

**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

**STATUS REPORT OF THE STATE OF GEORGIA
FEBRUARY 5, 2016**

This report constitutes the thirteenth monthly status report filed by the State of Georgia pursuant to Section 4 of the Case Management Plan.

I. GENERAL STATUS

Since the last status report, Georgia has been working to complete fact discovery and to prepare expert reports. To that end, Georgia took and defended over twenty depositions in January. Georgia also continues to cooperate with Florida to facilitate discovery. Specifically, Georgia provided comments to the U.S. Army Corps of Engineers concerning the Water Control Manual recently published by the Army Corps and has timely supplemented its written discovery to provide Florida with Georgia's comments. Georgia remains on track to complete fact discovery on February 29, 2016, consistent with the Case Management Order.

The parties have made substantial progress toward completing fact discovery and have been able to work through numerous issues through the meet and confer process. That said, Georgia has encountered difficulties over the past month with Florida's written discovery responses and production of documents. For example, and as discussed in more detail below, Florida's recent supplemental—and untimely—responses to Georgia's Interrogatories sought to change the scope of Florida's alleged harm, long after written discovery closed and after a 30(b)(6) deposition of a Florida witness on the topic of alleged injury had already been conducted. In addition, Florida has failed to supplement deficiencies in its responses to Georgia's Requests for Admission or even respond to Georgia's January 8, 2016 letter on this topic. Although it intends to continue to meet and confer with Florida about these issues, Georgia feels it is important—given the impending close of fact discovery—to bring them to the Special Master's attention.

II. ONGOING DISCOVERY ISSUES

A. Florida's Late Supplementation of Interrogatory Responses

Since the beginning of this case, Georgia has asked Florida to explain, with supporting facts, the alleged harms that form the basis of Florida's suit against Georgia. Florida, however, has failed repeatedly to provide full information about this critical topic. Because Georgia needs this information to direct its fact and expert discovery, Florida's failure to provide this information has prejudiced Georgia as it works to develop its case and its defenses. A primary example is that Georgia served Interrogatory No. 7 over a year ago, asking Florida to “[i]dentify and describe in detail each and every injury that Florida alleges is caused, at least in part, by Georgia's allegedly inequitable water use in the ACF Basin.” This information is uniquely in Florida's possession. But instead of responding with a complete answer, Florida first refused to respond at all and has since disclosed its response in piecemeal fashion over a period of months,

supplementing its answer now four times—even though Florida has presumably known these facts from the outset of this case.

The timing of Florida’s supplemental responses is prejudicial to Georgia. First, Florida recently asserted a number of new, previously undisclosed forms of alleged harm, including alleged “harmful algae blooms,” “human health hazards,” and harm to “cross-border populations.” Florida has taken the position that it previously disclosed “harmful algae blooms” (though not the other new information), but even there, the only reference to “harmful algae blooms” came as a single BATES reference in a list of documents with no explanation of how or why that constituted a harm Florida was pursuing in this case. The document itself contains only raw data of algae cell concentrations at various times. Prior to its untimely supplement, Florida never explained how this raw data indicated an injury and never suggested that algae blooms were linked to Georgia’s water use. Florida had an obligation to disclose these alleged harms earlier in discovery so that Georgia could adequately investigate and prepare to respond to these claims.

Second, the timing of Florida’s supplemental responses is particularly prejudicial with regard to subject matters that have already been the topic of 30(b)(6) depositions because it has deprived Georgia of the opportunity to depose Florida’s designated witnesses about these new allegations. This is especially troubling with regard to Mr. Drew Bartlett, who among other things was designated to testify about Florida’s “ecosystem services.” Just *four days after* his deposition, Florida supplemented its answer to an Interrogatory about ecosystem services, augmenting its previous allegations and identifying for the first time additional harms related to those services. Because Florida’s untimely changes to its alleged harm have deprived Georgia of the opportunity to depose Mr. Bartlett on this information, Georgia has asked Florida to disavow

reliance on these untimely allegations, or—at the very least—to re-open the relevant 30(b)(6) deposition. Florida has not yet provided a response.

B. Florida’s Inadequate Responses to Requests for Admission

As explained in prior status reports, Georgia’s Requests for Admission were designed to narrow the issues in dispute—including issues related to Florida’s purported harms. But when Florida provided its responses, more than half of those responses were deficient. Most notably, Florida refused to admit or deny facts that it had already admitted in official records and statements outside the litigation context, or that were otherwise supported by clear evidence from independent sources, without any explanation for its refusal to admit all or part of the RFA. Georgia originally identified these deficiencies in a letter to Florida dated November 24, 2015. Florida supplemented some of these responses on December 30, 2015 and again on January 4, 2016. But after further review, Georgia determined that many of Florida’s responses were still inadequate. For instance, Florida continues to refuse to admit or deny basic facts within its knowledge or related to its own statutes, regulations, and executive orders. Georgia outlined these concerns in a January 8, 2016 letter and requested that Florida supplement its responses by January 15, 2016. To date, Georgia has not received any response from Florida.

C. Florida’s Supplemental Productions for Upcoming Deponents

On Friday, February 5, 2016, Florida produced additional documents from custodians Mr. Sherman Wilhelm, the former Director of Aquaculture at the Florida Department of Agriculture and Consumer Services (“FDACS”), and Mr. David Heil, a Section Leader at the Florida Fish and Wildlife Conservation Commission’s Division of Marine Fisheries Management (“FWC”). The documents from Mr. Wilhelm were produced after Georgia raised concerns about the completeness of his production with Florida on January 20, 2016. On January 31, Florida

explained that an error during the processing of Mr. Wilhelm's documents had led to an incomplete production and agreed to supplement.

Florida's February 5, 2016 production also includes 1450 previously unproduced documents from Mr. David Heil. Florida has attributed this production to another processing error, though it is unclear why this was just recently discovered. Because Georgia has already completed the depositions of Mr. Jim Estes and Mr. Nick Wiley, both of whom regularly communicated with Mr. Heil about topics relevant to this case, and used a number of documents from Mr. Heil as exhibits in those depositions, Georgia must now evaluate whether it needs to re-open those or other depositions in light of these newly produced documents.

D. Depositions Relating to Adam Putnam's Letter

Georgia is scheduled to take the deposition of Mark Berrigan on February 18, 2016. As part of that deposition, Georgia intends to ask Mr. Berrigan about his role in preparing the September 5, 2012 letter from Commissioner Adam Putnam to Governor Rick Scott. In addition, Georgia has scheduled a deposition of David Heil, who similarly was involved in preparation of the materials Mr. Putnam submitted to Governor Scott. Based on documents produced in the case, Georgia believes these two witnesses are likely to have the most relevant information, but in light of representations made by Florida, Georgia is also evaluating whether to conduct depositions of Ms. Leslie Palmer and Mr. Mark Joyner, who Florida states had minor involvement in drafting Mr. Putnam's letter. Before proceeding, however, Georgia is investigating document-production issues relating to Ms. Palmer and Mr. Joyner. In particular, Florida produced no documents for Mr. Joyner in the years leading up to Mr. Joyner's work on the Putnam letter, and his document production otherwise appears to be incomplete.

E. Georgia's Production of Email

On January 14, 2016, the Special Master ruled that Florida was not entitled to 30(b)(6) testimony regarding Georgia's email retention policies as it related to three former directors of Georgia's Environmental Protection Division. The following week, on January 21, 2016, Florida sent a letter to Georgia raising similar claims regarding the email productions for over a dozen other custodians. Georgia disagrees with Florida's belated assertions, and believes that these efforts distract from the merits of this dispute. Nevertheless, Georgia made a good-faith effort to answer Florida's e-discovery questions. In a January 26, 2016 letter to Florida, Georgia explained (among other things) its process for collecting and producing emails for agreed-upon custodians; confirmed that Georgia implemented the Electronically Stored Information protocol agreed on by the parties; confirmed that Georgia produced emails for all custodians for whom it agreed to produce emails; and noted that Georgia has produced over 450,000 pages of emails and attachments.

Yesterday, Florida sent Georgia yet another letter raising questions regarding email production. This letter was received 9 days after Georgia had responded to Florida's previous letter, and the very day before the parties' respective status reports were due. Georgia is reviewing Florida's letter and will provide a response. However, Georgia must emphasize that these repeated efforts to turn this case into an "e-discovery dispute" only serve to distract the parties from the merits of this case. Georgia is committed to cooperating with Florida on discovery issues, but untimely and overbroad attacks on document collection and production unnecessarily divert resources in a month where the parties already have over 40 days of depositions scheduled. That is all the more so in this case, where Florida has had the majority of documents from each of these custodians since August of 2015, well before the written discovery

period closed on November 29, 2015. As the Special Master noted with respect to Florida's prior attempts to raise similar issues, these matters are untimely because Florida has raised them with just "weeks remain[ing] before the close of fact discovery and well after the parties' deadline for production of documents." Case Management Order No. 14 at p. 3 (Dkt. # 353, January 14, 2016).

F. Georgia's Privilege Log

Florida recently challenged an entry on Georgia's revised privilege log, which noted that Georgia did not produce certain documents that were privileged as attorney-client communication and/or work product between certain members of the ACF Stakeholders ("ACFS") group, and an attorney for that group. As Georgia has explained several times in the past two weeks, Georgia inadvertently collected these documents when it voluntarily gathered ACFS documents in response to Florida's subpoena for a particular third-party custodian. Georgia is not itself claiming privilege over those materials. Rather, counsel for ACFS asserted privilege over the documents and demanded a clawback of the inadvertently collected documents pursuant to the Federal Rules of Civil Procedure. The documents were noted in Georgia's privilege log for the sake of thoroughness and transparency. Georgia has advised Florida that if Florida believes it is entitled to those documents, it should raise the matter with counsel for ACFS.

III. STATUS OF DISCOVERY

A. Deposition Discovery

The parties have taken or are scheduled to take over 40 days of depositions from 36 witnesses in February. To date, Georgia has taken 21 depositions and Florida has taken 18 depositions. In this final month of fact discovery, Georgia is scheduled to take 17 depositions (18 days) and Florida is scheduled to take 16 depositions (23 days). For many Georgia

witnesses, Florida has requested multi-day depositions, including scheduling two-, three-, and even four-day depositions where a witness is also testifying about 30(b)(6) topics. In an effort to facilitate discovery, Georgia has made its witnesses available for the days requested, but Georgia nonetheless hopes that Florida makes efficient use of its time and that some of the deposition days currently scheduled will ultimately not be necessary.

B. Expert Depositions

As fact discovery draws to a close, Georgia continues to prepare its expert reports. Given the potentially large number of expert reports, the number of anticipated defensive reports, and the complexity of both affirmative and defensive reports, Georgia is concerned that the current expert deposition deadline of May 16, 2016 (provided for by Section 6.2 of the Case Management Plan as amended)—which is only 30 days after the exchange of defensive reports (provided for by Section 7.2 of the Case Management Plan as amended)—does not leave sufficient time to conduct expert depositions. Georgia will revisit the issue after initial expert reports are exchanged between the parties on February 29, 2016, and will seek guidance from the Special Master as needed.

C. The Parties' Submissions to the Army Corps

On September 30, 2015, the Army Corps of Engineers issued its Draft Environmental Impact Statement for the Update of the Water Control Manual for the ACF River Basin in Alabama, Florida, and Georgia, and a Water Supply Storage Assessment (“Draft EIS”). On January 30, 2016, Georgia submitted a letter to the Corps commenting on the Corps’ Draft EIS, including the Water Supply Storage Assessment Report attached in Volume III. Florida also submitted comments to the Army Corps on January 30, 2016. The parties have been in the process of exchanging discovery on those submissions. Significantly, Florida’s comments to the

Corps seek substantially the same relief that Florida is seeking against Georgia in this case and only confirm the indispensable role the Corps plays in regulating water flows in the ACF Basin.

IV. MEDIATION

The parties have held an initial conference with the agreed-upon mediator to discuss logistics, a mediation briefing schedule, and to arrange further calls with the mediator in advance of a formal mediation. Georgia will update the Special Master as mediation progresses.

Dated: February 5, 2016

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EXHIBIT A

**DOCUMENTS RECEIVED FROM THIRD PARTIES IN RESPONSE TO GEORGIA'S
SUBPOENAS AND PRODUCED TO FLORIDA**

Third Party	Bates Range	Date Produced
Alligator Point Water Resources District	APWRD_00001 to APWRD_01177	July 1, 2015
Apalachicola Bay Oyster Dealers Association	ABODA_0001 to ABODA_0081	Apr. 30, 2015
Apalachicola Chamber of Commerce	ACOC_0001 to ACOC_0195	Apr. 30, 2015
Apalachicola Riverkeeper	AR_0001 to AR_0036	Apr. 30, 2015
	AR_0000037 to AR_0116946	July 27, 2015
	AR_0116947 to AR_0221940	Sept. 28, 2015
Bay County	BAY_CO.(FL)_00001 to BAY_CO.(FL)_00009	July 1, 2015
Calhoun County	CALHOUN_CO_0001 to CALHOUN_CO_0049	Apr. 30, 2015
City of Apalachicola	City_of_Apalachicola(FL)_0001 to City_of_Apalachicola(FL)_0617	Apr. 30, 2015
City of Blountstown	BLOUNTSTOWN(FL)_00001 to BLOUNTSTOWN(FL)_01557	May 29, 2015
City of Bristol	City_of_Bristol(FL)_0000001 to City_of_Bristol(FL)_0000998	July 27, 2015
City of Carrabelle	City_of_Carrabelle(FL)_0001 to City_of_Carrabelle(FL)_0020	Apr. 30, 2015
	City_of_Carrabelle(FL)_0021 to City_of_Carrabelle(FL)_1595	July 1, 2015
City of Chattahoochee	City_of_Chattahoochee(FL)_00001 to City_of_Chattahoochee(FL)_00136	May 29, 2015
City of Cottondale	COTTONDALE(FL)_00001 to COTTONDALE(FL)_00227	May 29, 2015
City of Marianna	City_of_Marianna(FL)_00001 to City_of_Marianna(FL)_00217	July 1, 2015
City of Port St. Joe	Port_St_Joe_0000001 to Port_St_Joe_0000486	July 27, 2015
City of Wewahitchka	Wewahitchka(FL)_0000001 to Wewahitchka(FL)_0003099	July 27, 2015
Florida State University	FL_State_Univ_00001 to FL_State_Univ_00050	May 29, 2015
	FL_State_Univ_00051 to FL_State_Univ_01377	Sept. 28, 2015
Florida Sea Grant	FL_SEA-GRANT_00001 to FL_SEA-GRANT_37355	Apr. 30, 2015
	FL_SEA-GRANT_37356 to FL_SEA-GRANT_56648	May 29, 2015
	FL_SEA-GRANT_56649 to FL_SEA-GRANT_56762	Sept. 28, 2015
Franklin County	FRANKLIN_CO_0001 to FRANKLIN_CO_5512	Apr. 30, 2015
Franklin Co. Seafood Workers Association	FCSWA_00001 to FCSWA_00005	May 29, 2015
	FCSWA_00006 to FCSWA_00017	July 1, 2015

Third Party	Bates Range	Date Produced
Gadsden County	Gadsden_Co_0001 to Gadsden_Co_0015	Apr. 30, 2015
Gulf County	Gulf_County(FL)_00001 to Gulf_County(FL)_00194	Nov. 6, 2015
Jackson County	JACKSON_CO_0001 to JACKSON_CO_0062	Apr. 30, 2015
Jacob City	JACOB_CITY(FL)_00001 to JACOB_CITY(FL)_00309	July 1, 2015
Liberty County	Liberty_Co_0001 to Liberty_Co_0804	Apr. 30, 2015
Lighthouse Utility Co.	Lighthouse_Util_Co.(FL)_00001 to Lighthouse_Util_Co.(FL)_00581	July 1, 2015
Town of Alford	Town_of_Alford(FL)_00001 to Town_of_Alford(FL)_00480	May 29, 2015
Town of Altha	TOWN_OF_ALTHA(FL)_00001 to TOWN_OF_ALTHA(FL)_00163	July 1, 2015
Town of Greenwood	Town_of_Greenwood(FL)_0000001 to Town_of_Greenwood(FL)_0000019	July 27, 2015
Town of Malone	Town_of_Malone(FL)_00001 to Town_of_Malone(FL)_00181	May 29, 2015
	Town_of_Malone(FL)_00182 to Town_of_Malone(FL)_00284	July 27, 2015
Town of Sneads	SNEADS_0001 to SNEADS_0802	Apr. 30, 2015
St. James Island Utility Company Water Treatment Plant	SJIUC_0001 to SJIUC_0153	Apr. 30, 2015
University of Florida	UFL_0001 to UFL_0858	Apr 30, 2015
	UFL_00859 to UFL_01592	May 29, 2015
	UFL_00001593 to UFL_00846570	Sept. 22, 2015
	UFL_00846571 to UFL_01432034	Sept. 28, 2015
	UFL_01432035 to UFL_01432069	Nov. 6, 2015
	UFL_01432070 to UFL_01432134	Nov. 30, 2015
Washington County	Washington_Co.(FL)_00001 to Washington_Co.(FL)_00113	May 29, 2015
Water Management Services, Inc.	Water_Mgmt_Servs(FL)_0000001 to Water_Mgmt_Servs(FL)_0001071	July 27, 2015
	Water_Mgmt_Servs(FL)_0001072 to Water_Mgmt_Servs(FL)_0002133	Sept. 28, 2015

EXHIBIT B**GEORGIA'S PRODUCTIONS**

Production Number	Bates Range	Production Type	Date Produced
First	GA00000001 to GA00000008	7 Models (4.4 GB), 1 Database	Feb. 6, 2015
Second	GA00000009 to GA00013500	Electronically Stored Information	Feb. 10, 2015
Third	GA00013501 to GA00041516	Electronically Stored Information, 2 Databases	Mar. 6, 2015
Fourth	GA00041517	1 Database	Mar. 27, 2015
Fifth	GA00041518 to GA00041989	Electronically Stored Information	Apr. 2, 2015
Sixth	GA00041990 to GA00208007	9 Models (78 GB), Electronically Stored Information and Paper Records	Apr. 3, 2015
Seventh	GA00208008 to GA00208010	3 Models (4.3 GB)	Apr. 30, 2015
Eighth	GA00208011 to GA00338078	Electronically Stored Information and Paper Records	May 1, 2015
Ninth	GA00338079	1 Model (2.5 GB)	May 29, 2015
Tenth	GA00338080 to GA00596884	Electronically Stored Information and Paper Records	June 4, 2015
Eleventh	GA00596885 to GA00596886	1 Database & 1 Database Report	June 15, 2015
Twelfth	GA00596887 to GA00646491	Electronically Stored Information and Paper Records	June 22, 2015
Thirteenth	GA00646492 to GA00865658	Electronically Stored Information and Paper Records	July 7, 2015
Fourteenth	GA00865659 to GA00865664	6 Models (149 GB)	August 5, 2015
Fifteenth	GA00865665 to GA01382872	Electronically Stored Information and Paper Records	August 5, 2015
Sixteenth	GA01382873 to GA01827401	Electronically Stored Information and Paper Records	Aug. 26, 2015
Seventeenth	GA01827402 to GA02052890	Electronically Stored Information and Paper Records	Sept. 9, 2015
Eighteenth	GA02052891 to GA02126195	Electronically Stored Information and Paper Records	Oct. 1, 2015
Nineteenth	GA02126196 to GA02316611	Electronically Stored Information and Paper Records	Nov. 10, 2015
Twentieth	GA02316612 to GA02323632	Electronically Stored Information and Paper Records	Nov. 10, 2015

Production Number	Bates Range	Production Type	Date Produced
Twenty First	GA02323633 to GA02337223	Electronically Stored Information and Paper Records	Nov. 24, 2015
Twenty Second	GA02237224 to GA02337506	Electronically Stored Information and Paper Records	Dec. 4, 2015
Twenty Third	GA02337507 to GA02350116	Electronically Stored Information and Paper Records	Dec. 14, 2015
Twenty Fourth	GA02350117 to GA02416732	Electronically Stored Information and Paper Records	Dec. 23, 2015
Twenty Fifth	GA02416733 to GA02451829	Electronically Stored Information and Paper Records	Jan. 15, 2016
Twenty Sixth	GA02451830 to GA02473631	Electronically Stored Information and Paper Records	Feb. 1, 2016

CERTIFICATE OF SERVICE

This is to certify that the FEBRUARY 5, 2016 STATUS REPORT OF THE STATE OF GEORGIA has been served on this 5th day of February 2016, in the manner specified below:

<p><u>For State of Florida</u></p> <p><u>By U.S. Mail and Email</u></p> <p>Allen Winsor Solicitor General Counsel of Record Office of Florida Attorney General The Capital, PL-01 Tallahassee, FL 32399 T: 850-414-3300 allen.winsor@myfloridalegal.com</p>	<p><u>For United States of America</u></p> <p><u>By U.S. Mail and Email</u></p> <p>Donald J. Verrilli Solicitor General Counsel of Record Department of Justice 950 Pennsylvania Avenue, N.W. Washington, DC 20530 T: 202-514-7717 supremectbriefs@usdoj.gov</p>
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<p><u>For State of Georgia</u></p> <p><u>By Email Only</u></p> <p>Samuel S. Olens Nels Peterson Britt Grant Sarah H. Warren Seth P. Waxman Craig S. Primis K. Winn Allen georgiawaterteam@kirkland.com</p>	<p><i>/s/ Craig S. Primis</i></p> <hr/> <p>Craig S. Primis <i>Counsel of Record</i> KIRKLAND & ELLIS LLP 655 Fifteenth Street, NW Washington, DC 20005 T: 202-879-5000 craig.primis@kirkland.com</p>