

**In The
Supreme Court of the United States**

STATE OF FLORIDA,

Plaintiff,

v.

STATE OF GEORGIA,

Defendant.

Before the Special Master

Hon. Ralph I. Lancaster

**STATUS REPORT OF THE STATE OF GEORGIA
MARCH 4, 2016**

This report constitutes the fourteenth monthly status report filed by the State of Georgia pursuant to Section 4 of the Case Management Plan.

I. GENERAL STATUS

With fact discovery now concluded, Georgia is focused on expert discovery and mediation. Georgia has submitted one expert report that analyzes the impact of the United States Army Corps of Engineers' ("USACE") operations on water flowing across the Georgia-Florida state line. That report concludes that: 1) any change in the amount or timing of water flowing across the Georgia-Florida state line and entering the Apalachicola River must be coordinated with and executed by the USACE; 2) any reduction in Georgia's consumptive use would not result in additional streamflow at the Georgia-Florida state line during seasonal low flow or drought periods—the times when Florida alleges it most needs additional water—due to the

USACE's reservoir operations; and 3) the only way to ensure any particular flow regime into the Apalachicola River is to set flow requirements at Woodruff Dam at a particular time or for a given set of circumstances, and any such change would require both modification of the USACE's current reservoir operations and involvement by the USACE.

Florida has submitted 20 expert reports comprising over 2500 pages and has produced over 1.3 terabytes of supporting materials. Georgia is in the process of reviewing Florida's reports and supporting materials and will submit a number of defensive reports in response. Georgia is devoting substantial resources to this effort, but the sheer number of Florida's expert reports as well as the large volume of highly technical data that the reports rely on necessitates an extension of the April 14, 2016 deadline for defensive reports set forth in the revised Case Management Plan, which does not offer sufficient time to address the volume and complexity of the reports that have now been submitted by Florida. Additionally, given that there will need to be at least 21 expert depositions to explore the reports submitted thus far (each of which is allotted up to three business days under the Case Management Plan, unless it is amended), with additional depositions for the forthcoming defensive experts, Georgia does not believe that the current 30 days allotted for depositions will be sufficient. Georgia requests a 45-day extension to the deadline for submission of defensive reports and a 30-day extension to the deadline for the conclusion of expert discovery. A proposed revised schedule can be found in Section III.E below.

Georgia continues to cooperate with Florida to prepare for mediation. Georgia is committed to working in good faith to explore the potential for a mutually agreeable outcome through the mediation process.

II. COMPLETION OF FACT DISCOVERY

During fact discovery, the parties completed a combined total of 77 depositions, comprising 85 days of testimony. Georgia took 37 depositions comprising 37 days of testimony and defended 40 depositions comprising 48 days of testimony.

Since submitting its last status report, Georgia supplemented its production twice, producing 448 additional pages of materials. One production included updated documents from the Metro District, and the second production was a single document from a single custodian. Since the last status report, Florida supplemented its production seven times, producing over 119,000 additional pages of materials.¹ Florida has also supplemented its responses to Georgia's interrogatories related to harm five times.

III. EXPERT REPORTS

A. Georgia's Offensive Expert Report

At the beginning of this case, Georgia moved to dismiss Florida's complaint for failure to join a required party under Fed. R. Civ. P. 12(b)(7). *See* Dkt. 48, "Georgia's Motion to Dismiss for Failure to Join a Required Party." (Feb. 16, 2015) ("Motion"). Georgia explained that Florida had failed to join the United States as a party, and that "[w]ithout the United States participating as a party that can be bound by a final judgment, the Court cannot accord Florida complete relief." Motion at 4.

In an effort to "sidestep[] the need to join the United States as a party," Florida narrowed its requested relief by asserting that it could achieve complete relief through a cap on Georgia's water consumption alone—without any changes to the way USACE operates the ACF Basin. Dkt. 128, Order on State of Georgia's Motion to Dismiss for Failure to Join a Required Party at

¹ This does not include the additional 1.3+ terabytes of data Florida produced in connection with its expert reports.

12 (June 19, 2015) (“Order”). Given that Georgia’s motion was based on the pleadings alone, the Special Master was required to accept the facts as pleaded by Florida in its complaint and required to draw all reasonable inferences in Florida’s favor. *Id.* At that nascent stage of the case, the Special Master found that there was not yet enough information available to reject Florida’s assertion and denied Georgia’s request to dismiss the case on that ground. *Id.* at 11.

At the time, the Special Master characterized Florida’s strategy as a “two edged sword,” — that by “voluntarily narrow[ing] its requested relief and shoulder[ing] the burden of proving that the requested relief is appropriate, it appears that Florida’s claim will live or die based on whether Florida can show that a consumption cap is justified and will afford adequate relief.” *Id.* at 13.

Now that fact discovery has concluded, the factual record that has been developed, as well as Georgia’s expert analysis, show that a hypothetical consumption cap alone would not provide additional flow in times of drought or low flows. To that end, Georgia has submitted an expert report concluding that under the USACE’s current reservoir operations, any reduction in Georgia’s consumptive use will not result in additional streamflow at the Georgia-Florida state line during seasonal low-flow or drought periods—when Florida claims that additional flows are most needed—and would produce minimal, if any, increases in state-line flow at times of the year when water is relatively plentiful. The only way to ensure any particular flow regime into the Apalachicola River would be to set flow targets at Woodruff Dam, and any change to flow targets would require the USACE to modify its current reservoir operations throughout the ACF Basin.

This expert conclusion is supported not only by data, but also by numerous statements by Florida officials. Those statements confirm that additional basin inflow over 5,000 cfs would not

necessarily materialize as additional state-line flow, and instead would often be stored in USACE reservoirs under the USACE's operational rules. For example, Steve Leitman, Florida's chief modeler during the ACF Compact negotiations, analyzed the impact of reducing irrigation demands in the Flint Basin and reached the conclusion that "[d]uring extreme low flow events reducing irrigation demands has the effect of reducing the need for supplemental releases from the reservoirs, not increasing the flow into the Apalachicola River." Leitman Exhibit 12; *see also id.* Exhibit 10 ("Under the current RIOP[,] reducing demands in the Flint and Chattahoochee basins translates more into higher reservoir elevations at Lake Lanier than increased outflow from Jim Woodruff Dam to the Apalachicola River in drought years."); *id.* Exhibit 13 ("If the intent is to remedy flow related problems in the Apalachicola River and Bay during droughts through reducing agricultural irrigation water use, then the plan for managing the federal storage reservoirs will have to be modified."); *see also, e.g.*, FL-ACF-01457637 ¶ 131 (Florida's Second Amended and Supplemented Complaint for Declaratory and Injunctive Relief, *In re Tri-State Water Rights Litig.*, M.D. Fla., 3:07-cv-00250-PAM-JRK (filed Jan. 10, 2008)) (noting that "[USACE's drought operations] allow[] the Corps to store 100% of the water that would otherwise flow to the Apalachicola from the Chattahoochee River").

Other current and former Florida officials have also testified consistently that changes in USACE operations are likely necessary in order to create higher flows in the Apalachicola River. *See, e.g.*, Dep. Tr. of Michael Sole, Former Secretary FDEP 80:14-81:4 ("Q: Would it be fair to say that the assumption always while you were secretary was that to resolve the issues of Florida's, you know, claimed harm to the river and the bay, it was understood that the Corps would have to modify its operations? A: . . . I will think I agree with you that as part of that management of the system, the Corps would potentially need to modify their operations of the

system.”). As another example, Douglas Barr, the chief negotiator for Florida during the ACF Compact and the former Executive Director of the Northwest Florida Water Management District (NFWFMD) explained in a sworn declaration that “the ‘action zones’ developed and implemented by the Corps have, at minimum, a profound effect on downstream flows for the authorized purpose of navigation and therefore on availability of water to the to the Apalachicola River and Bay. They require retention of water in the Lake Lanier reservoir at the expense of releases downstream. . . . The purpose of flow reductions in the Apalachicola River instituted by the Corps has been the conservation of storage for water supply in the Corps’ reservoirs in the Basin, so there is a direct relation between conservation of storage for water supply by the Corps and damage to Florida’s interests.” Declaration of Douglas Barr, *In re Tri-State Water Rights Litig.*, M.D. Fla., Case No. 3:07-MD-1-PAM-JRK (filed Jan. 23, 2009).

B. Florida’s Offensive Expert Reports

As the plaintiff in this case, Florida bears the burden of proof for all issues other than the Rule 12(b)(7) issue described above. Florida’s twenty expert reports cover a wide range of topics including hydrology, economics, sociology, and ecology. In addition to the final reports (which total over 2500 pages), Florida has also produced over 100,000 separate files totaling over 1.3 terabytes of electronic data. Most of the production consists of complex models and related files that must be evaluated by Georgie’s experts, and that work cannot be completed in the 45 days that are currently allotted.

C. Georgia’s Defensive Reports

Georgia will submit defensive expert reports. However, given the large volume of data, models, and new model runs Florida recently submitted with its expert reports, Georgia will not be able to finalize its defensive reports by the current deadline of April 14, 2016. Of particular concern is the large volume of highly technical data that must be analyzed by Georgia’s experts.

The data analysis is crucial to Georgia’s ability to prepare its defense in this action. In order to properly review and analyze Florida’s twenty reports and supporting models and data, Georgia requests that the deadline for defensive reports be extended by 45 days to a total of 90 days for the parties to complete defensive reports.

D. Expert Depositions

Georgia remains concerned that the current expert deposition deadline of May 16, 2016 (provided for by Section 6.2 of the Case Management Plan as amended)—which is only 30 days after the exchange of defensive reports (provided for by Section 7.2 of the Case Management Plan as amended)—does not leave sufficient time to conduct expert depositions. Given that Florida has submitted twenty reports, and Georgia has submitted one report, the current deadline does not provide sufficient time for both States to complete the 21 expert depositions—some of which are likely to span multiple days—that will result from submission of the current reports alone. When Georgia’s defensive experts are included, the burden will be even greater. Georgia requests that the deadline for the close of expert discovery be extended by 30 days for a total of 60 days for expert depositions, which will be necessary to allow both states to sufficiently develop the factual record before the case is submitted to the Special Master for decision.

E. Proposed Revised Schedule

| | Current Deadline | Proposed Deadline |
|----------------------------------|------------------|-------------------|
| Defensive Reports | April 14, 2016 | May 30, 2016 |
| Completion of Expert Depositions | May 16, 2016 | July 29, 2016 |

IV. MEDIATION

The parties have agreed to a basic framework for mediation and are preparing materials for that process. The parties have scheduled multiple calls to brief the mediator as well as two mediation sessions with counsel and senior officials from both states.

Dated: March 4, 2015

/s/ Craig S. Primis
Craig S. Primis, P.C.
K. Winn Allen
KIRKLAND & ELLIS LLP
655 Fifteenth St. NW
Washington, DC 20005
Tel.: (202) 879-5000
Fax: (202) 879-5200
cprimis@kirkland.com

CERTIFICATE OF SERVICE

This is to certify that the MARCH 4, 2016 STATUS REPORT OF THE STATE OF GEORGIA has been served on this 4th day of March 2016, in the manner specified below:

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| <p><u>For State of Florida</u></p> <p><u>By U.S. Mail and Email</u></p> <p>Allen Winsor Solicitor General Counsel of Record Office of Florida Attorney General The Capital, PL-01 Tallahassee, FL 32399 T: 850-414-3300 allen.winsor@myfloridalegal.com</p> | <p><u>For United States of America</u></p> <p><u>By U.S. Mail and Email</u></p> <p>Donald J. Verrilli Solicitor General Counsel of Record Department of Justice 950 Pennsylvania Avenue, N.W. Washington, DC 20530 T: 202-514-7717 supremectbriefs@usdoj.gov</p> |
| <p><u>By Email Only</u></p> <p>Donald G. Blankenau Jonathan A. Glogau Christopher M. Kise Matthew Z. Leopold Osvaldo Vazquez Thomas R. Wilmoth floridawaterteam@foley.com</p> | <p><u>By Email Only</u></p> <p>Michael T. Gray michael.gray2@usdoj.gov</p> <p>James DuBois james.dubois@usdoj.gov</p> |
| <p><u>For State of Georgia</u></p> <p><u>By Email Only</u></p> <p>Samuel S. Olens Nels Peterson Britt Grant Sarah H. Warren Seth P. Waxman Craig S. Primis K. Winn Allen georgiawaterteam@kirkland.com</p> | <p><i>/s/ Craig S. Primis</i></p> <hr/> <p>Craig S. Primis <i>Counsel of Record</i> KIRKLAND & ELLIS LLP 655 Fifteenth Street, NW Washington, DC 20005 T: 202-879-5000 craig.primis@kirkland.com</p> |