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. Paul J. Kelly, Jr.

JOINT MEMORANDUM
OCTOBER 2, 2018

The parties jointly submit this memorandum summarizing their positions on the questions posed by the Special Master in Case Management Order (CMO) No. 23. The parties met and conferred on these issues on Friday, September 14, 2018 and Thursday, September 20, 2018. Thereafter, the parties exchanged drafts of their respective portions of this submission, but were unable to agree on how this case should proceed. Below, the parties set forth their respective positions.

I. FLORIDA'S PRELIMINARY STATEMENT

This case returns for further proceedings following the Supreme Court's decision in June holding that Special Master Lancaster had applied "too strict a standard" in concluding that, while Florida had shown "real harm" as a result of Georgia's "unreasonable upstream water use," the Court was nevertheless incapable of issuing a decree redressing Florida's injuries. *Florida v.*

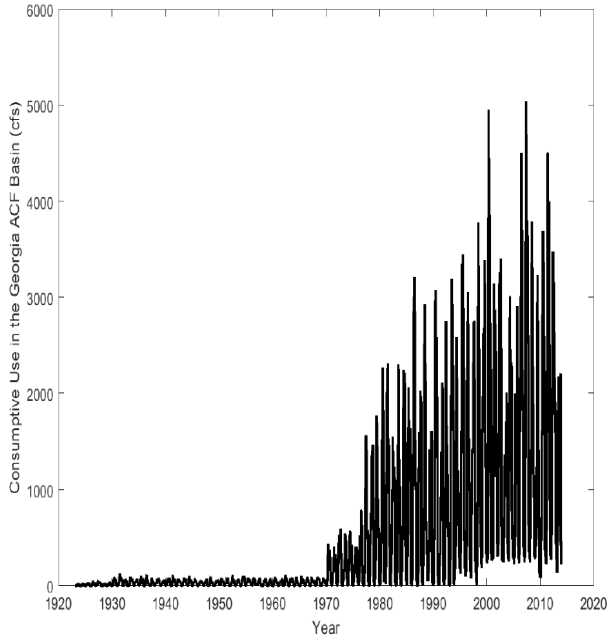
Georgia, 138 S. Ct. 2502, 2516, 2519 (2018). After considering Georgia's strenuous pleas that Florida had not proven its case and that a remedy was not feasible in any event (which Georgia renews here), the Court set aside Special Master Lancaster's recommendation that the case be dismissed, stressing that "[f]lexibility and approximation are often the keys to success in our efforts to resolve water disputes between sovereign States," and observing that "the record leads us to believe that, if necessary and with the help of the United States, the Special Master, and the parties, we should be able to fashion [a decree]" redressing Florida's injuries. *Id.* at 2526-27. As Florida explains below, Georgia has already recognized the feasibility of one such potential decree (under which it would work with the Corps to ensure a minimum flow of 6,000 cubic-feet-per-second ("cfs") into Florida under most circumstances), and Florida will demonstrate during these remand proceedings that there are numerous other reasonable, workable options available as well.

A. The Genesis Of This Dispute

The case concerns the fate of an area that "the United Nations, the United States, and the State of Florida have all recognized as one of the Northern Hemisphere's most productive estuaries." *Id.* at 2509. Ultimately the health, and viability, of that irreplaceable resource stems from the flow of fresh water from the Flint River and Chattahoochee River in Georgia. Those rivers meet at the Florida-Georgia border to form the Apalachicola River (the "River"), which then flows for 106 miles from the state line through the Florida panhandle into the Apalachicola Bay (the "Bay"), a roughly 200 square-mile estuary located where the River empties into the Gulf of Mexico. The River and Bay are home to a myriad of animal and plant species, including endangered or threatened mussel species, the threatened Gulf sturgeon, the largest stand of Tupelo trees in the world, and (historically, at least) one of the largest sources of oysters in the United States. *Id.* at 2519. This case represents the last, best hope for saving these natural resources, as well as the way of life in Apalachicola communities that depend on them.

As the Supreme Court recognized, even though the water at issue in this case originates upstream in Georgia, Florida has an "equal right" to make reasonable use of the water. 138 S. Ct. at 2513. For decades, Florida has warned that the River, Bay, and entire Apalachicola region are already suffering significant harm and face a still worse, catastrophic and irreversible change in conditions unless something is done to control the run-away growth in upstream water consumption in Georgia, particularly for irrigation along the Flint River in southern Georgia. And for decades, Georgia has recognized that truth—but has been unable to muster the political will to do anything about it. As Special Master Lancaster put it in his Report and Recommendation: "Georgia's position—practically, politically, and legally—can be summarized as follows: Georgia's agricultural water use should be subject to no limitations, regardless of the long-term consequences for the Basin." Report of the Special Master 34 (Feb. 14, 2017) ("R&R").

The following graph (just one piece of the overwhelming evidence introduced at trial showing Georgia's ever-growing consumption) illustrates the explosion in Georgia's consumptive water use in the Apalachicola Basin since the 1970s:



Hornberger Pre-Filed Direct ("PFD") at 37, Fig. 7 (Nov. 4, 2016).

The sharp increase in consumption has led to a huge decrease in flows. During the dry periods of summer months when streamflow matters most, Georgia's modern consumption reduces flow into the Apalachicola by between 3,000 and 4,000 cfs—an impact that is far greater than is suggested by the full-year figures on which Georgia's experts prefer to focus. *See id.* at ¶¶ 83-85; *see also id.* at ¶¶ 42-54, 74-77, 94, 97-98, 102; Florida's Opening Statement, at Slide 34 (graph prepared by Georgia expert Philip Bedient highlighting historical frequency of riverflows to Florida below 6,000 cfs).[1] Indeed, even Georgia's own chief hydrologist admitted at trial that Georgia's consumption during summer months in recent drought years approximated one third—*or more*—of the state-line flows. *See* Zeng Test., Trial Tr. vol. 13, at 3370:14-3371:4. Nor are the effects of Georgia's consumption limited to dry years; Florida presented evidence showing the effects Georgia's consumption has had in *all* years, and the long-term impact it is having on the Floridan aquifer. *See, e.g.*, Hornberger PFD ¶¶ 63-70.

The reduction in the volume of water flowing into the Apalachicola has had the predictable effect: It has severely impacted the resources in the region. The impact on oysters has been especially stark. As Special Master Lancaster determined, and the Supreme Court recognized, increased salinity in the Bay caused by decreased flows of freshwater in the River led to "an unprecedented collapse of [Florida's] oyster fisheries in 2012." 138 S. Ct. at 2518. Indeed, one official testified that the influx of conchs—oysters' natural predators—created by the increase in salinity in the Bay was "almost like a science fiction movie," Lipcius Test., Trial Tr. vol. 17, at 4336:6-4337:3, and NOAA declared the oyster collapse a fishery disaster, *see* FX-413, NOAA

[1] Florida submitted a copy of the slides it presented during its Opening Statement, as well as other materials presented during the course of the trial, to Special Master Lancaster in supplemental filings on December 2 and 9, 2016, following the conclusion of trial.

Final Decision Memorandum, at NOAA-002289697.[2] Moreover, as the Court observed, "[t]he harms of reduced streamflow may extend to other species in the Apalachicola Region," including endangered and threatened mussels in the River. *Id.* at 2519. In fact, the existing record amply establishes numerous severe injuries to the region, not to mention that conditions in the entire region will only worsen if nothing is done to check Georgia's overconsumption.

B. Florida's Suit And Special Master Lancaster's Initial Report

Yet all along, Georgia has denied that there is any problem, and just upped its consumption. So Florida, having exhausted all other avenues, turned to the Supreme Court for relief by asking the Court to equitably apportion the waters at issue. Georgia opposed that, too. But the Supreme Court ordered that Florida's action should be allowed to proceed.

The Court appointed Special Master Ralph I. Lancaster, Jr. to assist it in determining whether and how to enter an equitable apportionment in this case. In 2016, Special Master Lancaster held what the Supreme Court aptly referred to as "lengthy evidentiary proceedings," which included a five-week trial. 138 S. Ct. at 2508. During the trial, he heard extensive, competing testimony from fact and expert witnesses about whether and to what extent the River and Bay had been injured, whether and to what extent that injury was caused by unreasonable consumption in Georgia, and what could be done to remediate it. Following the trial, Special Master Lancaster issued a 70-page Report and Recommendation for the Court's consideration, which included numerous "specific and key statements" on the issues that were the focus of the trial, including the harm suffered by Florida and Georgia's misuse of resources. *Id.* at 2512.

[2] "FX" refers to exhibits on Florida's Exhibit List, "GX" refers to exhibits on Georgia's Exhibit List, and "JX" refers to the parties' Joint Exhibits. *See* Special Master Docket 581. Copies of these exhibits were provided to Special Master Lancaster at trial. If the Special Master would like the parties to provide new copies of the trial exhibits, the parties would be happy to do so.

Among other things, Special Master Lancaster stated:

- "[T]he evidentiary hearing made clear [that] Florida points to real harm and, at the very least, likely misuse of resources by Georgia." R&R at 31.

- "There is little question that Florida has suffered harm from decreased flows in the River," including most notably "an unprecedented collapse of [Florida's] oyster fisheries in 2012." *Id.* at 32.

- That "oyster collapse has greatly harmed the oystermen of the Apalachicola Region, threatening their long-term sustainability." *Id.*

- Georgia's own evidence "show[s] a dramatic growth in consumptive water use for agricultural purposes," and demonstrates that "[i]n the face of this sharp increase in water use, Georgia has taken few measures to limit consumptive water use for agricultural irrigation." *Id.* at 33.

- "Even the exceedingly modest measures Georgia has taken have proven remarkably ineffective." *Id.*

- "Georgia's position—practically, politically, and legally—can be summarized as follows: Georgia's agricultural water use should be subject to no limitations, regardless of the long-term consequences for the Basin." *Id.* at 34.

Despite his conclusions about Florida's injuries from reduced flows and Georgia's complete unwillingness to implement even modest conservation measures that might avoid them, Special Master Lancaster recommended that the Court deny Florida any relief. His recommendation rested on his conclusion that there was "no guarantee" that the Army Corps of Engineers would ensure that all water saved from reduced consumption in Georgia would flow into the Apalachicola during dry periods (instead of being held in upstream federal reservoirs during those periods). *Id.* at 69. In his view, that meant that Florida had failed to show "with sufficient certainty that the Corps must (or will choose to) operate its projects so as to permit . . . the entire marginal increase in streamflow to benefit Florida." *Id.* at 48. So, in his view, even though Florida had shown real injury and inequitable conduct on Georgia's part, the Supreme Court was essentially powerless to fashion a remedy.

C. The Supreme Court's Decision Remanding For An Equitable Balancing Inquiry

Florida filed exceptions to the Report and Recommendation and, on June 27, 2018, the Supreme Court issued a decision agreeing with Florida's exceptions and remanding the case for further proceedings. Four aspects of the Court's ruling are particularly salient:

First, although the Supreme Court corrected the *legal* premises on which Special Master Lancaster based his recommendation, its decision did nothing to undermine any of Special Master Lancaster's "specific and key statements" about the critical *factual* issues of injury to Florida and inequitable conduct by Georgia. *Florida*, 138 S. Ct. at 2512. Indeed, the Court emphasized that Special Master Lancaster's direct participation at trial meant that his factual conclusions "'deserve respect and a tacit presumption of correctness.'" *Id.* at 2517 (citation omitted). And while the Court stated that certain "further findings," or "more specific" findings, are needed on issues such as "how much extra water there will be, when, and how much Florida would benefit," it extensively relied on and credited the statements that Special Master Lancaster had already made about injury and inequitable consumption upstream. *Id.* at 2525, 2518.

Second, the Court held that Special Master Lancaster had applied "too strict a standard when he determined that the Court would not be able to fashion an appropriate equitable decree." *Id.* at 2516. The Court reiterated that "[u]ncertainties about the future . . . do not provide a basis for declining to fashion a decree," *id.* at 2513 (quoting *Idaho ex rel. Evans v. Oregon,* 462 U.S. 1017, 1026 (1983)), and that "[a]pproximation and reasonable estimates may prove 'necessary to protect the equitable rights of a State,'" *id.* at 2527 (quoting *Idaho ex rel. Evans*, 462 U.S. at 1026). Thus, the Court rejected Georgia's efforts to evade any equitable check on its consumption by arguing that Florida had not shown with adequate specificity whether, and how, a decree would

redress its injuries. "Flexibility and approximation," the Court stressed, are "often the keys to success in our efforts to resolve water disputes between sovereign States." *Id*.

Third, the Court rejected one of the primary arguments on which Georgia has relied throughout this case—the notion that the Corps' inherent "discretion" in deciding how to operate its dams meant it was impossible for the Court to fashion an effective decree. The import of Georgia's argument is this: because the Corps cannot constrain Georgia's over-consumption, no remedy for Georgia's consumption is available in *any* forum unless the Corps voluntarily intervenes in this case. The Court was not persuaded by Georgia's argument, and instead stressed that, although the Corps must take into account various factors when it allocates water, "[t]he United States has made clear that the Corps will work to accommodate any determinations or obligations the Court sets forth if a final decree equitably apportioning the Basin's waters proves justified in this case." *Id.* at 2526. Accordingly, the Court further instructed even without the Corps as a party in the case, the Special Master should still consider the effects that "reasonable modifications" to the Corps' Master Manual would have in terms of increasing streamflow to Florida. *Id.* at 2527. The Court's opinion thus rejected Georgia's attempt to avoid responsibility by pointing a finger at the Corps and arguing that the Court cannot do anything to redress Florida's injuries because the United States is not a party to this case.

And fourth, the Court concluded that "[t]he record shows that Florida's proposed cap"—even in the absence of any "reasonable modifications" to the Corps' operating Manual, as the Court envisions, *id.* at 2527—"could result in the release of considerable extra water into Lake Seminole," and that the increase in streamflow into Florida of 1,500 to 2,000 cfs "is reasonably likely to benefit Florida significantly." *Id.* at 2520. The Court further stated that the evidence in the record indicates that this extra water would "significantly redress the economic and ecological

harm that Florida has suffered." *Id.* at 2526. But because Special Master Lancaster's report did not address this particular issue (in light of the erroneous legal standard that he had applied), the Court remanded the case for the Special Master to address this issue in light of the record and the Court's decision explicating the standards that actually govern an equitable apportionment proceeding such as this. The Court directed that the Special Master make further factual findings, "take additional evidence" as the Special Master deems necessary, and ultimately "conduct the equitable-balancing inquiry" that the Court's cases require. *Id.* at 2527, 2518.

D. The Proceedings On Remand Should Be Carefully Circumscribed And Build On The Existing Record

1. The Existing Record Is Sufficient To Address Many Of The Issues That The Court Has Asked The Special Master To Consider

In undertaking that equitable-balancing inquiry on remand, there is no need to start from scratch. As the Supreme Court recognized, it will be possible for "the Special Master to make more specific factual findings and definitive recommendations" on many issues using just the "very large factual record amassed" already in this case. *Id.* at 2527, 2511.

The record already contains, for example, extensive documentary evidence reflecting Georgia's own recognition that it was consuming too much water and that the effects of that overconsumption would be severe, potentially irreversible damage to downstream ecosystems. Nearly two decades ago, for example, Georgia's Chief of Fisheries admitted that there was already "clear evidence that groundwater is over-allocated in the lower Flint River basin." FX-6 at FL-ACF-0254447. Other Georgia officials likewise recognized that this "[o]ver-use will cause severe impacts on fish and other aquatic life in the Flint River and its tributaries." FX-4, at GA01419037; *see* Florida's Opening Statement, at Slides 75-79 (discussing FX-4). By 2006, biologists in Georgia's Wildlife Resources Division recognized that the "sub-basin is grossly over-allocated" (meaning that Georgia had authorized farmers to withdraw too much water) and that "further

allocation of water withdrawal permits . . . would unquestionably destroy or irreparably harm the ecological health and diversity of the . . . sub-basin." FX-23; *see also* FX-2 at GA02257044; FX-5 at GA01186515; Florida's Opening Statement, at Slides 71-74 (discussing FX-2 and FX-5). Yet the evidence showed that Georgia allowed agricultural consumption to continue to grow virtually unabated during that time, heedless of the consequences. *See, e.g.*, JX-21 at 23-24; FX-23.

Special Master Lancaster considered that evidence, and much more, over the course of a five-week trial; weighed it against the competing evidence in light of his assessment of the various experts' credibility; and made a series of high-level factual conclusions that leave no doubt that the existing record and briefing is more than sufficient to address the fundamental questions of injury to Florida and inequitable consumption by Georgia. *See, e.g.*, R&R 30-34; Florida Post-Trial Br. 19-27, 35-59, 65-77; Florida Post-Trial Resp. Br. 19-62; Florida's Opening Statement, at Slides 5-94; Georgia Post-Trial Br. 21-73; Georgia Post-Trial Resp. Br. 23-58.

The existing record also contains much evidence relevant to evaluating the benefits, and any costs, of an equitable decree. On that point, too, Florida relied heavily at trial on Georgia's own recognition of measures that it could employ to substantially limit agricultural consumption without undue costs. *See* Florida Pre-Trial Br. at 26-35; Florida's Opening Statement, at Slides 69-94. To this day, for example, Georgia's agricultural permits place no limits on how much irrigation water can be applied to a given acre of land. Cowie Test., Trial Tr. vol. 9, at 2223:19-2224:4; Masters Test., Trial Tr. vol. 14, at 3655:13-21. Imposing reasonable limits—as Florida and other States have done, *see, e.g.*, Cyphers PFD ¶¶ 36-39; Sunding Test., Trial vol. 11 at 2853:16-2856:4; Florida Post-Trial Br. at 63-65—would help eliminate wasteful irrigation practices by forcing farmers to internalize the effects of their existing overconsumption. Similarly, in 1999, Georgia itself adopted several other reforms that would have represented at least a start

toward reasonable resource management among agricultural users as part of its Flint River Drought Protection Act ("FRDPA"). But that legislation, which Georgia enacted in an effort to stave off earlier litigation concerning its overconsumption, quickly fell into disuse, and after the earlier litigation ended Georgia simply refused to follow through on the requirements of its *own* law as described by its *own* experts. *See* Florida Post-Trial Br. at 66-74 (describing Georgia's failure to implement numerous mandatory requirements of the FRDPA); R&R 33-34 (recounting "remarkably ineffective" implementation of the statute).

As Special Master Lancaster recognized, the existing record shows that Georgia's failure to implement those measures is a result of political paralysis and disregard for the effects its overconsumption has for "the long-term consequences" in Florida, R&R 34, rather than any legitimate concern about the ratio of costs to benefits. Georgia repeatedly offered doomsday rhetoric on supposed effects that water conservation could have on Atlanta's future growth, but the measures Florida has proposed would impose only a miniscule cost on Georgia in relative terms, and would not impair growth in Atlanta in any material way. The evidence at trial showed that Georgia could conserve thousands of cfs of water in dry summer months—and even in normal non-drought years—through low-cost conservation measures that primarily concerned agricultural use and would have little impact in Atlanta. *See, e.g.*, Hornberger PFD ¶¶ 3e, 74-76; Sunding PFD ¶¶ 8, 39, 89, Tables 4-6. These measures, most of which Georgia itself had already identified but failed to implement, and which have been implemented successfully in Florida and other responsible States, would carry an annual fiscal cost of $35.2 million. *See* Sunding PFD at 44

(Table 4).[3] Atlanta would need to adhere to its own announced conservation goals for 2050—but Georgia can hardly call those unreasonable or unrealistic. *See id.* at ¶¶ 42-45.

Indeed, Georgia's own witnesses testified to Georgia's acknowledged ability—and willingness, when faced with litigation pressure—to facilitate a 1,000 cfs increase in the minimum flow levels into the Apalachicola under most circumstances. *See* Turner Test., Trial Tr. vol. 12, at 3019:9-3020, 3074:18-3076:21; Zeng PFD ¶¶ 140-41 ("In 2012, Georgia submitted a proposal . . . in which we recommended phasing in a 6,000 cfs minimum flow requirement at the state line to replace the current 5,000 cfs minimum flow requirement.").

2. The Parties Can Collect And Present The Limited Additional Evidence That Is Needed Through Efficient, Carefully Circumscribed Proceedings

The Supreme Court also recognized, however, that it may be necessary for the Special Master to "take additional evidence" on remand. *Florida*, 138 S. Ct. at 2527. As Florida explains in more detail below, some limited additional evidence and supplemental discovery on a small number of discrete issues is needed to ensure that the equitable balancing properly reflects changes that have occurred since the 2016 trial, including the Supreme Court's instructions about "reasonable modifications." Below, Florida proposes a brief period of discovery to address those discrete issues, a short supplemental evidentiary hearing on those issues, and attorney argument (much like a summary judgment argument) to address the ultimate balance of equities in the case.

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[3] Georgia argues that there would be significantly higher *indirect* effects primarily by pointing to testimony of its hired expert, Dr. Robert Stavins, about row crop irrigation. But as Dr. Stavins admitted at trial, he deliberately constructed his estimates based on what would happen if one eliminated all irrigation for row crops, rather than (as Florida had actually proposed) simply imposing reasonable limits on irrigation of the sort that other States have adopted. *See* Stavins Test., Trial Tr. vol. 17 at 4542:19-4543:7. His projections thus shed essentially no light on the costs a decree in this case would generated—and Special Master Lancaster ignored them entirely, never once citing Stavins' work. Moreover, even using his grossly overstated count, the effects would constitute, at most, a tiny sliver of one percent of the gross regional product of the portion of the ACF basin located in Georgia. *See id.* at 4473:6-20; *see also* Sunding PFD ¶ 21.

If the Special Master would find it helpful, Florida would also be happy to address the questions about the sufficiency of the existing record and the need for limited additional discovery at an in-person or telephonic conference.

II. GEORGIA'S PRELIMINARY STATEMENT

This case concerns Florida's request for an equitable apportionment of the waters in the ACF Basin. The extensive record already developed by the parties shows that Georgia's water use is reasonable: Georgia's portion of the ACF Basin is home to more than 5 million people and accounts for around $283 billion in gross regional product per year. Stavins Direct at ¶ 30. The Florida portion, by contrast, has a population of fewer than 100,000 people and generates around $2 billion in gross regional product per year. *Id*. In relative terms, Georgia accounts for 98% of the population and 99% of the economic production in the Basin. *Id.* Georgia has 5 times the land area, 56 times the population, 80 times the number of employees, and 129 times the gross regional product as Florida's portion of the Basin. *Id.* Despite that dramatic disparity in population and productivity, Georgia's water usage is modest. Georgia consumes only 4% of the total waters available in the ACF Basin in an average year, and only 8% in a dry year. *Id.* at ¶ 32. The remaining water—over 90% even in the driest years—is left for Florida's use.

Florida initiated this lawsuit over five years ago seeking an even greater share of ACF waters by imposing draconian restrictions on water use in Georgia. Following years of motions practice, discovery, and a trial on the merits, Special Master Lancaster recommended dismissing this case on the ground that Florida could not receive effective relief without the Army Corps of Engineers participating as a party. *See* Report of the Special Master ("Report") at 30, 69. Because Special Master Lancaster recommended dismissing the case on this threshold issue, he found it unnecessary to propose formal findings on the remaining merits issues. In a 5-4 split decision, the Supreme Court disagreed with Special Master Lancaster's recommendation and ordered that the

case be remanded so that findings could be made on the remaining issues in the case. *See Florida v. Georgia*, 138 S. Ct. 2502, 2518 (2018). Justice Thomas dissented, joined by Justices Alito, Kagan, and Gorsuch. *Id*. at 2528. In an opinion that thoroughly reviewed the evidence in the existing record, those four justices found that "Florida ha[d] not shown that it will appreciably benefit from a cap on Georgia's water use," and that absent such a showing, "the balance of harms cannot tip in Florida's favor." *Id.* at 2548.

The Supreme Court made clear that the ultimate merits question to be addressed on remand is whether Florida has proven, by clear and convincing evidence, "that the benefits of the [proposed apportionment] substantially outweigh the harm that might result." *Id*. at 2527 (quotation marks omitted). In making that determination, the Court identified a number of specific issues on which Your Honor may make "more specific factual findings and definitive recommendations." *Id.* at 2527. Those issues include: (1) Whether Georgia is taking too much water from the Flint River? (2) Whether Florida has sustained injuries from low flows in the Apalachicola River and, if so, whether those injuries were caused by Georgia's water use? (3) To what extent a cap on Georgia's water consumption would increase the amount of water flowing from the Flint River into Lake Seminole? (4) To what extent would additional water resulting from a cap on Georgia's water consumption result in additional streamflow in the Apalachicola River? (5) To what extent would that additional streamflow into the Apalachicola River ameliorate Florida's injuries? and (6) What costs would a consumption cap impose on Georgia? *See id.* at 2526-2527.

The Court was clear that none of these issues have been resolved and that it was left to Your Honor to make findings and recommendations on these questions in the first instance. Contrary to Florida's repeated suggestion in this submission, neither Special Master Lancaster nor the Supreme Court made factual findings regarding Florida's alleged injuries, the reasonableness

of Georgia's upstream water use, or any issue other than the adequacy of a potential remedy in the absence of the Corps as a party. The Supreme Court limited its opinion to that narrow issue, and the whole point of remanding the case was for Your Honor to make findings in the first instance on those issues. *See id.* at 2527 ("[T]he Master may find it necessary to address in the first instance many of the evidentiary and legal questions and answers to which we have here assumed").

Although the Supreme Court's opinion was narrow, the record in this case is not and is more than sufficient to answer all of the questions posed by the Court. The parties conducted more than 18 months of discovery in this case and participated in a 5-week trial. At the time of trial, neither side knew that the Special Master would ultimately limit his Report to the single threshold issue that he found dispositive. The parties therefore presented evidence on all issues in the case, including all of the issues identified by the Supreme Court in its remand opinion. Among other things, the current record shows the following:

The extent of Georgia's water use is eminently reasonable, particularly in light of the fact that Georgia accounts for over 98% of the population and economic activity in the Basin. As noted, Georgia uses only 8% of ACF waters in dry years. Stavins Direct at ¶ 30. Georgia puts the small fraction of water it does consume to highly beneficial uses. ACF waters are the principal municipal and industrial water supply for 5.1 million citizens in Atlanta and the surrounding metropolitan area. Mayer Direct at ¶ 22; Kirkpatrick Direct at ¶ 9. Georgia is home to many industries and businesses for which water is a key input, including poultry processing, pharmaceutical manufacturing, aircraft manufacturing, and landscaping and horticultural services. Stavins Direct at ¶ 16. And ACF waters are integral to Georgia's substantial agricultural industry, which generated $4.7 billion in revenue in 2013. *Id.* at ¶ 17.

The existing record also contains extensive evidence showing that, to the extent Florida's alleged harms exist, they are not caused by Georgia's upstream water use, but are instead the combined result of natural environmental factors, Florida's own activities (including mismanagement of the oyster fishery in Apalachicola Bay), and the actions of third parties. For example, the evidence shows that a key element of harm alleged by Florida—lower streamflow levels in the Apalachicola River—are strongly correlated with less rainfall over the entire ACF Basin as a result of several, multi-year droughts over the last 15 years. *E.g.* Bedient Direct at ¶ 129; Panday Direct at ¶ 60. Moreover, Florida's mismanagement and lack of enforcement over its oyster fishery had a devastating effect on Apalachicola Bay oyster populations before, during, and after the collapse of the oyster fishery in 2012. *See, e.g.*, Berrigan Direct at ¶¶ 50-60; Ward Direct at ¶ 41. Finally, river channel changes due to the construction of Jim Woodruff Dam and dredging operations by the U.S. Army Corps of Engineers have caused declines in water levels in the Apalachicola River. *See* GX-88, at 1 (Light et al. (2006)); Kondolf Direct at ¶ 35.

The existing record also shows that imposing a consumption cap on Georgia's water use would not remedy Florida's alleged injuries. That is true for several different reasons, the most important of which is that even draconian cuts to Georgia's water use would not yield enough increases in water flows into Florida, at the right times, to generate meaningful ecological benefits. Florida's own ecologists found that reducing Georgia's irrigation by half would have minimal impacts on both riverine and Bay species. For example, under this scenario, oyster biomass at the oyster bars analyzed by Florida's oyster expert would have increased by less than 1.5% from 2007 through 2013. White Direct at ¶ 153. Similarly, had such a remedy been in place in 2012 (the year of the oyster collapse), it would have resulted in changes in salinity of less than 1 part per thousand at almost all locations in the Bay. *E.g.* Greenblatt Direct at Att. 1. Georgia's ecological

expert confirmed that these minor changes are "within the range of natural variability" to which species have adapted in the Bay. Menzie Direct at ¶ 7.

Finally, there is extensive evidence in the existing record showing that Florida's proposed caps would impose tremendous costs on Georgia, and that those costs significantly outweigh any potential benefit to Florida. Implementing Florida's proposed caps *in toto* would impose costs of more than $2 billion for municipal and industrial water users and $335 million for Georgia farmers, each year they are implemented. Stavins Direct at ¶¶ 89-90. Even implementing just some of Florida's suggested ways to reduce water use, such as cutting outdoor water use by 50%, reducing irrigation for row crops, and implementing additional municipal leak abatement, would result in direct costs to Georgia of over $800 million for every year those measures are implemented. *E.g.* Stavins Direct at ¶¶ 85, 135-139. Just focusing on cuts to row-crop irrigation also would impose significant costs: Those cuts alone would impact Georgia's economy by $322 million annually, and eliminate over 4,000 jobs in agricultural and related sectors. Stavins Direct at ¶ 90. Regardless of which measures were employed, the harm those restrictions would impose dwarfs the value of any potential benefits to Florida. The value of the entire fishing industry in the Apalachicola Bay is only around $12 million, and even draconian cuts to Georgia's upstream water use would generate no more than a few hundred thousand dollars of increased value. Stavins Direct at ¶ 126.

In light of the current state of the record on those and other issues, it is apparent why Florida wants to re-litigate and reopen discovery on various topics in this case. The existing record refutes Florida's allegations of harm and fails to provide the clear and convincing evidence necessary to justify the extraordinary remedy of an equitable apportionment. Florida therefore wants a second bite at the apple. But the Supreme Court's opinion did not provide a license to re-litigate this entire case, years after the parties have already spent significant time and tens of millions of dollars

developing a record. Rather than reopen issues that have already been tried, Georgia respectfully requests that the Special Master instruct the parties to proceed on the current record, which is more than sufficient to allow the Special Master to make detailed findings on all the issues identified by the Supreme Court. Indeed, the parties already extensively briefed these issues for Special Master Lancaster, and nobody at that time thought that the record was inadequate to answer any of the questions raised by the Court. The people of both states have shouldered enough costs, uncertainty, and delay in this dispute and now deserve a prompt resolution without more unnecessary, duplicative discovery on issues already fully developed in the existing evidentiary record.

III. RESPONSES TO QUESTIONS BY THE SPECIAL MASTER

A. CMO 4(a) - Whether the existing record is sufficient to resolve this case as to the merits of each issue identified by the Supreme Court upon remand.

1. Florida's Statement

The Supreme Court identified five main questions in this case:

> *First,* has Florida suffered harm as a result of decreased water flow into the Apalachicola River? . . .
>
> *Second,* has Florida shown that Georgia, contrary to equitable principles, has taken too much water from the Flint River . . . ? . . .
>
> *Third,* if so, has Georgia's inequitable use of Basin waters injured Florida? . . .
>
> *Fourth,* if so, would an equity-based cap on Georgia's use of the Flint River lead to a significant increase in streamflow from the Flint River into Florida's Apalachicola River . . . ? (This is the basic question before us.)
>
> *Fifth*, if so, would the amount of extra water that reaches the Apalachicola River significantly redress the economic and ecological harm that Florida has suffered? (This question is mostly for remand.).

138 S. Ct. at 2518.

The existing record is sufficient to address the "[f]irst," "[s]econd," and "[t]hird" issues, all of which are largely backward-looking and already answerable based on the facts as they existed in 2016. The parties canvassed those facts extensively in their opening statements at trial and pre- and post-trial briefs, and Special Master Lancaster, based on those presentations and his observations at trial, identified conclusions on several of these issues in the Report and Recommendation. *See, e.g.*, R&R 31-34; Florida Post-Trial Br. 19-27, 35-59, 65-77; Florida Post-Trial Resp. Br. 19-62; Florida's Opening Statement, at Slides 5-94; Georgia Post-Trial Br. 21-73; Georgia Post-Trial Resp. Br. 23-58. There is no need to reopen the record on those issues. Nor would the record supply any basis to reach conclusions different from the ones Special Master Lancaster reached on the points he specifically addressed in the Report and Recommendation.

The existing record is not sufficient, however, to address the "[f]ourth" and "[f]ifth" issues identified by the Court. These issues, unlike the first three issues identified by the Court, are necessarily impacted by events following trial—namely (1) the further growth in Georgia's upstream consumption; (2) the Corps' publication of a new Master Manual; (3) the Court's instruction to consider "reasonable modifications" the Corps could make in connection with an equitable apportionment; and (4) the Supreme Court's elaboration on the principles that must govern what relief is ultimately appropriate in this case. In particular:

- In order to determine exactly how much additional streamflow would result from conservation measures in Georgia, it will be necessary to take stock of how many new acres are receiving agricultural irrigation in Georgia in the two years since trial, and the effect that has had on Georgia's current water consumption.

- The current record is insufficient to address the effects of the revised Master Manual that the Corps finalized in March 2017, several months after trial in this matter concluded. *See* Record of Decision adopting Proposed Action Alternative for Implementation of Updated Apalachicola-Chattahoochee-Flint River Basin Master

Manual (Mar. 30, 2017) ("Record of Decision").[4] In December 2016, after the close of trial, the Corps issued a Final Environmental Impact Statement ("FEIS") regarding its proposed changes to the Manual, in which it analyzed new water supply scenarios and proposed adoption of a new preferred operational alternative—new Alternative 7K—which was not the operational alternative that was previously the subject of public comment. *See* Record of Decision at 1, 11. Neither party had the ability to put on evidence regarding the revised Manual during trial, nor could they present evidence regarding how the Corps would implement that Manual in practice. Indeed, two weeks after trial concluded, the Corps issued the FEIS and Manual for further review and comment before finalizing the Record of Decision. *See* 81 Fed. Reg. 91,154, 91,154 (Dec. 16, 2016). Before that point (and even after that point) the most the parties could do was guess about what the revised Manual might ultimately say. And while the Corps provided high-level descriptions of the possible effects of its proposed revisions in its post-trial amicus brief, that brief represents the first time they had offered such descriptions—at a point when it was too late for Florida to present any expert testimony or any other new evidence explaining the relevance of the Corps' amicus statements to its case. By the time the Corps actually finalized the manual, moreover, Special Master Lancaster had already submitted his report for the Court's consideration, meaning that Florida had no ability at that time to ask Special Master Lancaster to reopen the record to allow the submission of additional evidence. Thus, Florida has never had an opportunity to present evidence about how the revised Manual, in its final form, affects its claims.

- Florida has also never had an opportunity to put on evidence regarding the possible "reasonable modifications" identified in the Court's opinion, because it was not until the Corps' March 2017 Record of Decision finalizing the revised Manual that the Corps first expressed its willingness to "adjust its operations accordingly" if "the Supreme Court [were to] issue a decree apportioning the waters of the ACF Basin." Record of Decision at 18. The Supreme Court relied on that post-trial commitment by the Corps (as reiterated in the Solicitor General's Exceptions-stage amicus brief) multiple times in its opinion, and went so far as to specifically indicate that the Special Master should determine on remand what effects such "reasonable modifications" would have on "additional streamflow in the Apalachicola River" "resulting from a cap on Georgia's water consumption. *Florida*, 138 S. Ct. at 2527; *see also*, *e.g.*, *id.* at 2526 (noting that "[t]he United States has made clear that the Corps will work to accommodate any determinations or obligations the Court sets forth"). That can only be accomplished through expert analyses modeling of the effects various modifications to Corps operations would have on streamflow levels, which the existing record does not contain.

- Finally, the existing record does not contain evidence about the difficulties with achieving recovery in the Bay over the last two years. That experience, following an unprecedented crash in the oyster fisheries, has provided experts with additional

[4] This document is available at http://www.sam.usace.army.mil/Portals/46/docs/planning_environmental/acf/docs/ACF%20ROD%20Signed%2030%20March%2017.pdf?ver=2017-03-30-142329-577.

information about how increased streamflow is needed to drive out oyster predators that invaded the Bay during the low-flow, high-salinity conditions in 2012 and have remained there even during subsequent years in which average flows were relatively high.

- As explained below, the parties can address those important intervening developments in a manner that builds efficiently on the existing record and does not create unnecessary burdens.

2. Georgia's Statement

Georgia addresses question 4(a) below in connection with question 4(b), regarding the need for additional discovery.

B. CMO 4(b) - Whether additional discovery is needed and, if so, what specific issue(s) the proposed discovery would address.

1. Florida's Statement

As explained above, the existing record is sufficient as to many of the issues of injury and inequitable conduct upstream. Accordingly, no further discovery is needed on those issues. However, limited additional discovery is needed on a few discrete topics. Specifically:

- *New Revised Master Manual*: As described above, Florida has never had an opportunity to put on expert testimony regarding the as-adopted version of the revised Master Manual, and will need to present supplemental expert testimony about that topic. Florida anticipates preparing and disclosing its expert report to Georgia in a timely fashion, and proffering that expert for a deposition. Florida anticipates that Georgia will wish to do the same. Florida would be pleased to work with Georgia to propose a schedule for expert discovery.

- *Reasonable Modifications*: The parties will also need to present expert testimony modeling the "additional streamflow" that would result from "reasonable modifications that could be made to th[e revised] Manual," as the Court envisioned. *Florida*, 138 S. Ct. at 2527. That expert testimony would involve limited documentary discovery consisting of materials that the experts consulted in preparing their reports. It would also include narrowly targeted document requests to Georgia regarding its prior modeling of one such reasonable modification—the minimum flow requirement of 6,000 cfs—that Georgia witnesses testified at trial would be "feasible." Zeng PFD ¶ 141; *see also* Turner Test., Trial Tr. vol. 12, at 3019:9-3020:7 (acknowledging that Georgia offered a "state line minimum which would have increased flows to Florida"); *id.* at 3074:18-3076:21 (discussing proposed minimum of 6,000 cfs under most circumstances). Georgia either failed to produce or clawed back that modeling before

trial, but its choice to then present trial testimony that it believed its proposal was "feasible," and that it had "conducted modeling analysis of the benefit to Florida of . . . changing the RIOP's minimum flow requirement to 6,000 cfs in the summer," Zeng PFD ¶ 141, has made it clear that such material is indeed discoverable.

- *Limited Discovery Regarding Additional Irrigated Acreage in Georgia, and Related Issues*: Florida will need to make limited, targeted requests for discovery from Georgia about the post-trial increase in irrigated acreage in Georgia and the effect those increases have had on Georgia's upstream consumption. Florida contemplates a very limited series of document requests, applicable to the time since discovery previously concluded, designed to disclose that specific information, and likely 2-3 depositions of Georgia personnel with knowledge of those issues. Florida proposes conducting these depositions in accordance with Fed. R. Civ. P. 30(d)(1). This discovery will be relevant to the extent of Georgia's over-consumption, the amount of additional flow that conservation measures could generate, and the balance of equities.

- *Lack of Recovery in the Bay/River*: The Bay has not recovered in the two years since trial concluded, and this lack of recovery has shed additional light on the nature of the remedy needed in this case. Florida proposes to proffer supplemental expert testimony addressing how best to alleviate that persistent lack of recovery in the Bay by returning to the historical flow periods in which the Bay was healthy. Because Florida believes supplemental expert testimony will be needed on these issues, it also contemplates limited expert discovery. Specifically, supplemental expert analysis by ecologists would detail how the timing and amount of additional freshwater flows would flush out invasive high-salinity oyster predators and facilitate recovery. Especially in an equitable balancing proceeding about future relief where the Supreme Court has stressed the need for "[f]lexibility," *Florida*, 138 S. Ct. at 2527, it would make no sense to ignore two years of data about the continued lack of recovery. Georgia's strenuous objection to the introduction of such limited additional evidence simply reflects its concern about what the data will show, especially as to oysters.

This discovery should be limited and speedy, concluding within a relatively short period of time and focusing—with the exception of previously withheld Georgia modeling documents—just on new evidence since the close of discovery.[5] If such discovery is permitted, Florida would

[5] At trial, Florida called Dr. David Sunding, an economist specializing in agricultural and environmental issues, to among many other things, prepare charts summarizing the balance of costs and benefits associated with a range of equitable apportionments. *See* Sunding PFD ¶¶ 88-93. Florida does not currently foresee a need to recall Dr. Sunding to re-address these issues, and thus does not list updated testimony by Dr. Sunding in the bullets listed in the text. But depending upon how the evidence develops regarding "reasonable modifications" and the revised Master Manual, described above, it may turn out that such updated testimony would be helpful. In that event, Florida would request permission to submit such additional evidence at an appropriate time.

gladly work with Georgia to propose limits on the scope of document requests, number of additional expert reports, and duration and number of depositions. Florida would also be happy to participate in a status conference or hearing addressing the need for additional evidence, if that would be helpful to the Special Master.

2. Georgia's Statement

No additional discovery is needed because the voluminous record in this case is more than sufficient to answer all questions posed by the Supreme Court on remand. While Special Master Lancaster focused his Report and Recommendation on the single issue of the Army Corps operations and their impact on Florida's requested remedy, all issues that could conceivably arise in an equitable apportionment case were the subject of voluminous discovery, an extensive trial, and post-trial briefing.

Discovery in this case was open for 18 months and included ***all*** issues in the case. The parties produced 7.2 million pages of documents, responded to over 90 interrogatories, answered over 400 requests for admission, served 130 third-party subpoenas, and conducted 69 fact depositions, many spanning multiple days. *See Fla. v. Ga.*, 138 S. Ct. at 2511. The parties were allowed to make an unlimited number of document requests, an unlimited number of requests for admission, issue up to fifty interrogatories, and take up to 45 non-expert depositions, each deposition lasting up to eight hours a day for three days. The parties also engaged in extensive expert discovery: Florida issued expert reports from 20 different experts, and Georgia issued reports from an additional 8 experts. Each expert was deposed, and many of those depositions lasted for three days, with eight hours of testimony each day.

That expansive discovery culminated in a trial that lasted over a month. Like the discovery before it, that trial embraced the issues identified in the Supreme Court's opinion. Before trial, the

parties submitted pre-filed witness testimony from 41 witnesses which totaled over 1,800 pages. Report at 21. The parties also submitted over 2,400 exhibits in support of that testimony, which when printed filled "more than sixty volumes." *Id.* During the proceedings, witnesses first affirmed their pre-filed testimony and then were subject to cross-examination, redirect, and questioning by the Special Master. *Id.* The trial transcript totals more than 4,500 pages.

Those expansive proceedings covered all of the issues identified by the Court in its remand opinion. All that remains is for Your Honor to make "factual findings and definitive recommendations" on those issues, 138 S. Ct. at 2527, and to decide the ultimate merits question of whether Florida has proven by clear and convincing evidence that the benefits of an apportionment substantially outweigh the costs such a remedy would impose on Georgia.

Georgia proposes a focused process that will enable Your Honor to make those findings, while also not subjecting each state to additional, unnecessary costs and duplicative proceedings. In particular, Georgia proposes that the parties file supplemental briefs addressing the specific questions posed by the Supreme Court on remand and the ultimate question of equitable balancing. Those briefs would rely on testimony and evidence that is already in the record. No additional discovery would be conducted. After those briefs are filed, Georgia proposes that the Special Master hold a non-evidentiary hearing, where attorneys from both sides can present argument and answer questions. That hearing could take place over several days and could address the various questions posed by the Court in seriatim fashion. After that hearing, Your Honor could issue a Report & Recommendation addressing the issues identified by the Court.

Florida proposes a different process, under which discovery would be reopened, and an evidentiary hearing held, on several topics, including: (1) the Army Corps' new Water Control Manual; (2) what "reasonable modifications" can be made to that Manual; (3) alleged harms to the

Bay; and (4) new discovery on Georgia's water use. The Special Master should reject Florida's invitation to reopen discovery on those topics. Additional discovery is not necessary, nor are those topics nearly as "limited" as Florida suggests. To the contrary, accepting Florida's invitation to conduct yet more discovery in this case will inevitably involve substantial new expert and factual work that will require months of additional discovery and millions of dollars in fees and expenses. Whatever marginal relevance that additional discovery may have to this matter, it is more than outweighed by the significant costs and burdens that it would impose on parties who have already borne more than five years of ligation and tens of millions of dollars of expense.

a. No Additional Discovery Is Needed On The New Corps Manual.

The new Water Control Manual does not warrant reopening discovery. Special Master Lancaster previously found that that the revised manual makes no material changes from the prior Army Corps operations, "retains the same basic framework established in the Corps' [previous] protocols," and is "likely to have no appreciable incremental effect on flow conditions in the Apalachicola River compared to the [Revised Interim Operating Plan ("RIOP")]." Report at 45-46. The United States concurred: "The Master Manual retains the same basic framework as the RIOP, with a few alterations," and "the Corps determined that operations under the Master Manual are 'likely to have no appreciable incremental effect on flow conditions in the Apalachicola River compared to the [RIOP]' and no more than 'negligible effects' on estuarine fish and aquatic resources in the Apalachicola Bay." *Br. for the United States as Amicus Curiae* at 10-12 (Aug. 7, 2017) (quoting FEIS at 6-93, 6-324 to 6-325, Tbl. 6.4-6). Nothing in the Supreme Court's opinion questioned those assertions or gave Florida any reason to disagree with them. The new Manual thus makes no alterations that are relevant to this case.

Florida wrongly claims that "Neither party had the ability to put on evidence regarding the revised Manual during trial, nor could they present evidence regarding how the Corps would

implement that Manual in practice." The parties already conducted discovery on operations of the Army Corps reservoirs under both the old and the new Water Control Manual. The protocols in the new Manual were among those announced in September 2015 in the Draft Environmental Impact Statement. *See, e.g.*, JX-124. The DEIS, which consisted of thousands of pages, assessed the environmental effects of operating the Army Corps reservoirs under alternative management regimes. *Id.* As part of the DEIS, the Corps evaluated several different proposed sets of reservoir operations and ultimately selected "Alternative 7" as the reservoir operations protocol for the revised Manual. *Id.* at 4-61. Florida claims that no party presented evidence on "new Alternative 7K—which was not the operational alternative that was previously the subject of public comment." But the parties presented extensive evidence about Alternative 7H at trial, and the Corps explained that Alternative 7H was so "similar in scope and its overall effects" to Alternative 7K that there was no need to do any additional environmental impact analysis. FEIS, p. 1-21. Those proposed protocols were already subject to extensive discovery in this case, including reservoir simulation modeling and expert testimony that explained how the proposed reservoir operations scenarios would affect state-line flows, both in terms of absolute flows and relative to the prior reservoir operations.

When the Corps released its Final Water Control Manual for the ACF River Basin, the Special Master specifically requested that the United States submit an amicus brief to address "the extent to which (if at all) the final [Water Control Manual] materially changes the operations of the Corps as presented by the parties during the recently completed evidentiary hearing." Special Master Dkt. 579. The Corps submitted its brief the same date as the parties' initial post-trial brief on December 15, 2016. Both Florida and Georgia submitted responsive briefs two weeks later. If Florida had any issue with the Corps' characterization of the Final Water Control Manual, the time

to raise those concerns was in December 2016. Florida did not do so. In short, there is nothing new to learn about the new Army Corps Manual and no basis on which to reopen discovery into this issue.

Even if the parties had not already conducted discovery into the protocols embodied in the new Manual, additional discovery would still not be needed. That is because when analyzing potential remedies, Florida's ecological experts used data that ignored the impact of Corps operations altogether. Florida's experts, in other words, assumed that all saved water from the Flint River would pass straight through to Florida without regard to Corps operations. Hornberger Dep. at 447:21-24 (describing the Remedy Scenario); Report at 57. That means that Florida's experts already have analyzed the outside bounds of whether a remedy will have any benefit to Florida.

b. No Additional Discovery Is Needed On Potential "Reasonable Modifications" To The Corps Manual.

There is also no point in taking discovery on what "reasonable modifications" can be made to the Army Corps' Manual. Only the Army Corps has the authority to make modifications to the Manual. The Corps, however, is not a party to this case, cannot be bound by a decree, and cannot be ordered by the Court to adopt any modifications at all (whether "reasonable" or otherwise). Although the Corps has stated that it would "consider any operational adjustments that are appropriate in light of [a Supreme Court] decision," the Corps cannot make such modifications without going through a lengthy administrative process that would be separate and apart from this case. U.S. Army Corps Record of Decision ("Record of Decision") at 18 (Mar. 30, 2017). Therefore any findings from the Supreme Court about potential "reasonable modifications" that could be made to the Army Corps Manual would be, at most, an advisory opinion that would have to be considered in a separate administrative proceeding.

In determining what "modifications" could be made to the Water Control Manual for the ACF Basin, it is important to understand that the Corps does not just account for the respective interests of the individual states—here, Florida and Georgia. Rather, the Corps is required to balance numerous congressionally mandated objectives, established by federal statutes and agency regulations, including "navigation, hydroelectric power generation, national defense, recreation, and industrial and municipal water supply." Report at 6. In operating its reservoir system in the ACF Basin, the Corps is also required to comply with various federal statutes and regulations, such as the Endangered Species Act. *Id.* at 7. Florida has offered no viable process by which the Court could determine what constitutes a "reasonable modification" to the Manual not just with respect to Florida's interests for additional water, but also with respect to the multitude of congressionally mandated objectives that the Corps is required to serve.

Even if any proposed modifications to the Corps' manual could theoretically be satisfactory to the two states and to the Corps, these proposed modifications would still have to go through a lengthy federal agency review and an extensive public notice-and-comment process. *See* Eng'r Reg. 1110-2-240 at 5-2 (May 30, 2016) ("Public involvement in the development or significant revision of water control plans. . . .is required under this regulation."). That process would require, "at a minimum, an examination of the congressionally authorized purposes, a determination of how providing additional flows would impact those purposes, limitations imposed by the ESA or other laws, and supplemental documentation of environmental impacts as required by NEPA." *Br. for the United States as Amicus Curiae* at 31 (Aug. 7, 2017).

For example, the process for issuing the current Manual began in January 2008 and was not completed until March 30, 2017. The Corps evaluated a range of water management alternatives. Record of Decision at 4. That process included modeling each alternative to simulate

reservoir operations, holding stakeholder workshops to explain the alternatives, and receiving public comments during scoping periods. *Id.* The Corps solicited comments during three separate scoping periods (2008, 2009, and 2012). *See* United States Army Corps of Eng'rs, Scoping Report at 20-22 (Mar. 2013). The Corps carefully reviewed all comments it received, adjusted the water management alternatives as appropriate, and published reports detailing the comments it received and its response after each scoping period. Record of Decision at 3-4. Additionally, as part of the Manual revision process, the Corps consulted with numerous federal agencies, including the United States Fish and Wildlife Service, the Department of Commerce, National Marine Fisheries Service, and the Environmental Protection Agency. *Id.* at 10. Finally, the FEIS was published in the Federal Register, allowing for another comment period, during which a number of federal, state, local, and non-governmental entities submitted comments. *Id.* at 12.

Nor are the Corps, Florida, and Georgia the only parties that would have a say in what modifications the Corps is able to make. There are dozens—if not hundreds—of other interested parties in the ACF Basin, including the State of Alabama, power companies, environmental groups, and other entities. Indeed, in the last administrative proceeding, the Corps received a total of 3,621 comments from 965 individuals, organizations, and agencies. *See* Scoping Report at 28. All of those entities would need to be given an opportunity to comment on the "reasonable modifications" requested by Florida, and those parties would undoubtedly have different views on whether such modifications should be made. The Corps, moreover, would be required by the Administrative Procedure Act ("APA") to give reasoned consideration to those comments and could not preference Florida's views over those of other stakeholders.

Finally, even once that administrative process concludes, any "modifications" made by the Corps would be subject to challenge in federal district court, under the APA and other statutes.

There have been numerous such lawsuits over the years. *See, e.g.*, *In re MDL-1824 Tri-State Water Rights Litig.*, 644 F.3d 1160 (11th Cir. 2011); *Se. Fed. Power Customers, Inc. v. Geren,* 514 F.3d 1316 (D.C. Cir. 2008). Indeed, there is litigation currently pending in the Northern District of Georgia concerning the very Army Corps Water Control Manual to which Florida now wants to make "reasonable modification" in this proceeding. *See In re ACF Basin Water Litig.*, 1:18-mi-043-TWT (N.D. Ga.). That litigation was filed by the State of Alabama and various environmental groups. The State of Florida has not intervened.

In its portion of this submission, Florida argues that Georgia previously "agreed" that it would be "feasible" to increase by 1,000 cfs the minimum-flow levels that the Corps employs during drought operations. That is misleading at best. The testimony Florida cites on this point relates to prior settlement negotiations between the States. In an effort to bring its dispute with Florida to an end, Georgia proposed making a joint request to the Army Corps of Engineers. One piece of that request was to increase the minimum flow at Woodruff Dam to 6,000 cfs. Critically, however, that increase would have been feasible only if a large number of other highly significant and costly changes were also made, including—most significantly—various changes to Corps operations such as developing monthly varying flow requirements to save storage in Lake Lanier and changing the winter rule curves at West Point and W.F. George Lakes to store more water in the spring. Wei Direct at ¶ 141. The Corps' prior experience shows that adopting a 6,000 cfs minimum-flow regime *without* those (and potentially other) changes would cause significant disruption to the system by preventing the Corps from refilling its reservoirs during droughts, putting its other project purposes at risk. *Fla. v. Ga.*, 138 S. Ct. at 2543 (Thomas, J., dissenting). Moreover, it is worth noting that Florida rejected this proposal, so it is curious at the very least that Florida tries to revert to it now. In any event, the key point is that even if Florida had agreed to

that proposal, the States could not implement it without the Corps modifying its Manual. And those modifications would have to follow the same long and uncertain process described above.

For those reasons, any discovery on what "reasonable modifications" the Corps could make to its existing Manual would be entirely speculative, would involve issues and parties that go beyond this lawsuit, would require the adoption of a full administrative process, and would serve little purpose given that the Corps is not a party to this case that could be bound by a decree.

c. The Request To Reopen Discovery Related To Oysters Is Unnecessary.

Having failed to present any evidence of harm during non-drought periods at trial, Florida now is asking the Court to allow it to expand its claimed harm under the guise of a request for discovery. Florida claims it needs the opportunity to discover harms over the past two years—years it describes as "years in which *average* flows were relatively high." The reason Florida wants this discovery is simple. As the Supreme Court acknowledged: "Florida [] provided *no evidence* that a decree in this case could provide an effective remedy during normal (*i.e.*, non-drought) periods." 138 S. Ct. at 2512 (emphasis added). Florida now wants to fix its failure to carry its burden in the first instance. But the Court's remand instructions were not an invitation to allow Florida to re-try issues where it previously failed to provide any evidence.

Regardless of Florida's motivations, no additional discovery is needed related to the oyster fishery. The causes of the oyster fishery collapse in 2012 were a primary focus of discovery and trial. Seven witnesses testified live at trial regarding the oyster fishery collapse. These witnesses included Dr. David Kimbro (Florida's oyster expert), Dr. Wilson White (Florida's oyster modeling expert), and Dr. Romuald Lipicius (Georgia's oyster ecologist and fisheries management expert), Mark Berrigan (former Florida official in charge of monitoring oyster resources in the Bay), Eric Sutton (Assistant Executive Director of Florida Fish & Wildlife Conservation Commission), Major Rob Beaton (a law enforcement officer responsible for enforcing oyster harvesting regulations),

and Thomas Ward (an oysterman in Apalachicola Bay). Moreover, testimony from two University of Florida scientists, Dr. Karl Havens and Dr. William Pine, was presented via deposition testimony regarding the cause of the oyster fishery collapse. The data presented at trial included four years after the oyster collapse and both parties presented expert testimony that analyzed both the initial collapse and what happened in the subsequent years.

To the extent Florida claims it wants to present evidence about the impact of above average flows, the oyster population model developed by Florida's expert, Dr. White, already analyzes oyster populations under various flow scenarios—including model runs where he assumed Georgia consumed no water. Dr. White's model evaluated the impact of salinity on the oyster population in the Bay by examining how population dynamics would change with increased freshwater flows from the Apalachicola River. White Direct at ¶ 41. Dr. White compared the oyster population prior to and during the 2012 oyster fishery collapse with the modeled oyster population had Apalachicola Bay received additional freshwater from 2007-2012. *Id.* at ¶ 43. Specifically, White modeled an unimpaired flow scenario, which assumed that Georgia consumed no water. *Id.* at ¶ 146. White also modeled Florida's "remedy scenario," which would have reduced Georgia's agricultural irrigation by half. *Id.* at ¶ 152. The parties do not need more evidence on whether higher flows will help the oysters because Dr. White's report (¶ 142-163) already presents Florida's analysis on that exact question.

d. New Discovery On Georgia's Upstream Water Use

There is no basis for reopening discovery into Georgia's water use. Both sides have already presented substantial evidence about the amount of water Georgia uses in the ACF Basin.[6] Florida

[6] *See, e.g.*, Zeng Direct at ¶¶ 4-6, 52; Tr. 3215:3-11, 3302:23-3304:2, 3370:18-3371:4, 3381:3-18 (Zeng); Bedient Direct at ¶ 37; Tr. 3989:12-221, 3992:2-12 (Bedient); Hornberger Direct at ¶¶ 50-

gives no reason why more discovery is needed other than the passage of time. But Florida has no basis to claim that Georgia's water use today is materially different than it was at the time of trial. In 2012, Georgia placed a moratorium on accepting any new permits in the Flint River Basin for withdrawals from surface water or from aquifers that materially impact streamflow. That moratorium is still in effect today. Turner Direct, ¶ 97. To the extent that there have been slight changes in water use since trial, the burden of opening discovery on basin-wide water use (and all related discovery such as the impact on Corps operations, ecology, etc.) outweighs whatever marginal benefit there might be from updated information.

e. If The Special Master Does Permit More Discovery, Such Discovery Should Be Focused With Clear Limitations.

If the Special Master disagrees with Georgia's position and allows additional discovery, Georgia respectfully requests that meaningful limitations be placed on the scope and nature of the discovery that the parties are authorized to take. Prior Case Management Orders in this case authorized expansive discovery, including an unlimited number of expert reports, an unlimited number of requests for production, up to 45 fact depositions per side (an amount requested by Florida and allowed over Georgia's objection), and a default deposition time-limit of three days of 8 hours on the record each day (almost 3.5 times the length of a deposition allowed under the Federal Rules of Civil Procedure). There were no meaningful limitations placed on the scope of discovery, and as a result both States incurred significant costs. If there is to be additional discovery, Georgia believes that much more meaningful limits should be imposed. Georgia is open to holding discussions with Florida about what those limitations might include, but at the very least they should limit the number of any additional expert reports, strictly limit (if not

53; Panday Direct at ¶¶ 4, 61; Tr. 3769:25-3770:6 (Panday); *see also* GX-1120 (mapping irrigated acreage).

prohibit) additional document requests, limit the total number of additional depositions, and limit the length of any depositions to one day of seven hours.

f. Neither Special Master Lancaster Nor The Supreme Court Made Findings Regarding Harm To Florida Or The Reasonableness Of Georgia's Water Use

As noted above, both Special Master Lancaster and the Supreme Court limited their prior opinions in this case to resolving the "single, discrete issue" of whether Florida could receive effective redress in the absence of the Corps as a party. Report at 30-31; *Fla. v. Ga.*, 138 S. Ct. at 2511-12. Nonetheless, Florida repeatedly argues in its portion of this submission that the Special Master (and even the Supreme Court) made "recommended findings" on other issues, including (1) the alleged harm suffered by Florida and (2) whether Georgia's upstream water use was inequitable. That is incorrect. Neither the Special Master nor the Supreme Court made *any* formal findings or conclusions on those issues. To be sure, the Special Master made certain preliminary observations regarding harm and equitable water use, but he quickly made clear that he was not making formal findings on those issues and that "much more could be said and would need to be said on these issues (as well as other issues, such as causation)" if the role of the Army Corps was not dispositive. Report at 34. The Supreme Court was similarly clear that it was not reaching any conclusions on those issues, and was leaving all of those questions to be resolved by Your Honor on remand. *See Fla. v. Ga.*, 138 S. Ct. at 2518.

Georgia, moreover, strongly disagrees with the preliminary statements made by Special Master Lancaster concerning harm and equitable water use, and does not believe those statements are supported by the record. Rather, the evidence in this case shows that (1) many of Florida's alleged injuries are unproven and unsubstantiated; and (2) Georgia's upstream water use is reasonable and equitable, particular when evaluated against the fact that Georgia is home to the overwhelming weight of population and economic activity in the Basin. As explained, Georgia

uses only a small fraction of ACF waters even in the driest years, and Georgia puts the water resources it does use to highly productive and beneficial uses. *See supra*. In addition, Georgia has spent significant time and resources on conservation initiatives in an effort to reduce its consumptive-use levels even more. The state has taken "significant steps to conserve water in the Atlanta metropolitan region." Report at 34, n.28. And with respect to agricultural irrigation, Georgia (among other things) put a total moratorium on all new agricultural permits in 2012, enacted legislation requiring farmers to use high-efficiency irrigation systems, set up water-planning councils in the ACF Basin, and required water analysis and planning studies to be conducted every five years. Georgia intends to present this evidence and more to the Special Master during the narrow remand proceedings it has proposed.

Even if Your Honor ultimately does find that Florida has established harm and inequitable upstream use, Florida still will not be entitled to relief because the evidence in the record does not support the other elements it needs to show to get an equitable apportionment. For example, Florida will not be able to prove by clear and convincing evidence that Georgia's water use caused any of the alleged harms. In the Apalachicola River (as opposed to the Bay), Florida claims that Georgia's water use caused a drop in water levels, but Florida's own state environmental regulator, in conjunction with the USGS, concluded that "[c]hannel widening and deepening, which occurred throughout much of the river, apparently caused the declines." GX-88, at 1. Florida also has major problems with causation when it comes to oysters in Apalachicola Bay. After the oil spill in 2010, Florida loosened restrictions on oyster harvesting. This allowed more oysters to be harvested in 2011 and 2012 than in any of the previous 25 years. Florida Governor Scott summed up the real reason for the oyster crash in his letter to NOAA in 2012 requesting the declaration of a fishery disaster: "[h]arvesting pressures and practices were altered to increase fishing effort, as measured

in reported trips, due to the closure of oyster harvesting in contiguous states during 2010. This led to overharvesting of illegal and sub-legal oysters further damaging an already stressed population." JX-77. In other words, Florida's own government admits that mismanagement of the fishery was a contributing factor to its crash.

The evidence also shows that even under draconian cuts to Georgia's water use—*and* assuming that all saved water flows immediately to Florida—Florida will receive no meaningful benefit. Eliminating half of Georgia's irrigation (plus other cuts) would increase the biomass on key oyster bars by less than 1.5%. White Direct at ¶ 153, Figs. 14 and 15. To put that in perspective, Florida agency reports claim that the 2012 oyster crash resulted in a loss of 80% of oyster biomass. JX-096 at 8. Florida also cannot prove that additional water will benefit the river estuary. Cutting Georgia's agricultural irrigation in half would have no "biologically significant" impact whatsoever across a number of riverine metrics, Tr. 409:9-410:3 (Allan), and would actually result in *more* modeled harm for a number of other metrics, Tr. 407:23-408:8 (Allan). Florida's expert also testified that he did not know, and had not analyzed, whether this draconian remedy scenario would actually improve the populations of species in the river. Tr. 546:9-13 (Allan). In light of that evidence, Florida cannot show that whatever marginal benefit it expects to receive from a cap will outweigh the incredible costs such a cap would impose on Georgia.

Finally, in its portion of this submission, Florida argues that the Supreme Court "concluded" that a cap on Georgia's water use could generate an additional 1,500 to 2,000 cfs of streamflow and that such an increase would redress Florida's alleged injuries. That is wrong. The Supreme Court never "concluded" that such an increase in streamflow was possible. To the contrary, the Supreme Court simply *assumed* that such increases were possible purely for purposes of its analysis: "The Master did not make specific findings of fact regarding this aspect of Florida's

proposed remedy. Rather than expressly making any findings, the Master apparently accepted Florida's estimates of the increased streamflow that would result from a consumption cap. At this stage, we shall do the same." *Fla. v. Ga.*, 138 S. Ct. at 2520. As it turns out, Florida's estimates of how much increased streamflow would result from a cap are badly mistaken. Generating an additional 2,000 cfs/month during summer "cannot be physically accomplished because that number is more than [Georgia's] ***total*** consumptive use." Tr. 3310:13-19 (Zeng) (emphasis added). Georgia's annual average consumptive use in the ACF Basin between 1994 and 2013 has never been larger than 900 cfs. Zeng Direct, ¶ 19. And Georgia's monthly average consumptive use, even during the driest months of the driest years, has never reached 2,000 cfs. *Id.* at ¶ 23. In reality, therefore, the record shows that even Florida's most draconian, costly, and far-reaching proposed remedies would not generate anywhere close to 2,000 cfs increases in state-line flows.

C. CMO 4(c) - Whether stipulations are possible as to operative facts, especially as to the relative economic issues.

As requested by CMO 23, the parties discussed the possibility of stipulating to certain facts in this case. The parties do not currently believe that there are any significant facts to which the parties could stipulate.

D. CMO 4(d) – Whether any additional hearings, evidentiary or non-evidentiary, would be beneficial.

1. Florida's Statement

Consistent with its views expressed above, Florida believes that additional evidentiary hearings are not necessary on the questions of injury and Georgia's inequitable consumption of water upstream. The Special Master could hold a hearing—akin to an extended oral argument on

a motion for summary judgment—at which the parties could present their respective positions on injury and inequitable consumption.[7]

Also consistent with its views expressed above, Florida believes that additional evidentiary hearings are unavoidable regarding the timing and extent of additional flows into the Apalachicola that reduced consumption in Georgia would produce. Such hearings will be needed to address not only the revised Manual adopted in March 2017, but also the sorts of "reasonable modifications" that the Corps could make to "accommodate any determinations or obligations the Court sets forth i[n] a final decree equitably apportioning the Basin's waters." *Florida*, 138 S. Ct. at 2526.

Until Florida has completed limited discovery on the issues addressed herein and evaluated the record in light of such discovery, it will be difficult for Florida to project exactly how long any new evidentiary hearings would be likely to last. But Florida does not currently anticipate a hearing lasting longer than a single week.

2. Georgia's Statement

Given the extensive record that already exists in this case, Georgia proposes that the Special Master conduct a summary-judgment-style proceeding. The parties would file supplemental briefs addressed to the specific questions posed by the Supreme Court on remand. Those briefs would rely on testimony and evidence that is already in the record. After those briefs are filed, Georgia proposes that the Special Master hold a non-evidentiary hearing at which the parties would present

[7] At that hearing, the parties could also present their legal arguments about the burden-shifting framework applicable in equitable apportionment actions, which the parties have disagreed about since the outset of the case. *See* Florida Post-Trial Br. 11-17; Georgia Post-Trial Br. 15-19; see also *Florida*, 138 S. Ct. at 2517 ("[O]ur cases, while referring to the use of a 'clear and convincing' evidentiary standard in respect to an initial showing of 'invasion of rights' and 'substantial injury,' have never referred to that standard in respect to a showing of 'remedy' or 'redressability.'"). Contrary to Georgia's position throughout this litigation, the Supreme Court has never held a State to the heightened burden that Georgia has suggested for these proceedings.

argument, guide the Special Master through the evidence in the record, and respond to questions. That hearing could take place over several days, with the parties devoting specified time to each of the discrete issues identified by the Supreme Court.

E. CMO 4(e) - Whether settlement possibilities have been and will be explored fully.

1. Florida's Statement

Florida has long believed that this dispute can and should be settled. As far back as 1997, Florida—with the express approval of the U.S. Congress—agreed to a compact that was intended to establish a process by which Florida, Georgia, Alabama, and the federal government could negotiate an equitable apportionment of the waters of the ACF Basin. R&R 11; *see also* Apalachicola-Chattahoochee-Flint River Basin Compact, Pub. L. No. 105-104, § 1, 111 Stat. 2219, 2222-24 (1997). But Florida has learned from unsuccessful prior settlement negotiations that Georgia has been unable to finalize any commitment to reduce agricultural irrigation, or take other similar conservation measures, in the absence of immediate pressure from litigation. Accordingly, while settlement discussions thus far have not proven fruitful, Florida believes that the situation may change as this case proceeds. If, for example, the Special Master adopts as recommended findings Special Master Lancaster's previous statements regarding harm to Florida and inequitable water use by Georgia, *see* R&R 31-34, that might help to initiate productive settlement negotiations regarding an agreed apportionment.

2. Georgia's Statement

For over two decades, Georgia has made every effort to settle this long-running dispute with Florida. In this case alone, Georgia has participated in no fewer than four mediation sessions, and a number of informal settlement discussions. Florida refused to participate in the last mediation session scheduled between the parties, which had been scheduled for September 21,

2016. Georgia still attended that session and met unilaterally with the mediator. While Georgia will always consider reasonable ways to resolve this dispute, the parties have fully explored a number of settlement possibilities and have been unable to agree on the basic framework for a potential settlement.

F. CMO 4(f) – Whether any other issues should be brought to the attention of the Special Master.

At this time, the parties do not believe there are any other issues that should be brought to the attention of the Special Master.

Dated: October 2, 2018

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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. Paul J. Kelly, Jr.

CERTIFICATE OF SERVICE

This is to certify that the OCTOBER 2, 2018 JOINT MEMORANDUM BY THE STATE OF FLORIDA AND THE STATE OF GEORGIA has been served on this 2nd day of October 2018, in the manner specified below (with service by mail to be made on October 3, 2018):

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