court described the balancing -- this is
18 on Page 2527, I believe -- it did not refer to clear and
19 convincing evidence. The Court referred to clear and
20 convincing evidence only on the initial stage of whether
21 we've shown shifting of equitable balancing, which it
22 held that we met.

23 The dissent several times referred to clear
24 and convincing evidence, but the Court didn't. It
25 instead stressed the need for flexibility.

1 In any event, we believe we meet any burden of
2 proof.

3 Second, on the balancing, I would refer this
4 Court to New Jersey v. New York, where the Court
5 balanced the interests of the oyster beds in New Jersey
6 to the need for New York City to have more water.

7 And finally, I would stress what I began with,
8 which is that this is a case about eliminating waste and
9 mismanagement. That's what distinguishes this case from
10 Washington v. Oregon and Idaho v. Oregon, where the
11 Court found that the uses there were reasonable. Here,
12 as Special Master Lancaster laid out, Georgia's
13 irrigational practices are unreasonable, unrestrained,
14 and ultimately --

15 THE COURT: I disagree with you. Lancaster
16 didn't find anything. He assumed it.

17 MR. GARRE: Yes, Your Honor. And we believe
18 his discussion there is compelling, although we
19 recognize this Court can revisit that and make its own
20 findings.

21 Ultimately, this gets back to what Justice
22 Holmes said in New Jersey v. New York, which is that a
23 river is a treasure and should not be wasted.

24 Georgia today indicated in response to Your
25 Honor's questions that there is no limit on the amount

1 of water that they believe that they can consume.

2 Florida is seeking to protect an irreplaceable
3 ecological resource that once gone, will never come
4 back.

5 Thank you, Your Honor.

6 THE COURT: Thank you very much. Your
7 arguments were very helpful.

8 We will take this matter under advisement, and
9 we'll let you know in due course. Thank you.

10 We are in recess.

11 LAW CLERK ROBERT TEPPER: All rise.

12 (Proceedings concluded at 11:25 a.m.)

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2 DISTRICT OF NEW MEXICO

3
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