

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 NOVEMBER 6, 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 (the “CMP”), as subsequently amended.

I. GENERAL STATUS OF THE MATTER.

Florida is nearly finished producing the millions of pages of documents Georgia has requested and expects to meet the November 10 deadline for the close of written discovery in all other respects. To date, Florida has taken the first eight of its anticipated depositions and is targeting specific testimony and particular documents necessary to make its case at trial. Set forth below is an update on anticipated activities over the upcoming month.

Although the parties continue to make some progress on a number of issues in meet-and-confer conferences conducted pursuant to the CMP, Florida wishes to alert the Court to certain

specific issues that may soon mature into disputes requiring judicial assistance. For example, Florida does not yet have specific documents from Georgia Universities (and certain third parties) key to central issues in this case. We cannot explain the causes of these delays in production, but note that if such delays continue, Florida's ability to conduct discovery expeditiously and prepare for trial may be impacted.

II. DISCOVERY EFFORTS.

A. Interrogatories and Requests for Admissions

On October 26, 2015 Florida served its objections to Georgia's Third Set of Interrogatories and its Objections to Georgia's Requests for Admission. Florida is working diligently to prepare responses to Georgia's most recent round of written discovery—36 new interrogatories and 336 requests for admission, which are due on November 9.

B. Production of Responsive Documents

Overall, Florida and Florida Universities (which are represented by their own counsel) have produced approximately 4.6 million pages of documents in response to Georgia's document requests. At this stage, Florida and Florida Universities have produced the vast majority of documents they intend to produce. This total now exceeds the total produced by Georgia and Georgia Universities by approximately 2 million pages.

Following the Court's recent hearing, Florida and Georgia discussed the documents remaining to produce before the November 10, 2015 deadline and reached an understanding regarding the remaining documents Florida will produce in the coming days. By contrast (as described below) Florida does not yet have a sense of which documents will be forthcoming from the Georgia Universities, and Florida is still awaiting clarity on whether certain key materials will be forthcoming.

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.

Touhy Requests to Federal Agencies

The States are continuing to cooperate with the agencies and departments upon which they have served *Touhy* requests. Since the October 2, 2015 status report, Florida has followed up with counsel for the State Department regarding its response to Florida's July 8, 2015 *Touhy* request for production of documents. Florida has also served four *Touhy* requests for testimony from four employees of U.S. Agencies:

1. Donald Imm: Mr. Imm is an ecologist at the U.S. Fish & Wildlife Service familiar with the specific negative impacts of reduced ACF flows on ecology in the Apalachicola River and Bay. In addition to knowledge regarding this ecology, Mr. Imm has been involved with specific and serious objections recently raised by USFWS to actions and proposed actions by the U.S. Army Corps of Engineers. In addition, Mr. Imm's deposition should be relevant to establishing how, notwithstanding prior assumptions regarding Army Corps operating rules, unanticipated record low ACF flows over extended periods since 2005 have caused substantial harm to endangered species in Florida.

2. Jerry Ziewitz: Mr. Ziewitz is a biologist at the U.S. Fish & Wildlife Service who has worked on ACF issues for decades. Mr. Ziewitz has specialized knowledge regarding USFWS's efforts to advise the States of Georgia, Florida and Alabama on water allocation formulas and instream flow guidelines optimal for protecting wildlife habitats and fisheries in the ACF Basin. Mr. Ziewitz also has specialized knowledge regarding the hydrology of the ACF Basin and the habitats, health, and status of the ACF Basin's wildlife.

3. Lynn Torak: Mr. Torak is a hydrologist at the U.S. Geological Survey. He has performed and participated in certain computer modeling and other analysis of the groundwater and surface water hydrology of the ACF Basin. Mr. Torak has specialized knowledge regarding certain assumptions regarding interactions between ACF groundwater and ACF streamflows and regarding anthropogenic effects on these water resources. Mr. Torak also has specialized knowledge of the State of Georgia's efforts to develop a groundwater-flow model to account for stream-aquifer interaction and streamflow reduction caused by agricultural pumping, and was a technical consultant to the States during the Comprehensive Study and ACF Compact.

4. Jacob LaFontaine: Mr. LaFontaine is a hydrologist at the U.S. Geological Survey. He has participated in computer modeling of water resources in the ACF Basin, and has specialized knowledge of the application of the Precipitation-Runoff Modeling System (PRMS) to the ACF Basin, simulations of hydrologic response to anthropogenic and landscape change in the ACF Basin, and the interactions between ACF groundwater and ACF streamflows. He also has specialized knowledge of the State of Georgia's efforts to develop a groundwater-flow model to account for stream-aquifer interaction and streamflow reduction caused by agricultural pumping.

Florida has also discussed with counsel for the United States (but not yet formally requested) a deposition of a representative of the U.S. Department of Commerce and/or its component agencies regarding its analysis and determination that Florida qualified for a federal disaster declaration because low river flows impacted the health of the Apalachicola Bay oyster fishery.

Florida will continue to meet-and-confer with the federal agencies regarding its *Touhy* requests to facilitate the agencies' response to them.

Non-Party Subpoenas Seeking Production of Documents

Florida continues to work with subpoenaed third parties to facilitate production of documents and resolve outstanding issues. With the exception of a few entities, noted below, these efforts have been successful. Nearly all subpoenaed entities have made at least a partial production of documents, yielding approximately 600,000 pages of documents produced to date.

As noted during the Nov. 2 hearing on the Parties' extension request, however, Florida is still waiting for productions from several important third parties. These include:

1. Atkins and Black & Veatch (former technical advisors to the ACF Stakeholders or ACFS). Late last month, Florida reached a compromise with the ACFS which should soon lead to production by Atkins of data, analysis, drafts, emails and other related documentation regarding Georgia water consumption, ACF flows, and their impacts. Certain ACFS-related material was recently provided by Black & Veatch, but this production does not appear to be

complete. We are currently evaluating these issues and will follow-up with both Atkins and Black & Veatch for any outstanding requested materials.

2. Georgia Institute of Technology/Georgia Water Resources Institute (“GWRI”).

As of the time of filing this Status Report, Georgia counsel (who also represents Georgia Universities in this matter) has yet to comply with Case Management Order No. 12 and produce Dr. Martin Kistenmacher’s email.¹ To put the delay in context, Florida asked its e-discovery vendor to provide estimates for the amount of time required to perform the type of tasks associated with the collection and production of an email folder associated with a particular user. The e-discovery vendor confirmed Florida’s beliefs regarding the time associated with such a simple task: the work of collecting a discrete folder of email from Dr. Kistenmacher’s computer could have been done in minutes by Georgia Tech or GWRI IT staff, or within a day by an outside consultant. The burdens associated with processing and review of this folder of email are also minimal: processing would take a day at a cost of \$170-200/GB, and Dr. Kistenmacher confirmed at his deposition that it is a discrete project-related folder. Further, Dr. Kistenmacher testified that none of the underlying technical work was performed under the direction of any attorney; thus, there should be no meaningful delay associated with privileged review. Florida understands and is sympathetic to the press of many tasks in this case, but the delay (which is now three weeks since this Court ordered production of the material) has impacted Florida’s progress in conducting discovery.

Notably, similar problems appear to be delaying production of key emails for Georgia Tech professor Dr. Aris Georgakakos. Dr. Georgakakos is a hydrologist who has performed specific analyses on the hydrology in the ACF Basin, including on specific issues at the core of

¹ GWRI is represented by the Georgia Attorney General’s Office and outside counsel for Georgia.

this case. Not only was he integrally involved in the ACFS process and its public reports, he has also worked with Georgia regulatory agencies on a regular basis prior to the filing of this case. Further—and crucially, in light of upcoming discovery deadlines—Florida expects that Dr. Georgakakos' documents will contradict, qualify, or rebut key elements of Georgia's contentions in this case.

On October 20, Florida wrote to Georgia to narrow its request for Dr. Georgakakos's email to a small number of very specific issues key to Florida's trial strategy in this case. Florida offered to formulate search terms to reduce any burden that collection and review of these emails might pose. Such specifically targeted requests should not require any significant investment of time or resources. Georgia has very recently responded to Florida's letter, but has offered no assurance that it will actually produce these documents. Florida will shortly further propose narrow and specific search terms for Dr. Georgakakos to facilitate targeted production of relevant material. Further delay in production of this material threatens to delay Florida's progress in this case in multiple important respects. The Court already rejected Georgia's prior arguments for withholding similar emails associated with Dr. Kistenmacher, so it is difficult to understand how Georgia can object to responding to these targeted requests.

3. Albany State University/Georgia Water Planning and Policy Center. Florida subpoenaed Albany State University in July and has received several small productions of documents to date. It also subpoenaed Albany State employee Mark Masters for documents and testimony in September. Mr. 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, and had a key role in the

development of the groundwater modeling of the Lower Flint Basin that is used by the Georgia Environmental Protection Division. The States are negotiating the scope of production (including email) that will be made on Mr. Masters' behalf. Florida is concerned that Mr. Masters' emails may not be produced, again causing delays.

4. Dr. James Hook (Professor Emeritus, University of Georgia). James Hook is a retired professor at UGA who has extensively studied agricultural irrigation practices in the Flint River Basin, their impact on groundwater, and on water conservation and sustainable irrigation practices. He also contributed to several important analyses of agricultural water use in Georgia. *See, e.g., Agricultural Water Demand: Georgia's Major and Minor Crops, 2011 through 2050* (see <http://www.nespal.org/sirp/waterinfo/state/awd/agwaterdemand.htm>); *Water Use Data Inventory Report – Surface Water Availability Modeling and Technical Analysis for Statewide Water Management Plan*, Georgia Department of Natural Resources at FN 11, p. 61, March 10, 2010 (available at http://giec.org/documents/Final_WUDI_Report_2010-03-10.pdf); and *Flint River Basin Regional Water Development and Conservation Plan: Final Report, March 20, 2006*. Dr. Hook was served a subpoena duces tecum on October 8, and the States are negotiating the scope of production (including email) that will be made on his behalf.

5. Dr. Golladay and Mr. Hicks: Dr. Golladay and Mr. Hicks have extensive first-hand experience with the hydrology and ecology of the ACF River Basin, in particular the Lower Flint River Basin. They have conducted field surveys, and otherwise recorded the ecological and other impacts of reduced flows, and published studies demonstrating how Georgia's consumptive use of ground and surface water (principally for irrigation purposes) has materially impacted and altered the hydrology and ecology of the Lower Flint River Basin, including Spring Creek and Ichawaynochaway Creek. The same Georgia consumptive water uses are also impacting the

Apalachicola, further downstream. Georgia now pumps groundwater to augment the stream flow of certain Georgia creeks during specific dry years to attempt to offset the impacts of Georgia irrigation during those years, but refuses to take action to reduce impacts in the Apalachicola. We expect that documents will be provided by Dr. Golladay and Mr. Hicks this week, and will confer further with their counsel regarding their depositions.

Florida is continuing to work with counsel for these individuals and entities to facilitate production, and will apprise the Special Master promptly of any concerns that cannot be resolved by the parties.

D. Depositions

To date, Florida has scheduled numerous previously-noticed depositions, and has taken eight:

1. Martin Kistenmacher on Sept. 30;²
2. Philip Roberts on Oct. 16;
3. Judith Curry on Oct. 22;
4. Jeff Regan on Oct. 23;
5. Flint Riverkeeper on Oct. 28;
6. Menghong Wen on Oct. 30;
7. Chattahoochee Riverkeeper on Nov. 3; and
8. Cliff Lewis on Nov. 4.

As noted in the Nov. 2 hearing, Georgia has not begun taking depositions.

² This deposition has been left open pending production of Dr. Kistenmacher's email, as required by Case Management Order No. 12 (Oct. 16, 2015). Georgia has yet to make a production in response to this order.

Since the October 2, 2015 Progress Report, Florida has served deposition notices and subpoenas seeking testimony from five additional individuals and organizations.

As provided in Section 3 of Appendix C of the CMP, 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 anticipates scheduling a large number of additional depositions over the next several weeks. With respect to the recent extension, Florida appreciates the Special Master's understanding in granting the extension—which Florida believes will aid its trial preparation and improve the quality of the record and issues presented at trial—and will ensure that it completes all noticed depositions by February 29, 2016, as required by Case Management Order No. 13 (Nov. 2, 2015).

III. UNRESOLVED DISPUTES.

There are no unresolved disputes under the terms of the Case Management Plan. While certain issues may ultimately require judicial intervention, a host of other issues have been and should continue to be resolved through the meet-and-confer process. The States continue to meet-and-confer on a frequent basis to resolve such issues.

Finally, Florida wishes to express its concern about counsel for Georgia's use of speaking objections in defending certain depositions. In multiple depositions, counsel for Georgia have made numerous speaking objections that could be construed as affecting witness testimony. Following the objections certain witnesses have resisted adopting their own prior written words or the plain meaning of those words. Speaking objections can impact Florida's ability to obtain a clear account of important events and its ability to complete the depositions within our time estimates. Florida has raised this concern with counsel for Georgia but has not yet received an assurance that the practice will stop.

IV. 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 NOVEMBER 6, 2015 PROGRESS REPORT has been served on this 6th day of November 2015, in the manner specified below:

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