

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 AUGUST 7, 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 (“CMP”), as subsequently amended.

**I. CHANGES IN THE GENERAL STATUS OF THE MATTER.**

Since the State of Florida’s July 9, 2015 Progress Report, the States continue to make meaningful progress in discovery. Florida remains diligent in working with the State of Georgia and third parties to address discovery issues as they arise, participating in multiple productive meet-and-confer sessions over the last month. Florida also continues to review and produce documents responsive to requests for production issued by Georgia in accordance with the production deadlines. Additional detail about Florida’s discovery efforts is provided in Section II below.

## **II. DISCOVERY EFFORTS.**

### **A. Production of Responsive Documents to Georgia**

Pursuant to Section 6.1.2 of the CMP, as amended, the States timely commenced their respective production of documents on February 11, 2015, and are continuing to produce documents on a rolling basis. As noted previously, Florida has mobilized a document review team of more than 50 attorneys to review and produce responsive information in accordance with the schedule established by the CMP. To date, Florida has produced approximately 335,000 emails (including approximately 45,000 this week), more than 100,000 pages of non-email ESI, and over 60 gigabytes of electronically produced modelling files.

The States continue to participate in meet-and-confer sessions to facilitate the discovery process and to resolve discovery issues promptly. As noted in previous Progress Reports, the States have devoted a considerable amount of time to further developing and refining the parameters of electronic discovery, and have reached agreement on an initial set of email custodians and search terms for each side. This approach has substantially reduced the scope and volume of materials the States must review and produce.

Florida expects to complete production of responsive documents within the production deadline specified in Section 6.1.2 of the CMP, as amended.

### **B. Written Discovery to Third Parties**

Florida has continued to actively pursue responses to its written discovery from numerous non-parties, including a number of federal agencies and departments.

#### **1. Touhy Requests and Subpoenas to Federal Agencies**

The States are continuing to cooperate with the agencies and departments upon which they have served *Touhy* requests. Since the July 9 status report, the U.S. Department of Commerce, the U.S. Geological Survey, the U.S. Department of Agriculture, the U.S. Army

Corps of Engineers, and the U.S. Fish & Wildlife Service have all made productions, and Florida has followed up with the U.S. Fish & Wildlife Service and the U.S. Army Corps of Engineers to provide additional guidance on the materials it would like the agencies to prioritize in their productions.

The States will continue to meet and confer with the agencies regarding the joint *Touhy* requests to facilitate production of documents in response to them.

## 2. Non-Party Subpoenas

Florida has served a total of 93 non-party subpoenas. Florida served 6 additional non-party subpoenas since the last Progress Report. These are listed on Exhibit A.

Thus far, counsel for Florida has conferred with representatives of, or otherwise obtained documents from 87 of the 93 entities it has subpoenaed. Florida continues to work with these subpoenaed third parties to streamline further production and resolve any outstanding issues. With the exception of one entity, noted below, these efforts have been successful. subpoenaed entities have made at least a partial production of documents, yielding approximately 71,500 documents produced to date. Efforts to communicate with counsel for the remaining subpoena recipients are ongoing, and counsel for Florida will continue to make every effort to facilitate the third parties' timely, cost-efficient production of documents. However, given the scope of the search required to respond, a number of non-parties have advised Florida that they are unlikely to complete their productions within 120 days.

As noted above, the vast majority of the subpoenaed entities have worked cooperatively with Florida to produce responsive documents. However, Florida has a continuing disagreement with ACF Stakeholders, Inc. ("ACFS"). ACFS is a group composed of interested private parties and local governmental entities, the majority of whom reside in Georgia or represent Georgia interests. After gathering data and engaging a team to perform hydrologic, statistical, and

technical modeling, the group made a series of public recommendations to mitigate impacts during drought years, including impacts to the Apalachicola River and Bay.

Among other recommendations, the group proposed (1) state and local “conservation policies” to reduce “impacts to stream flow of consumptive use from agriculture,” noting that “some of the streams which are impacted by agriculture have experienced decreases in baseflow between 80 and 100%,” (2) state and local efforts to maximize water returns and minimize water transfers out of the ACF basin, and (3) in connection with reductions in Georgia consumption and increased upstream storage, federal policies facilitating increased flows to the Apalachicola River and Bay during Spring and Summer months. ACF Stakeholders, Sustainable Water Management Plan 3-4, 65-66, 71, 73 (May 13, 2015), <http://acfstakeholders.org/wp-content/uploads/2015/05/ACFS-Sustainable-Water-Management-Plan-For-Release.pdf>.

ACF Stakeholders has objected to producing any of their underlying hydrologic modeling efforts and associated data, citing “confidentiality” concerns (but failing to identify any cognizable legal privilege or supporting caselaw), and arguing that other parties in receipt of a nonparty subpoena in this case, including Georgia Water Resources Institute, may themselves have possession, custody, or control of the same material. We have offered to address confidentiality issues in accord with this Court’s existing confidentiality order (Section 10.1 of the Case Management Plan), and are currently engaged in an effort to determine if we can obtain that information from other parties. We hope to either resolve these issues or bring them to the Special Master pursuant to Section 11.1.2 of the Case Management Plan as soon as feasible.

### **III. UNRESOLVED DISPUTES.**

Currently, there are no unresolved disputes between the States. While the States have identified certain issues regarding the sufficiency of written discovery responses and the completeness of designated and identified email custodians, they continue to meet and confer on

a frequent basis to resolve such issues. As noted in prior Progress Reports, Florida believes that the scope and frequency of counsel interaction has facilitated—and will continue to facilitate—resolution of the foregoing and other issues.

#### **IV. OTHER ISSUES OF CONCERN.**

##### **A. Technological Issues with the Production of Models and Data Sets**

As Florida has noted in prior Progress Reports, technological issues with models and other data sets are slowing the States' progress in discovery. The States are continuing to discuss technological issues associated with the production of certain data sets and scientific models, but the production of such documentation remains challenging. Moreover, the assimilation and analysis of the data and modeling information produced to date is time consuming for both States, and has required multiple meet-and-confer sessions regarding the accessibility and scope of what has been produced. Florida anticipates such issues will continue to arise as discovery progresses.

##### **B. Timing**

With the extensions of the discovery schedule granted by the Court on April 8, 2015 and May 11, 2015, Florida anticipates completing discovery in accordance with the schedule delineated in Sections 6 and 7 of the CMP, as amended.

#### **V. FURTHER DISCOVERY ANTICIPATED DURING THE COMING MONTH.**

Florida continues to analyze responses it received from Georgia and various third parties and may serve focused additional written discovery 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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Respectfully submitted,

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## Exhibit A

### List of Non-Party Subpoenas Served Since the July 9 Status Report

Entity	Propounding Party	Date Served on Opposing Party
Brinson Farm Supply, Inc.	Florida	7.13.2015
Glenn Heard	Florida	7.13.2015
Longleaf Ridge, Inc.	Florida	7.13.2015
Glen Cox	Florida	7.13.2015
Georgia Water Planning and Policy Center	Florida	7.13.2015
Albany State University	Florida	7.13.2015

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**CERTIFICATE OF SERVICE**

This is to certify that the State of Florida's August 7, 2015 Progress Report has been served on this 7th day of August 2015, 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 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 <a href="mailto:Allen.Winsor@myfloridalegal.com">Allen.Winsor@myfloridalegal.com</a></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 <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 U.S. Mail and Email:</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>	

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