

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 SEPTEMBER 4, 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 August 7, 2015 Progress Report, Florida has: (1) issued ten subpoenas for third-party 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 requests; (3) pursued certain specifically relevant documents being withheld (without any appropriate privilege claim) by ACF Stakeholders; and (4) participated in multiple productive meet-and-confer calls with Georgia on discovery issues. Additional detail about Florida’s discovery efforts is provided below.

II. DISCOVERY EFFORTS.

A. Production of Responsive Documents to Georgia

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 500,000 emails (including approximately 165,000 this week), more than 100,000 pages of non-email electronically stored information, nearly 40,000 documents received from third parties, and over 60 gigabytes of modeling files. In all, Florida has produced more than 1.8 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. This approach has substantially reduced the scope and volume of materials the States must review and produce.

Florida expects to complete production of responsive documents within the production deadline specified in Section 6.1.2 of the CMP, as amended.

B. 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 August 7 Progress Report, the U.S. Department of Commerce, the U.S. Army Corps of Engineers, and the U.S. Fish & Wildlife Service have all

made productions, and Florida has met and conferred with the Department of State and followed up with the U.S. Geological Survey and the Army Corps of Engineers regarding specific additional documents it would like produced in response to its requests. Although certain key materials have not yet been produced, Florida believes that the U.S. Government is diligently responding to its requests.

The States will continue to meet and confer with the agencies regarding the joint *Touhy* requests to facilitate production of documents in response to them.

2. Non-Party Subpoenas Seeking Production of Documents

Florida has previously served 93 third-party subpoenas. 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 one entity, noted below, these efforts have been successful. Subpoenaed entities have made at least a partial production of documents, yielding approximately 72,000 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*, Florida has a continuing disagreement with ACF Stakeholders, Inc. ("ACFS"). ACFS is a group composed of interested non-litigant private parties and local entities, the majority of whom reside in Georgia or represent Georgia interests. ACFS made a

series of public recommendations, in lengthy public reports, to mitigate impacts of reduced river flows during drought years, including impacts to the Apalachicola River and Bay. These recommendations included: (1) Georgia state and local “conservation policies” to reduce the “impacts of upstream consumptive use from agricultural irrigation” and other activities; and (2) Georgia state and local efforts to maximize water returns and minimize water transfers out of the ACF basin. Although ACFS’s detailed findings and recommendations have been publicly disclosed, and although other information regarding the work leading up to the public disclosure is available on its internet site, counsel for ACFS nevertheless refuses to produce the data and related information behind its public disclosures.

We have had difficulty understanding ACFS’s objections to producing responsive material. ACFS’s counsel has not claimed attorney-client privilege or work product protection for any material, and indeed could not do so. Nor has ACFS identified any recognized statutory or common law privilege to support its failure to produce documents or cited any case law supporting its position. ACFS has argued that the material underlying its public findings and recommendations is “confidential,” but Florida has offered to treat such information as confidential under this Court’s Case Management Plan, or take other steps necessary to address ACFS’s confidentiality concerns. Yet ACFS has still refused to produce any non-public materials. Moreover, to date, ACFS has also refused to provide any log of the documents it is refusing to produce.

ACFS’s most recent position seems to be described in its letter of July 29, 2015, where ACFS’s counsel has also argued that “the discovery sought is unreasonably cumulative or duplicative *or can be obtained from another source.*” It is true that the underlying data, inputs and associated model for the ACFS findings may be available from other sources, and we have

been pursuing that information from such sources. Staff from the Georgia Water Resources Institute—part of the Georgia Institute of Technology School of Civil and Environmental Engineering (“GWRI”)—assimilated the underlying data inputs and ran modeling (using a GWRI model) on a range of topics relevant to this litigation. GWRI—which is represented by the Georgia State Attorney General’s Office—has agreed to produce responsive materials relating to this effort, and has begun to do so. In addition, Florida is seeking to obtain additional ACFS material from contractors who also assisted with ACFS’s work—including Atkins Global and Black & Veatch (see discussion below). Florida is inviting counsel for ACFS to a final “meet and confer” teleconference next week, and may seek this Court’s assistance following that meeting.

C. Non-Party Depositions

Since the August 7 Progress Report, Florida has served subpoenas seeking testimony and documents¹ from ten individuals and organizations:

1. Dr. Martin Kistenmacher: Dr. Martin Kistenmacher is a Research Engineer at the Georgia Institute of Technology School of Civil and Environmental Engineering and is Assistant Director of GWRI. He specializes in climate/hydrologic/river basin modeling, served as a consultant to ACFS, and 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, Georgia Water Resources Institute, Georgia Institute of Technology, Atlanta, Georgia, 211p.

2. Dr. Stephen Golladay: Dr. Stephen W. Golladay is currently an Associate Scientist at the Joseph W. Jones Ecological Research Center (“Jones Center”) in Newton,

¹ As provided in Section 6.1 of Appendix C of the Case Management Plan, the subpoenas seek documents not previously produced, and were served at least 20 days prior to the return date.

Georgia. The Jones Center, and its scientists and staff, have taken a primary role in researching and publishing on the ecology and water resources in the ACF Basin. *See, e.g.,* <http://www.jonesctr.org/research/>. Dr. Golladay has been publishing, presenting, and speaking on water management in the ACF Basin, in particular the Flint River Basin (“FRB”), for over two decades. Among other things, Dr. Golladay studies: (i) the impact of human land use, including agricultural uses that rely heavily on irrigation, on water quantity and quality in the FRB; and (ii) the impact of changes in hydrology on the ecology of streams and wetlands (including rare and endangered freshwater mussel species) in the FRB. In addition to his work for the Jones Center, Dr. Golladay has served as a technical advisor to the Georgia Environmental Protection Division, the Georgia Department of Natural Resources, and the Southwestern Florida Water Management District.

3. Dr. Philip Roberts: Dr. Roberts is a professor in environmental fluid mechanics and water resources at the Georgia Institute of Technology’s School of Civil and Environmental Engineering. Dr. Roberts has been involved in a long-term project, so far resulting in at least two reports, that discuss the effects of upstream water withdrawals on the salinity and ecology of Apalachicola Bay, based on a hydrodynamic model set up and calibrated by him and his co-author.

4. David “Woody” Hicks: David W. Hicks is a former hydrologist at the U.S. Geological Survey and the Jones Center. For over 20 years, Mr. Hicks has been publishing, presenting, and speaking on water management issues in the ACF Basin. Mr. Hicks has also been active in multiple groups that have worked on water management issues in the ACF. He is currently a member of the ACFS Executive Committee. Mr. Hicks’s research focus has included, among other things, (i) the hydrology of the FRB, including the impacts of agricultural

water use on water quantity and quality in the FRB; and (ii) the impact of changes in hydrology on the ecology of streams and wetlands in the FRB.

5. Dr. Judith Curry: Dr. Curry is a professor at the School of Earth and Atmospheric Sciences at the Georgia Institute of Technology. Dr. Curry has researched climate change and drought, and she has commented on the Atlanta region's water consumption and the impacts of its population growth.

6. Chattahoochee Riverkeeper (30(b)(6) deposition): The Chattahoochee Riverkeeper is a non-profit organization located in Georgia "dedicated to protecting and preserving the Chattahoochee River, its lakes and tributaries for the people, fish and wildlife that depend upon them." Chattahoochee Riverkeeper, "About Us," <http://chattahoochee.org/about-us/> (2015). As an organization working to protect the natural environment in the Chattahoochee River Basin, the Chattahoochee Riverkeeper's efforts are relevant to this case in a number of areas, including the organization's work for nearly 20 years on issues surrounding the ACF Basin interstate water dispute, and recently as a member of ACFS. Chattahoochee Riverkeeper, "CRK's Role," <http://chattahoochee.org/our-work/tri-state-water-conflict/crks-role/> (2015).

7. Flint Riverkeeper (30(b)(6) deposition): The Flint Riverkeeper is a non-profit organization in Georgia established "to address the various issues that are threatening the Flint River and its tributaries in the face of unprecedented growth in Atlanta and outlying areas." Flint Riverkeeper, "About Flint Riverkeeper," <http://www.flintriverkeeper.org/about-flint-riverkeeper> (May 14, 2014). As an environmental organization working to protect the FRB's natural environment, the Flint Riverkeeper's knowledge of this environment, as well as its work with ACFS, is directly relevant to this case.

8. Boston Consulting Group (30(b)(6) deposition): Boston Consulting Group is a global management consulting firm. In 2009, Boston Consulting Group assisted the Georgia Water Contingency Planning Task Force convened by Georgia Governor Sonny Perdue in analyzing Georgia's options for water conservation, costs associated with developing alternative sources of water resources, and other related issues.

9. Black & Veatch (30(b)(6) deposition): Black & Veatch is a consulting firm selected to conduct the modeling required for ACFS's Sustainable Water Management Plan Project. Among other things, Black & Veatch delivered a water demands report documenting how the upstream waters of the ACF Basin are currently being consumed, and it assisted in the development of water management alternatives that were part of ACFS's Sustainable Water Management Plan proposal.

10. Atkins Global (30(b)(6) deposition): Atkins Global is an international consulting company that was hired by ACFS to analyze the flow needs of the various species in the ACF river system, including fish and mussels. Atkins' final report on environmental flows purportedly analyzes the effect of various flow levels on aquatic and floodplain habitats; analyzes the effects rainfall, human consumption, and other factors on river flows; compares flow benchmarks; and discusses land use in the basin.

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. Florida hopes to complete most, if not all, of these depositions prior to the next Progress Report, but notes that this will depend upon the availability of witnesses and the schedules of counsel for witnesses and the States.

III. UNRESOLVED DISPUTES.

There are no unresolved disputes with third parties other than the dispute with ACF Stakeholders 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 written discovery and 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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the State of Florida's September 4, 2015 Progress Report has been served on this 4th day of September 2015, in the manner specified below:

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