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Georgia faces another crucial court test in water war

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TALBOTTON, GA. — The Flint River, from high atop the bridge on Po Biddy Road, looks nothing like the water-hogging culprit Florida makes it out to be. It's all rocks with slivers of water barely coursing through.

"That's what paddlers call 'bony,' " said Gordon Rogers, the Flint Riverkeeper. "It should be almost three times as high. And we're not even in a big-dog drought."

Yet much of Georgia is in a drought — worsening by the day — and the lack of rain, barren streams and dwindling reservoirs buttress the latest "water war" legal battle set to begin Monday in a Maine courtroom. The stakes for Georgia have never been higher.

Metro Atlanta's future rides on the legal opinion of one irascible, no-nonsense Yankee barrister who has warned that neither Georgia nor Florida will be satisfied with his ruling. The U.S. Supreme Court appointed Ralph Lancaster as the "special master" to determine the validity of Florida's 2013 lawsuit against Georgia and its alleged overconsumption of the Chattahoochee and Flint rivers.

If Florida prevails, then Georgia might have to cap its water use, much to the economic detriment of southwest Georgia cotton farmers and/or Atlanta utilities, factories and Realtors. Florida, in pretrial briefs, seeks as much as 40 percent more water from Georgia during droughts.

"Anybody who knows anything about the water war has got to be worried," said Bradley Currey Jr., the retired CEO of the packaging company Rock-Tenn who has played a key role in Georgia's water-supply saga for 25 years. "We're at risk. There is no more important single issue than resolving the water war in terms of the long-term future of the Atlanta region and of Georgia."

Metro Atlanta is expected to grow into a 10-million-man megalopolis by 2050, an urban-suburban swath of concrete and steel stretching from Tennessee to Alabama and Athens. Without ample water, though, the region withers. This latest drought, with 25 North Georgia counties experiencing "exceptional" dryness — the worst designation — punctures metro Atlanta's sense of inevitability.

But Florida v. Georgia is not just a parochial spat. The master's ruling, if seconded by the high court, carries far-reaching national implications, especially for states east of the Mississippi where water law and "equitable apportionment" of rivers — the crux of this case — remain unsettled.

Whiskey's for drinking, as the adage goes, but water's worth fighting over.

Georgia, Florida and Alabama have traipsed to the courthouse numerous times the past 27 years attempting to resolve the tri-state water war. Georgia, more times than not, prevailed.

This time, though, may be different. While some legal experts give Georgia the upper hand — Florida has to prove that Georgia consumes too much water and that harms the Sunshine State’s economy and environment — nobody knows the special master’s thinking.

Lancaster rarely speaks publicly and even less frequently to the press. Yet he is considered sensitive to arguments over environmental degradation and impact on the economy. In a July teleconference call with attorneys from Georgia and Florida, for example, the special master said he was “impressed with the writings that relate to the droughts that are there and happening and are being predicted.”

A warning to Georgia perhaps?

“Judge Lancaster is wise enough to tell the parties that, ‘You need to start considering changing weather patterns in your water use,’ ” said Ryan Rowberry, an attorney in Atlanta who worked on behalf of Florida in a previous water fight with Georgia. “We’ve had so much abundant water before that we’ve not had to worry about regulating it. Now, Lancaster might recommend conservation measures by both states to better manage the water we have.”

‘Death or life for us’

The Chattahoochee and Flint rivers flow into a reservoir along the Georgia-Florida line that feeds into the Apalachicola River, which trickles 100 miles to the Gulf of Mexico. Apalachicola Bay is an ecologically beautiful spot where salt and fresh water combine to produce some of the tastiest oysters in the country.

Yet lack of abundant fresh water, Florida claims, allows salt water to push further upstream, harming the delicate fresh-salt water balance that nurtures the plankton oysters live on. The bay once produced 10 percent of the nation’s oysters.

In 2012, though, after eight months of bad drought, the oyster industry in Apalachicola collapsed. The federal government declared a disaster. Oystermen who once filled bag upon bag with juicy oysters laid down their tongs. The state instituted a four-bag-a-day limit, yet the fishermen have trouble filling their quota. Dockside value of oysters in 2014: \$4.4 million — a pittance compared with earlier hauls.

The trial, beginning Monday in Portland, Maine, might be an oysterman’s last, best chance.

“It’s death or life for us,” said Shannon Hartsfield, who heads up Apalachicola’s seafood workers association. “If we don’t get nothing out of this, we’re over with.”

Florida’s lawsuit says Georgia unfairly hoarded water in the Chattahoochee and Flint river basins during the 2012 drought. It cites “massive” withdrawals of groundwater from the Floridan aquifer, which supplements Flint River irrigation by cotton and peanut farmers, as one reason for the paucity of water reaching Florida. And it targets overconsumption by metro Atlanta industries, utilities and lawn-waterers as another.

“This harm is worsening with every drought; if the status quo continues, Florida’s injuries will be catastrophic and irreversible,” Florida contends.

Florida also claims low flows harm endangered species, including mollusks and sturgeon, further up the Apalachicola River. And it says the economic impact to the entire ecosystem — dying Tupelo honey trees, dried-out sloughs, desperate fishermen, reduced tourism — is incalculably high, yet must be considered.

Its lawsuit is predicated upon a wasteful and greedy Atlanta benefiting at Florida's expense. It notes that water consumption in metro Atlanta has doubled since the 1970s and may double again by 2050 as the region's population explodes.

Florida is also taking aim at the farmers in southwest Georgia who "are consuming exponentially more irrigation water from the Flint River Basin." They're easy targets.

In 2012, the farmers tallied 6,500 water withdrawal permits. Their wells irrigated 900,000 acres of cotton, peanuts, wheat and other crops. As the drought worsened, the state imposed a moratorium on wells for the Floridan aquifer, the Flint and other streams. So farmers just dug deeper wells into other aquifers.

An additional 237 permits were issued over the ensuing two years.

One Georgia official, in court filings, said "there is no doubt that we need a viable management tool to deal with drought in the Flint River Basin." Georgia tried, sort of, to limit irrigation with a proposed auction to buy out farmers' well-digging rights. But the General Assembly didn't finance it.

Self-inflicted wounds?

"Florida has to prove by clear and convincing evidence that they're being harmed by an inequitable distribution of water," said Robert Abrams, a law professor at Florida A&M University who co-wrote a book on the water war. "Unless I completely missed it (in the briefs), they don't have that proof. I cannot see Florida winning this case."

Abrams points to the testimony of another professor, Karl Havens at the University of Florida, who said he "never found any quantitative linkage between flow from the (Apalachicola River) and the crash with the oysters."

Georgia also says Florida's "mismanagement" of the Apalachicola Bay, after the Deepwater Horizon oil spill in 2010 in particular, led to the oyster industry's decline. As oyster beds in Texas and Louisiana closed after the devastating spill, fishermen headed to Apalachicola. Florida Gov. Rick Scott wrote in 2012 that "this led to overharvesting of illegal and sub-legal oysters further damaging an already stressed population."

Georgia further cites its own water conservation measures. In 2000, for example, metro Atlanta used 155 gallons per capita per day. Today, it uses 98 gallons per day and credits low-flow toilets, tiered pricing and mandatory outdoor watering restrictions for the reduction.

And, according to Georgia's 2001-page pretrial brief, "to the extent Florida asserts it is receiving less water than it did historically, the evidence shows that such decreases are largely due to an increase in the severity and frequency of natural droughts."

A drought, though, cuts both ways. Georgia may blame low flows on lack of rain, but that doesn't mitigate Florida's need for more water. Dan Tonsmeire, the Apalachicola Riverkeeper, said the river was extremely low last week with kayakers getting stuck on sand bars.

"What this drought does is paint in stark terms the need of a (water wars) resolution that's flexible and capable of dealing with changing weather patterns," said Rowberry, the Atlanta attorney who teaches at Georgia State University. "Judge Lancaster said both sides will not be pleased with his ruling. I think he will recommend conservation measures for both states. And neither state will like that because of the cost in time and money."

Georgia, seemingly, leaves little to chance. It hired 70 lawyers to prepare for trial. It has spent \$24 million this year alone fighting the water wars. The threat of a huge economic hit — as much as \$18 billion to industry and agriculture if the special master orders a heavy consumption cap — worries state officials.

But they won't comment publicly; Lancaster has repeatedly warned them to avoid the press. Privately, though, some of Atlanta's water warriors target the farmers along the Flint as sacrificial lambs. Florida is only too eager to go along.

"The majority of the water savings from potential measures Georgia could implement will involve its agricultural irrigation," its brief says.

The Georgia Farm Bureau, in a court filing, says "if access to water for irrigation disappears, farming disappears, and the communities of southwest Georgia disappear."

It won't end here

The water wars won't end with Lancaster's ruling. He'll make a recommendation to the Supreme Court, and the justices may put it on their calendar in 2017.

Professors Rowberry and Abrams expect Georgia and Florida to negotiate in good faith if the special master finds both at fault. Alabama, which is siding with Florida, could file yet another lawsuit.

The dams and reservoirs along the Chattahoochee River are controlled by the U.S. Army Corps of Engineers, which is finalizing its latest water plan for the river. No water-sharing deal is possible without the corps.

Talk of a "compact" between Georgia, Florida and Alabama, with each state guaranteed a set amount of water, will likely heat up in 2017. And droughts, which always bring water war negotiators back to the table, will likely be with us for years to come.

WHY IT MATTERS

If Florida prevails, Georgia might have to cap its water use, much to the economic detriment of cotton farmers and/or Atlanta business, industry and real estate interests.

Water wars timeline

1956: The Army Corps of Engineers completes construction of the earthen Buford Dam, impounding the Chattahoochee River to form the 38,000-acre Lake Lanier.

The cities of Buford, Cumming and Gainesville, as well as Forsyth and Gwinnett counties, draw water out of the lake. Cobb, DeKalb and Fulton counties get water from pumping stations on the Chattahoochee after the water passes through the dam's turbines.

1960s: The corps allows the metro area to increase its water withdrawals from the Chattahoochee River because the intakes did not affect the dam's hydroelectric operations.

1975: The corps determines that it could supply an average of 230 million gallons of water per day to metro Atlantans without it affecting hydropower generation.

1986: The corps determines that it could supply an average of 327 million gallons of water per day to metro Atlantans without it affecting hydropower generation.

1989: The corps releases a proposal for a new operating manual for Buford Dam that calls for significantly increasing the amount of water that could be used to meet the area's needs.

1990: The corps scuttles its plan to make more water available as water supply after Alabama files the first of four lawsuits challenging metro Atlanta's withdrawals from Lake Lanier.

1997: Georgia, Alabama and Florida agree to form a commission to figure out an allocation formula. The pact includes a "live and let live" provision that allows the corps to honor existing water supply contracts and permits water systems to increase their withdrawals to satisfy "reasonable" increases in demand. The agreement dissolves in 2003 when the commission cannot agree on a formula.

2000: Georgia asks for increased withdrawals to meet Atlanta's needs through 2030. The request is denied.

2007: Drought hits the Southeast.

2009: A federal judge signs an order that would severely restrict Atlanta's water withdrawals unless Alabama, Florida and Georgia strike a water-sharing deal. U.S. District Judge Paul Magnuson said that Lake Lanier was not intended as a water supply for metro Atlanta. The intended purposes were hydropower, navigation and flood control, he said. Magnuson gave the states three years to work out an agreement before the order would take effect, limiting metro Atlanta to withdraw water at the same levels as it did in the mid-1970s.

June 28, 2011: An appeals court overrules Magnuson's decision, saying supplying metro Atlanta water was an intended use for the lake.

June 25, 2012: The U.S. Supreme Court secures metro Atlanta's claim to water from Lake Lanier when the court turns down appeals from Alabama and Florida.

Oct. 1, 2013: Florida asks the U.S. Supreme Court to order Georgia to let more Chattahoochee River water flow into the Panhandle to keep the state's oyster industry afloat. The suit asks that metro Atlanta's withdrawals from Lake Lanier and the Chattahoochee River be held to the same levels as 1992, when the region drew about 275 million gallons a day to serve 3 million. The level in 2013, following a

55 percent increase in the region's population since 1992 to 5.4 million, was about 360 million gallons a day.

Nov. 3, 2014: The U.S. Supreme Court agrees to hear the Florida lawsuit that seeks to cap Georgia's withdrawals from the Chattahoochee River. Trial in the case is set to begin Monday in Portland, Maine.