

No. 142, Original

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In the  
Supreme Court of the United States

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STATE OF FLORIDA,

*Plaintiff,*

v.

STATE OF GEORGIA,

*Defendant.*

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Before the Special Master

Hon. Ralph I. Lancaster

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**THE STATE OF FLORIDA’S FEBRUARY 5, 2016 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 pleased to once again report meaningful progress. In recent status reports, both parties informed the Court that (1) a mediator had been selected by mutual agreement; and (2) that the confidential mediation process was beginning. Since that report, the parties have begun conferring with the mediator, and anticipate a series of teleconferences and scheduled meetings in the coming weeks and months. Based on activities to date, Florida believes that both parties are engaged in this confidential process in good faith. Florida and Georgia are in agreement that

the process is most likely to succeed if conducted confidentially consistent with this Court's Order in Case Management Order 8.

As set forth below, the parties are also currently engaged in an intense period of discovery depositions. At the same time, expert reports are being prepared for exchange on the upcoming deadline. In the midst of this activity, the parties are also seeking and providing specific targeted supplemental documentation regarding discrete issues discovered in connection with particular depositions. The combination of all these factors ensures that this month will be very busy. Since the last Progress Report, the States have both taken numerous depositions, have scheduled nearly all the depositions they intend to take, and expect to complete fact discovery by the February 29, 2016 deadline.

As the November 10, 2015 date for written discovery has passed, this Progress Report discusses only specific outstanding issues. To put those issues in context, it is helpful to describe generally how the parties have addressed electronic document discovery since early 2015. Since January 2015, the parties have had an agreement that full email account collections would be performed only for specifically identified current and former state employee custodians (and these accounts would be subject to an agreed-upon search term inquiry), and that a "reasonably diligent" search would be performed for documents and records of other state employees who could have relevant information. Florida identified 24 Georgia employees as priority email custodians, and Georgia in turn identified 23 Florida employees as priority email custodians.

Florida's production of documents was significantly aided by its prior creation, more than ten years ago, of a specific database within its Department of Environmental Protection to archive and preserve documentation specifically related to the multi-year dispute between Florida and Georgia. That database was populated with information by a large number of

relevant personnel, and grew to significant size by the time this case was filed. Florida produced a very large percentage of the non-privileged material in that database, including archived emails, to Georgia. In addition, counsel for Florida also met with and tasked current Florida employees in the Department of Environmental Protection and other relevant agencies to compile other information and documents not present in the specialized database. Further, Florida compiled and produced hundreds of thousands of emails that “hit” on the agreed upon search terms from the designated email custodians Georgia identified. Because Georgia’s requests for production were very broad (for example, “All documents relating to the effect of climatological conditions—including but not limited to precipitation levels, drought, storms, or natural disasters—on the hydrology of the ACF Basin”) and the search terms Georgia requested were even broader, (including any document with Apalachicola or Chattahoochee or Flint or ACF and “rain”) Florida ultimately produced over four million pages of documents and several hundred gigabytes of electronic files. For example, Florida produced approximately 516,000 emails for the designated priority custodians and other employees with responsive emails. (By contrast, Georgia produced approximately 54,000). Florida’s effort consumed very significant expense and exceeded the obligation under the Federal Rules of Civil Procedure to conduct a “reasonably diligent search.”

As discovery has matured and depositions have been taken, both Florida and Georgia have made determinations that current and former employees who were not initially identified as priority custodians are nevertheless important to the case, and need to be deposed. This is not surprising, since depositions and document review have led both parties to a better understanding of key facts and documents for each element of their cases. For its part, Florida has actively

worked to accommodate Georgia's requests for additional information and documents from these current and former employees. Further details regarding these efforts are detailed below.

At this stage, Florida believes that most remaining issues between the parties can be resolved amicably, and is not aware of any pending issue that requires immediate resolution by the Court. That said, pending discovery issues are itemized briefly below to ensure that the Court will be aware of these matters in the event an unresolvable controversy arises in the coming weeks.

## **II. POTENTIAL DISCOVERY ISSUES**

### **A. Missing Georgia Email Files**

In recent Progress Reports, Florida has raised concerns about Georgia's failure to preserve email accounts of multiple former Georgia EPD directors and other key personnel, *see* January 12, 2016 Progress Report at 7-8, as well as large gaps in email produced for Tim Cash, who Florida deposed on January 14, 2016. *See* January 12, 2016 Progress Report at 8. As Florida has prepared for and taken depositions over the past 30 days, additional gaps in priority email custodian productions have become apparent. It appears, for example, that significant periods of emails are missing for at least six of the priority Georgia email custodians Florida originally identified. For example, long-time Georgia employees with relevant knowledge dating back more than a decade apparently only have emails for a small portion of that period. Florida asked Georgia to explain these gaps, and believes that Georgia's explanation can be summarized as follows:

- Prior to 2014, the State of Georgia did not instruct employees of its Environmental Protection Division ("EPD") or other relevant State employees to preserve emails or documents pertinent to either ongoing or anticipated future litigation with Florida over the waters of the ACF basin.
- Georgia relied on individual EPD employees and other relevant State agency employees to determine, consistent with their own email "habits," whether or not to permanently

archive and preserve their email files on their own personal computers. If any employee chose not to permanently archive email files, the emails would not be retained on the individual's personal computer or by any central server, back-up tape or other technology.

- Emails were in fact not preserved during certain periods for Georgia EPD and other key employees.

In summary, Georgia has informed Florida that, to the best of its knowledge, many relevant communications among its employees have not been preserved – despite the fact that the States have been involved for decades in litigation involving ACF issues and Georgia has long anticipated that this Original Action would be filed. Florida has requested that Georgia take additional steps to attempt to find missing emails for the designated priority email custodians. To date, Georgia has declined to make any further effort to do so, but Florida has continued to request this assistance.

#### **B. Assertions of Privilege for Communications with ACFS**

On January 15, 2016 Georgia served an updated categorical privilege log.<sup>1</sup> This log contained privilege claims for certain “communications and/or documents prepared by or sent between counsel for the Apalachicola-Chattahoochee-Flint Stakeholders (“ACFS”) and members, employees, or retained and consulting experts of ACFS, reflecting, providing, or seeking legal advice” during two separate time periods (November 2010 to March 2014, and February 2015 to present). ACFS is an independent nonprofit organization that is not affiliated with Georgia; accordingly, it is not apparent to Florida how Georgia could have a privileged

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<sup>1</sup> Due to the burdens posed by the prospect of logging thousands of privileged documents on an individual basis, the States agreed to exchange categorical privilege logs—that is, to exchange logs with categories of privileged documents that document the basis for the privilege claim and the number of documents in each category that have been withheld.

relationship with ACFS.<sup>2</sup> *See, e.g., In re: Grand Jury Matter No. 91-01386*, 969 F.2d 995, 997 (11th Cir. 1992) (“The attorney-client privilege exists to protect confidential communications *between client and lawyer* made for the purpose of securing legal advice.”) (emphasis added). Nor is it clear to Florida how Georgia could withhold any attorney work product from ACFS, given that it is a non-party comprised of “[a] diverse group of individuals, corporations, and non-profit organizations throughout Alabama, Florida, and Georgia that represent all of the interests within the Apalachicola-Chattahoochee-Flint basin” that by definition does not share a common interest with Georgia.<sup>3</sup> *See, e.g., SR Int’l Bus. Ins. Co. Ltd. v. World Trade Ctr. Properties LLC*, 2002 WL 1334821 at \*4 (S.D.N.Y. June 19, 2002) (holding that common interest privilege does not exist between a party and a non-party that has not been shown to have “an identical legal interest”). For similar reasons, any work product protection that may have existed is waived by disclosure to Georgia.<sup>4</sup> *See, e.g., United States v. Deloitte LLP*, 610 F.3d 129, 141 (D.C. Cir. 2010) (explaining that “disclosing work product to a third party can waive protection if ‘such disclosure, under the circumstances, is inconsistent with the maintenance of secrecy from the disclosing party’s adversary.’ Under this standard, the voluntary disclosure of attorney work product to an adversary or a conduit to an adversary waives work-product protection for that material.”) (citation omitted).

Florida communicated its concerns to counsel for Georgia and received an explanation last night stating that the documents identified as “privileged” were actually collected

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<sup>2</sup> Counsel for Georgia has confirmed on the record that there is no relationship between the State of Georgia and ACFS. *See* Status Conference Tr. 15:18-11, Sept. 29, 2015. (“ . . .there is this group, the ACF Stakeholders, who have done their own study of the water in the ACF Basin. . . . Georgia doesn’t control it. It’s independent”).

<sup>3</sup> *See* <http://acfstakeholders.org>.

<sup>4</sup> On September 28, 2015 this Court denied the request of Mr. Pendergrast, counsel for ACFS, for a protective order against specific deposition questions and ordered Mr. Pendergrast to provide a log specifying each document and objection if he objected to any request to produce documents.

inadvertently from an employee of a Georgia university. Georgia suggested that the documents were then at some point returned to ACFS. It appears, however that the documents are still in the possession of an employee of Albany State, a Georgia university represented by counsel for Georgia in this matter. Florida is following up for further clarification.

### **III. STATUS OF OTHER DISCOVERY AMONG THE PARTIES**

#### **A. Interrogatories and Requests for Admissions**

Since the January 8, 2016 Progress Report, both states have served supplemental interrogatory responses—on January 15, 2016 Georgia served its Fifth Supplemental Response to Florida’s First Set of Interrogatories, and on January 25, 2016 Florida served its Fourth Supplemental Response to Georgia’s First Set of Interrogatories, its Second Supplemental Response to Georgia’s Second Set of Interrogatories. and its Second Supplemental Response to Georgia’s Third Set of Interrogatories.

Florida will continue to revise or supplement its responses to written discovery promptly in the final weeks of fact discovery.

#### **B. Production of Additional Responsive Documents at Georgia’s Request**

The States completed productions of responsive documents on November 10, 2015. Since the January 8, 2016 Progress Report, both States have made supplemental productions (including of third party materials) and Georgia has served an updated privilege log.

Georgia has recently made new document productions, including over 2,000 files and 21,000 pages of additional relevant material relating its estimates of upstream consumption of water in the Atlanta Metro area. In addition, representing Georgia Universities, Georgia counsel has produced new documentation from University of Georgia.

Florida has also received a number of productions from subpoenaed third parties—including Atkins, Black & Veatch, and multiple Georgia universities—and understands that production of documents from subpoenaed third parties is close to complete.<sup>5</sup>

As noted above, due to the ongoing discovery and depositions, both Florida and Georgia have determined that current and former employees who were not initially identified as priority custodians in this case are nevertheless important to the case, and need to be deposed. Florida has actively worked to accommodate Georgia's requests for additional documentation related to these additional deponents. For example, in November 2015, upon request, Florida searched for, collected and produced additional documents for an individual Georgia intended to depose, Mr. Shawn Hamilton (Georgia later determined it would not depose Mr. Hamilton). More recently, when Georgia alerted Florida that documents appears to be missing for an email custodian, Mr. Sherman Wilhelm, Florida promptly investigated, located additional files, apologized, and is preparing those additional documents for production this week and next week. Mr. Wilhelm's deposition has been rescheduled to ensure that Georgia has sufficient time to review the new material.

Similarly, after this Court issued Case Management Order 15 denying Georgia's request to compel Florida to produce Commissioner Adam Putnam for a deposition, Florida voluntarily offered to produce multiple witnesses who had a role, along with former Florida employee Mr. Mark Berrigan, in preparing the September 5, 2012 letter and report at issue. In addition, as Georgia has recently requested, Florida is working with each of these witnesses to produce specific additional documentation Georgia is now requesting in advance of the depositions.

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<sup>5</sup> Florida will continue to produce to Georgia third party documents it receives on a rolling basis.



As the parties work through technical issues that inevitably arise with document collections and productions on the scale involved in this case—millions of documents—Florida and Georgia are working cooperatively to resolve issues, including privilege clawbacks and document production vendor errors. Florida recently identified a vendor error that resulted in the discovery of approximately 1,400 additional documents for upcoming witness David Heil. Georgia is deposing Mr. Heil on February 24. Florida has notified Georgia and is producing these recently-identified documents. In connection with an upcoming deposition Florida also recently discovered certain compact discs created approximately a decade ago that appear to contain a mix of certain materials previously produced along with geospatial images, photographs and other media that may not yet have been produced. Florida has not yet fully reviewed all this material, but has nevertheless asked Georgia whether it desires that the discs be produced.

In short, Florida is working in good faith to respond to Georgia's requests and to ensure that all loose ends are tied up as the fact witness discovery period draws to a close.

### **C. Depositions**

The Parties continue to make progress in depositions, working collaboratively to conduct examinations of remaining fact witnesses and to address scheduling and privilege issues as they arise. By the end of the fact discovery period, both parties will likely near the deposition limits set by this Court on October 6, 2105.

## **IV. THIRD-PARTY DISCOVERY**

Most third party issues have been successfully resolved, and Florida hopes that no other issues remain. Florida is still discussing deposition scheduling with one third party witness originally subpoenaed multiple months ago. The importance of this particular witness's testimony has become even more apparent in depositions conducted during the past three days.

Florida has offered to limit the length of the deposition and to travel to any convenient location to conduct the witness's deposition. Florida is attempting to work out scheduling with this third party witness's counsel and hopes to resolve the issue soon.

**V. UNRESOLVED DISPUTES**

Florida is earnestly trying to find common ground with Georgia on the open issues identified herein. Florida hopes to make and report progress before the upcoming status conference, but is not certain it will be able to do so.

**V. SETTLEMENT EFFORTS**

As indicated, the States have agreed on a mediator and have had continued discussions regarding the schedule and format for mediation. Florida believes that mediation is most likely to succeed if counsel and the parties can maintain a constructive working relationship in this litigation. For the most part, recent communications have been constructive, and Florida hopes and expects that this tone can continue.

Respectfully submitted,

PAMELA JO BONDI  
ATTORNEY GENERAL, STATE OF  
FLORIDA

ALLEN WINSOR  
SOLICITOR GENERAL  
*Counsel of Record*  
JONATHAN GLOGAU  
SPECIAL COUNSEL  
OFFICE OF THE ATTORNEY GENERAL  
The Capitol, PL-01  
Tallahassee, FL 32399-1050  
Tel.: (850) 414-3300

CRAIG VARN  
SPECIAL COUNSEL  
FLORIDA DEPARTMENT OF  
ENVIRONMENTAL PROTECTION  
3900 Commonwealth Blvd. MS 35  
Tallahassee, FL 32399-3000  
Tel.: (850) 245-2295

                                  /s/                                    
CHRISTOPHER M. KISE  
JAMES A. MCKEE  
ADAM C. LOSEY  
FOLEY & LARDNER LLP  
106 East College Avenue  
Tallahassee, FL 32301  
Tel.: (850) 513-3367

GREGORY G. GARRE  
PHILLIP J. PERRY  
ABID R. QURESHI  
CLAUDIA M. O'BRIEN  
JOHN S. COOPER  
LATHAM & WATKINS LLP  
555 11th Street, NW  
Suite 1000  
Washington, DC 20004  
Tel.: (202) 637-2207

PAUL N. SINGARELLA  
LATHAM & WATKINS LLP  
650 Town Center Drive, 20th Floor  
Costa Mesa, CA 92626-1925  
Tel.: +1.714.540.1235

DONALD G. BLANKENAU  
THOMAS R. WILMOTH  
BLANKENAU WILMOTH JARECKE  
LLP  
1023 Lincoln Mall  
Suite 201  
Lincoln, NE 68508-2817  
Tel.: (402) 475-7080

*Attorneys for the State of Florida*

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**CERTIFICATE OF SERVICE**

This is to certify that the STATE OF FLORIDA'S FEBRUARY 5, 2016 PROGRESS REPORT have been served on this 5th day of February, 2016, in the manner specified below:

<b><u>For State of Florida</u></b>	<b><u>For United States of America</u></b>
<p><u>By Federal Express:</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 <a href="mailto:Allen.Winsor@myfloridalegal.com">Allen.Winsor@myfloridalegal.com</a></p>	<p><u>By Federal Express:</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 <a href="mailto:supremectbriefs@usdoj.gov">supremectbriefs@usdoj.gov</a></p>

<p><u>By Email Only:</u></p> <p>Donald G. Blankenau  Jonathon A. Glogau  Christopher M. Kise  Matthew Z. Leopold  Osvaldo Vazquez  Thomas R. Wilmoth  <a href="mailto:Floridawaterteam@foley.com">Floridawaterteam@foley.com</a></p>	<p><u>By Email Only:</u></p> <p>Michael T. Gray  <a href="mailto:Michael.Gray2@usdoj.gov">Michael.Gray2@usdoj.gov</a></p> <p>James DuBois  <a href="mailto:James.Dubois@usdoj.gov">James.Dubois@usdoj.gov</a></p>
<p><b><u>For State of Georgia</u></b></p> <p><u>By Federal Express:</u></p> <p>Craig S. Primis, P.C.  Counsel of Record  Kirkland &amp; Ellis LLP  655 15<sup>th</sup> Street, N.W.  Washington, D.C. 20005  T: 202-879-5000  <a href="mailto:Craig.primis@kirkland.com">Craig.primis@kirkland.com</a></p> <p><u>By Email Only:</u></p> <p>Samuel S. Olens  Nels Peterson  Britt Grant  Seth P. Waxman  K. Winn Allen  Sarah H. Warren  <a href="mailto:Georgiawaterteam@kirkland.com">Georgiawaterteam@kirkland.com</a></p>	
	<p>By: <u>/s/ John S. Cooper</u></p> <p>Philip J. Perry  Abid R. Qureshi  John S. Cooper  LATHAM &amp; WATKINS LLP  555 11th Street, NW  Suite 1000  Washington, DC 20004  Tel.: (202) 637-2200  <a href="mailto:john.cooper@lw.com">john.cooper@lw.com</a></p>

	<p>Paul N. Singarella LATHAM &amp; WATKINS LLP 650 Town Center Drive, 20th Floor Costa Mesa, CA 92626-1925 Tel.: +1.714.540.1235 <a href="mailto:paul.singarella@lw.com">paul.singarella@lw.com</a></p> <p><i>Attorneys for Plaintiff, State of Florida</i></p>
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