

Litigators of the Week: A Look at the Lawyers Who Won Key Battle in Water War

From the beginning, the Kirkland team's strategy was to make it impossible for Florida to build its case against Georgia in an epic battle over water rights.

By **Katheryn Hayes Tucker**

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To score a victory for Georgia in its long-running water war against Florida, a team of 20 people from Kirkland & Ellis in Chicago moved to Portland, Maine for six weeks.

That was the duration of proceedings before the U.S. Supreme Court's special master Ralph Lancaster Jr. of Pierce Atwood.

The two states faced off over the use of water in the Apalachicola-Chattahoochee-Flint River Basin. Florida claimed it was entitled to sufficient streamflow to support its riverine and estuarine ecosystems—not to mention people like oystermen who rely on it for their livelihoods. Georgia countered that it needs the water to meet the demands of the Atlanta metropolitan region and farmers to the south.

In his report Wednesday, Lancaster used the term "evidentiary hearing" to describe the six weeks of court proceedings held in a federal bankruptcy court building in downtown Portland.

"It had the look and feel of a federal bench trial," said Kirkland partner Craig Primis, who led a team that included partners K. Winn Allen and Devora Allon. They were accompanied by another 10 lawyers, three legal assistants, two trial technology specialists and two secretaries.



Craig S. Primis, K. Winn Allen and Devora W. Allon of Kirkland & Ellis

The firm rented out an entire floor of a nearby office building to work. The team lived at a downtown hotel. They found a favorite coffee house and an antique map shop where they could peruse renderings of the rivers and bay they were fighting over. They would often cross paths on the main street leading to the courthouse with their opposing counsel from Latham & Watkins arguing for Florida.

From the beginning, the Kirkland team's strategy was to make it impossible for Florida to build its case for forcing water consumption limits on upstream Georgia without also suing the U.S. Army Corps of Engineers – which controls water flows from the rivers with a series of dams. Of course, the Kirkland lawyers knew

Florida couldn't sue the federal government without first securing a waiver of sovereign immunity, which would almost surely never happen.

"That's how we framed the case from the outset," Primis said. "We continued to press this issue of the central role of the Army Corps."

A key expert witness scored the point. Wei Zeng, chief hydrologist for the Georgia Environmental Protection Division, testified that even if Florida succeeded in capping Georgia's water use, the Corps would simply conserve more water in lakes during times of drought and so the downstream volume would remain the same.

"He's a brilliant scientist," Primis said. "He explained it like a professor."

Later, the Corps made the same point in writing. Lancaster quoted it on page 48 of his report: "As the Corps stated in its post-trial *amicus* brief, the Corps expects in an extreme low flow scenario [i.e., during drought operations] that Apalachicola River flows would be very similar with or without a consumption cap until enough water is stored to return the system to normal operations," Lancaster wrote. "This conclusion is supported by the evidence presented at trial."

Lancaster denied a motion to dismiss the case early on over this point, but in the end he tied his decision to it.

"In sum, the report recommends that the court deny Florida's request for relief because the Corps is not a party to this original jurisdiction proceeding," Lancaster wrote. "Without the ability to bind the

Corps, I am not persuaded that the court can assure Florida the relief it seeks. I conclude that Florida has not proven by clear and convincing evidence that its injury can be redressed by an order equitably apportioning the waters."

Lancaster's report – 137 pages with attachments – gives a relatively concise summary of the long-running dispute and the current lawsuit over the use of water from three rivers that come together in the Apalachicola-Chattahoochee-Flint River Basin, which encompasses parts of Georgia, Alabama and Florida.

The high court appointed Lancaster in 2014 after deciding to hear Florida's lawsuit against Georgia seeking a cap on its upstream neighbor's water consumption, alleging that greater Atlanta and the multibillion dollar agriculture industry were choking wildlife and the oyster industry.

Georgia Gov. Nathan Deal and then-Attorney General Sam Olens engaged Kirkland & Ellis to defend the state in the lawsuit in late 2013.

"It's a fascinating case," Primis said. Original jurisdiction cases – meaning one state suing another – are extremely rare and require approval of the Supreme Court even to be filed. "It's even more unusual for one to go to trial."

The case number is 142, original. That means only 141 others have been recorded in the history of the Supreme Court. The type of action – equitable apportionment – is also unusual, Primis said. It applies only to water – or wildlife in the water. "This is a very rare opportunity."