

**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

**STATUS REPORT OF THE STATE OF GEORGIA
OCTOBER 7, 2016**

This report constitutes the twenty-first monthly status report filed by the State of Georgia pursuant to Section 4 of the Case Management Plan.

I. PRE-TRIAL PROCEEDINGS

Georgia and Florida exchanged draft exhibit lists, witness lists, and deposition designations on September 9, 2016, as required by Case Management Order Nos. 19 and 20. The parties continue to meet and confer regarding pre-trial logistics, including but not limited to the joint exhibit list, deposition counter-designations and objections, and confidentiality of exhibits. While the parties have made progress on a number of these matters, there are several outstanding issues, discussed in greater detail below, on which Georgia requests guidance from the Court.

Deposition Designations

As stated above, the parties have exchanged deposition designations and counter-designations and plan to exchange objections in the near future. The parties will file those deposition designations with the Court in advance of trial. Georgia recognizes that each party may want to highlight some of the designated testimony by either reading that testimony into the record or playing the video recording of that testimony. Given the volume of deposition designations in this case, Georgia believes a limit on the number of hours of read designations and/or video played in court will help ensure efficiency and economy in trial presentations. Georgia proposes a four-hour limit per party.

Georgia is also objecting to designations by Florida that are improper and should be excluded altogether. Florida improperly designated the deposition testimony of some of own its current employees, including Captain Rob Beaton, Jim Estes, and Ted Hoehn. We have met and conferred with Florida, and Florida has withdrawn these designations. However, Florida still plans to designate for David Heil who, at the time of deposition, was also a current employee. Florida's designations are improper under Rule 32(a), which provides that deposition testimony may only be used: (1) if the witness is unavailable; (2) the witness is the "party's officer, director, managing agent, or designee under Rule 30(b)(6)" and when the testimony is used by an adverse party; or (3) for impeachment purposes. *See* Fed. R. Civ. P. 32(a)(2)-(4). Florida's improper designations for Mr. Heil do not meet any of these requirements. Mr. Heil was a current employee at the time of his deposition, and is clearly within Florida's control. There is no reason to believe he is unavailable, and Florida has provided no such reason.

In contrast, Florida has rendered unavailable several of its own expert witnesses by choosing not to call these witnesses in its case-in-chief. Since Georgia will not have the opportunity to cross-examine these expert witnesses at trial, it has instead designated deposition testimony for these witnesses relating to several key issues in the case. Georgia's designations for the following Florida witnesses are therefore proper under Rule 32(a):

- ***Dr. Kenneth Jenkins.*** Dr. Jenkins was retained by Florida to provide expert testimony to support the claim that Georgia's water consumption has harmed fish and other species (other than oysters) in Apalachicola Bay. Dr. Jenkins had extreme difficulty testifying as to the nature of the harm that he broadly alleged, and deposition revealed significant flaws in his analysis. Florida has decided not to call him as a witness. This testimony should be admitted through deposition designation as admissions of an agent for Florida and as testimony of an unavailable witness under Rule 32. Moreover, many of Florida's other experts have relied upon Dr. Jenkins' analysis, including Dr. Glibert, whose reliance on and deference to Jenkins was abundantly clear in her deposition. *See, e.g.*, Glibert Tr. 49:10-15. It is improper for Florida to secure the benefit of aspects of Dr. Jenkins' analysis through other experts or fact witnesses, while hiding Dr. Jenkins' testimony and admissions concerning that analysis.
- ***Mr. James Barton.*** Florida advanced James Barton as an expert in Army Corps operations. Mr. Barton, who has over 30 years of experience in water management and reservoir operations of federal reservoir projects, testified that the only way to ensure a predictable flow of water into Florida would be with the involvement and cooperation of the Corps. Barton Tr. 205:14-20. As he put it: "because the Corps operates the good Woodruff Dam and that's what releases the water into Florida, there would probably need to be some involvement of the Corps." *Id.* at 204:13-16. Mr. Barton also testified to the robustness and reliability of HEC-ResSim, the Corps' premier reservoir simulation model that Florida now rejects in this litigation. He described ResSim as "widely used," "very dependable," "reliable," and "state of the art." *Id.* at 130:5-134:23. Mr. Barton testified that he was not aware of any other model that better represents the ACF reservoir operations, and that "everyone agreed that the model was very much acceptable for use on the ACF system." *Id.* at 134:24-135:2. That testimony is admissible by designation now that Florida has made Mr. Barton unavailable.
- ***Dr. Mathias Kondolf.*** One of Florida's chief harm experts, Dr. Allan, relies on the testimony of Dr. Kondolf related to alleged harm to certain river species, but Kondolf too has now been demoted to "may call" status by Florida. Dr. Kondolf testified that, "despite its enormous ecological value, the Apalachicola River ecosystem has been severely degraded through a long history of navigational dredging by the US Army Corps of Engineers." Kondolf Tr. 64:20-65:18. Dr. Kondolf further testified that the Army Corps' navigational dredging enlarged the River channel such that it "lowered

water levels for the same flows from upstream,” and this Corps activity “caused the floodplains and sloughs to dry out . . . with severe ecological effects.” *Id.* at 76:15-77:17. Dr. Kondolf’s testimony constitutes admissions of a Florida agent, he is unavailable to Georgia, his analysis has been relied upon by other Florida experts and Georgia’s experts, and it should be admitted through designation.

- ***Dr. David Langseth.*** Dr. Langseth is a groundwater modeler who testified that the maximum streamflow impact of Georgia’s irrigation pumping is significantly lower than the remedies proposed by other Florida experts. Dr. Langseth’s analysis is likewise incorporated in and relied upon by several other Florida experts. Dr. Langseth is listed as a “may call” witness but Georgia suspects Florida is likely to call him. If he is not called, Georgia should be allowed to submit his testimony through designation for the reasons cited above.

Florida has in fact acknowledged that Georgia can designate from a withdrawn expert. Georgia designated testimony from Florida’s now-withdrawn expert on municipal and industrial water use, John Dracup, who testified (among other things), that Lake Lanier and the Chattahoochee River were the best water supply sources for the Atlanta Metropolitan area and “the o[nly] game in town,” Dracup Tr. 71:3-72:16; that water use of “below a hundred gallons per day per capita” would indicate that Atlanta’s conservation measures were being appropriately implemented (Atlanta is at 98 gallons per day per capita), *id.* at 132:12-18; and who dismissed concerns over the costs of alternative water supply measures (which ran into the billions) as “whiny,” *id.* at 79:7-20. Florida posed no objection to these designations and instead submitted counter-designations. There is no reason for these other experts to be treated differently for Florida’s strategic advantage.

Order of Witnesses

For the sake of efficiency and planning, Georgia proposes that the parties disclose their proposed order of witnesses in advance of trial. Georgia proposes that Florida disclose its witnesses on October 19 and Georgia disclose its witnesses a week later, on October 26.

Florida had originally designated seven Georgia witnesses on its witness list. To maximize efficiency, Georgia offered to make these witnesses available live for Florida’s case so

that they only had to testify once at trial. Florida has chosen to present two of these witnesses live in its case-in-chief, and Georgia has agreed to make these witnesses available. The parties have agreed that Florida will not seek to read deposition designations or play deposition video testimony for any of the witnesses that Georgia has indicated it plans to call live at trial.

Exhibit Objections

The parties have conferred on lodging objections to exhibits. Georgia proposes that the parties comply with the Case Management Order Nos. 19 and 20 and lodge all objections with the Court on October 26. Georgia understands that Florida may propose a different approach.

Confidentiality

The parties have met and conferred and are generally in agreement as to the material that should be redacted for confidentiality at trial. Georgia therefore respectfully requests that the Special Master issue an order granting its motion to seal or redact. If further issues arise, the parties will meet and confer and raise them with the Court at that time if they are unable to resolve them on their own.

II. MEDIATION

The parties had scheduled a session with the mediator on September 21, 2016. At the last minute, Florida indicated that it would not be attending the mediation. Georgia was disappointed by Florida's absence at the session. However, Georgia still attended the session to meet with the mediator and believes it was productive to continue the dialog if only with the mediator. Georgia continues to believe that mediation is a viable option in this case and remains hopeful that Florida will re-engage with the mediation process.

Dated: October 7, 2016

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CERTIFICATE OF SERVICE

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

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