No. 142, Original

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

THE STATE OF FLORIDA'S MARCH 4, 2016 PROGRESS REPORT

The State of Florida respectfully submits this Progress Report to the Special Master pursuant to Section 4 of the December 3, 2014 Case Management Plan (the "CMP"), as subsequently amended.

I. GENERAL STATUS OF THE MATTER

Over the past month, Florida has taken or defended twenty-nine depositions, completed and served reports for twenty retained expert witnesses, updated interrogatory responses to reflect discovery to date, and met all the intervening deadlines in the Court's Case Management Orders. Florida believes that the parties have resolved amicably many (but not all) past fact discovery disputes, and it is not aware of a dispute on those prior issues currently requiring any immediate judicial resolution.

As to expert discovery, Florida is aware that Georgia will be seeking an extension of the current April 14, 2016 deadline for filing expert disclosures for witnesses whose testimony is "on an issue concerning which [the Party] does not bear the burden of proof." *Case Management Order No. 13* (Nov. 2, 2015) at 4. In addition, Georgia has previously indicated a concern regarding the May 16, 2016 deadline to complete expert depositions. *See Status Report of the State of Georgia* (Feb. 5, 2016) at 8. Although Florida is agreeable to a short extension of the April 14 deadline and to a longer extension of the May 2016 deadline, Florida wishes to identify a threshold concern regarding Georgia's approach to experts under the Case Management Orders. That threshold concern, along with a summary of other potentially relevant issues, is set forth below.

In addition, Florida reports that as the expert phase of this case continues in the coming months, the parties will continue to participate in their confidential mediation process.

II. POTENTIAL DISCOVERY ISSUES

As the fact discovery cutoff has now passed, this Progress Report discusses only specific issues that have arisen between the States.

A. Possible Backloading of Georgia's Expert Reports/Burden of Proof Issues

The CMP (as amended by Case Management Order No. 13), establishes that disclosures of expert testimony "in support of an issue upon which [a] party bears the burden of proof" were due "no later than February 29, 2016," while expert disclosures "on an issue concerning which it does not bear the burden of proof" may be made at any time up until April 14, 2016. CMP §§ 7.1, 7.2. On February 29, 2016, Florida disclosed twenty expert reports on a wide range of issues in the case, including expert analyses establishing that Florida has suffered significant harm from fundamental hydrologic changes in the ACF basin resulting from Georgia's upstream

diversions for agricultural, municipal, and industrial uses.[1] The Supreme Court's case law establishes that, as the upstream state, Georgia bears the burden of showing that its own upstream diversions of interstate water are equitable and reasonable and should be permitted under the doctrine of equitable apportionment. *See, e.g., Colorado v. New Mexico*, 467 U.S. 310, 317 (1984) ("[T]he burden shifted … to Colorado to show, by clear and convincing evidence, that reasonable conservation measures could compensate for some or all of the proposed diversion and that the injury, if any, to New Mexico would be outweighed by the benefits to Colorado from the diversion."); *id.* at 317-18, 320, 323-24; *Colorado v. New Mexico*, 459 U.S. 176, 187-88 & n.13 (1982). Likewise, Georgia pled five affirmative defenses in its Answer. Answer at 27-31, Dkt. No. 15; *see Taylor v. Sturgell*, 553 U.S. 880, 907 (2008) ("Ordinarily, it is incumbent on the defendant to plead and prove such a[n affirmative] defense." (citing *Jones v. Bock*, 549 U.S. 199, 204 (2007)); *Deputron v. Young*, 134 U.S. 241, 253 (1890).

In light of the expert disclosure requirements in the CMP, Florida anticipated that Georgia would disclose a number of expert reports on these issues by the February 29, 2016 deadline. Georgia, however, disclosed only a single export report on that deadline. That single expert report related to Georgia's fifth affirmative defense, and essentially restated the arguments previously presented to the Court in Georgia's motion to dismiss regarding the Army Corps of Engineers. Of course, Georgia may have made the strategic decision not to rely on expert testimony regarding the other issues on which it bears the burden of proof in this case. Florida's concern, however, is that Georgia may have instead decided for strategic reasons to hold back its required expert disclosures on issues for which it bears the burden of proof until the later April

[1] In an abundance of caution, Florida also served expert disclosures and reports on issues for which it does not bear the burden of proof including, for example, on how Georgia can and should take reasonable steps to reduce its agricultural irrigation related diversions in the Flint River Basin and elsewhere.

14, 2016 expert deadline. Needless to say, any such strategy would not comply with the Court's CMP, and would impose undue prejudice on Florida.

B. February 26, 2016 Production of Key Information

Since the February 5, 2016 Progress Reports, both states have continued to make supplemental productions and work cooperatively to follow up on requests regarding potential gaps in production. This process has been cooperative and generally has not interfered with progress in discovery. However, on Friday, February 26, 2016 at 10:37 pm—the last business day before expert reports were due—Georgia produced a spreadsheet (GA02474080 and filename "WettedAcres_Deliverable_Feb 2016.xlsx") (the "Spreadsheet") with a very large volume of information about agricultural water use and irrigation in the State of Georgia, including the Flint River Basin. In his deposition on February 29, 2016, Mr. Mark Masters—Director of the Georgia Water Planning and Policy Center at Albany State University—testified that the Spreadsheet "is the state wide wetted acreage database." Masters Tr. (Rough), Feb. 27, 2016 at 117:19. He further indicated that the Spreadsheet was a "deliverable" that Albany State University delivered to the Georgia Environmental Protection Division ("EPD") sometime in February 2016. *Id*. at 118:13-16. Mr. Masters stated that, in preparing the document: "We worked in conjunction with Georgia EPD staff located in Tifton, Georgia, as we were producing the final deliverable." *Id*. at 118:23-25. Mr. Masters also testified that the information in the spreadsheet was intended to support Georgia's regional water planning efforts. *See id*. at 118:17-20.

Florida is in the process of examining whether the information in the Spreadsheet was produced to Florida previously, but the timing of the production is troubling because of the possibility that it contains Georgia's new contentions about water usage in the Flint River Basin (and elsewhere) – including certain new estimates of the number of irrigated (or wetted) acres in

the state. *See id*. at 127:13 – 131:6 (describing a new approach to estimating irrigated acres in which Georgia assumed that every center pivot in the state was equipped with an end gun throw that wetted 100 feet beyond the hardware of the equipment). This subject matter was the focus of many questions in Florida's depositions, and Florida repeatedly requested Georgia's irrigated acres information throughout the discovery period.

Because of Georgia's delayed delivery of the Spreadsheet, Florida was not able to consider the extensive information it contained in examining fact witnesses in depositions prior to February 29, or in the preparation of the expert reports submitted on February 29. Florida is currently evaluating whether the delayed production of the Spreadsheet impacted its efforts in discovery.

In addition, Florida believes that Georgia's production of the Spreadsheet was inconsistent with Section II.A.2 and Exhibit A of the February 11, 2015 Agreement Regarding Document Production and Electronic Discovery Procedures. Specifically, Georgia did not provide all of the metadata associated with the Spreadsheet that the Agreement requires, including the date the document was created and the date it was last modified. Florida sent a letter to Georgia on March 1, 2016 requesting that it provide all of the required metadata, and awaits a response.[2]

C. Missing Springs Data

During Florida's January 23, 2016 deposition of Mr. John Kilpatrick, a biologist employed by Georgia's Department of Natural Resource's Wildlife Resources Division ("DNR-WRD"), Florida learned that Georgia DNR-WRD has in its possession a database or databases documenting the location and flow condition of certain ground water discharge points (springs)

[2] Florida notes further that it has not identified in Georgia's production underlying documentation relevant to the delivery and creation of the Spreadsheet. Accordingly, Florida has requested that Georgia confirm that all non-privileged documentation relevant to the delivery and creation of the Spreadsheet was previously produced.

in the Flint River that are relevant for demonstrating how Georgia's agricultural irrigation permitting practices affect Flint River flows, and also demonstrate harm to critical habitat of the Gulf Striped bass in those areas. This information is clearly responsive to Florida's Requests for Production, and Florida has requested that Georgia provide the information to Florida as soon as possible. Florida anticipates that it can work cooperatively with Georgia to address this issue through the meet and confer process.

D. Testimony Regarding Commissioner Putnam's Letter

The States previously litigated the need to depose the Commissioner of the Florida Department of Agriculture and Consumer Services, Mr. Adam Putnam. In response, this Court ruled that Georgia had not met its burden to show that Mr. Putnam possessed unique first-hand knowledge that could not be obtained from other sources. *See Case Management Order No. 15* (Jan. 20, 2016). In the weeks since the Court issued its decision, Georgia has had a full and fair opportunity to do so, and has not pursued the issue further.

To ensure that Georgia had a full opportunity to pursue the relevant factual issues, on January 29, 2016 counsel for Florida offered to make each of the three individuals involved with preparing the letter signed by Commissioner Putnam—Mr. Mark Berrigan, Ms. Leslie Palmer, and Mr. Mark Joyner—available for deposition. Florida further explained that "Mr. Berrigan supplied the principal content for the Letter; Ms. Palmer organized and structured the Letter in a proper format for submission to the Department of Commerce; and Mr. Joyner provided the Letter to Commissioner Putnam." Georgia moved forward with the deposition of Mr. Berrigan on February 18th, but chose not to depose Ms. Palmer or Mr. Joyner. Mr. Berrigan's deposition took place on February 18, 2016. Mr. Berrigan testified that he supplied the substantive content

of the letter to Ms. Palmer, and that she composed that substantive content into a properly formatted letter request for a disaster declaration.

E. Missing Georgia Email Files

As noted, the States have completed fact discovery and Florida has developed extensive evidence demonstrating that Georgia engaged in inequitable conduct in connection with its consumptive use of water from the ACF basin over the last twenty years. Florida previously observed that Georgia failed to preserve relevant emails regarding its conduct during this time period. *See February 5, 2016 Progress Report* at 4-5; *January 12, 2016 Progress Report* at 7-8. The failure to preserve these emails may have legal implications as this continues. *See, e.g.*, *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002) (allowing for sanction of adverse inference "even for the negligent destruction of documents" on grounds that "[i]t makes little difference to the party victimized by the destruction of evidence whether that act was done willfully or negligently[, and t]he adverse inference provides the necessary mechanism for restoring the evidentiary balance"); *Adkins v. Wolever*, 692 F.3d 499, 503–05 (6th Cir. 2012) (following same standard).

III. STATUS OF OTHER DISCOVERY AMONG THE PARTIES

A. Interrogatories and Requests for Admissions

Since the February 5, 2016 Progress Report, Florida has continued to diligently update its responses to Georgia's interrogatories to reflect ongoing discovery:

- On Feb. 12, Florida served its Third Supplemental Responses to Georgia's Third Set of Interrogatories, and its Fifth Supplemental Responses to Georgia's First Set of Interrogatories;

- On Feb. 19, Florida served its Fourth Supplemental Responses to Georgia's Third Set of Interrogatories, and its Sixth Supplemental Responses to Georgia's First Set of Interrogatories;
- On Feb. 27, Florida served its Seventh Supplemental Responses to Georgia's First Set of Interrogatories; and
- On Feb. 29, Florida served its Fifth Supplemental Response to Georgia's Third Set of Interrogatories.

Florida will continue to supplement its responses as the need arises, as it expects Georgia to do. *Cf. Status Report of the State of Georgia* (Jan. 8, 2016) at 6 ("Although written discovery is now closed, the parties have continued to supplement their responses as necessary."); *Status Report of the State of Georgia* (Dec. 4, 2015) at 3 ("[T]o the extent necessary, Georgia will supplement its responses to Florida's interrogatories as discovery continues."); *see also Case Management Plan § 15*.

In Georgia's last Progress Report, it criticized Florida's responses to certain of its requests for admission. As Florida has previously noted, Georgia served an extremely large number of requests for admission – 336 in total. A great majority of these requests sought admissions on issues that are clearly in dispute, or simply reflect Georgia's misunderstanding of the subject matter on which they were seeking an admission. Indeed, the majority of these 336 requests were not an appropriate use of the parties' time or resources. As to appropriate requests: Florida admitted 151 of the requests in whole or in part. The relatively few requests that Florida has neither admitted nor denied are largely requests that do not require a response—for example, because they call for legal conclusions. *See, e.g.*, *Government Employees Ins. Co. v. Benton*, 859 F.2d 1147, 1148 n.3 (3d Cir. 1988) ("request for admissions [that] could be

interpreted as asking for conclusions of law [are] impermissible under Rule 36"); *In re Enron Corp. Securities, Derivative & Erisa Litigation*, 762 F. Supp. 2d 942, 959 (S.D. Tex. 2010) ("Rule 36 cannot be used to compel an admission of a conclusion of law."); *English v. Cowell*, 117 F.R.D. 132, 135 (C.D. Ill. 1986) ("The rule also limits requests to questions of fact or mixed questions of fact and law. Requests asking for legal conclusions are not proper.").

B. Production of Additional Responsive Documents

The States completed productions of responsive documents on November 10, 2015. Since the February 5, 2016 Progress Report, both States have made supplemental productions (including of third party materials). Further, on February 29, 2016 both States produced a large volume of information, including modeling files, in support of their expert reports. Due to the number of expert reports it served, Florida's production was comparatively large.

As the parties continue to work through technical issues that inevitably arise with document collections and productions on the scale involved in this case—millions of documents—the States will continue to work cooperatively to resolve issues, including privilege clawbacks, document production vendor errors, and the like.

C. Depositions

As noted above, the weeks since the February 5, 2016 Progress Report have been an extremely busy period of depositions in which Florida has taken 17 depositions and defended 12. The logistics of scheduling and taking this number of depositions—in multiple locations and involving a number of third parties—were challenging, but through extraordinary efforts by both States, Florida is pleased to report that all depositions (individual, 30(b)(6), and third party) were completed on time.

IV. UNRESOLVED DISPUTES

There are no unresolved disputes under the terms of the CMP.

V. SETTLEMENT EFFORTS

The States have agreed on a mediator and schedule, and the mediation process is underway.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

This is to certify that THE STATE OF FLORIDA'S MARCH 4, 2016 PROGRESS REPORT was served on this 4th day of March 2016, in the manner specified below:

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