

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

**JOINT SUBMISSION OF THE PARTIES REQUESTING CHANGES
TO CASE MANAGEMENT PLAN AND A TELEPHONIC HEARING**

Pursuant to Paragraph 5 of Case Management Order No. 1, the parties make this joint submission requesting certain changes to the Case Management Plan issued by the Special Master on December 3, 2014. This submission proceeds in three parts. *First*, the parties explain why more time is required for discovery than currently provided for in the Case Management Plan. *Second*, the parties outline a cooperative and timely approach to developing an alternative Case Management Plan. *Third*, the parties propose an alternative approach in the event the Special Master prefers to enter a schedule now rather than adopt the parties' proposed approach.

The parties also respectfully submit that a brief telephonic hearing would be beneficial and provide the Special Master a more developed understanding of the issues herein presented.

I. The Case Management Plan Does Not Provide Sufficient Time For Discovery

A discovery period greater than that provided in the Case Management Plan is necessary because: i) the parties have not previously engaged in discovery relative to the issues presented in this original action; and ii) discovery in this equitable apportionment action will be a multidisciplinary, highly technical effort demanding the timely convergence and assimilation of a large volume of hydrologic, biological, and economic data.

First, while there has been extensive litigation involving the ACF Basin, such litigation differed markedly from this original action and involved minimal discovery, rendering that record of quite limited value to the current dispute. The questions presented in the prior litigation centered around how the U.S. Army Corps of Engineers operated its system of reservoirs and dams within the ACF Basin to accommodate certain statutorily authorized purposes and to meet various obligations under federal environmental law. The evidentiary foundation in the various cases consisted of a series of administrative records developed by the federal agencies, and traditional discovery never took place. At no point did Florida and Georgia exchange discovery requests or conduct depositions.

Second, this proceeding is one for equitable apportionment, which calls for a “delicate adjustment of interests” based on weighing a wide range of factors. *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945). The Supreme Court has stressed the need for full development of facts in any original action. *United States v. Texas*, 339 U.S. 707, 715 (1950) (“The Court in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts.”). This need is only magnified in an equitable apportionment, where discovery may involve subjects including: physical and climatic conditions, the consumptive use of water, the extent of established uses, the effect on downstream areas, the parties’ conservation efforts, and the effect

on upstream areas if a limitation is imposed on usage. *See Colorado v. New Mexico*, 459 U.S. 176, 183-84 (1982). Discovery in this case is not limited to documentary or historical records and will involve substantial hydrologic, biological, and economic data. The hydrologic questions alone are complex and involve the interaction of consumptive water uses with surface flows, groundwater recharge, and hydrologically connected groundwater, and the parties will likely rely on sophisticated groundwater modeling and multiple experts. The parties anticipate that their initial discussions, *see infra* at 3-5, will reveal additional areas of potential complexity (*e.g.*, issues regarding document custodians or technological challenges). Consistent therefore with the scope of discovery accorded parties to any original action, and to equitable apportionment actions in particular, sufficient time should be provided to gather and assimilate a large volume of diverse and technical data.

II. The Parties Should Be Afforded Time To Meet-And-Confer on Discovery Issues and Submit a Revised Case Management Plan

In light of the complex factual and legal questions involved in this case—and recognizing the Special Master’s desire to move this case forward expeditiously—the parties have already met-and-conferred on three occasions about potential ways to streamline and organize discovery. Based on those discussions, the parties have intensified internal discussions with key State personnel in an attempt to identify those State agencies that are likely to possess relevant information, the location of potentially relevant documents within those agencies, and the nature of the information-technology systems that store many of those documents.

Based on their current assessment of the discovery that will be necessary in this case, the parties jointly propose the following: Between now and the commencement of written discovery on February 9, 2015, the parties will attempt to negotiate and agree upon discovery issues including (1) the number and identity of custodians whose documents will have to be collected,

reviewed, and produced; and (2) the search terms the parties will use to narrow the scope of electronic information to be reviewed. That process will enable the parties to better understand the scope of discovery in this case and the timeframe that will be required for the parties to collect, process, review, and produce relevant, non-privileged documents. Indeed even at this stage, both States submit a 30-day period for the production of documents—as currently contemplated by Section 6.1.2 of the Case Management Plan—is far too short. Neither Florida nor Georgia believe that 30 days is sufficient to conduct all of the work necessary to produce documents, including identifying relevant custodians, collecting documents, having those documents processed by a third-party discovery vendor, reviewing the documents for responsiveness and privilege, creating privilege logs, and ultimately producing the documents.

The parties thus suggest respectfully they be given the next two months to do much of the logistical work required to move discovery forward, including identifying relevant State agencies, custodians, documents, search terms, and discovery vendors. Once the parties have reached agreement on the relevant issues, the parties will then—by no later than February 2, 2015—submit a proposed Amended Case Management Plan to the Special Master that sets forth a discovery schedule that adheres to the Special Master’s desire for the case to proceed swiftly, yet allows for the discovery essential to a full development of facts in this original action and to a fair presentation of the case by both sides. Under this procedure, the deadlines for discovery to commence and conclude would be suspended pending the Special Master’s approval of the proposed Amended Case Management Plan, but non-discovery deadlines such as the Answer deadline, and the deadline for Georgia to file a motion based on Fed. R. Civ. P. 12(b)(2)-(5) or (7), would remain in place. Allowing the parties to submit a proposed Amended Case Management Plan after meeting-and-conferring will permit the parties to do the preliminary

work necessary for discovery to proceed in an expedited manner, and then return to the Special Master with an aggressive plan that takes into account the practical realities of the case.

III. Alternatively, The Parties Request That Certain Changes Be Made To The Case Management Plan

Alternatively, if the Special Master wishes to have a Case Management Plan in place immediately, the parties jointly propose the below revisions to the current Case Management Plan. As noted, the parties are concerned that the current Case Management Plan does not provide sufficient opportunity for the discovery essential to a full development of facts in this original action. Based on current knowledge, and prior to completion of the meet-and-confer process outlined above, the parties have attempted to determine the most efficient and effective plan.

To begin, the parties propose adjusting the deadlines contained in Appendix B—and reflected throughout the Case Management Plan—as follows. This proposed schedule suggests staggering fact and expert discovery because the parties are concerned that simultaneously proceeding with both fact and expert discovery would be inefficient and could require duplicative expert work as facts are learned and refined over the course of the case. To avoid unnecessary and repetitive discovery, the parties believe that expert discovery should be conducted only after the factual record is closed or substantially complete. *See* Case Management Plan § 6.

February 2, 2015	Deadline for answering complaint
February 9, 2015	Deadline for Georgia to file a motion based on Fed. R. Civ. P. 12(b)(2)-(5) or (7)
February 9, 2015	Deadline for United States statement of intended participation

February 9, 2015	Fact discovery may commence
March 9, 2015	Deadline for objecting to U.S. statement of intended participation
November 20, 2015	Deadline for completion of written discovery responses and non-expert depositions
February 1, 2016	Deadline for serving expert reports by the party with the burden of proof on any issue that is the subject of expert testimony
April 8, 2016	Deadline for serving all responding expert reports
June 10, 2016	Deadline for completion of expert discovery
July 29, 2016	Deadline for motions to dismiss based on Fed. R. Civ. P. 12(b)(6) and/or motions for summary judgment

These proposed revisions to the deadlines represent the parties' best estimate, based on their current understanding of their discovery needs and challenges, of the minimum time needed in each instance to ensure a full development of the facts. Indeed the parties believe that additional time is warranted and necessary to complete the discovery in this case. But the parties jointly propose the above deadlines in an effort to address the Special Master's desire for a more expeditious schedule.

In addition to those changes to the discovery schedule, the parties jointly propose the following modifications to the Case Management Plan:

- Section 6.1.1 Interrogatories — Instead of 10 days to serve objections and 30 days to serve answers, the parties jointly ask for 30 days to serve objections and 45 days for answers to interrogatories.
- Section 6.1.2 Requests For Production of Documents/Inspections to Parties — Instead of 10 days to serve objections, and 20 to 30 days to complete document productions, the parties jointly ask for 20 days to serve objections and for document productions to be made on a rolling basis beginning 45 days after initial requests and to be completed by 180 days after the service of the requests for production.
- Section 6.1.3 Requests For Production of Documents/Inspections to Non-Parties — Instead of 20 days to serve objections, and 20 to 30 days to complete document productions, the parties jointly ask for 30 days to serve objections and for document

productions to be made on a rolling basis and to be completed by 90 days after the service of the requests for production.

- Section 6.1.1 Request for Admission — Instead of 10 days to serve objections and 30 days to serve responses, the parties jointly ask for 45 days to serve both objections and responses to requests for admission.
- Section 16 Dispositive Motions — Instead of 10 days to file oppositions to motions to dismiss or motions for summary judgment and 7 days to file replies, the parties jointly ask for 60 days to file oppositions to motions to dismiss or motions for summary judgment and 21 days to file replies. The parties anticipate that, given the significant and complicated issues involved in this case, summary judgment briefing will be lengthy and involve a number of technical and scientific issues.

CONCLUSION

The parties respectfully request that the Special Master enter a Case Management Order adopting the approach outlined in Part II of this submission or, in the alternative, adopting the revisions outlined in Part III. In addition, the parties respectfully request that the Special Master schedule a brief telephonic hearing.

Respectfully submitted,

Craig S. Primis, P.C.
Sarah Hawkins Warren
K. Winn Allen
Kirkland & Ellis LLP
Special Assistant Attorneys General
655 Fifteenth St., N.W.
Washington, DC 20005

Counsel for the State of Georgia

Allen Winsor
Solicitor General
Jonathan Glogau
Special Counsel
Office of the Attorney General
The Capitol, PL-01
Tallahassee, FL 32399-1050
Tel.: 850-414-3300

Christopher M. Kise
Adam C. Losey
Foley & Lardner LLP
106 E. College Ave., Suite 900
Tallahassee, FL 32301-7748
Tel.: 850-513-3367

Counsel for the State of Florida

CERTIFICATE OF SERVICE

This is to certify that the foregoing has been served on the following on this 10th day of December 2014, in the manner specified below:

For State of Florida

By U.S. Mail and Email:

Allen Winsor
Solicitor General
Counsel of Record
Office of Florida Attorney General
The Capitol, PL-01
Tallahassee, FL 32399
T: 850-414-3300
allen.winsor@myfloridalegal.com

By Email only:

Donald G. Blankenau
Jonathan A. Glogau
Christopher M. Kise
Matthew Z. Leopold
Osvaldo Vazquez
Thomas R. Wilmoth
floridawaterteam@foley.com

For United States of America

By U.S. Mail and Email:

Donald J. Verrilli
Solicitor General
Counsel of Record
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530
T: 202-514-7717
supremecibriefs@usdoj.gov

By Email only:

Michael T. Gray
Michael.gray2@usdoj.gov

James DuBois
James.dubois@usdoj.gov

For State of Georgia

By U.S. Mail and Email:

Craig S. Primis, P.C.
Counsel of Record
Kirkland & Ellis LLP
655 15th Street, N.W.
Washington, D.C. 20005
T: 202-879-5000
craig.primis@kirkland.com

By Email only:

Samuel S. Olens
Nels Peterson
Britt Grant
Seth P. Waxman
K. Winn Allen

georgiawaterteam@kirkland.com

/s/ Christopher M. Kise

Foley & Lardner LLP