

In The
Supreme Court of the United States

STATE OF FLORIDA,

Plaintiff,

v.

STATE OF GEORGIA,

Defendant.

FLORIDA'S INITIAL PRETRIAL PROPOSAL

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On May 12, 2016, the Court instructed the parties to submit information on the following topics by June 6, 2016: (1) a proposed trial date and location, and an estimate for the length of trial; (2) a preliminary list of witnesses; and (3) a proposed trial briefing schedule. Florida has conferred with Georgia regarding dates and the duration of trial and the trial briefing schedule, and sets forth below its initial proposals on each of these topics. As the parties are in the midst of expert discovery at this time, this statement is necessarily tentative.

PRELIMINARY STATEMENT

Florida anticipates a focused trial presentation, organized around four fundamental principles:

- Georgia's upstream diversions continue to dramatically alter the hydrology of the Apalachicola-Chattahoochee-Flint (ACF) Basin, leaving no doubt that Florida has been, and will continue to be, seriously injured.
- Georgia has long recognized the severe potential consequences of its upstream diversions, and yet has repeatedly failed to take the types of actions necessary to address the problem.
- An equitable apportionment requiring Georgia to cap its upstream consumption can redress Florida's longstanding and worsening injuries without imposing unreasonable costs on Georgia.
- Georgia's multiple efforts to blame other factors for Florida's harms are not credible or well founded.

Florida anticipates supporting its case through expert testimony, testimony of Florida witnesses and certain third parties, and testimony and admissions by Georgia personnel.

As previewed in recent filings, the parties disagree about their respective burdens of proof in this case: Florida contends that it must show that Georgia's

upstream diversion of interstate water is causing or will cause Florida “real or substantial injury or damage,” while Georgia must demonstrate that its existing or planned diversions are nevertheless justified “under the principle of equitable apportionment.” *Colorado v. New Mexico*, 459 U.S. 176, 183-187 & n.13 (1982); *Colorado v. New Mexico*, 467 U.S. 310, 317-21, 323-24 (1984). Georgia, on the other hand, contends that the burdens are allocated differently.

The parties have also taken different approaches to disclosing experts. To carry its burden, Florida has designated experts in three categories: (1) hydrology; (2) harm to Apalachicola River Ecology; and (3) harm to the Apalachicola Bay and Florida communities which depend upon the Bay. Florida has also designated experts who will identify how Georgia can take reasonable measures upstream to mitigate ongoing and future harm to Florida, and several other experts who can rebut Georgia’s affirmative defenses and many other allegations that Georgia has made in the course of this litigation. Florida has assembled an expert team of nationally and internationally renowned individuals with complementary expertise. Florida’s hydrology team, for example, is led by Dr. George Hornberger, an internationally known hydrologist who authored a principal textbook in his field. Dr. Hornberger is supported by three other expert hydrologists, each designated to perform specific complementary analyses. While this approach leads to a higher number of individuals designated as experts, it also forthrightly demonstrates the significant depth of work and knowledge behind the focused conclusions the experts collectively reach. The same is true for certain other elements of Florida’s case: for

example, Dr. David Sunding—Florida’s prominent lead economics expert—is supported by other designated experts who supply specialized knowledge on discrete elements of the case.

Georgia appears to have taken a somewhat different approach to its expert disclosures that may have contributed to the differing numbers of expert reports. While Georgia’s nine disclosed experts certainly rely upon each other’s opinions, it appears that certain experts—perhaps most notably, Dr. Charles Menzie—intend to rely on work performed by a number of staff members who have not been identified or provided reports. Florida anticipates more clarity on this issue as expert discovery progresses.

Florida has considered multiple options to shorten and streamline the time to try this case. One option is employing pre-filed direct testimony for certain of the parties’ expert and lay witnesses. For example, when acting as Special Master in *Kansas v. Nebraska*, Judge Kayatta employed such an approach, generally providing that the parties file written direct testimony in advance of trial, and permitting additional direct testimony only if the need for that testimony was not reasonably foreseeable prior to trial. Case Management Order 5 § 1.2, *Kansas v. Nebraska*, No. 126, Orig. Florida has raised the notion with Georgia that certain witnesses be handled in this fashion—perhaps with an opportunity to conduct a brief direct examination introducing the witness by way of summary narrative before cross-examination begins. The parties have also discussed and agree that they would propose to file pre- and post-trial briefs.

I. LOCATION AND LENGTH OF TRIAL

The parties agree that trial should proceed in Washington, DC. Florida proposes that trial begin in early November, and understands that Georgia is in agreement with this schedule. The parties have not yet agreed on a proposed duration for trial, and Florida is not yet privy to Georgia's trial planning. If pre-filed direct testimony is used for certain witnesses and the parties can agree to reasonable stipulations, Florida currently projects that trial may consume 4-5 weeks. Without pre-filed direct testimony, Florida currently projects that trial may extend for 7-8 weeks.

II. PRELIMINARY WITNESS LIST

At this preliminary stage, Florida currently anticipates calling a number of experts and lay witnesses from the following preliminary lists, and/or for certain witnesses, relying upon pre-filed direct testimony (see discussion above) or deposition designations. Florida expects to be able to make a focused presentation, and intends to take steps to reduce the number of potential witnesses as it learns more through ongoing expert discovery and, specifically, which of Georgia's many identified defenses it intends to pursue. Although dozens of individuals are preliminarily identified below, Florida currently anticipates calling a subset of that number, or relying on pre-filed direct or deposition designations, depending upon the factors identified above. For example, it may not be necessary to call all of the supporting experts identified below. To further reduce trial duration, Florida intends to work with Georgia to reach a stipulation regarding admissibility of certain documents and the use

of certain deposition designations. Moreover, many of the witnesses listed below are identified for discrete, but potentially important issues that would not entail substantial trial time.

A. Potential Expert Testimony:

Hydrology, and Related Topics: Dr. George Hornberger; Dr. Peter Shannahan; Dr. Samuel Flewelling; Dr. David Langseth; Dr. Dennis Lettenmaier.

Impacts to Apalachicola Bay and River, and Related Local Communities: Dr. J. David Allan; Dr. G. Mathias Kondolf; Dr. David Kimbro; Dr. Patricia Glibert; Dr. J. Wilson White; Dr. Stephen Scyphers; Dr. Kenneth Jenkins.

Georgia's Ability to Mitigate Harm through Equitable Upstream Conservation Measures, and Other Economic Issues: Dr. David Sunding; Dr. Gerrit Hoogenboom; Dr. Adelbert Bottcher; Dr. Daniel Phaneuf.

Rebutting Georgia's Affirmative Defenses and Other Allegations: Multiple individuals listed above, plus Mr. James Barton; Dr. Scott Douglass.

B. Preliminary List of Possible Fact Witnesses

Nature of Apalachicola Basin, Communities and Economy: Jonathan Steverson (Secretary, Florida Department of Environmental Protection); Brett Cyphers (Executive Director, Northwest Florida Water Management District); Thomas Ward (Representative for Apalachicola Bay Oyster Dealers Association); Shannon Hartsfield (President, Franklin County

Seafood Workers Association).

Impacts to Apalachicola Bay and River, and Related Local Communities: Individuals identified above, plus Theodore Hoehn (Fisheries & Wildlife Scientist, Florida Fish & Wildlife Conservation Commission); Eric Sutton (Assistant Executive Director, Florida Fish & Wildlife Conservation Commission); Aris Georgakakos (Director, Georgia Water Resources Institute, Georgia Institute of Technology University); Professor Philip Roberts (Professor, Environmental Fluid Mechanics and Water Resources, Georgia Institute of Technology); Mark Berrigan (Chief, Florida Department of Agriculture and Consumer Services); Capt. Rob Beaton (Law Enforcement Captain, Florida Fish & Wildlife Conservation Commission); David Heil (Section Leader, Fisheries Services, Florida Fish & Wildlife Conservation Commission).

Thirty-Year History—Georgia’s Repeated Failures to Take Effective Action to Mitigate Overconsumption Upstream: Individuals identified above, plus Harold Reheis (former Director of Georgia Environmental Protection Division); Joe Tanner (former Commissioner, Georgia Department of Natural Resources); Napoleon Caldwell (Section Manager, Water Supply Section, Watershed Protection Branch Georgia Environmental Protection Division); Judson Turner (recent Director, Georgia Environmental Protection Division); Gail Cowie (Assistant Branch Chief, Watershed Protection Branch, Georgia Environmental Protection Division);

Wei Zeng (Supervisor, Hydrological Analysis Unit, Water Supply, Watershed Protection Branch, Georgia Environmental Protection Division); Jason Wisniewski (Aquatic Zoologist, Nongame Conservation Section, Wildlife Resources Division, Georgia Department of Natural Resources); John Kilpatrick (Regional Fisheries Management Biologist, Wildlife Resources Division, Georgia Department of Natural Resources); Clifford Lewis (Program Manager, Agricultural Permitting Unit, Georgia Environmental Protection Division); David Struhs (Former Secretary, Florida Department of Environmental Protection); Michael Sole (Former Secretary, Florida Department of Environmental Protection); Herschel Vinyard (Former Secretary, Florida Department of Environmental Protection); Greg Munson (Former Deputy Secretary of Water Policy, Florida Department of Environmental Protection); Gordon Rogers (Riverkeeper and Executive Director, Flint Riverkeeper); Laura Hartt (Staff Scientist & Policy Director, Chattahoochee Riverkeeper).

Measures Georgia Should Take Upstream to Mitigate Harm:

Individuals identified above, plus a small number of other possible individuals.

Georgia's Multiple Efforts to Blame Other Factors for Florida's Harms: Names identified above, plus Judith Curry (President, Climate Forecast Applications Network); James Hook (Retired Professor, University of Georgia); Hailian Liang (Modeler, Hydrological Analysis Unit, Georgia Environmental Protection Division); Menghong Wen (Environmental Engineer 3, Hydrological

Analysis Unit, Water Supply, Watershed Protection Branch, Georgia Environmental Protection Division); Dr. Woody Hicks.

III. PROPOSED PRETRIAL SCHEDULE

Florida does not intend to file a pretrial dispositive motion. The States have conferred on scheduling, and appear to be in agreement on many elements of the schedule. Florida proposes the following schedule for pretrial disclosures, non-dispositive motions practice, and briefing:

August 5, 2016: Close of expert discovery.¹

September 14, 2016: Deadline for the parties to exchange exhibits, witness lists, and deposition designations.

September 23, 2016: Deadline for motions *in limine* and other procedural pretrial motions.

September 30, 2016: Deadline for deposition cross-designations.

October 7, 2016: Deadline for oppositions to any pretrial motions filed on September 23, 2016.

October 14, 2016: Deadline to file reply briefs in support of procedural pretrial motions filed on September 23, 2016.

October 17, 2016: Deadline to file substantive pretrial briefs and

¹ As indicated in its recent motion for an extension, Florida is reviewing Georgia's recent expert disclosures and considering whether to seek leave to disclose certain focused rebuttal expert reports on recently identified issues. If Florida does seek leave to disclose such rebuttal experts, it will do so soon and in a fashion not designed to extend the period for close of expert discovery.

written direct testimony.²

October 24, 2016: Deadline for objections to written direct testimony.

Early November 2016: Beginning of trial.³

CONCLUSION

Florida will continue to confer with Georgia to seek consensus on trial scheduling and logistics and to identify additional ways to narrow issues before trial.

Dated: June 6, 2016

Respectfully submitted,

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² If the Court permits amicus filings, Florida respectfully submits that an appropriate deadline for such filings would be one week after the parties' deadline for substantive pretrial briefs (October 24, 2016).

³ Demonstratives to be exchanged 48 hours before the day they are used at trial.

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No. 142, Original

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Before the Special Master

Hon. Ralph I. Lancaster

CERTIFICATE OF SERVICE

This is to certify that FLORIDA'S INITIAL PRETRIAL PROPOSAL has been served on this 6th day of June, 2016, in the manner specified below:

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