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 DECEMBER 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 (the "CMP"), as subsequently amended.

I. GENERAL STATUS OF THE MATTER.

Florida finished producing documents and responding to other written discovery in accordance with the November deadline. The parties continue to work constructively and have made important progress on a number of issues. For instance, nearly 40 depositions are currently scheduled or tentatively scheduled for December, January and February, and a number of other depositions have been noticed and should soon be scheduled. That said, certain issues regarding Georgia counsel's anticipated production of Georgia University emails are still unresolved. These and other issues described herein raise concerns that Florida may not receive the documentation it needs from Georgia or Georgia Universities in a timely manner, and that continuing discovery efforts could be impacted.

Florida is hopeful these issues can quickly be resolved and will continue to seek resolution of each of those issues through the required meet and confer process.

II. DISCOVERY EFFORTS.

A. Interrogatories and Requests for Admissions

On November 9, 2015 Florida served its responses to Georgia's Third Set of Interrogatories and to Georgia's 336 Requests for Admission (RFA's). The same day, Florida also served supplemental responses to certain interrogatories in Georgia's First and Second Sets of Interrogatories to Florida. Georgia likewise responded to Florida's Third Set of Interrogatories and Florida's Requests for Admission.

Although there is no ripe dispute for decision by the court at this time under the Case Management Plan regarding interrogatory responses or responses to requests for admissions, Florida has raised several issues with Georgia regarding Georgia's responses, and Georgia has agreed to supplement certain of its interrogatory responses. Georgia has likewise raised certain concerns regarding Florida's responses to Requests for Admission, and Florida has agreed to supplement certain of those responses.

B. Production of Responsive Documents

Florida has made a number of productions since the November 6, 2015 Progress Report, and completed productions of responsive documents on November 10.[1] The same day, Florida produced its privilege log to Georgia in a form negotiated by the Parties. Florida understands from Georgia counsel that it has finished producing responsive documents from the State but not

[1] Florida will continue to produce to Georgia third party documents it receives after November 10.

from Georgia Universities (which Georgia counsel also represent). At Florida's request, counsel for Georgia is following up to confirm all responsive telemetry data from the Georgia Soil and Water Conservation Commission has been produced. To date, Georgia has not produced a privilege log, but has indicated its intention to do so next week.

Two specific issues are worthy of identification here.

<u>*New Georgia Hydrology and Consumption Analyses*</u>: Comprehensive analyses of water uses in the ACF basin require expertise in hydrology, and often hydrologic modeling. For decades, Georgia has utilized an approach to hydrologic modeling employing certain flawed techniques and datasets that fail to fully account for the impact of Georgia's agricultural and other consumptive water uses on downstream flows (including a significantly flawed approach to "unimpaired flows"). Analysis by Georgia University professors (and Florida's depositions to date) have identified a number of these specific flaws. However, in their November 10, 2015 responses to written discovery, Georgia disclosed the following:

> Georgia admits that as of January 10, 2013, Mr. Turner [Director of Georgia's Environmental Protection Division] stated to the Army Corps of Engineers that Georgia's projected water supply needs that are dependent on withdrawals and special releases from Lake Lanier would meet or exceed 705 millions of gallons per day on an annual basis by 2040. ***Georgia is currently in the process of updating that projected water supply need in light of more recent data and information and in connection with the current process of responding to the Army Corps' proposed revisions to the Water Control Manual.*** Georgia will supplement its discovery responses as necessary in light of that updated information.[2]

Although many of Florida's requests for documents and interrogatories to date have been aimed at identifying Georgia's hydrologic analyses and underlying data, Florida is not aware of

[2] The Army Corps has expressly cited Georgia's pre-existing hydrologic analyses of its predicted future consumptive water uses (with a 705 mgd prediction) as a primary reason the Corps is proposing to revise the Water Control Manual for operation of Army Corps dams on the Chattahoochee River. Department of the Army, Corps of Engineers, *Notice of Open House—Draft Environmental Impact Statement for Updated Water Control Manuals for the Apalachicola-Chattahoochee-Flint River Basin*, 80 Fed. Reg. 59741 (Friday, Oct. 2, 2015).

any prior indication in any of Georgia's responses to discovery that Georgia was updating its prior analysis "in light of more recent data and information." And Florida does not know what "more recent data and information" Georgia is employing for that purpose. Florida has already conducted multiple depositions regarding Georgia's prior hydrologic analyses – all without any notice that Georgia intended to change those analyses with undisclosed "more recent data and information."

Florida explained to Georgia that it is important that such information is shared as soon as possible, and Georgia informed Florida that it would be submitting a letter modifying its Jan. 11, 2013 water supply request within days and would produce this letter to Florida. To better understand Georgia's new analysis, Florida has noticed a new 30(b)(6) deposition to try to determine what "more recent data and information" Georgia is now employing, and has requested that relevant Georgia interrogatory responses be updated as soon as possible.

Deleted Emails: Early in 2015, the parties agreed that they would specify certain of their opponent's current or former employees as priority custodians for production of emails. Florida identified a list of Georgia personnel that included multiple former directors of Georgia's Environmental Protection Division. In response, Georgia disclosed that the email accounts of at least three of those personnel (including one former director who left the state in December 2011) had been deleted or otherwise destroyed. As discovery has continued, the importance of email communications – particularly these missing communications – has become more apparent.

In light of the potential importance of the missing emails, Florida has served a 30(b)(6) notice seeking further information regarding the destruction of those emails and whether any can be retrieved.[3] Florida hopes to move forward quickly with that inquiry, and plans to depose the subject individuals once it is determined whether any additional emails can be identified.

C. Written Discovery to Third Parties

Florida has continued to pursue responses to its written discovery from numerous non-parties, including 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 November 6, 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.

On November 18, 2015 the Department of Interior denied Florida's four *Touhy* requests for testimony. Florida is evaluating its options regarding this decision, including whether to accept interviews with certain U.S. employees in lieu of the depositions originally requested.

Non-Party Subpoenas Seeking Production of Documents

Florida continues to work with subpoenaed third parties to facilitate production of documents and resolve outstanding issues. Nearly all subpoenaed entities have made at least a partial production of documents; however, as Florida has previously noted, it is still waiting for productions from several important third parties. These include:

1. <u>Atkins and Black & Veatch (former technical advisors to the ACF Stakeholders or ACFS)</u>. As Florida noted in its November 6, 2015 Progress Report, 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

[3] Georgia maintains a detailed retention schedule requiring preservation of many types of materials, including relevant emails. *See "Retention Schedules," Georgia Archives: University System of Georgia*, http://www.georgiaarchives.org/records/retention_schedules (last visited December 2, 2015).

flows, and their impacts. Atkins has begun to produce these materials on a rolling basis. Similarly, certain ACFS-related material was recently provided by Black & Veatch, but this production did not initially include email that was important to understanding the technical work performed by Black & Veatch. Counsel for Florida has since reached an agreement with counsel for Black & Veatch regarding production of these emails.

2. <u>Georgia Institute of Technology (Georgia Tech) / Georgia Water Resources Institute ("GWRI")</u>. Georgia's counsel in this case also represents Georgia Universities. This Court ordered Georgia to produce certain emails for Georgia Tech/GWRI employee Martin Kistenmacher on Oct. 16, 2015. GWRI represents itself as having "a close partnership with the Georgia EPD" on water planning issues, including the state water plan. Florida received approximately 1900 documents from the Kistenmacher email production on Nov. 9, 2015. These emails and attachments are directly relevant to his action in multiple ways (including by impeaching the ACF hydrologic analyses long relied upon by the State of Georgia). Review of these materials has also demonstrated in painstaking detail why email productions from relevant Georgia and Georgia University employees are critical to Florida's case.

For more than six weeks, Florida has also been engaged in an effort to obtain similar emails for Dr. Aris Georgakakos, the Director of from GWRI, in response to a subpoena duces tecum it served on September 21, 2015. Documents show that Dr. Georgakakos has also had a principal role in analyzing Georgia water use and hydrology in the ACF basin. Florida has volunteered to narrow its requests for the Georgakakos emails and has proposed certain targeted search terms. To date, Georgia has reportedly run the search terms on a portion of the Georgakakos emails and reported that roughly 15% of the total volume are responsive. Georgia has not, however, communicated any position on whether it will produce this material until it finishes running the terms on another segment of the emails. Nor has Georgia suggested any further steps to narrow the production. Florida believes that the specific Georgakakos emails are critical to multiple of its scheduled depositions and needs to receive and review those emails before those depositions can occur. Time is of the essence, and production in the near future will be important to keeping Florida's discovery efforts on track.

3. Albany State University/Georgia Water Planning and Policy Center. Florida subpoenaed Georgia's Albany State University in July and has received several productions of documents to date. It also subpoenaed Albany State employee Mark Masters for documents and testimony in September. Dr. 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. To date, these productions have only included a limited number of email communications (appx. 500). Florida has recently asked how Georgia determined which of Dr. Masters' emails to produce, and which it chose to withhold. We are awaiting a response.

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. To date, these productions have only included a limited number of email communications (appx. 350). Florida has recently asked how Georgia determined which of Dr. Hook's emails to produce, and which it chose to withhold. We are awaiting a response.

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 on endangered species of Georgia irrigation during those years. Although it takes these actions for creeks in Georgia, Georgia refuses to take action to reduce similar impacts in the Apalachicola. Counsel for Dr. Golladay and Mr. Hicks made a production of field work that counsel for Florida is in the process of reviewing. In reviewing the Kistenmacher emails identified above, Florida has identified several communications for Mr. Hicks directly relevant to issues in this case.

The anticipated Georgakakos email production (once received) is likely to contain more of this material for both Mr. Hicks and Dr. Golladay. Upon receiving the Georgakakos' emails production, counsel for Florida will confer further with counsel for Mr. Hicks and Dr. Golladay 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. 30(b)(6) Depositions

The parties are still addressing the many 30(b)(6) topics they have exchanged. Georgia has already deposed witnesses on a number of its 29 topics, and dates for other 30(b)(6) topics are being scheduled. Florida has served a 30(b)(6) notice and a revised and amended 30(b)(6) notice, and contemplates taking those depositions as soon as they can be scheduled.

In the Court's last teleconference, a question was discussed regarding the broad scope of certain of Georgia's 30(b)(6) topics. A number of Georgia's 30(b)(6) topics focus on subject matter areas involving highly technical expert testimony; disclosure of expert testimony is premature at this time. In addition, certain of Georgia's topics were so broad that a 30(b)(6) witness could not be reasonably prepared to address them.[4] Florida has assured Georgia that it would indeed produce a 30(b)(6) witness on all the subject topics, but also asked Georgia to consider whether it could narrow certain topics so that witnesses could be fairly prepared to address relevant underlying factual material. Georgia recently communicated revised 30(b)(6) topics that Georgia believes will narrow the range of material addressed. Florida intends to produce witnesses in response to these narrowed topics – and hopes that disputes regarding

[4] Georgia seems to agree that it is not entitled to premature expert testimony prior to the expert disclosure deadlines set by this court.

30(b)(6) are now resolved. However, in the event these issues arise again, Florida wishes to identify authorities regarding the misuse of 30(b)(6) depositions in certain circumstances:

- Roger Fendrich and Kent Sinclair, Discovering Corporate Knowledge and Contentions, 50 Ala. L. Rev. 651, 699 (1999) ("Rule 30(b)(6) was never intended to be a culminating stage at which a party's entire proof would be synthesized for the benefit of the other side, organized, then restated orally by one omniscient witness's integration.").

- *Trs. of Boston Univ. v. Everlight Elecs. Co.*, 2014 U.S. Dist. LEXIS 158982, *12-13 (D. Mass. Sept. 24, 2014) ("A party may properly resist a Rule 30(b)(6) deposition on the grounds that the information sought is more appropriately discoverable through contention interrogatories and/or expert discovery…. A Rule 30(b)(6) deposition is an overbroad, inefficient, and unreasonable means of discovering an opponent's factual and legal basis for its claims.").

- *In re Independent Serv. Orgs. Antitrust Litig.*, 168 F.R.D. 651, 654-655 (D. Kan. 1996) ("Even under the present-day liberal discovery rules, [the responding party] is not required to have counsel "marshal all of its factual proof" and prepare a witness to be able to testify on a given defense or counterclaim…. This reasoning is especially true where the information appears to be discoverable by other means." (citations omitted)); I., 2013 U.S. Dist. LEXIS 14802, *3-5 (D. Colo. Feb. 4, 2013) (same).

- *Apple Inc. v. Samsung Electronics Co.*, 2012 WL 1511901, at *2 (N.D. Cal. Jan. 27, 2012) (" [T]he purpose served by Fed.R.Civ.P. 30(b)(6) … does not extend to burdening the responding party with production and preparation of a witness on every facet of the litigation.").

- *Integra Bank Corp. v. Fid. & Deposit Co.*, 2014 U.S. Dist. LEXIS 3039, 9-10 (S.D. Ind. Jan. 10, 2014) ("The court agrees with the Magistrate Judge that a response to Topic 21 would be tantamount to the FDIC putting on its case in chief…. In addition, the court finds that the information sought in Topic 21 is largely duplicative of the responses to the interrogatories provided by the FDIC.").

- *Castillon v. Corrections Corp. of America, Inc.*, 2014 WL 4365317, at *2 (D. Idaho Sept. 02, 2014) ("Topic 9 of Plaintiff's 30(b)(6) deposition notice requires the deponent to testify regarding the 'facts or data CCA contends mitigates the need for a substantial punitive damage verdict in this case.' … Requiring Defendant to prepare a deponent to testify as to all such matters is overbroad and unduly burdensome.").

- *Bowers v. Mortgage Elec. Registration Sys., Inc.*, 2011 WL 6013092, at *7 (D. Kan. Dec. 2, 2011) ("[T]he burden on [the responding party] of producing a representative to testify to the far-reaching 22 topics contained its Rule 30(b)(6) deposition notice outweighs the likely benefit of the discovery sought.").

- *Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000) ("An overbroad Rule 30(b)(6) notice subjects the noticed party to an impossible task. …. Where, as here, the [serving party] cannot identify the outer limits of the areas of inquiry noticed, compliant designation is not feasible.").

- *E.E.O.C. v. Texas Roadhouse, Inc.*, 2014 WL 4471521, at *4-5 (D. Mass. Sept. 9, 2014) ("A Rule 30(b)(6) deposition on these topics [Nos. 2 & 3] is unnecessary. The information requested can be adequately provided by written discovery, interrogatories, and a deposition of the EEOC's expert on damages …. A Rule 30(b)(6) deposition is unnecessary on this topic [No. 7] as defendants can depose plaintiff's expert concerning statistical analysis procedures and methodology.").

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.

IV. SETTLEMENT EFFORTS.

The parties are making progress in addressing the logistics of a confidential mediation in this matter.

Respectfully submitted,

__________/s/____________

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CERTIFICATE OF SERVICE

This is to certify that the STATE OF FLORIDA'S DECEMBER 4, 2015 PROGRESS REPORT has been served on this 4th day of December 2015, in the manner specified below:

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