

No. 142, Original

In the
Supreme Court of the United States

STATE OF FLORIDA,

Plaintiff,

v.

STATE OF GEORGIA,

Defendant.

Before the Special Master

Hon. Ralph I. Lancaster

THE STATE OF FLORIDA’S OCTOBER 2, 2015 PROGRESS REPORT

The State of Florida respectfully submits this Progress Report to the Special Master pursuant to Section 4 of the December 3, 2014 Case Management Plan (“CMP”), as subsequently amended.

I. CHANGES IN THE GENERAL STATUS OF THE MATTER.

Since the State of Florida’s September 4, 2015 Progress Report, Florida has: (1) issued subpoenas and deposition notices for eighteen depositions, pursuant to Section 6.2 and Appendix C of the CMP; (2) continued to produce thousands of pages of responsive documents to Georgia pursuant to its broad production requests; (3) served additional written discovery; (4) begun taking its previously noticed depositions; (5) worked to resolve discovery disputes with third parties; and (6) participated in multiple meet-and-confer calls with Georgia on discovery issues. Additional detail about Florida’s discovery efforts is provided below.

II. DISCOVERY EFFORTS.

A. Written Discovery Among The Parties

Since the September 4, 2015 Progress Report, Florida has continued to move forward with written discovery. Specifically, on September 25, 2015 Florida served its Third Set of Interrogatories to Georgia and its First Set of Requests for Admission. For its part, Georgia served Interrogatories and 336 separate Requests for Admission on the same day.

B. Production of Responsive Documents

The States are continuing to produce documents on a rolling basis. As noted previously, Florida has mobilized a large document review team to review and produce responsive information in accordance with the schedule established by the CMP. To date, Florida has produced approximately 660,000 emails (including more than 160,000 this week), more than 100,000 pages of non-email electronically stored information, and nearly 90,000 documents received from third parties. In all, Florida has produced more than 3 million pages of documents in response to Georgia's document requests.

The States continue to meet-and-confer to facilitate the discovery process and to resolve discovery issues promptly. As noted in previous Progress Reports, the States have devoted a considerable amount of time to further developing and refining the parameters of electronic discovery, and have reached agreement on an initial set of email custodians and search terms for each side. However, certain issues regarding email productions have arisen.

First, Georgia has informed Florida that it did not preserve the email accounts of four of Florida's selected custodians—Harold Reheis, Carol Couch, Allen Barnes, and Ed Holcombe. Reheis, Couch, and Barnes were Directors of the Georgia Environmental Protection Division for the majority of the period since litigation over the ACF was filed in 1990 and were integral to prior compact negotiations between the States and water policy in Georgia during relevant

periods. Similarly, Holcombe is the former Chief of Staff to Governor Purdue and a key member of the Governor's 2009 Water Contingency Task Force studying potential conservation measures. Georgia has yet to provide a full or satisfactory explanation for why these email accounts were not preserved. Florida is concerned that these issues have remained unresolved for so long and is raising them yet again with Georgia.

Second, in the September 30 deposition of Dr. Martin Kistenmacher, counsel for Florida learned that Georgia counsel (who is now also representing witnesses from Georgia universities) chose not to produce relevant Kistenmacher emails that Florida had subpoenaed specifically for purposes of the deposition.¹ Florida was disappointed when Georgia indicated that the emails were not being produced, but nevertheless proceeded with the initial scheduled day of the deposition. Although the written objections to production submitted by the Office of the Georgia Attorney General indicated that email records would be “unduly burdensome” to produce (these objections did not identify any privilege from production), the witness testified that he has preserved the subject emails for production in a specific folder on his computer, and would not be inconvenienced by such a production. Failure to produce the Kistenmacher and other relevant email files, and certain metadata, impacted the deposition. Counsel lacked context and explanations for key analytical documents that were the focus of the deposition. And the witness encountered difficulties authenticating certain documents and differentiating between drafts and final versions of others. We have been unable to schedule a meet and confer session with Georgia on this issue before this coming Monday, and remain uncertain if the emails will be produced. The deposition remains open pending resolution of this issue.

¹ By agreement among the parties, Georgia and Florida universities were previously regarded as third parties subject to subpoena, and thus outside of the scope of the email custodian agreement between the States. Florida's subpoena *duces tecum* for Dr. Kistenmacher specifically requested the communications at issue.

These two issues have not yet ripened into disputes, but given the rapid pace of discovery in the case, Florida felt compelled to mention them now. If at all possible, we will work to resolve these and other ongoing issues with Georgia amicably.

C. Written Discovery to Third Parties

Florida has continued on a daily basis to pursue responses to its written discovery from numerous non-parties, including a number of federal agencies and departments.

1. Touhy Requests and Subpoenas to Federal Agencies

The States are continuing to cooperate with the agencies and departments upon which they have served *Touhy* requests. Since the September 4, 2015 status report, Florida has received supplemental productions from USGS and the Corps, and has followed up with counsel for the United States regarding additional documents for production from the Corps, and counsel for the State Department regarding its production in response to Florida's July 8, 2015 *Touhy* request for production of documents. Although certain key materials have not yet been produced, Florida believes that the U.S. Government is diligently responding to its requests.

In addition, on September 21, 2015 counsel for Florida informed counsel for the United States that it intended to seek testimony from seven U.S. agency employees, specifically including four from USFWS, two from USGS, and one from the Corps. Florida has (to date) delayed serving these requests pending resolution of the question of deposition limits raised by Georgia. Given the pace of discovery, Florida may serve these requests in the coming week.

The States will continue to meet and confer with the agencies regarding their *Touhy* requests to facilitate the agencies' response to them.

2. Non-Party Subpoenas Seeking Production of Documents

Florida has not served any additional subpoenas for production of documents since the September 4 Progress Report. Thus far, counsel for Florida has conferred with representatives of,

or otherwise obtained documents from 90 of the 93 entities it has subpoenaed. Florida continues to work with these subpoenaed third parties to facilitate production of documents and resolve any outstanding issues. With the exception of a few entities, noted below, these efforts have been successful. Subpoenaed entities have made at least a partial production of documents, yielding almost 90,000 documents produced to date. Florida will continue to make every effort to facilitate the third parties' timely, cost-efficient production of documents. However, given the scope of the search required to respond, several of the non-parties have been unable to complete their productions within 120 days. Florida is continuing to work with counsel for these entities to facilitate production, and will apprise the Special Master promptly of any concerns that cannot be resolved by the parties.

As noted above, the vast majority of the subpoenaed entities have worked cooperatively with Florida to produce responsive documents. However, as reported previously, *see August 7, 2015 Progress Report* at 3-4 & *September 4, 2015 Progress Report* at 3-5, Florida has a continuing disagreement with ACF Stakeholders, Inc. ("ACFS") over the production of responsive documents it is seeking to discover. ACFS is a group of non-litigants, the majority of whom are located in Georgia. Among other activities, the group cooperated with advisors (including certain researchers and professors at the Georgia Institute of Technology) to analyze the impacts of agricultural irrigation and other upstream consumption on river flows in the ACF Basin, for purposes of making public recommendations to policy makers in the region. Florida is pursuing these analyses because they incorporate key data relevant to issues in this case, and because the analyses demonstrate that Georgia researchers and professors specializing in relevant fields developed data and reached conclusions at odds with the position of the State of Georgia in this litigation.

As Florida noted in its September 4 Progress Report, Florida has sought to avoid imposing significant financial burdens on ACFS—a non-profit with limited funding—so Florida has pursued discovery of ACFS’s modeling and technical files from other entities involved in the ACFS process, including the Georgia Water Resources Institute (“GWRI,” a part of the Georgia Institute of Technology, now represented by Georgia counsel), Atkins, and Black & Veatch. *September 4, 2015 Progress Report* at 4-5. To date, Florida has obtained the vast majority of the analytical documents developed during the ACFS process—most of which were provided by GWRI.

Notwithstanding GWRI’s production of these materials, counsel for ACFS continues to attempt to prevent production of additional relevant documentation, insisting that non-privileged email communications relating to and explaining these analyses must not be produced. Florida does not object to maintaining the confidentiality of this material under this Court’s confidentiality order. ACFS has never asserted attorney-client privilege as a basis for withholding these communications, and Florida believes that ACFS counsel’s position is not “substantially justified” under Federal Rules of Civil Procedure. Florida desires to resolve this issue and has repeatedly requested that ACFS counsel produce a log of the documents withheld so that a specific focused motion to compel can be pursued. To date, ACFS counsel has refused to provide any such log. We are currently working with counsel for Black and Veatch and Atkins to narrow any remaining issues so that an appropriate motion to compel can be brought.

D. Depositions

Written discovery concludes on November 10, and a number of the key depositions in this case will necessarily occur after that date. That said, Florida has been aggressively pursuing deposition discovery already, and (based on documents received to date) has carefully targeted each of its depositions to elicit specific probative information. As counsel for Florida noted in

the September 29, 2015 hearing on Georgia's request for a limit of 20 depositions per side, Florida anticipates taking up to 40 or 45 fact depositions. Florida has already noticed 28 depositions of Georgia witnesses and third parties, and, as noted above, has notified counsel for the United States that it intends to seek testimony from up to seven employees of federal agencies. Florida anticipates noticing up to eight to ten other depositions in the coming weeks.

Since the September 4, 2015 Progress Report, Florida has served subpoenas seeking testimony from eighteen additional individuals and organizations.

1. Judson Turner: Judson Turner is the current Director of the Georgia Environmental Protection Division ("EPD"). Mr. Turner was former Georgia Governor Sonny Perdue's executive counsel and also served as the then-governor's legal representative in negotiations with the Corps and USFWS regarding drought operations at the federal reservoirs of the ACF Basin. Turner has served both Governors Perdue and Nathan Deal as special executive counsel in negotiations between the states of Alabama, Georgia and Florida related to the ACF Basin. Turner signed an Affidavit on January 10, 2013 detailing Georgia's projected water supply demands through the year 2040, and has specific knowledge relevant to a large number of issues in this case.

2. Allen Barnes: Allen Barnes was the Director of the Georgia EPD from 2009-2011. Barnes was one of Governors Perdue's and Deal's chief negotiators with Florida and Alabama over allocation of water in the ACF Basin, both while he worked at the EPD and as a private contractor while working at Joe Tanner and Associates. Barnes was also involved in Georgia decisions regarding application of its Flint River Drought Protection Act, and should testify about a number of relevant Flint River issues.

3. Harold Reheis: Harold was the Director of the Georgia EPD from 1991-2003. He was directly involved with Georgia's water management policies and practices, including in the ACF Basin, while he worked at the EPD. Reheis managed water resource allocation and was involved in the interstate water compact negotiations among Georgia, Alabama and Florida.

4. Joe Tanner: Joe Tanner served as Commissioner of the Georgia Department of Natural Resources, from the department's creation in 1972 until May 1984 and from December 1990 until May 1995. Tanner participated in ACF Compact negotiations on behalf of Georgia, and has other relevant knowledge specifically relevant to arguments in this case.

5. Robert Kerr: Robert Kerr was the founding Director of the Pollution Prevention Assistance Division (P2AD) of the Georgia Department of Natural Resources. Prior to becoming the director of P2AD, Kerr served as the executive director of the Georgia Hazardous Waste Management Authority. Kerr represented Georgia on policy matters relative to two interstate water compacts. He also represented Georgia as the lead negotiator in the negotiations between Alabama, Florida, Georgia and the federal government to develop water allocation formulas under those compacts.

6. Wei Zeng: Wei Zeng is the head of the Hydrological Analysis Unit of the Watershed Protection Branch of the Georgia EPD. The Hydrological Analysis Unit provides mathematical modeling, analytical, and other technical support for water basin management issues, including in the ACF Basin. The Unit also develops water quality and surface water availability resources assessments for each river basin in Georgia. Zeng has been involved in hydrological modeling of the ACF Basin for years and has authored myriad reports, memoranda, presentations, and other communications regarding water demand, use, and flows in the ACF Basin. Georgia has produced over 30,500 of Zeng's documents in this matter.

7. Nap Caldwell: Napoleon “Nap” Caldwell is the Section Chief of the Water Supply Program in the Watershed Protection Branch of the Georgia EPD, working with Watershed Protection. Caldwell has been with the Georgia EPD for the past 20 years, he has advised the EPD Directory and Assistant Director on water and wastewater regulatory and policy matters. He oversees state water conservation and management projects, including fielding comments on proposed water and drought rules and working with population and hydrology data related to ground water permitting and water storage.

8. Cliff Lewis: Cliff Lewis is the Program Manager of the Agricultural Permitting Unit of the Georgia EPD. In this position, Lewis provides technical assistance to public and private officials, consultants, and the general public regarding hydro-geological and geological issues. He also coordinates EPD activities related to the Lower Flint River Drought Protection Act, inspects and monitors irrigation facilities to ensure compliance with state and federal regulations, and is responsible for reviewing and issuing withdrawal permit applications, as well as maintaining the permit files and databases. From 2008 through 2012, Lewis was an Assistant Branch Chief in the EPD Watershed Protection Branch and from 2005 through 2009 he was the EPD Farm Use Water Permitting Program Manager. He has been engaged in water allocation and compliance in Georgia for ten years and has a broad knowledge specifically relevant to this case.

9. David Eigenberg: David Eigenberg is the Deputy Executive Director of the Georgia Soil & Water Conservation Commission (“GSWCC”). GSWCC, and in turn, Eigenberg, were involved in the water metering program implemented by the State of Georgia (H.B. 579) to help conserve water resources. Eigenberg was also involved with the Flint River Surface and Groundwater Conservation project in which the Commission was charged with

piloting a cost-share project for the installation of water-saving irrigation technologies and/or improvements to irrigation systems in agricultural Georgia for the purpose of restoring natural discharge in the Flint River.

10. Bill Frechette: Bill Frechette is a geologist and Groundwater Unit Coordinator for the Georgia EPD. He reviews applications for groundwater permits, particularly municipal and industrial groundwater permits, including in the ACF Basin. Frechette also monitors permittees' groundwater use reports to analyze whether permittees have exceeded their permitted withdrawals. To perform his permitting duties, Frechette receives and analyses statistical data for water use and return flows in Georgia.

11. Aris Georgakakos: Dr. Aris Georgakakos is currently a Professor at the School of Civil and Environmental Engineering at Georgia Tech and Director of the GWRI. He specializes in climate/hydrologic/river basin modeling, served as a consultant to the State of Georgia, and to ACFS. He is a co-author of reports studying the hydrology of the ACF Basin. *See, e.g.,* Georgakakos, A.P., and M. Kistenmacher (2012): Unimpaired Flow Assessment for the Apalachicola Chattahoochee-Flint River Basin. Technical Report, GWRI, Georgia Tech., Atlanta, Georgia, 211p. He was the Principal Investigator for the report "Development of an Integrated Water Resources Management Plan for the Apalachicola-Chattahoochee-Flint (ACF) River Basin," sponsored by the ACF Stakeholders Association (2011-2014).

12. ARCADIS: ARCADIS is a global asset and design consulting firm. Among other things, the Georgia EPD contracted with ARCADIS-USA to develop unimpaired flow data used in the State Water Plan's Surface Water Availability Resource Assessment task. Such data contains stream flow under "natural" or "unimpaired" conditions, i.e. stream flow that would

have resulted without the human alterations. ARCADIS also provided EPD with water availability modeling, irrigation acreage, and other data related to hydrology in the ACF Basin.

13. Jon Ambrose: Dr. Jon Ambrose has been an employee of the Department of Natural Resources of Georgia for more than 28 years. Ambrose was recently named chief of the Georgia Wildlife Resources Division's Nongame Conservation Section in July 2014. As chief, Ambrose supervises an agency charged with conserving Georgia's rare and other nongame wildlife, such as fish and mussels, as well as native plants, and their natural habitats. Ambrose has worked directly on mussel conservation strategies in the lower Flint River Basin and studied the stream flow requirements and water use impacts on wildlife in the Flint River Basin.

14. Jason Wisniewski: Jason Wisniewski is a Wildlife Biologist at the Georgia Department of Natural Resources since 2004. Georgia identified Mr. Wisniewski as an individual that provided information included in Georgia's interrogatory responses. He is a mussel specialist who has created and run models to evaluate the impacts of hydrological changes on mussels. He has published many articles related to this topic such as: C.P. Shea, J.T. Peterson, M.J. Conroy, J.M. Wisniewski (2013), Evaluating the influence of land use, drought and reach isolation on the occurrence of freshwater mussel species in the lower Flint River Basin, Georgia (USA). *Freshwater Biology*; and J.C. Dycus, J.M. Wisniewski, J.T. Peterson (2014), The effects of flow and stream characteristics on the variation in freshwater mussel growth in a Southeast U.S. river basin. *Freshwater Biology*. These issues are directly relevant to impacts of agricultural irrigation on river flow.

15. Mark Masters: Mark Masters is the Director of the Georgia Water Planning and Policy Center at Albany State University. The Center acts as headquarters for the Flint River Water Planning and Policy Center. Masters conducts research focused on agricultural water use,

basin planning and the regional impacts of alternative water policies. Georgia water planning activities will be a key subject in this litigation.

16. Menghong Wen: Menghong Wen works in the Hydrological Analysis Unit of the Watershed Protection Branch of the Georgia EPD. Wen specialized in analysis of ground water and surface water withdrawals and flow levels. Wen also has knowledge of the models used to calculate streamflow simulations, and is a co-author of many reports and presentations studying the hydrology of the ACF Basin. *See, e.g.*, M. Wen, H. Liang, and W. Zeng (2011): Using the USGS Dougherty Plain Groundwater Model for Ensemble Analysis. Proceedings of the 2011 Georgia Water Resources Conference *available at* <http://www.gwri.gatech.edu/sites/default/files/files/docs/2011/3.1.3Zeng.pdf>; *see also* reports co-authored with Yi Zhang, cited below.

17. Yi Zhang: Yi Zhang is a former member of the Hydrological Analysis Unit of the Watershed Protection Branch of the Georgia EPD. Zhang is a co-author of a number of reports and presentations studying the hydrology of the ACF Basin. *See, e.g.*, Y. Zhang and M. Wen (2005), Watershed Modeling and Calibration for Spring Creek Sub-basin in Flint Basin of Georgia Using EPA BASINS/HSPF Modeling Tool. Georgia Water Resources Conference, p. 752; and Y. Zhang, D. Hawkins, W. Zeng, and M. Wen (2005), The Framework of GIS-based Decision Support Systems (DSS) for Water Resources, Georgia Water Resources Conference p. 769.

18. Jeff Regan: Jeff Regan works in the Hydrological Analysis Unit of the Watershed Protection Branch of the Georgia EPD. He is involved in the collection and analysis of data and modeling regarding water withdrawals and returns in the ACF Basin relevant to the issues before the Court.

As provided in Section 3 of Appendix C of the Case Management Plan, Florida is working with both counsel for the subpoenaed individuals and entities and counsel for Georgia to schedule these depositions at mutually convenient times and places. To date, Florida has scheduled multiple previously-noticed depositions, and has taken one—that of Dr. Martin Kistenmacher on September 30. Florida anticipates scheduling a large number of depositions over the next several weeks, and anticipates completing all noticed depositions by January 15, 2016, as required by the Case Management Plan.

III. UNRESOLVED DISPUTES.

There are no unresolved disputes with third parties other than the disputes detailed above, and no unresolved disputes between the States. While the States have identified certain issues regarding the sufficiency of written discovery responses and the completeness of designated and identified email custodians, they continue to meet and confer on a frequent basis to resolve such issues. As noted in prior Progress Reports, Florida believes that the scope and frequency of counsel interaction has facilitated—and will continue to facilitate—resolution of the foregoing and other issues.

IV. OTHER ISSUES OF CONCERN.

A. Technological Issues with the Production of Models and Data Sets

As Florida has noted in prior Progress Reports, technological issues with models and other data sets are slowing the States' progress in discovery. The States are continuing to discuss technological issues associated with the production of certain data sets and scientific models, but the production of such documentation remains challenging. Moreover, the assimilation and analysis of the data and modeling information produced to date by Georgia and various third parties is time consuming for both States, and has required multiple meet-and-confer sessions regarding the accessibility and scope of what has been produced. Florida anticipates such issues

will continue to arise as discovery progresses.

B. Timing

With the extensions of the discovery schedule granted by the Court on April 8, 2015 and May 11, 2015, Florida anticipates completing discovery in accordance with the schedule delineated in Sections 6 and 7 of the CMP, as amended.

V. FURTHER DISCOVERY ANTICIPATED DURING THE COMING MONTH.

Florida continues to analyze responses it received from Georgia and various third parties, and intends to serve additional deposition notices during the coming month. As it has endeavored to do throughout this proceeding, Florida will work to minimize the burden and narrow the scope of any additional discovery requests it issues to Georgia or any third parties.

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CERTIFICATE OF SERVICE

This is to certify that the STATE OF FLORIDA'S OCTOBER 2, 2015 PROGRESS REPORT have been served on this 2nd day of October 2015, in the manner specified below:

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