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

STATE OF FLORIDA'S RESPONSE TO GEORGIA'S MOTION TO SUBMIT TRIAL EXHIBITS UNDER SEAL OR WITH REDACTIONS

The State of Florida agrees that trial exhibits and deposition transcripts containing information in a number of the categories specified in the State of Georgia's motion can be redacted, with non-redacted versions filed under seal. However, for certain other categories, the confidentiality descriptions Georgia provides are too broad and imprecise to determine exactly what must be maintained as confidential, and are thus objectionable. Florida's and Georgia's counsel have been conferring on these issues, and Florida is hopeful that a mutually agreeable solution can soon be reached that should minimize any need to close the courtroom during trial. Florida also believes that the parties can and should propose a joint solution to the Court in their upcoming October 7, 2016 status reports. Below, Florida explains its current objections.

I. THE PARTIES HAVE ALREADY SIGNIFICANTLY NARROWED THE AREAS OF DISAGREEMENT

Georgia lists sixteen "categories for redaction" in its motion. There is no dispute regarding the first eight of those categories; Florida agrees that (1) Social Security numbers; (2) names of minor children; (3) dates of birth; (4) financial account numbers; (5) home addresses; (6) home telephone numbers; (7) cell phone numbers; and (8) personal email addresses can and should be redacted from trial exhibits.[1, 2]

Florida's objections on the remaining categories are as follows:

A. Category 9: Precise Locations (Such As GPS Coordinates) Of Threatened And Endangered Species

While there is precedent for withholding GPS coordinates for specific endangered animals or plants in certain circumstances, the locations of the endangered and threatened species at issue in this case are largely already public. For example, many public U.S. Fish and Wildlife Service ("USFWS") documents already discuss the impacts of extreme low flows in the Apalachicola River on various endangered species in various locations in the river and its floodplain forests. *See, e.g.*, USFWS, Biological Opinion for Jim Woodruff Dam Revised Interim Operation Plan at 26-28 (May 22, 2012), https://www.fws.gov/southeast/news/2012/pdf/woodruffBOFinal.pdf (documenting location of endangered fat threeridge mussel and threatened purple bankclimber mussel). Likewise, the locations of threatened and endangered species in Georgia's Flint River basin (which have also been harmed by extreme low flows on the Flint and elsewhere within Georgia) are identified in rare species range maps available on the Georgia

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[1] In addition, as noted in Georgia's Motion (at 5), Florida does not object to the redactions proposed by the University of Florida to protect student record information.

[2] Georgia has requested the redaction of personal information and social security numbers in its proposed trial exhibit 1670, titled "NRCS 68-3A75-4-200_CPerry_2004 VRI CIG Final Report2.PDF". Florida does not object to that redaction, but it notes this document is available at: https://www.nrcs.usda.gov/wps/PA_NRCSConsumption/download/?cid=nrcseprd964007.pdf.

Department of Natural Resources website. *See* Ga. Dep't of Nat. Res. Div., Range Maps of Rare Natural Elements, http://georgiawildlife.com/about_rare_species_range_maps (see "Special Concern Animals in Georgia" section that contains range maps for the endangered fat threeridge mussel and threatened purple bankclimber mussel, among other threatened and endangered species).

Florida intends to discuss endangered species in both Florida's and Georgia's portions of the ACF basin as part of its case in chief, and will likely employ a series of photographs, video clips and documentary exhibits in pre-filed direct testimony and in open court for that purpose. Florida may also question Georgia witnesses on these topics. *See, e.g.*, Attachment 8 to Florida's Motion *in Limine* to Preclude Expert Testimony by Dr. Suat Irmak (Dkt. 473) (USFWS letter indicating that extreme low flows in Georgia's Flint basin have caused certain endangered mussels in Spring Creek to be "on a steep trajectory to extirpation").

Although Florida intends to address these issues in open court, it can avoid supplying precise GPS coordinates for any particular species, so long as it can meaningfully identify the impacts on endangered and threatened species in photographs and descriptions of relevant geographic locations (*e.g.*, particular areas of the Apalachicola basin, including Swift Slough, Dog Slough, Mary Slough, Hog Slough, and channel margins in particular river reaches). If that solution is acceptable to Georgia and the Court, this issue should be resolvable.

B. Categories 10, 11, 12, 13, and 16: Agricultural Irrigation-Related Information

Florida does not need to identify individual names of Georgia farmers in open court (Category 13). But an important part of Florida's case-in-chief will focus upon the specific impacts of agricultural irrigation on river and streamflow in Georgia's Flint basin, and how that impacts Florida. Florida plans to identify specific irrigation practices in particular areas of

Georgia that are unreasonable and/or excessive, and plans to use photographs, data from agricultural metering devices and databases, satellite photographs, and the like to do so. It may also be necessary to identify with some specificity where large irrigation-related withdrawals from groundwater and surface water sources are occurring in order to demonstrate how those withdrawals are significantly impacting the underlying aquifer and Flint River and tributary flows (that in turn impact Florida.) In other words, while Florida does not desire to publicize any individual farmer's names, it does intend to demonstrate the impact of Georgia farmers' irrigation practices on aquifer levels, river flow and the Apalachicola basin.

Category 10 ("Individual farm water use information") will likely be necessary to address in open court. Because Georgia imposes no cap on the amount of irrigation water that can be utilized, a large number of Flint basin farmers use significantly more irrigation water than is necessary (even according to Georgia's own analyses). It will be relevant to Florida's showing of harm, and to its discussion of remedies, to identify how much of that water can be saved by (among other things) employing the same types of irrigation water use restrictions in Georgia that are already employed in Florida, and utilizing Georgia's Flint River Drought Protection Act in drought years. Thus, it may be necessary to identify how much ground and surface water particular farms are utilizing in particular geographic locations, precisely where farms are withdrawing water from rivers and aquifers, and what can be done to limit those uses. Florida can refer to those farms by permit number and location (or other means of identification), rather than using individual farmer names.

As to Georgia's Category 11, Florida does not need to publicly identify the specific GPS coordinates of public water supply intakes (which might in concept pose a Homeland Security issue). But Florida may need to identify the specific locations of both agricultural pumps and

pumping meters (Category 12) in order to demonstrate what harm irrigation-related pumping is causing in particular areas and how a consumption cap can mitigate that harm.

Irrigation permit enforcement (Category 16) is also likely to be an important issue at trial. For example, after Georgia produced what it termed its "Wetted Acreage Database" to Florida in late February 2016, Florida discovered that a large number of permitted irrigators in Georgia are irrigating a greater number of acres than their Georgia state permits allow – thus violating Georgia law. From Georgia databases, the number of illegally irrigated acres in Georgia's portion of the ACF basin appears to be roughly 90,000. Whether Georgia is taking enforcement action to address that significant problem and how much those illegally irrigated acres impact flows to Florida are each issues Florida intends to address in open court. In addition, how Georgia addresses these illegally irrigated acres will likely be relevant to how Georgia can comply with a consumption cap in the Flint basin. But, again, Florida can refer to specific permit numbers (or other identifiers), rather than farmer names.

As proposed, Georgia's vague confidentiality requests might be construed to require the courtroom to be closed when agricultural permitting or irrigation-related consumption issues arise. That might include an important portion of Florida's case. Georgia counsel has already expressed its willingness to find a solution to this problem, and Florida is hopeful that a solution will emerge in the coming week. Florida believes there should be a practical way to accommodate concerns for individual privacy without hampering how Florida proves its case in open court.

C. Category 14: Proprietary University Material

Florida has no objection, in principle, to preventing public disclosure of draft university materials that are pending publication or pending patent submissions, as long as this designation

is narrowly construed. Based upon the limited number of items that Georgia has designated under this category so far, Florida is hopeful that the parties can reach agreement.

D. Category 15: Confidential Information Related to Settlement or Mediation

Florida has no intention of publicly disclosing settlement discussions or mediation conducted in 2015 and 2016. But Florida's Complaint alleged "bad faith" by Georgia in past negotiations over the preceding 20+ years, and Florida intends to present witness testimony and documentary exhibits on that topic, and may examine Georgia witnesses on that topic. Without more detail on exactly what information Georgia intends to protect from public disclosure, it is difficult for Florida to commit to any blanket agreement on this topic.

II. OVERLY BROAD ASSERTIONS OF CONFIDENTIALITY WOULD IMPEDE EFFICIENT PRESENTATION OF TRIAL

There is significant value to all of the trial proceedings in this original action being public. Indeed, federal courts have long recognized a presumption of public disclosure of public records and documents. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597-99 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."); Federal Trial Handbook Civil § 10:42, Westlaw (database updated Oct. 2015) (detailing public's right to access court records). Georgia thus bears the burden of explaining *why* certain information should not be disclosed as part of the public record of these proceedings. *See, e.g.*, *Miller v. Indiana Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994) ("[O]ur 'strong presumption' of openness does not permit the routine closing of judicial records to the public. The party seeking to seal any part of a judicial record bears the heavy burden of showing that 'the material is the kind of information that courts will protect' and that 'disclosure will work a clearly defined and serious injury to the party seeking closure.'" (citation omitted)); *see also* Case Mgmt. Order No. 20 § 2.3 (July 13, 2016) (Dkt. 454) (requiring motion

to keep information out of public record). To carry that burden, a party must come forward with "articulable facts" showing the need for confidentiality, not "unsupported hypothesis or conjecture." *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995) (citation omitted).

Here, Georgia's imprecise descriptions and justifications for the aforementioned categories of "confidential material" do not meet that burden. Georgia bases its confidentiality request on its state laws exempting certain types of information from mandatory public disclosure in response to an open records request. *See* Ga. Mot. at 3; Ga. Code Ann. § 50-18-72(a). But Georgia's Open Records Act does not *protect* this information from all public disclosure or necessarily *prohibit* its use in litigation. *See* Ga. Code Ann. § 50-18-72(a). For example, Georgia does not cite any provision of state law that shields agricultural irrigation metering data from public use in a lawsuit or that confers such special confidentiality rights on farmers in any other respect. In short, the mere fact that Georgia's Open Records Act does not *require* disclosure of certain records does not, on its own, satisfy Georgia's burden to identify specific facts demonstrating the need for confidentiality in this original action. Thus, for the aforementioned categories, Georgia has not met its burden or shown why a substantial portion of this original action should be closed to the public.

In sum, Florida is hopeful that it can find a solution to Georgia's privacy concerns that will not unnecessarily impair public trial presentation. Florida respectfully suggests that the parties confer to narrow their disputed issues, so that any remaining issues can be brought to the Court's attention in the October 7, 2016 status reports.

Dated: September 30, 2016

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

This is to certify that the STATE OF FLORIDA'S RESPONSE TO GEORGIA'S MOTION TO SUBMIT TRIAL EXHIBITS UNDER SEAL OR WITH REDACTIONS has been served on this 30th day of September 2016, in the manner specified below:

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