

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 OCTOBER 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, as subsequently amended.

I. CONFIDENTIAL MEDIATION

Over the past month, Florida and Georgia continued to engage in the confidential mediation process. Despite the efforts of a highly skilled mediator, numerous mediation discussions and considerable time and effort invested in the mediation process throughout this year, it currently appears unlikely that the parties will be able to amicably resolve this decades-long dispute prior to the commencement of trial. If these circumstances change in the coming weeks, Florida will inform the Court immediately.

II. NUMBER OF ATTORNEYS AND STAFF ATTENDING TRIAL

Florida currently anticipates that approximately 5-7 attorneys will participate in the trial, and they will be supported by 2-4 additional professionals. The number of attendees at trial is likely to vary from day-to-day depending upon the complexity and number of exhibits, witnesses, and demonstratives utilized on a particular day. Florida also anticipates that client representatives and other interested parties from the State may be present, particularly during the initial days of trial.

III. TRIAL PRESENTATIONS

A. Trial Witnesses

The parties exchanged their respective witness lists on September 5. Georgia identified 17 witnesses it intends to call live at trial. Florida identified 18 witnesses it intends to call live, as well as certain other “may call” witnesses.¹ Florida also explained that it was prepared to present testimony by deposition designation of several Georgia employees, but that it would call those witnesses live in its case-in-chief if Georgia objected to the use of those deposition designations. Georgia objected to the use of deposition designations for three witnesses, each of whom is now listed among its 17 live witnesses. In an effort to reach a compromise and to streamline the presentation of both cases, Florida now intends to call at least 2 of those 3 individuals in its case as hostile witnesses (and will examine them live); Georgia has indicated that it will make those individuals available at an appropriate time in Florida’s trial presentation.

This process creates a question of logistics for those 2-3 witnesses because Georgia will be presenting “pre-filed direct testimony” for each. Florida proposes that it will call each hostile witness and conduct its examination without being limited to the scope of Georgia’s pre-filed

¹ Georgia also plans to file deposition designations for more than 40 witnesses, whereas Florida expects to file deposition designations for approximately 25 witnesses.

direct testimony. Georgia will then examine each such witness as if it were conducting redirect examination, followed by any subsequent cross-examination by Florida.²

B. Objections to Pre-filed Direct Testimony and Exhibits at Trial

The Court's Case Management Order Number 20 (July 13, 2016) already provides that the parties will exchange objections to exhibits on October 26, and supply any objections to pre-filed direct testimony before the relevant witness takes the stand. But the parties' exhibit lists are quite long. Georgia's exhibit list includes approximately 1790 exhibits. Florida's list includes approximately 860 exhibits; Florida anticipates that will it seek to introduce a subset of that total at trial. Florida has outlined below its proposal for an efficient way forward.

First, Florida has proposed a stipulation to Georgia that all exhibits in the following categories be regarded as authentic: (1) documents produced by either state; (2) documents produced or maintained by a federal government entity (including federal government websites or databases); and (3) documents authenticated by third party affidavit, deposition testimony or a pre-filed direct. Georgia has not yet assented.

Second, the parties have continued a dialogue to develop an efficient means of reviewing and objecting to exhibits. Georgia initially proposed saving all exhibit objections until after trial and asking the Court to conditionally admit exhibits at trial, subject to final determinations post trial. Florida was amenable to Georgia's proposal but Georgia recently withdrew that proposal.

Given the very large number of potential exhibits and objections, Florida respectfully proposes to the Court the following structure for making and adjudicating evidentiary objections:

1. For pre-filed direct testimony, objections are made pursuant to the Court's existing Order three days before a witness takes the stand. The parties would undertake

² Alternatively, Florida would be pleased to present video clips of each such witnesses' designated deposition testimony during its case, and then allow Georgia to call those witnesses live during its case.

to supply each other a list of likely witnesses at least four days before they are anticipated to testify. The Court would admit pre-filed direct testimony conditionally, subject to those objections, and adjudicate any relevant objections post trial.

2. For exhibits identified on each parties' exhibit list, the parties will make objections on October 26 and the Court will, to the extent necessary, adjudicate evidentiary objections post trial. Exhibits will be conditionally admitted subject to post-trial review of any objections.

3. For live examination (cross-examination, redirect examination, and direct examination of hostile witnesses): opposing counsel will make objections live on the record to any objectionable questions or to the use of exhibits inconsistent with the Federal Rules of Evidence.

Florida hopes that this proposal can save time that would otherwise be consumed hearing argument on and addressing myriad evidentiary disputes during trial.

C. Use of Deposition Testimony at Trial

In addition to the witnesses who will be presented live, both parties intend to present live at trial discrete segments of deposition testimony through video clips and by showing written questions and answers on a screen. The parties do not intend to consume excessive trial time with the entirety of the deposition designations in the case – instead only a subset of the designations would be utilized at appropriate times in the parties' trial presentations. The parties also anticipate that corresponding counter-designations of such depositions would be played directly after each set of excerpts is played. Florida believes that this process can be efficient and will focus the Court's valuable time on segments of depositions truly important to each

parties' trial presentations. Florida does not intend to present more than 8 hours of cumulative deposition testimony.

IV. MOTIONS TO SEAL

As proposed in Florida's September 30, 2016 response to Georgia's Motion to Submit Trial Exhibits Under Seal or With Redactions, Florida has conferred with Georgia regarding any remaining areas of disagreement between the parties on treatment of certain material Georgia has designated as confidential. Florida's position with respect to the categories discussed below is not meant to express a view on the admissibility of any such exhibits.

A. *Category 9: Precise Locations (Such As GPS Coordinates) Of Threatened and Endangered Species*

Among other evidence, Florida intends to present at trial testimony, photographs, videotape and other information regarding the impacts of extreme low flows in the Apalachicola River on various endangered species in various locations in the river and its floodplain forests. Similar evidence may also be employed as to the effect of low flows in Georgia's Flint River basin. To address Georgia's concerns, Florida proposed to Georgia that the parties simply avoid supplying precise GPS coordinates for any particular species in open court. The parties have now agreed that, with the Court's permission, each party may, in open court, identify and describe any particular location where endangered and threatened species are or were present—such as in particular locations in tributaries of the Flint River and particular locations in sloughs in the Apalachicola basin in the Apalachicola floodplain. The parties may describe the impacts of low flows on endangered and threatened species in those locations. The parties may also employ photographs or videotape of those particular locations and particular endangered or threatened species, along with maps identifying the areas where the photographs or videos were taken, so long as GPS data is not publicly disclosed. Likewise, witnesses called to testify

regarding impacts of low flows may utilize similar information, including as appropriate, demonstrative exhibits, so long as they do not identify GPS coordinates. Georgia agreed with that solution.

B. *Categories 10, 11, 12, 13, and 16: Agricultural Irrigation-Related Information*

Florida has explained to Georgia that it plans to use photographs, data from Georgia's agricultural metering devices and databases, satellite photographs, and similar relevant evidence in open court to demonstrate that specific irrigation practices in particular areas of Georgia are unreasonable and/or excessive, and to explain how Georgia can meet the requirements of a consumption cap remedy. Florida proposes to do so without identifying any individual Georgia farmer by name. While Florida may need to identify with some specificity where irrigation-related withdrawals from groundwater and surface water sources are occurring in order to demonstrate how those withdrawals are significantly impacting the underlying aquifer and Flint River and tributary flows (that in turn impact Florida), Florida proposes to refer to those farms by permit number and location (or other means of identification) to protect individual farmer identities. Similarly, Florida proposes to use permit numbers (or other identifiers), rather than individual farmer names to present evidence of the large number of permitted irrigators in Georgia that are irrigating a greater number of acres than their Georgia state permits allow. Georgia has now agreed to this approach for addressing confidentiality regarding agricultural irrigation. With the Court's permission, Florida plans to proceed in this fashion.

C. *Category 14: Proprietary University Material*

Florida has no objection to a narrowly construed designation, preventing public disclosure of certain draft university materials already identified by the parties. Florida is not aware of any issues regarding pending patents or other draft materials. By agreeing to confidential treatment of these specific draft materials, Florida does not intend to make any

broader agreement applying to any other materials or to any testimony by potential witnesses. Depending on how Georgia presents its defenses in this case, it may be necessary to question witnesses or refer to the subject draft university materials in a closed session or in confidential submissions.

D. *Category 15: Confidential Information Related to Settlement or Mediation*

Florida and Georgia agree any settlement discussions or mediation conducted in 2015 and 2016 will be treated as confidential. Florida is not aware of any confidentiality issues arising in any Georgia Exhibits with respect to settlement negotiations prior to 2015. Florida's position as to confidentiality is not intended to acknowledge the admissibility of any particular document or testimony regarding past settlement negotiations at any prior time.

V. LENGTH OF TRIAL

The length of trial is difficult to predict given the parties' inability to determine the amount of time opposing counsel will dedicate to cross-examination. At this stage, Florida anticipates a trial that may take between 4-5 weeks.

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Dated: October 7, 2016

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Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that THE STATE OF FLORIDA'S OCTOBER 2016 PROGRESS REPORT has been served on this 7th day of October 2016, in the manner specified below:

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