

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

FLORIDA,)
)
) Plaintiff,)
)
) v.) No. 142, Orig.
)
) GEORGIA,)
)
) Defendant.)
)

Pages: 1 through 71

Place: Washington, D.C.

Date: January 8, 2018

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9

10 Washington, D.C.

11 Monday, January 8, 2018

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 11:05 a.m.

16

17 APPEARANCES:

18 GREGORY G. GARRE, Washington, D.C.; on behalf
19 of the Plaintiff.

20 CRAIG S. PRIMIS, Washington, D.C.; on
21 behalf of the Defendant.

22 EDWIN S. KNEEDLER, Deputy Solicitor General,
23 Department of Justice, Washington, D.C.; on
24 behalf of the United States, as amicus curiae, in
25 support of overruling Florida's exception 2c.

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1 consumption be allowed to continue unabated
2 because Florida had failed to show an adequate
3 -- adequate certainty of complete relief.

4 With respect to the Special Master, we
5 believe he -- he made a legal error on this
6 discrete issue that the case should be returned
7 to him for him to complete the work that he has
8 begun.

9 JUSTICE GINSBURG: Mr. Garre, I
10 thought that the Special Master -- this is at
11 page 63 to 65 of his report -- said that
12 Florida at the trial concentrated only on the
13 harm from the low flows in drought years and it
14 did not address the benefits of increased flow
15 during normal non-drought periods.

16 It didn't even address it, he said, no
17 -- no less showed the benefits that it would
18 gain. So he said if -- if Florida has not
19 established its case, it's Florida's fault
20 because all they did was concentrate on the
21 drought years.

22 MR. GARRE: Right. And I think, first
23 of all, the Special Master's entire report has
24 to be viewed in light of the legal standard of
25 redressability that he applied. And we believe

1 that he applied far too great of a standard.

2 Second of all, I think it is fair to
3 say that Florida's presentation was focused on
4 the harm that we suffered during drought
5 conditions in the extreme low-flow periods.
6 But two things about that are important to
7 understand.

8 There's two ways to address that harm.
9 One is to provide more water during those
10 periods, the extreme low-flow periods, the
11 worst of the worst, and the other way is to
12 reduce the frequency and severity of those
13 drought operations.

14 And the United States, even the United
15 States in this case -- and it's at page 28 of
16 its brief -- recognizes that a decree in this
17 case limiting Georgia's consumption would
18 benefit Florida by reducing the frequency,
19 severity, and duration of drought conditions.

20 Now, we think that that benefit --

21 JUSTICE KAGAN: Where does the record
22 show that?

23 MR. GARRE: That we would benefit from
24 that? Well, what I can point you to, for
25 example, is the 2012 drought. And we've

1 explained this in the evidence cites at pages
2 48 to 49 of our brief.

3 And what that example shows is that if
4 more water had come into the system during the
5 2012 drought, which one of -- is one of the
6 worst that the region has experienced, it would
7 have meant that the Corps would not have dipped
8 into its drought operations during -- for --
9 for nine months during that period, which means
10 that the Corps would not have fallen into the
11 red zone, where all the sort of needles are at
12 the far end of the spectrum, for nine months
13 during that drought.

14 And that has to have resulted in
15 beneficial effects.

16 JUSTICE KAGAN: So here -- here's my
17 difficulty, Mr. Garre, with this argument. And
18 it's especially with respect to this exception
19 2d, I think it is.

20 MR. GARRE: Yeah.

21 JUSTICE KAGAN: Is that you have
22 common sense on your side. I mean, you say,
23 well, it has to have shortened the drought or,
24 you know, surely we would have gotten more
25 water and that would have been beneficial to

1 us.

2 But there seems to be a real dearth of
3 record evidence specifically quantifying how
4 much more water you would have gotten, exactly
5 what benefits would have followed from that.
6 It just doesn't seem as though Florida put that
7 into the record, even though you kind of want
8 to say, well, that must obviously be true.

9 MR. GARRE: Okay. Well, first of all,
10 I agree with you it obviously has to be true.
11 Second of all, let me give you some more --

12 JUSTICE KAGAN: Well, but, you know, I
13 guess what I'm saying is that's your first
14 reaction, but there must have been some reason
15 why it didn't put that into the record.

16 MR. GARRE: Right. So let me give you
17 some more evidentiary cites. And then --
18 before I do that, let me just point you to what
19 this Court said in the Idaho II case, Idaho
20 versus Oregon II, in which the Court said that
21 uncertainties about the future do not provide a
22 basis for fashioning the relief.

23 And I think, overall, that's a central
24 principle that's critical in this case, is of
25 course allowing more water through -- through

1 is going to address this harm. This Court has
2 never had a situation where it's recognized a
3 state as being injured, it's recognized that
4 the upstream state is wasting a resource, and
5 it's recognized that -- and the evidence shows
6 that relief is possible and indeed likely and
7 the Court has said: Nope, too bad, we're going
8 home.

9 And so let me get back to the
10 evidence.

11 JUSTICE GINSBURG: But in this -- but
12 in this case, Mr. Garre, the Special Master
13 said: Yeah, there was proof on that point, but
14 it was put in by Georgia, and Georgia's expert
15 said it wouldn't make enough of a difference --
16 a difference to cure Florida's problem.

17 MR. GARRE: Well -- and I'm going to
18 get back to the -- the evidentiary cites, but
19 on that, Justice Ginsburg, and just to be
20 clear, we think that one of the Special
21 Master's central error was to deal with all of
22 this on the basis of a central -- of a
23 threshold redressability inquiry and that
24 instead what this should have done is gone to
25 the equitable balancing stage of the equitable

1 apportionment proceeding, where the Special
2 Master would have to make all the findings that
3 he did not complete on the -- on the costs that
4 Georgia would incur of a decree, the full range
5 of harms that Florida has suffered. He didn't
6 conclude those findings.

7 JUSTICE KENNEDY: You do agree -- you
8 do agree that you have the burden to show
9 redressability?

10 MR. GARRE: We have the burden like
11 any plaintiff to show redressability in the
12 Article III sense, Justice Kennedy. And we
13 think that we meet redressability under any
14 conceivable standard.

15 Now, I think when you get into the
16 equitable balancing stage, I actually think
17 that the burden shifts to Georgia at that stage
18 because if we've shown, as the Special Master
19 acknowledged that we have, that we have
20 suffered real harm as a result of Georgia's
21 inequitable conduct, then at that point under
22 this Court's precedents, Colorado versus New
23 Mexico in particular, the burden shifts to
24 Georgia, but I think --

25 JUSTICE KENNEDY: You -- you would say

1 you do not have the burden, once you've shown
2 the injury, to show that a consumption cap can
3 help cure the problem.

4 MR. GARRE: Well --

5 JUSTICE KENNEDY: You do not have the
6 burden to show that?

7 MR. GARRE: I -- I think we do.
8 Certainly, we have to show that a consumption
9 cap is going to work. And the question is by
10 what standard?

11 JUSTICE SOTOMAYOR: All right.
12 Mr. Garre, but --

13 MR. GARRE: Do we have to show that a
14 mere certainty standard --

15 JUSTICE SOTOMAYOR: It is very
16 critical for me that you go through the
17 evidence of that.

18 MR. GARRE: Yes.

19 JUSTICE SOTOMAYOR: Now, just so --
20 correct me if I'm wrong, the Special Master
21 made two findings. The first one was that in
22 drought periods, you didn't prove that the
23 Corps -- the -- the Corps would release more
24 water.

25 The SG agrees with that and says,

1 under the protocols in place, during drought
2 periods you're not going to get more water by a
3 consumption cap.

4 Putting aside whether that's close to
5 the gavel -- gravel situation or not, I'm
6 really not addressing that --

7 MR. GARRE: Right.

8 JUSTICE SOTOMAYOR: But I do want to
9 go to the non-drought time.

10 MR. GARRE: Right.

11 JUSTICE SOTOMAYOR: And as I read his
12 report, he -- he does say there was no evidence
13 of the cap providing you with more water. And,
14 in fact, I did find plenty of evidence of that.
15 So I'm not quite sure. And he discussed some
16 evidence and rejected it as meaningful.

17 So point me to evidence he didn't
18 discuss and explain why it's meaningful.

19 MR. GARRE: Sure. I mean, first of
20 all, just to be clear, if Georgia's consumption
21 is limited, it's going to result in more water
22 in the system and that water is going to flow
23 through --

24 JUSTICE SOTOMAYOR: And that's Justice
25 Kagan's logic point.

1 MR. GARRE: Well, no --

2 JUSTICE SOTOMAYOR: But I'm -- I'm --

3 MR. GARRE: -- the Special Master
4 recognizes that because, for example, on pages
5 6 and 30 -- 37 of his report, he recognizes
6 that the -- the Woodruff facilities, a
7 run-of-the river facility, water's going to go
8 through it. The United States recognizes that
9 on page 33 of its brief.

10 JUSTICE SOTOMAYOR: They -- they --
11 they agree with you.

12 MR. GARRE: That water is going to go
13 through. And so, if we're talking about the
14 non-drought periods, what I would point you to,
15 for example, is the 2016 biological opinion by
16 the Fish and Wildlife Services, JX 168 at page
17 50, where it talks about the benefits of
18 additional water coming into the system.

19 I would point you to the Hornberger
20 direct testimony at paragraph 53 where it talks
21 about the benefits of having additional water
22 come through to help reduce the salinity for
23 the mussels.

24 I would -- I would point you to the
25 Allen direct, paragraph 3-D, where it talks

1 about the benefits of even modest additions of
2 waters and helping to halt an irreversible
3 cycle.

4 I would point you to the White direct
5 testimony, paragraph 164, where it makes
6 similar claims about this. These are all
7 supporting --

8 JUSTICE SOTOMAYOR: I -- I -- I agree.

9 MR. GARRE: Okay.

10 JUSTICE SOTOMAYOR: But where do they
11 quantify it to show that the improvement would
12 be meaningful? How -- how --

13 MR. GARRE: All of those talk about
14 how adding additional water, even in
15 non-drought periods, helping the system
16 rejuvenate is going to have a meaningful,
17 beneficial effect. Do they have a precise --

18 JUSTICE SOTOMAYOR: And so your
19 argument about the standard is that you didn't
20 have to prove the exact amount, you just had to
21 prove that it was meaningful?

22 MR. GARRE: Exactly. And this Court
23 said exactly that in Colorado versus New Mexico
24 where the Court said that absolute precision is
25 not required. Instead, this is an equitable

1 proceeding governed by broad and flexible --

2 JUSTICE GORSUCH: Mr. Garre, you talk
3 about a burden-shifting regime. And I want to
4 -- I want to understand your -- your thought on
5 that a little bit more clearly.

6 So, once you show that there are
7 benefits, you think then what happens?

8 MR. GARRE: Well, actually, I think,
9 and this is laid out in Colorado versus New
10 Mexico, Footnote 13, I think, is first, we have
11 the burden, by clear and convincing evidence,
12 to show that we have suffered real harm as a
13 result of Georgia's upstream consumption.

14 Once we meet that burden, the Special
15 Master I think concluded that we did, or he
16 assumed we did at the very least, then the
17 burden shifts to Georgia essentially to show
18 that the costs of the decree would be so much
19 that they outweigh the injury that Florida is
20 suffering.

21 And part of that inquiry --

22 JUSTICE GORSUCH: Well, now, does the
23 burden ever shift back to you to prove your
24 case at the end of the day that the benefits
25 you seek outweigh the harms you'd cause or --

1 MR. GARRE: Well, that's --

2 JUSTICE GORSUCH: -- or does the
3 burden ultimately rest with Georgia as a
4 defendant, in your view --

5 MR. GARRE: I think --

6 JUSTICE GORSUCH: -- and can that be
7 -- can that be right?

8 MR. GARRE: First of all, I think
9 whichever way you think the burden lies at the
10 end, we meet it under the correct
11 redressability standard.

12 Second of all, I think what this Court
13 has talked about is when you get to that
14 equitable balancing stage, the burden is on the
15 diverting state to show that it's -- that it --
16 it either cost too much or it's not worth it.

17 JUSTICE GORSUCH: Look, I thought that
18 the burden ultimately was for the plaintiff who
19 wishes to alter the status quo to show that the
20 benefits he wishes to obtain significantly
21 outweigh the harms that the relief he seeks
22 would cause. Am I wrong about that?

23 MR. GARRE: Well, I think you are
24 under Colorado versus New Mexico, but -- but if
25 you are right about that, Your Honor, I would

1 say that we have met that and that the Special
2 Master's --

3 JUSTICE GORSUCH: Okay. Help me with
4 that. Assume I'm -- I'm stuck on that
5 standard.

6 MR. GARRE: Sure.

7 JUSTICE GORSUCH: How do you meet that
8 high threshold seeking -- seeking this Court's
9 equitable --

10 MR. GARRE: First of all, assume no
11 change in the core operations. The United
12 States itself recognizes, and this is at page
13 28 of its brief, that a decree limiting
14 Georgia's consumption is going to benefit
15 Florida because it's going to reduce the
16 frequency, severity, and duration of the worst
17 possible periods, the drought conditions.
18 That's point number 1.

19 The second point is, is that the
20 United States has reckoned -- the Army Corps of
21 Engineers and the United States have recognized
22 that if this Court were to enter a decree in
23 this case, the Army Corps of Engineers would
24 review that decree and would adjust its
25 operations accordingly, so that it would --

1 JUSTICE GORSUCH: Well, let's just
2 stick with the non-drought operations. Okay?
3 Assume my standard. How do you win under the
4 non-drought years?

5 MR. GARRE: I think we have to show
6 that it is a likelihood of at least partial
7 redress. And I think that we have shown that
8 because --

9 JUSTICE SOTOMAYOR: Assume that.
10 Let's go to the real question, which is if it's
11 your burden to prove the balance, assume that,
12 how have you shown that the benefit to you is
13 greater than the cost to them?

14 MR. GARRE: Okay.

15 JUSTICE GORSUCH: Thank you.

16 MR. GARRE: First of all, Justice
17 Sotomayor, to answer that question, you have to
18 know what the costs to them are. And there's a
19 dispute between the parties about that.

20 They argue in their brief it's going
21 to cost them \$350 million a year. In fact, our
22 witness, Mr. Sundean, put on evidence it was
23 going to be \$35 million a year, and the Special
24 Master didn't make findings on that because he
25 short circuited these decisions --

1 JUSTICE GORSUCH: So is that your real
2 beef then, that at the end of the day that the
3 Special Master went off track on
4 redressability, with non-drought years, you
5 have redressability, and that he should have,
6 therefore, conducted a more thorough balancing
7 test in weighing the equities on the
8 non-drought years at the very least?

9 MR. GARRE: Yes, ultimately that's
10 what we think should happen next, and in that
11 proceeding what you would take into account is,
12 okay, what's the full extent of Florida's
13 injuries? The Special Master has found that
14 we've been gravely injured with respect to --
15 to oysters.

16 He didn't make findings on the
17 threatened Gulf sturgeon or the threatened
18 mussels in the Apalachicola River. He didn't
19 make those findings yet.

20 JUSTICE KAGAN: But, again, this goes
21 back to my first question. Suppose the Special
22 Master thought, you know, I can't even begin to
23 do a cost/benefit analysis in the way that you
24 would have liked him to because Florida hasn't
25 shown that they're going to benefit at all. So

1 it doesn't matter what the costs are with
2 respect to Georgia. They could be fairly
3 minimal.

4 But Florida hasn't put on any evidence
5 that they're going to get enough water as a
6 result of these consumption caps going into
7 place that would improve their ecosystems,
8 improve the oyster beds or so forth, and
9 without that, I can't go forward.

10 MR. GARRE: Your Honor, there was
11 significant evidence put in through our
12 witnesses, for example, Dr. Hornberger, about
13 the -- the benefits of the water coming through
14 and --

15 JUSTICE KAGAN: Well, there are two
16 kinds of evidence that you might be talking
17 about. One is evidence saying a lot more water
18 would help our ecosystems. And I think that
19 there is a fair amount of evidence with respect
20 to that.

21 But there's a prior question, which is
22 exactly how much more water would you get --

23 MR. GARRE: Yes.

24 JUSTICE KAGAN: -- if these caps went
25 into place? And that's the place where it

1 seems to me that there's kind of a vacuum.

2 MR. GARRE: Well, I don't think so.

3 And, you know, what I would point you to, for
4 example, is the United States' post-trial
5 brief.

6 If you look at page 19 of that brief,
7 I think, it recognizes that during low flow
8 periods, not the extreme low flows but the low
9 flows bumping up on the worst possible harm,
10 during that period, additional water coming in
11 would go through to Georgia.

12 And the example that it has is if you
13 had a flow rate at the border of 6,000 cfs and
14 additional water coming through of 2,000 cfs,
15 that you then have 8,000 going through. That's
16 -- that's a lot of water.

17 And our -- our witnesses
18 overwhelmingly show that that kind of water was
19 going to have a significant impact on the
20 Apalachicola River.

21 And I -- and I think, again, going
22 back to the -- stepping -- taking a step back
23 in terms of what we have to show in this
24 proceeding, this Court has always made clear in
25 this setting that uncertainties about the

1 future are not a basis to provide a brief, a
2 decree, that absolute precision is not
3 required. And that's because this Court is in
4 the realm of equity.

5 This Court has never had a situation
6 where it's found harm, it's found inequitable
7 conduct, and its found that relief is possible.
8 I think you have to conclude on this record
9 that relief is possible.

10 And the Special Master, the error that
11 he committed, and I would agree with Justice
12 Gorsuch on this, is he got off track on this
13 threshold redressability ruling, that instead
14 he should have continued the good work that he
15 had done, made all the findings in terms of all
16 the harm that Florida suffers, the costs that
17 Georgia is going to incur from the decree, and
18 then determine whether or not a decree, an
19 equitable apportionment, should be entered.

20 Now, if I could go to the Army Corps
21 of Engineers because I do think that this is a
22 separate basis for finding redressability. And
23 to be fair to the Special Master, he didn't
24 have the benefit of this. And that's the
25 record of the decision that was issued about

1 six weeks after the Special Master made his
2 recommendation here, where the Army Corps of
3 Engineers said if this Court enters a decree in
4 this case, it would review that decree and
5 adjust its operations accordingly.

6 CHIEF JUSTICE ROBERTS: Is that the
7 March 30 decree?

8 MR. GARRE: Yes, Your Honor.

9 CHIEF JUSTICE ROBERTS: Okay.

10 MR. GARRE: And I think it -- that's
11 on page 18 of that document.

12 And the United States importantly
13 recognizes that, in its brief at page 30 of its
14 brief, that that -- that a decree in this case
15 would form a part of the constellation of laws
16 that the Army Corps of Engineers would have to
17 look to in order to decide how to respond to
18 that.

19 We don't know what the Army Corps of
20 Engineers is going to do, but I think common
21 sense would tell you that any good government
22 actor would look at a decision by this Court
23 and seek to adjust its operations in a way that
24 would facilitate that decree. And you can just
25 take the Army Corps of Engineers' word for it.

1 At page 4 of that document, the record
2 of decision, the Army Corps of Engineers says
3 that it has continually asserted its
4 preparedness to implement an agreed upon
5 formula by the states. And that's certainly
6 consistent with the Army Corps of Engineers'
7 statements over time.

8 And then it also goes on to say that
9 the same formula could be instituted by
10 Congress or by the Court. Now, the Army Corps
11 of Engineers, again, it has continually
12 asserted its preparedness to implement a
13 decree.

14 And that makes sense because, as the
15 government has recognized in this case, a
16 decree equitably apportioning the waters is
17 only going to result in more water in the
18 system and make it easier for the Army Corps of
19 Engineers to accomplish its objectives.

20 So then the question is what would the
21 Army Corps of Engineers do with that water?
22 Would it somehow stash it away or just send it
23 to Georgia or would it look at the decision, a
24 decision by this Court in this case and seek to
25 facilitate that decision rather than frustrate

1 it?

2 I think everything would tell you,
3 including the words that I just quoted from the
4 Army Corps of Engineers' own decision, that it
5 would seek to facilitate the decision. And
6 that in itself should provide redressability.
7 The only way that it wouldn't provide
8 redressability is if we have to show a
9 certainty of complete relief today.

10 This Court has never required that.
11 If you look at your redressability cases like
12 Bennett versus Spears and Utah versus Evans,
13 this Court has treated situations where even
14 though the government wouldn't be formally
15 bound by a decision by this Court, it's
16 recognized that where that decision would
17 change the laws under which the agency would
18 have to operate, as was true in Bennett versus
19 Spears, that that was sufficient to establish
20 redressability because that made redress
21 likely.

22 And I think -- I've pointed you,
23 Justice Kagan, to -- to evidence in the record.
24 I would encourage you to read Mr. Hornberger's
25 testimony and other testimonies about the

1 benefits of additional water. But I think --

2 JUSTICE SOTOMAYOR: You haven't
3 answered Justice Kagan's question, though. We
4 -- I accept there's plenty of evidence on the
5 benefits of additional water.

6 MR. GARRE: Right.

7 JUSTICE SOTOMAYOR: She seems to be
8 saying the link that you haven't proven is
9 that, by putting in the consumption limit, that
10 that water would actually reach Florida.

11 MR. GARRE: Oh, okay. Well --

12 JUSTICE SOTOMAYOR: That -- that I
13 think is her question. That's mine too.

14 MR. GARRE: Okay. I mean, first of
15 all, I don't think the Special Master disagreed
16 with the notion that the water is going to go
17 flew -- through. I -- I think that he accepted
18 that. And I think if you look at pages 6 and
19 --

20 JUSTICE KAGAN: Have you at all
21 quantified how much water you were going to get
22 as a result of these consumption caps?

23 MR. GARRE: And -- and I think --
24 again, I think we did. I think if you look at
25 the testimony, the Hornberger testimony in

1 particular, other testimony about the amount of
2 water, there certainly was a -- a dispute
3 between the parties.

4 JUSTICE SOTOMAYOR: If you have those
5 cites, mention them. You've mentioned
6 Hornberger --

7 MR. GARRE: And I think, again, I
8 mean, all that the Special Master -- the lens
9 that he was looking at the record in was
10 whether we had shown that there was a guarantee
11 that the Corps would exercise its discretion in
12 a particular way, and he concluded that we
13 haven't shown to certainty that the water would
14 get through.

15 JUSTICE SOTOMAYOR: Do you have
16 another cite besides the one you've mentioned,
17 Hornberger?

18 MR. GARRE: Well, in terms of the --
19 the water that would go through?

20 JUSTICE SOTOMAYOR: Yes.

21 MR. GARRE: I mean, I also would point
22 you to the government's brief, that recognizes
23 on page 33 --

24 JUSTICE SOTOMAYOR: It doesn't
25 quantify it, though.

1 MR. GARRE: It -- well, we're talking
2 about -- our case was focused on showing that a
3 consumption cap would result in anywhere from
4 2,000 to 1,000 additional CFS flowing through
5 and that -- the limits we put in place. And I
6 think the evidence is very specific, when you
7 get into it, about that water flowing through.

8 JUSTICE SOTOMAYOR: I see.

9 MR. GARRE: And --

10 JUSTICE SOTOMAYOR: So you're saying
11 that the drought information holds true at
12 minimum for the non-drought one? So a certain
13 amount --

14 MR. GARRE: Well, that holds flew --
15 true for the water going through. And then
16 there are two questions. Then the question
17 becomes: When is that water going to go
18 through?

19 And -- and on that, I think first you
20 have to take as a given that water going
21 through, even outside of those drought periods,
22 is going to reduce the frequency and severity
23 of the drought periods. And that in itself is
24 relief. It's meaningful relief. And the
25 government recognizes that at page 28.

1 On the question of water going through
2 in drought operations, we put in evidence --
3 substantial evidence about how the Corps has
4 released -- made discretionary releases of
5 water at the Woodruff Dam even in drought
6 operations, going back decades.

7 And it also gets to this question of
8 how would the Corps respond to a decree in this
9 case? And in a sense, I mean, the Court is in
10 an unusual situation here where there's sort of
11 a chicken and the egg problem; you know that
12 you have a serious problem here. The
13 Apalachicola region has suffered serious harm.
14 Not only have its oysters been decimated but
15 really a way of life as such --

16 JUSTICE SOTOMAYOR: So really what the
17 issue is -- let me see if I understand it.

18 MR. GARRE: Sure.

19 JUSTICE SOTOMAYOR: You claim that --
20 I have to go back to the report and read it now
21 to find this -- that the Special Master
22 accepted that a consumption cap of 1- to 2,000
23 at minimum would flow through, drought and
24 non-drought years.

25 MR. GARRE: Well, let me --

1 JUSTICE SOTOMAYOR: Or I --

2 MR. GARRE: -- let me say it this way:
3 I think the Special Master did find that we
4 didn't prove to a certainty, a certainty, there
5 was no guarantee, that's what he said on page
6 69, that the Corps would allow additional water
7 through during drought periods.

8 JUSTICE SOTOMAYOR: I know that's what
9 it said.

10 MR. GARRE: Right.

11 JUSTICE SOTOMAYOR: I don't care what
12 happens with the Corps. I'm saying did he find
13 that the consumption cap would release a
14 certain minimum amount of water that would get
15 to the Corps?

16 MR. GARRE: He -- he didn't -- he
17 certainly didn't frame it this way -- that way,
18 Your Honor, in terms of you can't say that I
19 found that X amount is going on to go through.
20 I don't think he was quart -- he felt himself
21 --

22 JUSTICE KAGAN: Is your view,
23 Mr. Garre -- talk about non-drought
24 operations --

25 MR. GARRE: Sure.

1 JUSTICE KAGAN: -- am I right? Is
2 your view that if a consumption cap saves --
3 you know, saves 2,000 cubic feet of water, that
4 all of that necessarily gets through to
5 Florida?

6 MR. GARRE: Yes. I mean, that's the
7 way nature --

8 JUSTICE KAGAN: Just by physics?

9 MR. GARRE: By physics, exactly. And
10 eventually it's going to get through. The
11 United States says it right in page 33 of its
12 brief where it says it's timing.

13 JUSTICE BREYER: I mean, that's true,
14 but the question -- the mystery to me -- and I
15 have only one question, which I could ask all
16 three groups of lawyers, is why isn't the
17 United States in this case? I mean, they --
18 they have -- they give mystical answers. I
19 mean, the -- I don't understand it.

20 As I -- maybe I don't -- look, as I
21 understand the whole thing, imagine that I'm
22 standing south of the Woodruff in that
23 Apalachicola Bay or the river, I'm standing
24 there in the south, okay? And suppose about
25 2,000 cubic feet comes from the Flint River.

1 And now what the Corps will do with the other
2 river, which is the Chattahoochee, it'll make
3 certain it gets up to 4500, so they put in
4 2500.

5 Now, if one day instead of 2,000 in
6 this drought period comes down to Flint, 3,000
7 comes down to Flint, why in heavens name
8 doesn't the Corps send a little less and a
9 little more? In other words, what they're
10 thinking is, well, if 2,000 comes down, then
11 the Corps will reduce that part that it sends
12 down the Chattahoochee by 2,000.

13 That's a pretty tough position.
14 Wouldn't they be a little grateful? Wouldn't
15 they think anything of the oysters? Wouldn't
16 they say let's at least give them a
17 teaspoonful? We've saved 2,000 cubic feet of
18 water. So let's give them a little bit of it.

19 Now, the obvious people to answer that
20 question is the Corps. And whereas the other
21 case wants to get rid of them, in your case,
22 you don't want them. But I would like them
23 here --

24 (Laughter.)

25 JUSTICE BREYER: -- so I could ask

1 them that. You're not going to give them a
2 teaspoon of water? And that's in the drought
3 years. And in the non-drought years, we know
4 there's a lot of extra water stuffed up
5 there -- you don't even have to get down into
6 Zone 3 -- because so much is flowing down to
7 Flint.

8 Well, that's -- that's pretty good,
9 isn't it, because if you have a lot more in
10 Zone 3 up there on the Chattahoochee, then you
11 have more water to send down once the drought
12 begins. And won't you do it? What reason is
13 there for thinking you won't? Okay?

14 Now, that's as I understand this case,
15 which I expect you to say you're way off base
16 because I'd love to agree with you but I don't,
17 or you might say, yeah, you're on base, that's
18 the point. I wonder.

19 MR. GARRE: Well, Justice Breyer, I
20 mean, I think -- I think one way to think about
21 the Corps's position in this case, which has
22 evolved a bit --

23 JUSTICE BREYER: Am I basically on
24 base?

25 MR. GARRE: I think you're on base to

1 think that life would be a lot easier if the
2 Corps had intervened --

3 JUSTICE BREYER: Yeah, but I haven't
4 got this right as the -- as --

5 MR. GARRE: But I think -- I think one
6 question is -- is the light -- what the Corps
7 has said to you in its brief and the --

8 JUSTICE BREYER: Well, what the Corps
9 has said to me at the moment I'm assuming is
10 sort of vague. My question is whether my
11 question was a good question.

12 MR. GARRE: Well --

13 (Laughter.)

14 MR. GARRE: Yes. Without --
15 absolutely, Justice Breyer. But -- but I think
16 what the Corps has said to you in its brief
17 today, and I think that this in itself compels
18 that you not accept the Special Master's
19 recommendation, is that, first, Florida would
20 be benefitted by a decree insofar as it would
21 reduce the frequency, severity, and duration of
22 drought operations. That's on page 28.

23 Second, they stand by the Corps's
24 statement in its record decision that they will
25 review a decree by this Court and adjust its

1 operations accordingly.

2 And, third, they recognize that that
3 decree would form a part of the constellation
4 of laws by which the Corps would have to
5 operate.

6 So there's every reason to believe
7 that a decision in this Court imposing the
8 decree that equity would demand would result in
9 meaningful relief for Florida and we were not
10 required to show anything more than that to
11 allow this action to proceed.

12 If I may reserve the remainder of my
13 time.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 MR. GARRE: Thank you.

17 CHIEF JUSTICE ROBERTS: Mr. Primis.

18 ORAL ARGUMENT OF CRAIG S. PRIMIS
19 ON BEHALF OF THE DEFENDANT

20 MR. PRIMIS: Mr. Chief Justice, and
21 may it please the Court:

22 Florida has premised this entire case
23 on the proposition that a cap on Georgia's
24 water consumption alone would result in a
25 material increase in water to Florida during

1 drought without any change to Army Corps
2 operations.

3 After two years of discovery and a
4 five-week trial, Florida failed to prove that
5 case.

6 CHIEF JUSTICE ROBERTS: Well, but I
7 don't think they've premised it entirely on
8 that. They've premised it on the fact that the
9 Corps may change how it allocates water.
10 That's what they say in the March decision.
11 "Should the Supreme Court issue a decree
12 apportioning the waters of the ACF basin, the
13 Corps would take those developments into
14 account and adjust its operations accordingly."

15 So, I mean, the -- the decree granting
16 Florida greater claims to water will at the
17 very least change the facts on the ground and,
18 according to the Corps itself, cause them to
19 adjust its operations accordingly.

20 MR. PRIMIS: Mr. Chief Justice, we --
21 we do need to distinguish between drought
22 periods and non-drought periods. The entire
23 trial was over drought periods and what the
24 Corps would do.

25 The Corps just finished a 10 year

1 process of creating a Water Control Manual that
2 determined that during times of drought,
3 Florida is entitled to 5,000 cubic feet per
4 second. That was blessed by the United States
5 Fish and Wildlife Service, which studied the
6 region and said that would be adequate to
7 protect endangered species.

8 And so what the Corps said in the
9 record of decision and clarified in its brief
10 in this Court is that, of course, it would
11 review and consider a decree or an order of
12 this Court, but it also said explicitly that it
13 is not bound by an order of this Court and that
14 it may --

15 CHIEF JUSTICE ROBERTS: Right.

16 MR. PRIMIS: -- may not do anything.

17 CHIEF JUSTICE ROBERTS: Right. And it
18 reminds me of sort of the contract bidding
19 discrimination cases where you have someone was
20 discriminated against during the bid process.

21 We don't require that person to show,
22 well, if I hadn't been, I would have gotten the
23 contract. We just say if you show you were
24 discriminated against in the process, you get a
25 fair shot like everybody else.

1 It seems to me it's asking an awful
2 lot for Florida to have to say: We know that
3 the Corps is going to change things the way it
4 benefits us. Well, instead they just want to
5 say, well, look, they're going to make a
6 different decision if they've got more water to
7 allocate.

8 MR. PRIMIS: Your -- Your Honor --

9 CHIEF JUSTICE ROBERTS: You'll be able
10 to argue that. And right now they can't even
11 argue that.

12 MR. PRIMIS: Well, Florida can
13 certainly argue that, but the Corps has issued
14 its Water Control Manual. There is an APA
15 challenge that has been brought to that manual.
16 That case is proceeding in the district court
17 of District of Columbia.

18 Florida has not joined that suit. I
19 suspect it's because the arguments that it
20 would have to make in that suit would confirm
21 that the Corps is, in fact, necessary to solve
22 the problem.

23 And so there has been a lengthy
24 administrative process where Florida has made
25 all the same arguments it makes in this Court

1 and it chose not to challenge the Water Control
2 Manual in district court.

3 JUSTICE BREYER: Did they say, look, I
4 have in front of me this slightly
5 incomprehensible chart, and -- and what I --
6 what I derive from it is that, imagine now,
7 nothing is coming down the Flint River.

8 And then tomorrow because they
9 convince the mayor of Atlanta, whatever, to
10 drink more Pepsi or something, or whatever they
11 drink, Coca-Cola, I imagine, and -- and -- and
12 whatever reason that is --

13 MR. PRIMIS: Yes, it would be -- it
14 would be Coca-Cola, Justice Breyer.

15 JUSTICE BREYER: Yeah, I know that.
16 The -- the -- the -- the 3,000 cubic feet comes
17 down to Flint. Okay? So now the Corps doesn't
18 have to give 5,000. It can only -- it need
19 only give 2,000. See?

20 So it has 3,000 more. Am I right so
21 far? So far?

22 MR. PRIMIS: I would quarrel with the
23 hypothetical because there's no possibility of
24 that much water being generated for
25 consumption.

1 JUSTICE BREYER: Well, I'm just using
2 it as a big example, but it's some amount.
3 It's some amount. I'm just using it as a big
4 example.

5 MR. PRIMIS: Okay. I accept the
6 amount.

7 JUSTICE BREYER: Okay. So fine. Now,
8 they have a lot more water, say in my
9 hypothetical, 3,000 cubic feet. Now, what
10 reason is there to think that they won't give a
11 teaspoonful, they won't give a little bit at
12 least, of that extra water they never thought
13 they had to help the mussels and the oysters
14 and the others down in Florida? What reason?
15 It doesn't say in the chart what they'll do in
16 that situation.

17 All it says is that they guarantee
18 5,000 feet. They've got their 5,000. It
19 happens that 3,000 is coming from Flint. And
20 now what will they do with that extra? And --
21 and the answer, I think, is we don't know.
22 They won't say. But you'd think if we're being
23 equitable here, it would be equitable to give
24 at least a little bit to Florida.

25 Now, what's wrong with that?

1 MR. PRIMIS: Justice Breyer, the Corps
2 is governed by a panoply of federal statutes,
3 congressional dictates and mandates, as to how
4 to control the water in this basin.

5 And it is not as simple as if extra
6 water comes in, then you just pass it through
7 to Florida because they have articulated one
8 concern. There are multiple interests in the
9 basin, there are multiple stakeholders, and
10 multiple Congressionally-defined purposes.

11 Having studied this basin for a
12 decade, the Corps has determined that in
13 periods of drought and under its drought
14 operations, when the reservoirs get to a
15 critically low level, the Corps will release
16 5,000 cubic feet per second.

17 And that's not just an accidental
18 number. That number was chosen because that
19 number allows the Corps to protect the
20 endangered species downstream, as the Fish and
21 Wildlife Service has said, but also to protect
22 water quality, water supply in Atlanta,
23 navigation, flood control, hydropower. There's
24 a multitude of reasons.

25 And --

1 JUSTICE GORSUCH: Can we --

2 JUSTICE BREYER: Well, but there --

3 JUSTICE GINSBURG: -- can we agree --
4 can we agree that a cap at the very least would
5 prevent -- would prevent the situation in
6 Florida from getting worse? That is, that if
7 we do nothing, then the situation in Florida
8 can get worse, even worse than it is now.

9 If there is a cap, then Florida is
10 protected at least to that extent. It won't
11 get worse. Is that not so?

12 MR. PRIMIS: That's not correct,
13 Justice Ginsburg. In periods of drought, the
14 Corps answered the question that it will
15 continue to pass 5,000 CFS and store the
16 remainder of the water saved by that cap in its
17 reservoirs upstream until the drought --

18 JUSTICE SOTOMAYOR: So, what do we do
19 with their non-drought statement in their brief
20 where they say the U.S. does not mean to
21 suggest that a consumption cap would provide no
22 benefit to the Corps' operation in the basin or
23 to Florida?

24 And they say: As explained to the
25 Special Master, increased basin in-flows would

1 generally benefit the ACF system by delaying
2 the onset of drought operations by allowing the
3 Corps to meet the 5,000 CFS minimum flow during
4 longer -- flow longer during extended drought
5 and by quickening the resumption of normal
6 operations after drought.

7 And, in fact, your adversary points to
8 a lot of history showing that when there's
9 increased water, the Corps gives increased
10 water under its own protocol. The Corps says
11 under its own protocols, when there's increased
12 water during non-drought situations, more water
13 flows to Florida.

14 Isn't that their case?

15 MR. PRIMIS: Justice Sotomayor, the
16 Special Master at page 65 found unequivocally
17 that Florida presented no evidence assessing
18 the impact of a consumption cap on shortening
19 the Corps' drought operations or on increased
20 pass-through flows during --

21 JUSTICE SOTOMAYOR: Well, I disagree.
22 If I can point to, your colleague has
23 suggested, to a lot of record evidence, not
24 just the SG's statement, but statements from
25 Dr. Allen, Dr. Gilbert, Dr. Greenblatt, and

1 from other experts showing that, would the --
2 would we just say the Special Master was wrong
3 or that he didn't explain why that evidence was
4 inadequate?

5 MR. PRIMIS: Well, he wasn't wrong.
6 He was absolutely correct. All of the
7 individuals that Your Honor just mentioned are
8 biologists or deal with issues like salinity.

9 The -- the people who -- that Florida
10 hired to assess whether water would pass
11 through in these non-drought, shortened drought
12 operations periods were Dr. Hornberger and
13 Dr. Shanahan. Neither of them provided any
14 testimony on this case because --

15 JUSTICE KAGAN: Well, Mr. Primis, how
16 is it possible that it wouldn't pass through?
17 I mean, if I understand what Mr. Garre said,
18 it's something like this: If Georgia consumes
19 2,000 feet less of water, just as a matter of
20 physics, it's all going to get to Florida.

21 So -- and now there does seem, as you
22 suggest, to be not all that much in the record
23 showing that that's true. But it seems as
24 though it should be true.

25 Do you think it's not true?

1 MR. PRIMIS: With regard --

2 JUSTICE KAGAN: That all of that saved
3 water will eventually go south?

4 MR. PRIMIS: The water -- it is a
5 question of timing and when the water will go
6 south. During a drought we know, the Corps has
7 answered that question, and all the evidence at
8 trial showed --

9 JUSTICE KAGAN: No, but I was talking
10 about non-drought.

11 MR. PRIMIS: Correct. So let me --
12 let me address that directly.

13 With regard to shortened drought
14 operations, the evidence -- Georgia did present
15 evidence on this. Florida did not.

16 And there's a reason, because I think,
17 Your Honor, one of -- Justice Breyer or you
18 maybe used the word common sense. There's
19 nothing common sense about the operations of
20 this basin. It is incredibly complicated.

21 There are five reservoirs. They're
22 subjected to different rules by the Army Corps.
23 They have different hydrologic conditions.
24 They serve different purposes.

25 That's why we create or the Corps

1 creates complicated computer models, incredibly
2 complicated, and both sides hired experts to
3 evaluate the situation, your question under
4 those models.

5 JUSTICE KAGAN: Well, can you give me
6 an example of how it would be that an
7 additional 2,000 units saved in Georgia would
8 not benefit Florida to the same amount? How
9 would that be possible?

10 MR. PRIMIS: Certainly. The -- the --
11 the -- the problem is with the hypothetical
12 because, as I said before, you cannot get 2,000
13 cubic feet per second. Georgia consumes a much
14 smaller amount of water, and this is just in
15 the agricultural part of the state.

16 JUSTICE KAGAN: No, You're --

17 JUSTICE GORSUCH: Counsel, with
18 respect, I think you're fighting the
19 hypothetical --

20 MR. PRIMIS: Okay.

21 JUSTICE GORSUCH: -- and maybe --
22 maybe you can direct your attention to the
23 Corps' own statement --

24 MR. PRIMIS: Sure.

25 JUSTICE GORSUCH: -- and the SG's

1 statement, which Justice Sotomayor read, maybe
2 that'll help move us along --

3 MR. PRIMIS: But --

4 JUSTICE GORSUCH: -- which suggests
5 that in non-drought operations, there will be
6 more water going to Florida --

7 MR. PRIMIS: Well --

8 JUSTICE GORSUCH: -- the government,
9 the Federal Government says, and that that will
10 reduce the onset of drought operations.

11 I would have thought, and maybe this
12 is just where we're all stuck, is that's
13 redressability, at least. And then you have to
14 go weigh benefits and harms, which didn't seem
15 to take place here.

16 MR. PRIMIS: Justice Gorsuch, the
17 United States says explicitly in its brief at
18 17 that those are hypotheticals. And they say
19 also, this is a quote, "not attempts to
20 precisely quantify any particular effect on
21 flows" --

22 JUSTICE GORSUCH: No, there is no
23 precise quantification, but on page 28, they
24 say that it -- I'm not going to repeat it all
25 again, but pretty darn clearly that they

1 anticipate that non-drought operations, there
2 will be more water going through. Well, and
3 that that will help diminish drought
4 operations.

5 MR. PRIMIS: Georgia did quantify
6 this. We ran the Corps' computer model. And
7 we determined that as you add the water that
8 could be saved, and Georgia didn't skimp, we
9 modeled a 30 percent reduction in water use on
10 the Georgia side of the line, and the truth is
11 that the amount of water that that generates
12 just does not move the period in which Florida
13 goes -- I'm sorry, when the Corps goes into
14 drought operations. It's just not enough water
15 given passive systems --

16 JUSTICE KAGAN: No, but when you're in
17 -- when you're in non-drought operations, how
18 is it possible for the amount of water saved in
19 Georgia not to benefit Florida?

20 MR. PRIMIS: Okay. Well, that -- let
21 me -- that's, I think, a different question.

22 When there is plenty of water in the
23 system, when there's rain, we're not in
24 drought, Florida has not claimed it needs
25 additional water. It gets plenty of water just

1 through gravity and -- and meteorology. And
2 they have said --

3 JUSTICE KAGAN: Well, there must be a
4 set of months that are dry, so that Florida
5 wants more water, but not drought.

6 MR. PRIMIS: And the Corps' operations
7 account for that, when -- and that's baked into
8 the chart that the Special Master included in
9 his -- his report.

10 But the important point is Florida, it
11 is not a mistake that Florida didn't present
12 this evidence. And I do understand the Court's
13 statements that it seems common sense that it
14 would shorten drought operations or make it
15 fewer and farther between.

16 Florida didn't present its modeling
17 because when Florida's expert, Dr. Hornberger,
18 ran the ResSim model that the Corps uses, he
19 tried a 50 percent cap, and it still didn't
20 move drought operations.

21 JUSTICE BREYER: I have some --

22 MR. PRIMIS: It still started in
23 August.

24 JUSTICE BREYER: -- I have some kind
25 in front of me, a Bedient Demo 13, do you know

1 what I'm talking about, this thing?

2 MR. PRIMIS: Yes.

3 JUSTICE BREYER: Okay. They seemed to
4 be Georgia. And they say 71 days in 2007
5 Florida would receive more water flow from a
6 cap on Georgia's water consumption, so that's
7 71 days they get more water.

8 Seventy-one days they get more water,
9 that means the Corps has to reduce less water.

10 If the Corps has -- and, you know, the
11 Court can -- the Corps can save water on its
12 side in the Chattahoochee, right? And so if
13 they have more water saved up there in whatever
14 those zones are, 1, 2, and 3, they have -- the
15 can into 3 later. And if they get into 3
16 later, they have more water to give out later.
17 Is that right?

18 MR. PRIMIS: No, Justice Breyer.

19 JUSTICE BREYER: No, okay.

20 MR. PRIMIS: What I'm trying to tell
21 you is that Dr. Bedient --

22 JUSTICE BREYER: Yeah.

23 MR. PRIMIS: -- is the expert that the
24 Special Master credited --

25 JUSTICE BREYER: I know he was on your

1 side, but that doesn't --

2 MR. PRIMIS: But -- but the rest of it
3 -- another part of his analysis shows that we
4 don't shorten the drought operations. And
5 those 71 days are small increments that don't
6 benefit Florida. They're not material.

7 JUSTICE BREYER: All right. Is there
8 any --

9 MR. PRIMIS: They're random.

10 JUSTICE BREYER: Is there -- probably
11 your answer is going to be -- but I don't like
12 to turn this thing on who presented what and on
13 what time. I mean, it's a serious matter and a
14 lot of people need the water. And there are
15 all kinds of demands and it ought to go really
16 on not who said what in such and such, but what
17 the merits really are.

18 It's our case. Could we say: we
19 want, or request, the SG to provide material
20 experts and have a hearing and the hearing will
21 focus on what would be best for the region,
22 taken in light of all the demands, and Florida
23 and Georgia and anyone else who wanted to, as
24 an amicus, perhaps, could participate so that
25 the Master can get a decision here about

1 whether or not there should be or should not be
2 less water going from the Flint to the grazing
3 areas in Atlanta. Do you see what I have in
4 mind?

5 Is there some way of working that out?

6 MR. PRIMIS: The Court --

7 JUSTICE BREYER: I mean, not in
8 Atlanta, south of Atlanta.

9 MR. PRIMIS: The Court surely has the
10 power under its original --

11 JUSTICE BREYER: Would that make
12 sense?

13 MR. PRIMIS: It would not, for two
14 reasons. One is that the Army Corps just went
15 through that entire process. Everyone was
16 heard, and there is an APA litigation ongoing
17 today, about just those questions that Your
18 Honor articulated.

19 The second reason is that, while I
20 understand --

21 JUSTICE SOTOMAYOR: Except that the
22 government tells us that in its protocols, it's
23 not charged with looking at the harm we're
24 looking at; that it's not charged with looking
25 at the harm to the oysters or the muscles or

1 the other things that are being affected here.

2 So I don't think it's done a study
3 that addresses the issues of the harms that are
4 at -- in question in this litigation.

5 MR. PRIMIS: That's -- that's not
6 correct. The Army Corp, through the Endangered
7 Species Act, does look at the muscles and
8 sturgeon that live in the Apalachicola River.
9 It has said that the Apalachicola Bay is beyond
10 its jurisdiction, and that's why to Chief
11 Justice Roberts' question, the Court has said
12 in -- the -- the page 2-62 of its final
13 environmental impact statement that it doesn't
14 have the authority, without congressional
15 action, which is why -- to -- to help the
16 oysters or the bay.

17 And that's why this -- this case is an
18 ill-fitting vehicle for that. So I do want to
19 --

20 CHIEF JUSTICE ROBERTS: So what is the
21 standard that you would require Florida to
22 meet? Presumably they don't have to show to an
23 absolute certainty that, you know, they'll --
24 they'll benefit in a particular way, but what
25 do you think the standard is?

1 MR. PRIMIS: The standard is that
2 Florida should be required to show by clear and
3 convincing evidence that its requested --

4 CHIEF JUSTICE ROBERTS: Where did that
5 come from, by clear and convincing evidence?

6 MR. PRIMIS: That comes from Colorado
7 versus New Mexico and Colorado versus Kansas.
8 It is consistent --

9 CHIEF JUSTICE ROBERTS: Is that at the
10 equitable weighing stage or as an initial
11 matter, almost of standing?

12 MR. PRIMIS: Well, this is not a
13 standing question. This is as a matter of
14 equitable apportionment, the Court has
15 consistently said both in equitable balancing
16 and at the preliminary stage of injury and
17 benefit that it is clear and convincing
18 evidence, and that makes sense given the
19 sovereign interests of the states at issue.
20 The Court has consistently recognized that.
21 And --

22 CHIEF JUSTICE ROBERTS: Okay. I
23 interrupted you. You were saying they have to
24 show by clear and convincing evidence --

25 MR. PRIMIS: That they are requested

1 remedy will provide a material benefit. And
2 that is consistently mentioned in Washington
3 versus Oregon; the Court asked is it materially
4 more advantageous? In Idaho versus Oregon, the
5 Court asked, are there going to be numbers of
6 fish justifying additional restrictions? And
7 Colorado versus New Mexico put the burden on
8 the state seeking to disrupt the status quo.
9 The burden to prove benefits of the diversion
10 must substantially outweigh the harms that
11 might result.

12 Now, Florida told the Court, the
13 Special Master at the beginning of this case,
14 this is a quote from Docket No. 125 at 29, "If
15 you conclude after a trial that caps on
16 consumption will not redress Florida's harm,
17 then Florida will not have proved its case."

18 That's exactly what happened here.
19 Florida did not prove its case. It did not
20 prove that caps on consumption would redress
21 their harm.

22 CHIEF JUSTICE ROBERTS: But, I mean,
23 obviously that depends on what you mean by
24 redress. If -- if the Corps came up and said
25 we will definitely review our running of the

1 whole system in this -- in this basin, if the
2 Supreme Court tells us that Florida under an
3 equitable apportionment would get more water,
4 we will take another look at it, is that
5 redress?

6 MR. PRIMIS: It is not redress. It is
7 too speculative. And the Court requires clear
8 and convincing evidence of the material
9 benefit.

10 But the Corps would have to go through
11 a whole public comment process that has taken
12 decades. And in that scenario --

13 JUSTICE GINSBURG: But why is that so?
14 I think one of the things that we're told is
15 that the Corps, although it may not be required
16 to do so, has exceeded the minimum flows
17 whenever water is available.

18 So -- so does -- the Corps, the past
19 history is it has exceeded the minimum flows
20 when water is available.

21 MR. PRIMIS: Well, in drought periods
22 it shoots for roughly 5,000 cfs. It is very
23 hard to get it right at 5,000. Sometimes it
24 exceeds it. Sometimes there is rain --

25 JUSTICE GINSBURG: And why are we

1 dividing drought and non-drought? If the water
2 is eventually going to get to Florida, that
3 will help Florida. And that isn't to say that
4 it has to be immediately.

5 That was one of the problems with the
6 Special Master's report. He seemed to think
7 that the benefit had to be immediate, instead
8 of eventual.

9 MR. PRIMIS: Not immediate, but the --
10 the time when the Corps is in drought
11 operations can be very lengthy. And Florida,
12 when the Corps is coming out of drought
13 operations, there is plenty of rain.

14 Florida has not made the case that it
15 needs more water at a time when there is plenty
16 of rain and water in the system. It just --
17 that water just will wash out to sea and won't
18 benefit anybody.

19 When they really need it -- and that's
20 what the role trial was about -- I'm sorry, Mr.
21 Chief Justice --

22 CHIEF JUSTICE ROBERTS: Finish your
23 sentence.

24 MR. PRIMIS: What the whole trial was
25 about was can they get it during a drought?

1 And the Army Corps -- all the evidence shows
2 conclusively that they cannot.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Mr. Kneedler.

6 ORAL ARGUMENT OF EDWIN S. KNEEDLER ON BEHALF OF
7 THE DEPUTY SOLICITOR GENERAL, DEPARTMENT OF JUSTICE,
8 FOR UNITED STATES AS AMICUS CURIAE

9 MR. KNEEDLER: Mr. Chief Justice and
10 may it please the Court:

11 This case has proceeded from the
12 outset on the premise that the Corps of
13 Engineers' operations have to be taken as a
14 given and any decree by this Court would not
15 require a change in the Corps' operations.

16 That flowed directly from the fact
17 that the United States is a required party, but
18 has not been joined because it can't -- it
19 hasn't waived its sovereign immunity. And,
20 therefore, the Court cannot order the Corps of
21 Engineers to take any different operation.

22 CHIEF JUSTICE ROBERTS: Well, we don't
23 -- maybe -- maybe we can order the Corps and
24 maybe we can't, but surely you will. I mean, I
25 understand that's what you say in the March 30.

1 You're not going to ignore the determination by
2 the Court that what Georgia has done is
3 inequitable in arrogating to itself water that
4 should be flowing down.

5 Now, maybe at the end of the day you
6 say: Well, we've got other interests. We're
7 still going to do this. But that would change
8 the facts on the ground, wouldn't it? The
9 decision from us?

10 MR. KNEEDLER: Yes, but let me -- let
11 me explain the role of the Corps's operations
12 here because I think it's important. This is
13 not a -- an ordinary apportionment case where
14 there is no act of Congress that -- that has
15 been involved.

16 Here, there is an act of Congress.
17 Now, Congress, pursuant to its Commerce Clause
18 and other authorities, can enact statutes or
19 approve compacts that regulate or apportion
20 water in a stream. In Arizona versus
21 California, for example, the Court concluded
22 that the Boulder Canyon project had directly
23 allocated the water and so there was nothing
24 left for the Court, as a matter of equitable
25 apportionment, to do.

1 Here, Congress has enacted a statute
2 that doesn't directly apportion between the
3 states, but it -- it does heavily regulate this
4 river system. If the protocols that are in the
5 Corps's manual had been enacted into law, I
6 think there's no question that this Court would
7 have to respect that, could not order the court
8 to change it, and would have to take them as a
9 given.

10 Here, what Congress did instead was to
11 delegate to the Corps of Engineers the
12 responsibility for balancing all those
13 different interests and to do so through an
14 extensive public process that takes into
15 account all the basin interests, the -- the
16 hydropower, which was one of the primary
17 purposes of -- of this integrated system of
18 dams to begin with; flood control; Endangered
19 Species Act; and also re- -- refilling water
20 and being conservative so if a -- if a drought
21 is extended, that there will be enough water to
22 serve all of those purposes.

23 Congress vested in the Corps of
24 Engineers the responsibility --

25 JUSTICE BREYER: So, why don't you

1 just waive the sovereign immunity, get into
2 this, and try to help the Special Master reach
3 an equitable solution?

4 MR. KNEEDLER: For -- for the reason
5 that I -- that I said, that here you have an
6 act of Congress that delegates the power to the
7 Corps in the first instance. The Corps's
8 judgments would be reviewed under the APA,
9 under the arbitrary and capricious standard,
10 after it balances all of the interests. It's
11 not really a role for this Court to -- to de
12 novo determine what the role of the -- of the
13 Corps of Engineers is in a situation like this.

14 JUSTICE SOTOMAYOR: So what about a
15 consumption cap? It changes the rules on the
16 ground. It gives more water.

17 In what ways does a determination by
18 the Special Master that more water should come
19 into the system negatively affect your
20 discretion?

21 MR. KNEEDLER: Well, it depends how
22 that plays out. As we say, I don't think the
23 Court could order the Corps to take a -- a
24 different position, but under the Corps's own
25 protocols, there are circumstances in which

1 additional water that -- that would be freed up
2 would flow to -- would flow to Florida.

3 There is -- not at the drought period,
4 because the -- the Corps has set a minimum in
5 order to preserve water in case a drought is
6 extended, but above the 5,000 --

7 JUSTICE SOTOMAYOR: But you've taken
8 no position on whether that extra release would
9 actually provide a material benefit?

10 MR. KNEEDLER: Right. We have not
11 taken -- we have not gotten in --

12 JUSTICE SOTOMAYOR: Why not? Could we
13 ask you to take that position?

14 MR. KNEEDLER: I -- I -- I suppose you
15 -- the -- the government could participate that
16 -- in that as an evidentiary matter, but -- but
17 it seems --

18 JUSTICE SOTOMAYOR: I asked a very
19 specific question. Could we ask for an amicus
20 brief that does that?

21 MR. KNEEDLER: I -- I suppose you
22 could if you think --

23 JUSTICE BREYER: But what do you
24 think? In other words, what do you think we
25 should do?

1 (Laughter.)

2 MR. KNEEDLER: I --

3 JUSTICE SOTOMAYOR: Do you think we
4 should --

5 MR. KNEEDLER: From the -- from the
6 United States' perspective, we think that what
7 -- we are not taking a position on whether
8 Florida has shown that -- that a cap would
9 produce sufficient water to justify the cap in
10 terms of benefits to Florida.

11 Our interest here --

12 JUSTICE KAGAN: But you do think,
13 Mr. Kneedler, am I wrong, your -- your brief
14 says that if there were a consumption cap,
15 Florida would get material amounts, more water.

16 MR. KNEEDLER: There would be
17 additional water. It depends what you mean by
18 "material." Would they be -- would -- would
19 they come at the right time such that it would
20 -- it would produce a material benefit to the
21 ecosystem in Florida?

22 The -- the claim of injury isn't just
23 -- doesn't -- can't depend just on whether
24 there's more water going through but what would
25 happen as a result of that water. Would the

1 ecosystem be -- be improved?

2 And so that is the evidentiary
3 question.

4 JUSTICE KAGAN: So suppose that we
5 think that looking at the record that was
6 before the Special Master, there was quite a
7 lot of evidence that, with more water, the
8 ecosystem would be improved.

9 Do you think -- as I hear you, you're
10 saying: And there would be more water.
11 However much water is saved in Georgia comes to
12 Florida.

13 MR. KNEEDLER: No, not -- that -- that
14 is not necessarily true because the Corps
15 operates the five dams as an integrated whole
16 and it does so in part on basin inflow but in
17 part on how much water is stored in the
18 reservoirs at any particular time of year.

19 So there are certain situations,
20 looking at total basin inflow, for example, if
21 more water came in from the Flint River, that
22 would free up water to be stored upstream for
23 release during -- during low-flow periods.
24 It's operated as an integrated whole. There is
25 not a one-for-one tradeoff. Now, it maybe --

1 JUSTICE KAGAN: And that's true even
2 in non-drought operations?

3 MR. KNEEDLER: Yes. Right above --
4 right above drought operations, there is a
5 period -- there -- under different times of
6 year, from 5 to 10,000 feet, all of that flow
7 would go to Florida, but there are other times
8 when only 50 percent of the flow would go to
9 Florida; there are still other times when none
10 of the additional flow would go to Florida.
11 That -- that is under the protocol.

12 But if the Court concludes that a cap
13 within that, not -- not -- taking that
14 framework as a given, that additional -- that a
15 cap would produce additional water, the Corps
16 does not have a stake in that fight.

17 I did want to address one point about
18 the -- the prediction, the question of how
19 certain it is what the Court will do -- the
20 Corps will do. This is a different situation
21 than the typical case where there's a third
22 party and -- and how likely is it that will --
23 something -- something will happen.

24 Congress has adopted a separate
25 statutory regime in which the Corps has to

1 decide what to do with the range of additional
2 water that may be available at any particular
3 time.

4 CHIEF JUSTICE ROBERTS: But I just --
5 I'm sorry to interrupt, but it does seem fairly
6 important. You say we can't order you to do
7 something, but you've told us that you will
8 take it into account. And it seems to me that
9 that's arguably real redress to Florida, that
10 you're going to take into account a decision
11 saying that, equitably, they're entitled to
12 more water, that Georgia is improperly taking
13 its water.

14 MR. KNEEDLER: Well --

15 CHIEF JUSTICE ROBERTS: And -- and --
16 and you say you'll take it into account.

17 MR. KNEEDLER: Well, several things
18 about that.

19 To say that Florida is equitably
20 entitled to more water can't ignore the regime
21 that the Corps of Engineers has put in place
22 because equity follows the law in an original
23 case as any other.

24 So if the allocation that the Corps
25 has made, I think, has to be taken as a given

1 in the Court deciding what -- what is an
2 equitable apportionment. And Florida --

3 JUSTICE KENNEDY: Well, you have said
4 -- you have said you don't have any stake in
5 the argument about whether more water would
6 help Florida. Can't we ask you that question
7 when we're talking about your expertise?

8 You say, well, whatever you decide,
9 we'll use our expertise to follow it, but then
10 you don't tell us what to decide and you're the
11 experts.

12 MR. KNEEDLER: Well, the -- the Corps
13 is the expert through the process of the -- of
14 the manual, which was exactly what Congress
15 meant. The Corps -- if -- if this Court --
16 going back to the -- the Chief -- Chief
17 Justice's question, if -- what would the Corps
18 do if this Court entered a decree, first of
19 all, if the Court entered the decree that
20 Florida needed more water than the Corps of
21 Engineers' operation protocols right now
22 provide for, that's really sort of inconsistent
23 with the way this case began, which is that --
24 that -- that it was premised on the fact that
25 the Corps's procedures would not have to be

1 changed.

2 And that's not to say that the -- that
3 I suppose the Court could decide to do that
4 anyway.

5 JUSTICE BREYER: But we don't know --
6 see, I'm sure you have got this point, but, I
7 mean, I don't know what to do without knowing
8 what the Corps is likely to do. And I agree
9 with you that it's Florida's fault; at the
10 beginning, they said we don't want the Corps in
11 here.

12 And now it seems like you're their
13 best hope, all right? So -- so -- so that's
14 why I seriously asked you the question, if you
15 were sitting right here in my shoes, what would
16 you do?

17 MR. KNEEDLER: Well, what -- one
18 course would be, if -- if you agree that
19 Florida has not made the showing that it --
20 that it said that it would make, that there
21 would be material benefits from the increased
22 flows, Florida has the ability to challenge the
23 Corps of Engineers' master manual and say that
24 it does not provide sufficient downstream flows
25 for Florida or to petition the Corps to adopt a

1 new -- a new manual and revise it.

2 It's not at all clear that the
3 governing statutes -- may I finish? -- even
4 allow the Corps of Engineers to allocate
5 additional water for the Apalachicola Bay or to
6 do so would be consistent with balancing all
7 the other responsibilities the Corps has.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 Mr. Kneedler.

10 Mr. Garre, two minutes.

11 REBUTTAL ARGUMENT BY GREGORY G. GARRE
12 ON BEHALF OF THE PLAINTIFF

13 MR. GARRE: Thank you, Your Honor.

14 First, the problem here is Georgia's
15 consumption. The only way to address that is
16 through an equitable apportionment. Second, we
17 have heard a lot about the Master Control Water
18 Manual. The record of decision itself says
19 that the adoption of that manual, "in no way
20 would it prejudice this Court in adopting an
21 equitable apportionment."

22 And I think the arguments we have just
23 heard would result in a great deal of
24 prejudice.

25 JUSTICE SOTOMAYOR: Mr. Garre, what do

1 we do with the Special Master's conclusion on
2 65-66, where they credit the report by
3 Georgia's expert, Dr. Bedient, and Dr. Bedient
4 did a remodeling and came to the conclusion
5 that even if there was extra flow, it wouldn't
6 materially change the environmental impact?

7 MR. GARRE: Right.

8 JUSTICE SOTOMAYOR: That's your
9 greatest challenge.

10 MR. GARRE: Special Master is relying
11 on the wrong redressability standard. The
12 evidence -- Bedient was relying on a model that
13 didn't take into account discretionary
14 releases.

15 Let me give you some more evidence.
16 Shanahan --

17 JUSTICE SOTOMAYOR: If we -- if we say
18 that he couldn't, that he had to follow the
19 Army Corps' and assume that the Army Corps'
20 protocol would control, is Bedient right?

21 MR. GARRE: No, because he wouldn't be
22 addressing non-drought conditions where we're
23 going to get benefits with additional water
24 coming through. The evidence --

25 JUSTICE SOTOMAYOR: Bedient did it on

1 just drought conditions not on --

2 MR. GARRE: That's what the focus.
3 The evidence is that the water is going to come
4 through --

5 JUSTICE SOTOMAYOR: So why does the
6 Special Master rely upon it with the
7 non-drought situation?

8 MR. GARRE: Your Honor, in the context
9 of that discussion, I -- I don't think that
10 reliance on that can support the conclusion
11 that this case should end.

12 If I could give you some more
13 evidence, Shanahan directed at paragraph 60
14 explains the water that goes through.
15 Shanahan's testimony, page 25, 23, says the
16 water is going to go through. Allen paragraph
17 85 says even modest amounts will help Florida.

18 Justice Ginsburg, you're right, even
19 just preventing the situation from worsening is
20 going to provide redress. Hornberger addresses
21 that at paragraphs 125 to 126.

22 When it comes to what Congress has
23 said, what I would point to is a statute that
24 my friend, Mr. Kneedler, neglected but the
25 United States pointed to in its post-trial --

1 its motion to dismiss brief, where it said that
2 there is no reason to -- to assume that the
3 Corps would ignore a decree and it pointed to
4 the Compact statute passed in 1997 where
5 Congress directed federal officials to the
6 maximum extent possible to help facilitate the
7 state's agreed-upon allocation formula, there's
8 no reason to presume that the Corps would treat
9 a decree by this Court any differently.

10 We would ask this Court to decline the
11 Special Master's recommendation. Thank you,
12 Your Honors.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel. The case is submitted.

15 (Whereupon, 12:07 p.m., the case was
16 submitted.)

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