

SUPREME COURT OF THE UNITED STATES
No. 142, Original

STATE OF FLORIDA,)
)
Plaintiff,)
)
V.)
)
STATE OF GEORGIA,)
)
Defendants.)

TELEPHONE CONFERENCE before SPECIAL MASTER

RALPH I. LANCASTER, held at the law offices of Pierce
Atwood, LLP, at Merrill's Wharf, 254 Commercial Street,
Portland, Maine, on July 12, 2016, commencing at
10:00 a.m., before Claudette G. Mason, RMR, CRR, a
Notary Public in and for the State of Maine.

APPEARANCES:

For the State of Florida: PHILIP J. PERRY, ESQ.
ABID R. QURESHI, ESQ.
JONATHAN L. WILLIAMS, ESQ.

For the State of Georgia: CRAIG S. PRIMIS, ESQ.
BRITT GRANT, ESQ.

For the U.S.A.: MICHAEL T. GRAY, ESQ.

Also Present: JOSHUA D. DUNLAP, ESQ.
MARY CLIFFORD

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1 counsel, for your comments on CMO 19 and for
2 your willingness to confer today on
3 relatively short notice.

4 I thought, before I responded to your
5 comments and suggestions, that I would be
6 sure that I understood where each of you
7 stood on them. So I'm going to ask you by
8 category what your position is.

9 Mr. Gray, I'm not sure that it's
10 necessary for you to respond except on the
11 amicus for the United States; but feel free
12 to pitch in even if I don't call on you.

13 So let's start with the first one,
14 deadline for deposition cross-designations.
15 Florida?

16 MR. PERRY: Your Honor, I think both
17 parties are in agreement on that; and I
18 believe it was September 23 that we
19 suggested.

20 SPECIAL MASTER LANCASTER: Georgia?

21 MR. PRIMIS: That's correct, your Honor.

22 SPECIAL MASTER LANCASTER: Page limit
23 for pretrial briefs, 40 pages. Florida?

24 MR. PERRY: Your Honor, that's fine with
25 us.

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1 PROCEEDINGS

2 SPECIAL MASTER LANCASTER: Good morning,
3 counsel.

4 MR. PRIMIS: Good morning, your Honor.

5 MS. GRANT: Good morning, your Honor.

6 MR. PERRY: Good morning, your Honor.

7 SPECIAL MASTER LANCASTER: We'll begin
8 as we have a full room here. We have Josh
9 and Mary and Claudette.

10 We'll begin, as always, with
11 appearances. Florida?

12 MR. PERRY: Your Honor, it's Phil Perry
13 for Florida. And with me on the phone are
14 Abid Qureshi and then Jonathan Williams from
15 the Solicitor General's Office.

16 SPECIAL MASTER LANCASTER: Georgia?

17 MR. PRIMIS: Good morning, your Honor.
18 Craig Primis from Kirkland & Ellis for
19 Georgia. I also have on the line with me the
20 Solicitor General of Georgia, Britt Grant.

21 SPECIAL MASTER LANCASTER: United
22 States?

23 MR. GRAY: Good morning, you Honor.
24 This is Michael Gray for the United States.

25 SPECIAL MASTER LANCASTER: Thank you,

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1 SPECIAL MASTER LANCASTER: Georgia?

2 MR. PRIMIS: Yes, your Honor.

3 SPECIAL MASTER LANCASTER: Staggered
4 filing of direct testimony. Georgia?

5 MR. PRIMIS: Yes. Yes, your Honor. We,
6 Georgia, proposed that in our response to
7 Order 19. We believe that in a normal trial,
8 the plaintiff would present their evidence
9 first; and then the defendant would go second
10 and address directly the issues that were
11 actually raised by the plaintiff instead of,
12 you know, all possible issues that might have
13 been presented. And the simultaneous filing
14 that the Order currently has doesn't allow
15 for that. And so we're concerned, A, that we
16 will overttestify in that certainly Florida
17 will narrow and trim its case before it
18 proceeds to trial; and we will spend a lot of
19 time trying to anticipate and address through
20 testimony all the potential arguments that
21 could be made. And then, second, we only
22 want to join issue directly on their most
23 forceful points; and only by actually seeing
24 what the testimony is will we be able to do
25 that effectively.

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1 SPECIAL MASTER LANCASTER: Mr. Primis?
 2 MR. PRIMIS: That was Mr. Primis.
 3 Sorry. You said Georgia, so I just jumped
 4 in, your Honor.
 5 SPECIAL MASTER LANCASTER: Oh, I'm
 6 sorry.
 7 MR. PRIMIS: If you understood that to
 8 be Florida's position, then that's okay, too,
 9 with Georgia; but I think Mr. Perry may
 10 disagree.
 11 SPECIAL MASTER LANCASTER: I apologize.
 12 The voices all sound the same.
 13 MR. PRIMIS: My fault for not
 14 acknowledging that that was Craig Primis.
 15 SPECIAL MASTER LANCASTER: Okay.
 16 Florida?
 17 MR. PERRY: Your Honor, this is Phil
 18 Perry for Florida.
 19 We have three reasons why we oppose the
 20 staggered submission of direct filed
 21 testimony. The first we have identified
 22 previously. And that is that we believe
 23 Georgia's request to stagger is based on the
 24 notion that we bear all the burdens in this
 25 case and that it does not bear the burdens.

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1 why we proposed simultaneous exchange, that
 2 we will learn quite a bit from their pretrial
 3 briefs about what their case is. And, thus,
 4 that will help us in determining which
 5 witnesses to file direct for what it is
 6 they're going to assert.
 7 Now, if I might put that in a little bit
 8 broader context, I think it might be helpful.
 9 Last fall, as discovery was ongoing, it
 10 became clear to us that Georgia had a whole
 11 range of arguments it was going to make to
 12 try to attribute the harm in the bay and the
 13 river to other causes. And so in preparing
 14 our experts, we certainly prepared those that
 15 proved the elements of the case that we have
 16 to prove; but we also hired and prepared a
 17 whole range of other experts to address what
 18 appeared from their 360 requests for
 19 admissions and voluminous written discovery
 20 to be a whole range of other kind of kitchen
 21 sink arguments.
 22 We hope that we're not in a position,
 23 when it comes to trial, to have to put all
 24 that material on. And, certainly, we would
 25 love to put that material on in rebuttal if

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1 We briefed that to you, your Honor, over the
 2 spring in multiple filings. I won't repeat
 3 it now. But I'll say that we are as
 4 interested in what their positions are on
 5 their affirmative defenses and, indeed, on
 6 all the issues for which they bear the burden
 7 as they are interested in what we will do
 8 with our case.
 9 So to the extent I think it's in --
 10 their position is entirely predicated on this
 11 burden point or at least their filing
 12 suggested that, we think that they have got
 13 the burdens wrong.
 14 Second, their position in part was that
 15 it would cause us to economize our
 16 presentation if we had to go first. I think
 17 that's probably the opposite effect of what
 18 will happen if these are staggered. And let
 19 me explain by reference to the current
 20 schedule. They are asking to move our
 21 submissions of written direct up to October 7.
 22 And that would be roughly five days before we
 23 receive on the schedule their pretrial
 24 briefs.

And we are hoping, and indeed this is
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1 it becomes relevant. Of course, your Honor's
 2 Order suggests that rebuttal will be limited.
 3 So it will be very helpful for us to get
 4 Georgia's pretrial brief before we have to
 5 file our written direct testimony because
 6 that will help us narrow among those experts
 7 and other potential witnesses what written
 8 direct we really need to file. So as a
 9 practical matter, we oppose it for that
 10 reason. And if we had to go early with
 11 staggered submissions, I suspect that we
 12 would be forced to file far more than we
 13 might if this were simultaneous or after
 14 October 12.
 15 The third reason we oppose the staggered
 16 submissions is a reason really based on
 17 equity. And it's this; Mr. Primis and I are
 18 able to, when we confer, agree on a great
 19 number of things usually. And this May,
 20 preceding your Honor's request that we file
 21 proposals on June 6, we sat down and talked
 22 through pretrial requirements, pretrial
 23 dates, the date for trial, and all those
 24 sorts of things. And during that time
 25 period, we were trying to budget our time to

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1 submit prefiled direct in advance of trial.
 2 And, of course, we spent a lot of time
 3 thinking about the workability of the
 4 schedule. And we informed Mr. Primis of that
 5 at that time that we would be making a
 6 proposal to use prefiled direct. And he, of
 7 course, opposed it; but he didn't mention at
 8 any stage at that point that he was thinking
 9 about a staggered submission of prefiled
 10 direct. And had he, had we realized that one
 11 of his positions would have been the schedule
 12 should be staggered, that could well have
 13 affected in very specific ways what we
 14 proposed in terms of a schedule for pretrial
 15 briefs, for all the other submissions, and
 16 indeed even for the trial date.
 17 So our third reason is -- for opposing
 18 staggering is that this is an issue that
 19 could have been raised multiple months ago
 20 when we were working through what would be
 21 appropriate for a pretrial schedule. And to
 22 take two weeks away from us now that we had
 23 budgeted for to prepare our prefiled direct
 24 seems quite inequitable.
 25 So those are the three reasons why we
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1 of live direct, we thought that ordinary
 2 proceeding in the ordinary order should
 3 prevail.
 4 And then in terms of the point about
 5 economizing, I don't think that that's --
 6 it's not going to change anything if we file
 7 simultaneous written directs. Florida will
 8 still have to put on what it plans to submit
 9 as its case in chief, and they will not have
 10 the benefit of seeing our written direct
 11 testimony when they do that. So rather than
 12 have both sides guess, we should just have
 13 Florida put in what it intends to put in; and
 14 then Georgia, as the defendant, can respond
 15 to it and really engage on the actual issues
 16 rather than both sides trying to present
 17 everything that might come up.
 18 SPECIAL MASTER LANCASTER: Thank you.
 19 Let's move on to written objections to
 20 prefiled testimony. Florida?
 21 MR. PERRY: Well, your Honor, we're
 22 flexible in terms of the timing of written
 23 objections; but we think that it's better for
 24 the parties, particularly for us and perhaps
 25 for the Court, to have those written
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1 oppose the request for staggered submissions,
 2 your Honor.
 3 SPECIAL MASTER LANCASTER: Thank you,
 4 Mr. Perry.
 5 Mr. Primis, do you wish to respond?
 6 MR. PRIMIS: Yes, if I may, your Honor.
 7 Regardless of the burden of proof -- and
 8 Mr. Perry is right; we have a disagreement on
 9 that, and we both submitted our positions on
 10 it -- they would still go first in an
 11 ordinary trial. Likewise, on the last point
 12 Mr. Perry made about equity, when we were
 13 proposing that the trial be done by live
 14 testimony, I believe it was understood by
 15 everybody when we discussed it that, of
 16 course, the plaintiff would go first and put
 17 on their witnesses and their case; and then
 18 we would respond. And if they had some
 19 rebuttal to defenses or affirmative defenses,
 20 they would put that on after we went.
 21 So our position has been consistent, and
 22 it really is not tied to the burden of proof.
 23 It's tied to the ordinary and customary
 24 submission of evidence in a trial. And just
 25 because we switched to written direct instead
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1 objections filed before a witness takes the
 2 stand. And so we, I think, proposed in our
 3 paper that we find a way to give at least a
 4 couple days of notice of written objections
 5 to the likely testimony of one of the
 6 witnesses that had submitted prefiled direct.
 7 Whatever works for the Court works for
 8 us on that. We don't think it's particularly
 9 helpful to wait until two or three weeks
 10 after the entire trial is concluded to get
 11 objections, but we are flexible on exactly
 12 when the objections have to be made.
 13 SPECIAL MASTER LANCASTER: Mr. Primis?
 14 MR. PRIMIS: Yes, your Honor. The
 15 notion of submitting them in writing after
 16 the trial concluded was really predicated on
 17 a logistical and efficiency point. We have a
 18 very compressed time frame to get ready for
 19 trial. We're anticipating, if the Court
 20 remains with written directs, a very large
 21 number of written directs. And just from a
 22 pure resource and oral presentation of
 23 evidence perspective, it occurred to us that
 24 the written objections are unlikely to be
 25 ruled upon during the person's testimony,
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1 that your Honor -- as your Honor has pointed
 2 out, this is a bench trial. The Court is
 3 likely to hear a wide array of evidence and
 4 reserve many of the objections. And so it
 5 just seemed like it's an important
 6 housekeeping item. There should be written
 7 objections, but that it was not critical that
 8 they be done right in the time frame when
 9 both sides are going to be spending
 10 significant resources preparing for the
 11 actual presentation of evidence at the trial.
 12 SPECIAL MASTER LANCASTER: Thank you.
 13 Let's move on to how to present hostile
 14 witness testimony. Florida?
 15 MR. PERRY: Your Honor, we're borrowing
 16 in this proposal from what we understand
 17 Judge Kayatta did in Kansas versus Nebraska,
 18 I believe. And that is where you intend to
 19 call a hostile witness -- we're not exactly
 20 sure the number that we would call; that's
 21 something we're considering at this point --
 22 that you -- rather than submit prefiled
 23 direct, you submit a summary of what you
 24 reasonably anticipate you will cover with the
 25 witness, identifying the documents that

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1 you're likely to use in that context. And so
 2 it is a -- essentially in lieu of filing
 3 prefiled direct, recognizing that you don't
 4 have control of the witness. We don't intend
 5 to try to put words in any witness's mouth --
 6 I think that was Georgia's objection -- but,
 7 instead, to just explain what we think, based
 8 on the documents and what our plans are to
 9 examine the witness, is likely to come out.
 10 And, of course, if our summary is
 11 incorrect, I'm sure that Georgia will be
 12 able, through its cross, to be able to point
 13 that out.
 14 SPECIAL MASTER LANCASTER: Mr. Primis?
 15 MR. PRIMIS: Yes, your Honor. Thank
 16 you.
 17 This -- I would not put this as among
 18 the more important issues or even one of the
 19 more important disagreements among the
 20 parties. It just -- and we do acknowledge
 21 that this was the procedure used in Kansas
 22 versus Nebraska. We understand that. It
 23 just seemed to us that it was inappropriate
 24 for parties to characterize what a witness
 25 was going to say, especially when the witness

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1 is going to be showing up and will be there
 2 soon after. So rather than have the parties
 3 characterize and then potentially object to
 4 characterization, we proposed that the most
 5 efficient and fairest thing to do is simply
 6 to have the witness come and be examined
 7 live.
 8 SPECIAL MASTER LANCASTER: Thank you.
 9 Let's move on to U.S. amicus brief
 10 deadline. Georgia?
 11 MR. PRIMIS: Yes, your Honor. This is
 12 Craig Primis for Georgia.
 13 And we are the ones who raised this. As
 14 we were thinking through the schedule and
 15 contemplating the role that the United States
 16 might play, it occurred to us that the United
 17 States has not seen most of the evidence that
 18 will be provided at trial or will be
 19 presented at trial and that for the Court to
 20 get a more informed view from the United
 21 States, it would benefit everyone for the
 22 United States to actually understand the
 23 nature of the expert testimony that will be
 24 presented. And so for that reason we
 25 suggested moving the United States amicus

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1 brief date back towards the end of the
 2 proceeding rather than prior to the
 3 proceeding.
 4 One alternative is simply for the United
 5 States to see the expert reports and the
 6 nature of the hydrological arguments that are
 7 being made about the Army Corps prior to the
 8 trial, but I don't believe that's happened to
 9 date. And so we just want to make sure that
 10 the United States is informed as to how the
 11 issues are being framed before they weigh in.
 12 SPECIAL MASTER LANCASTER: Thank you.
 13 Mr. Perry?
 14 MR. PERRY: Your Honor, we defer to the
 15 United States on when it wants to file its
 16 amicus brief; and we're flexible on that.
 17 I'll note that we're in the midst of
 18 expert discovery now. And so if there is a
 19 time when the United States wants to receive
 20 information regarding expert reports or
 21 expert discovery, we're very happy to talk to
 22 them about that. But I would defer to them
 23 in terms of their preference.
 24 I might also note that your Honor has, I
 25 think, pretty clearly identified what the

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1 rules are for other potential amici. And so
 2 one question that might come up as you
 3 consider this is whether or not the time
 4 frames would change for other amicus filings.
 5 SPECIAL MASTER LANCASTER: Thank you.
 6 Mr. Gray?
 7 MR. GRAY: Yes. Thank you, your Honor.
 8 Maybe it would be helpful for me to
 9 provide a little bit of clarification as to
 10 what we envision our pretrial amicus brief to
 11 be. I don't think we intend in that filing
 12 to address sort of factual and expert
 13 testimony issues that Georgia is concerned
 14 about. Instead, any amicus brief we would
 15 file would be focused on legal issues that
 16 have been raised in either the motions or the
 17 pretrial briefs of the parties.
 18 As an example, you know, I think one of
 19 the things we're evaluating whether we would
 20 want to weigh in on is this burden of proof
 21 issue that the parties have raised several
 22 times in the past few months; and we imagine
 23 we'll be joined again at that stage. We
 24 think we might be -- potentially be of use
 25 there, particularly since the United States

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1 is a party in many of these proceedings. And
 2 so it would be that sort of legal issue that
 3 we would intend to address pretrial.
 4 And then the Order contemplates -- the
 5 further Order on post-trial briefing -- and
 6 we would appreciate and agree that that would
 7 be the appropriate time for us to address any
 8 factual issues in another amicus brief.
 9 SPECIAL MASTER LANCASTER: Thank you.
 10 I have no thought or suggestion that
 11 there will be anyone else wanting to file an
 12 amicus brief; but does -- do counsel have any
 13 thoughts on timing or suggestions -- any
 14 other suggestions, Mr. Perry?
 15 MR. PERRY: I have no other suggestions
 16 on that score, your Honor. I recall that you
 17 alerted us that the folks at Emory Law School
 18 were considering filing an amicus. I don't
 19 know at this stage if there are others who
 20 are. I imagine, given the profile of this
 21 case, there may be others; but I don't have
 22 any information about that.
 23 SPECIAL MASTER LANCASTER: Mr. Primis?
 24 MR. PRIMIS: Your Honor, the schedule
 25 for other non U.S. amicus seemed appropriate

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1 to us. We were -- we didn't have an
 2 objection to that.
 3 SPECIAL MASTER LANCASTER: Okay. Last
 4 item on my list is the length of opening and
 5 closing statements. My understanding is that
 6 you have agreed on 75 minutes each. Is that
 7 correct, Mr. Perry?
 8 MR. PERRY: Yes, your Honor.
 9 SPECIAL MASTER LANCASTER: And,
 10 Mr. Primis?
 11 MR. PRIMIS: Yes, your Honor.
 12 SPECIAL MASTER LANCASTER: Thank you
 13 very much. This has been very helpful. We
 14 will turn to it and get out an Order as soon
 15 as we can.
 16 Do you have anything else, Mr. Perry?
 17 MR. PERRY: Nothing else, your Honor.
 18 SPECIAL MASTER LANCASTER: Mr. Primis?
 19 MR. PRIMIS: Yes, your Honor. Just one
 20 item. Craig Primis for Georgia.
 21 We raised in our response and objection
 22 the notion of having live testimony rather
 23 than submissions by written direct. And
 24 we -- your Honor hasn't raised that issue;
 25 but we certainly don't want to waive it, and

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1 we believe that the trial would be better
 2 conducted in that fashion.
 3 SPECIAL MASTER LANCASTER: Mr. Perry?
 4 MR. PERRY: We were fine with prefiled
 5 direct, your Honor, and support and have no
 6 objection to the Court's Order on that score.
 7 SPECIAL MASTER LANCASTER: Thank you.
 8 As I said, counsel, this has been very
 9 helpful. We will get out another Order as
 10 soon as we can.
 11 You will notice that I'm going to be
 12 very liberal in times and other issues. So
 13 that it isn't misunderstood, the reason I'm
 14 going to do that is so that there can't be
 15 any complaints to the Supreme Court that you
 16 were prevented from making submissions or
 17 objections other than of matters of
 18 substance.
 19 But let me just say that if you really
 20 need two and a half hours each to prepare and
 21 present your case, I'm going to probably
 22 conclude either that you didn't prepare
 23 properly or you didn't present properly. But
 24 I will give you that 75 minutes for each.
 25 I'm just warning you that there may come a

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1 time when my eyes are glazed over.
 2 And last, but not least -- well, not
 3 last, next to last, I think you now know my
 4 feelings about the media. But that doesn't
 5 mean that I don't read the newspaper articles
 6 or watch television. And I'm impressed with
 7 the writings that relate to the droughts that
 8 are there and happening and are being
 9 predicted. I hope you're taking that into
 10 consideration.
 11 And last, but most importantly, as
 12 always, I urge you, again, to pursue
 13 mediation with diligence and vigor.
 14 There was a suggestion that I -- from
 15 Florida, I believe, that I talk to the
 16 mediator. I have no intention of invading
 17 your -- or influencing or discussing with the
 18 mediator anything that's going on. So I'm
 19 sure she's doing a good job and that you will
 20 pursue it with some seriousness.
 21 And that's all I have for today.
 22 Josh?
 23 MR. DUNLAP: Nothing further.
 24 SPECIAL MASTER LANCASTER: Thank you
 25 very much, counsel.

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1 CERTIFICATE
 2 I, Claudette G. Mason, a Notary Public
 3 in and for the State of Maine, hereby certify
 4 that the foregoing 22 pages are a correct
 5 transcript of my stenographic notes of the
 6 above-captioned proceedings.
 7 I further certify that I am a
 8 disinterested person in the event or outcome
 9 of the above-named cause of action.
 10 IN WITNESS WHEREOF, I subscribe my hand
 11 this 13th day of July, 2016.

 Notary Public

18 My Commission Expires
 19 June 9, 2019.

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1 MR. PERRY: Thank you, your Honor.
 2 MR. PRIMIS: Thank you, your Honor.
 3 MR. GRAY: Thank you.
 4 (The telephone conference was concluded
 5 at 10:23 a.m.)
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