

SUPREME COURT OF THE UNITED STATES
No. 142, Original

STATE OF FLORIDA,)
)
Plaintiff,)
)
V.)
)
STATE OF GEORGIA,)
)
Defendants.)

TELEPHONE CONFERENCE before SPECIAL MASTER

RALPH I. LANCASTER, held at the law offices of Pierce
Atwood, LLP, at Merrill's Wharf, 254 Commercial Street,
Portland, Maine, on March 8, 2016, commencing at
10:00 a.m., before Claudette G. Mason, RMR, CRR, a
Notary Public in and for the State of Maine.

APPEARANCES:

For the State of Florida: PHILIP J. PERRY, ESQ.
ALLEN C. WINSOR, ESQ.
JONATHAN L. WILLIAMS, ESQ.
MATTHEW Z. LEOPOLD, ESQ.

For the State of Georgia: CRAIG S. PRIMIS, ESQ.
K. WINN ALLEN, ESQ.
DEVORA W. ALLON, ESQ.
BRITT GRANT, ESQ.
SARAH HAWKINS WARREN, ESQ.

For the U.S.A.: JAMES J. DUBOIS, ESQ.

Also Present: MARY CLIFFORD

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1 Georgia. I have the Solicitor General for
2 Georgia, Britt Grant, on the line as well,
3 and two of my colleagues, Winn Allen and
4 Devora Allon.
5 SPECIAL MASTER LANCASTER: United
6 States?
7 MR. DUBOIS: Good morning, your Honor.
8 This is Jim -- James Dubois from the
9 Department of Justice.
10 SPECIAL MASTER LANCASTER: Good morning.
11 Is there anyone else on?
12 All right.
13 MS. WARREN: Sarah Warren is here from
14 Georgia as well, the Deputy Solicitor
15 General.
16 SPECIAL MASTER LANCASTER: Thank you.
17 Anyone else?
18 MR. LEOPOLD: Matt Leopold, State of
19 Florida, is on the line, your Honor.
20 SPECIAL MASTER LANCASTER: Thank you.
21 Anyone else?
22 All right. Let me ask, as we always do,
23 do you have any additions to your progress
24 reports, Mr. Perry?
25 MR. PERRY: No, your Honor. There may
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PROCEEDINGS

1 SPECIAL MASTER LANCASTER: Good morning,
2 counsel.
3 MR. PERRY: Good morning, your Honor.
4 MR. PRIMIS: Good morning, your Honor.
5 MR. WINSOR: Good morning, your Honor.
6 MS. GRANT: Good morning, your Honor.
7 SPECIAL MASTER LANCASTER: This morning
8 our case manager, Josh Dunlap, is off in
9 another jurisdiction taking depositions; but
10 we have the very valuable Mary Clifford, whom
11 you're familiar with, and, of course, as
12 always, our wonderful reporter, Claudette
13 Mason.
14 Let's begin, as we always do, by
15 entering appearances. Florida?
16 MR. PERRY: Your Honor, it's Phil Perry
17 for Florida. And with me on this call are
18 Allen Winsor, the Solicitor General, and
19 Jonathan Williams.
20 SPECIAL MASTER LANCASTER: Thank you,
21 Mr. Perry.
22 Georgia?
23 MR. PRIMIS: Your Honor, this is Craig
24 Primis from Kirkland & Ellis for the State of
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1 be a couple things I would like to comment on
2 towards the end of the call about our
3 opponent's progress report, but nothing in
4 addition to what we put in for our points.
5 SPECIAL MASTER LANCASTER: And,
6 Mr. Primis?
7 MR. PRIMIS: No, your Honor.
8 SPECIAL MASTER LANCASTER: All right.
9 Thank you.
10 Let me begin by congratulating you,
11 counsel, again on your cooperative efforts to
12 resolve your discovery disputes. While I
13 would expect nothing less from counsel of
14 your caliber, I'm very appreciative of your
15 efforts.
16 Now, is there anything else that we
17 should discuss?
18 Florida? Mr. Perry?
19 MR. PERRY: Your Honor, if I might, I
20 would like to raise the prospect that we may
21 at some point in the coming months need to
22 brief this issue of burden in this matter
23 because I think we have a dispute, if I'm
24 understanding Georgia's position correctly,
25 on who bears the burden for what issues in
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1 this case.
 2 In our status report, we cited the case
 3 Colorado versus New Mexico from 1984.
 4 There's, in fact, two of those cases. One is
 5 in 1982. And I think it's fair to say they
 6 both are the most recent statements by the
 7 Supreme Court on who bears the burden in
 8 equitable apportionment actions. And in both
 9 cases, including in footnote 13 of 459 U.S.
 10 176 in 1982, the Supreme Court describes how
 11 the burden shifts once the downstream state
 12 has made a showing that it's been injured.
 13 And under those circumstances, the burden
 14 shifts to the upstream diverter to prove that
 15 its diversion, either present or future
 16 diversion, would be reasonable, justifiable
 17 and equitable.
 18 Of course, this case is somewhat
 19 different than Colorado versus New Mexico
 20 because both of the states here are riparian
 21 rights states; and both in that case were
 22 prior appropriation states.
 23 But I think as this case goes forward,
 24 it may be quite important to resolve this
 25 burden shifting issue. And we are pleased at

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1 Florida's take on it.
 2 Your Honor is correct that we would need
 3 an opportunity to discuss it among the
 4 parties. But, more fundamentally, these
 5 types of burden issues and burden disputes
 6 typically are briefed in the context of
 7 summary judgment where there is an actual
 8 factual record and evidence that can be
 9 weighed. It's more concrete in that regard
 10 rather than just abstraction. And we
 11 think -- we'll see what Florida has in mind;
 12 and I'm sure we'll talk about it in coming
 13 weeks and months, but at this point it just
 14 seems premature. And I think Mr. Perry even
 15 indicated as much before the other expert
 16 reports have been produced and provided and
 17 we have a fuller record in terms of discovery
 18 and expert work.
 19 So, really, just note -- we note and we
 20 understand that that's an issue Florida has
 21 raised. We will discuss it with them. But,
 22 ultimately, we may come back and say that it
 23 should be briefed up either in the context of
 24 summary judgment or pretrial briefing when
 25 it's ripe.

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1 an appropriate juncture to brief that. And
 2 there may be a need to brief it in the coming
 3 months, and so we would welcome that
 4 opportunity. But we're also flexible.
 5 And I think as we see what reports we
 6 get at the next deadline, which is currently
 7 April 14, 2016, that may be a time at which
 8 this burden issue becomes mature for the
 9 Court's attention.
 10 SPECIAL MASTER LANCASTER: Well, of
 11 course, if it -- I'm hopeful that counsel at
 12 one of their meet and confer meetings will be
 13 able to resolve any differences; but if they
 14 can't, you should feel free to file the
 15 motion and support it with briefs, and we
 16 will address it.
 17 Mr. Primis, do you want to address this
 18 burden question at this point?
 19 MR. PRIMIS: More from a procedural
 20 perspective than anything else, your Honor.
 21 And thank you for the opportunity.
 22 We just -- we do -- it appears that we
 23 have a disagreement over this burden issue;
 24 but, frankly, the first we saw of it was in
 25 the status report. And we disagree with

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1 SPECIAL MASTER LANCASTER: Thank you.
 2 That issue will be addressed if you
 3 can't resolve it in due course. But I'm
 4 hopeful, again, that you can in a meet and
 5 confer resolve it between yourselves. If you
 6 can't, why, you know the process to get it
 7 before me.
 8 I have read thoroughly your very fine
 9 progress reports. Is there anything else,
 10 Mr. Perry?
 11 MR. PERRY: Your Honor, if I might,
 12 I would like to address a few of the pages
 13 in Georgia's report, which are essentially
 14 an argument on the merits. I will only
 15 address that briefly. But I would note
 16 that among our 20 retained experts are
 17 multiple nationally-recognized hydrologists,
 18 biologists, and others that establish,
 19 contrary to what Georgia's report suggests,
 20 that a cap on Georgia's upstream
 21 consumption -- consumption, excuse me,
 22 including on agricultural irrigation, will
 23 indeed produce substantial additional flows
 24 on the Apalachicola River, that those flows
 25 would substantially benefit Florida, both

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1 on the river and in the bay, and that
 2 Georgia can comply with such a consumption
 3 cap through a series of reasonable cost
 4 measures of the types other states already
 5 implement.
 6 I would not have ordinarily made a
 7 merits argument in this context, but given
 8 that these proceedings are public and that
 9 Georgia has done so, we felt compelled to
 10 respond briefly.
 11 SPECIAL MASTER LANCASTER: Thank you.
 12 Mr. Primis?
 13 MR. PRIMIS: Your Honor, no response on
 14 that. We wanted to notify the Court as to
 15 the issue that we had provided our report on.
 16 And obviously we will respond to the points
 17 made in their expert reports. We disagree
 18 with them, and the facts will bear out our
 19 position. But I don't know that we need to
 20 debate the merits in the context of this
 21 call.
 22 SPECIAL MASTER LANCASTER: All right.
 23 Thank you very much.
 24 And thank you again, both of you, for
 25 your progress reports.
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1 pre-existing models that all sides have
 2 worked with and agree are the right way to
 3 go. In many fundamental respects, Florida
 4 has designed new models, has created new data
 5 sets, and are applying the -- the raw
 6 material in ways that have not been applied
 7 before either by the U.S. Army Corps or the
 8 State of Georgia. So it is a significant
 9 amount of effort even just to understand the
 10 bases for their opinions and to break down
 11 and evaluate these models.
 12 We have been, I think, very disciplined
 13 in terms of when we come to the Special
 14 Master and ask for additional time; and we
 15 are keenly aware of the Special Master's
 16 desire to move this case along. And at each
 17 juncture, we need to balance that with the
 18 need to do the analysis correctly and
 19 properly and to ask for and, hopefully,
 20 receive the amount of time we feel in good
 21 faith that we need.
 22 And just given the magnitude and the
 23 diversity and the number of these reports and
 24 the types of analyses, we wanted to
 25 underscore that we view the requested
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1 MR. PRIMIS: Your Honor?
 2 SPECIAL MASTER LANCASTER: Yes?
 3 MR. PRIMIS: This is Craig Primis for
 4 Georgia. I thought you would swing it back
 5 to me before we ended.
 6 I did have one issue I wanted to amplify
 7 from our report, if I may.
 8 SPECIAL MASTER LANCASTER: Certainly.
 9 MR. PRIMIS: Thank you, your Honor.
 10 We have a deadline which is imminent of
 11 April 14. And we raised this issue in our
 12 status report. We -- we anticipated there
 13 would be substantial expert work in this
 14 case; but we did not anticipate 20 expert
 15 reports. It imposes a significant burden,
 16 both logistical and substantive, on us as we
 17 endeavor to respond to this very extensive
 18 set of reports we received.
 19 Even just the logistics -- I want to
 20 underscore one point -- just to copy the
 21 amount of data in the models that we received
 22 has taken a week in order to distribute it to
 23 our experts who are only now starting to load
 24 it up and evaluate what we received.
 25 In addition, these are not simply
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1 extension as -- as significant and very
 2 important to our development of our defense.
 3 And that is why we proposed May 30.
 4 Candidly, we could use more time than
 5 that just given the amount of work that this
 6 would entail; but we understand that the
 7 Court wants to move this along expeditiously,
 8 so we were -- we were conservative in what we
 9 asked for. So we do need and ask for the
 10 full amount of that time.
 11 We understand from discussions with
 12 Florida that they, likewise, would like
 13 additional time after receiving our reports;
 14 and we don't object to that. We think both
 15 sides should have ample opportunity,
 16 cognizant of the need for expedition, to
 17 evaluate each other's very technical and
 18 complex expert analyses.
 19 So before we got off the phone, I did
 20 want to just flag that we view that as an
 21 important issue and one that we hope can be
 22 addressed quickly because the deadline comes
 23 up so quickly.
 24 SPECIAL MASTER LANCASTER: Mr. Perry, do
 25 you wish to comment on this?
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1 MR. PERRY: Yes, I would, your Honor.
 2 For -- from our perspective, this
 3 question is tied in part to the burden issue
 4 I mentioned a few moments ago. And we
 5 anticipated under the Court's Case Management
 6 Plan and Order that we would receive a number
 7 of expert reports from Georgia. We received
 8 one. And we don't know at this point how
 9 many additional reports we will receive from
 10 them on their -- on the current deadline for
 11 their reports on April 14 or on any future
 12 proposed deadline. We don't know whether
 13 they are going to, at that point, try to put
 14 in reports on issues for which they bear the
 15 burden, which, of course, the deadline for
 16 those has already passed, or whether they
 17 will only be defensive expert reports
 18 responding to ours. So there is some
 19 uncertainty on our part and a concern.
 20 They, of course, have five affirmative
 21 defenses in this case where they will bear
 22 the burden as well. So far they have only
 23 put in one expert report on those five.
 24 Affirmative defenses 3 and 4 are ones where
 25 we expected that they would put forward

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1 expert reports if they anticipated using
 2 experts, which, of course, we don't know.
 3 So our position, your Honor, is that we
 4 would be fine with an extension of the April
 5 14 deadline. We would propose May 10 for
 6 that rather than May 30.
 7 I'll note that we, of course, did our 20
 8 expert reports -- and it took a fair amount
 9 of time to do those -- during the time when
 10 we were also engaged in fact discovery and
 11 completing dozens of depositions.
 12 Our concern about moving the deadline to
 13 May 30th is that the subsequent deadline
 14 under those circumstances would only be 60
 15 days thereafter. And we would only have 60
 16 days after May 30 to review, analyze, and
 17 depose however many experts Georgia decides
 18 to identify.
 19 And there also, your Honor, may be an
 20 issue with rebuttal experts. Of course,
 21 the Case Management Plan and Case Management
 22 Orders provide that those can be designated
 23 after a showing of good cause. In
 24 particular, this burden issue plays in
 25 there. And if it is, indeed, the case that

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1 Georgia has decided to hold its experts
 2 until this latter deadline rather than
 3 putting those forward on which it bears the
 4 burden of proof, we think that would work
 5 some substantial prejudice to us. So that
 6 is part of our thinking as well.
 7 So I will tentatively say, your Honor,
 8 that our proposal would be to move the
 9 April 14 deadline to May 10. And then as
 10 to the -- the second deadline, which is
 11 currently May 16, we're not sure how much
 12 time we would need. Tentatively we would
 13 say the end of July, but that may change
 14 depending on how many expert reports we
 15 receive.
 16 SPECIAL MASTER LANCASTER: Thank you.
 17 Mr. Primis, do you want to say anything
 18 else on this issue?
 19 MR. PRIMIS: Yes, your Honor.
 20 Mr. Perry has said it a couple of times.
 21 Just so it's clear, we don't bear the burden
 22 of proof on these issues. They're the
 23 plaintiff. They have to establish their
 24 case.
 25 And our expert reports will be timely

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1 filed under the Case Management Plan.
 2 Regardless of whatever arguments Florida
 3 may want to make on burden -- and there may
 4 be a time and a place for that down the
 5 road -- we're looking at 20 expert reports.
 6 You know, in a case where the Special Master
 7 has advocated for streamlining, this is the
 8 opposite. And we -- I don't expect we'll
 9 have 20 expert reports; but we do need to
 10 respond to everything that is in those
 11 reports, and we need the time to do that.
 12 I'm encouraged and I appreciate
 13 Mr. Perry being agreeable to May 10.
 14 Obviously, the Special Master is always --
 15 it's always up to your discretion; but I am
 16 glad to hear that Mr. Perry thinks that given
 17 the magnitude of information that they have
 18 provided, that some extension is reasonable.
 19 We're only asking for 20 additional days to
 20 what Florida would deem to be appropriate.
 21 And that -- in the scheme of things, with the
 22 issues at stake in this case, 20 additional
 23 days, I think, is not significant and is very
 24 reasonable.
 25 I would also just note that while

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1 Florida did produce its 20 reports, the
 2 experts working on those reports had been
 3 preparing those analyses for many months.
 4 Some of them have been working on them for
 5 many years. There are some experts who
 6 identified being retained as early as 2012.
 7 So there are new models. Some of them
 8 conducted lengthy and time-consuming surveys.
 9 There's just a lot of work that was done, and
 10 it was done in much more than 45 days.
 11 Obviously we have done some preliminary
 12 thinking and work, but we have only seen what
 13 Florida's position is on all these issues now
 14 for a week. And even just getting your arms
 15 around it and evaluating what needs to be
 16 responded to is quite time consuming.
 17 So we appreciate Florida's agreement
 18 that some extension is warranted. We think
 19 that an additional 20 days beyond what they
 20 have proposed is fair.
 21 And as I said, we would not object to
 22 Florida getting some additional time if they
 23 feel they need it after they receive our
 24 reports. And, in fact, we put that in our
 25 proposal. And we wouldn't -- if they feel

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1 that's insufficient, wouldn't object to an
 2 additional amount of time that's commensurate
 3 to what we're asking for.
 4 So that's all I have to say on that
 5 issue.
 6 SPECIAL MASTER LANCASTER: Mr. Perry,
 7 anything further on this issue?
 8 MR. PERRY: No further response, your
 9 Honor.
 10 SPECIAL MASTER LANCASTER: Well,
 11 counsel, I -- my crystal ball is broken.
 12 Today is, I think, March 8. And you're
 13 talking about a deadline of April 14, which
 14 is over a month away. When you put the
 15 burden question and the production together,
 16 you may well have a basis for some extension;
 17 but I don't have it in front of me at the
 18 moment enough to be able to rule.
 19 So if you do want to request an
 20 extension and if you do want to address the
 21 burden question, I suggest that you get
 22 together, see what you can produce, and then
 23 file a motion and brief it thoroughly --
 24 thoroughly -- with the needs as you see them
 25 fully explained with examples to support each

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1 request.
 2 I am not prepared to grant any extension
 3 today. From prior conferences you know that
 4 I'm very reluctant to extend this marathon.
 5 Very early on and, again, as recently as
 6 last month I suggested that you meet and
 7 confer on limiting the scope of discovery to
 8 the basic, hard-core issues you believe
 9 necessary to inform judgment. Instead, as
 10 reflected, once again, in these progress
 11 reports, both sides have plunged even deeper
 12 into discovery of hundreds, perhaps
 13 thousands, of complex issues that will
 14 ultimately be left on the wayside, millions
 15 of pages of hard copies and hundreds of
 16 gigabytes of electronic files.
 17 As you well know, I have been harping on
 18 settlement from the beginning of this
 19 process. Much to my delight, in its November
 20 progress report, Georgia suggested mediation
 21 and Florida agreed. Four months have gone
 22 by; and the most you can tell me -- and I'm
 23 quoting now from your progress reports -- is,
 24 quote, the mediation process is underway,
 25 unquote, and that you have, quote, agreed to

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1 a basic framework, unquote.
 2 Let me suggest -- and I hope I'm not
 3 being too unkindly here, that if you had
 4 invested up to 10 percent of the effort and
 5 time and expense you have used in discovery
 6 on mediation, we would not be here spinning
 7 our wheels.
 8 At the next call I expect to have
 9 reports that show actual mediation progress.
 10 Let me repeat that. At the next
 11 conference call I expect to have reports that
 12 show actual mediation progress.
 13 Is that clear, Mr. Perry?
 14 MR. PERRY: Yes, your Honor.
 15 SPECIAL MASTER LANCASTER: Is that
 16 clear, Mr. Primis?
 17 MR. PRIMIS: Yes, your Honor.
 18 SPECIAL MASTER LANCASTER: All right.
 19 Is there anything else, counsel?
 20 MR. PERRY: No, your Honor.
 21 MR. PRIMIS: No, your Honor.
 22 SPECIAL MASTER LANCASTER: All right.
 23 We are adjourned.
 24 Thank you very much.
 25 MR. PERRY: Thank you, your Honor.

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MR. PRIMIS: Thank you, your Honor.
(The telephone conference was concluded
at 10:21 a.m.)

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CERTIFICATE

I, Claudette G. Mason, a Notary Public
in and for the State of Maine, hereby certify
that the foregoing 21 pages are a correct
transcript of my stenographic notes of the
above-captioned proceedings.

I further certify that I am a
disinterested person in the event or outcome
of the above-named cause of action.

IN WITNESS WHEREOF, I subscribe my hand
this 10th day of March, 2016.

Notary Public

My Commission Expires
June 9, 2019.

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