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

PRE-FILED DIRECT TESTIMONY OF FLORIDA WITNESS DAVID STRUHS

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October 14, 2016

1. I, David B. Struhs, offer the following as my Direct Testimony concerning the State of Florida's involvement in the lengthy negotiations with the States of Georgia and Alabama under the Congressionally authorized Apalachicola-Chattahoochee-Flint River Basin Compact ("ACF Compact" or "Compact"), the goal of which was to come up with an equitable water allocation among the states.

2. I served as the Secretary of the Florida Department of Environmental Protection (FDEP) from 1999 to 2004 under Governor Jeb Bush. One of my responsibilities as Secretary was to act as the Governor's representative on the ACF Basin Commission created by the Compact. I led Florida's team under the Compact, which included the development of Florida's positions and assessing the progress of the negotiations. In that role, I became very familiar through extensive briefings from my staff on the history of the negotiations, dating back to the early 1990s. I also regularly met with the directors of Georgia and Alabama agencies involved in the negotiations, as well as representatives of the federal government agencies.

3. I ensured that Florida's various technical teams, led by Doug Barr, former Executive Director of the Northwest Florida Water Management District, were properly equipped to review the proposals made by the other states, oversaw the development of responses to those proposals, and coordinated with the heads of other Florida agencies and the Governor's office. Throughout the process, my goal was to ensure the long term environmental viability of the Apalachicola River and Bay by maintaining a reliable, natural flow regime in the face of fast growing water consumption upstream. This would require negotiating reasonable, fair, and enforceable limitations on the consumptive use of water in the ACF system. I have first-hand knowledge of the information relied on by the states in the course of negotiations and

associated model runs, and personally witnessed the effects that Georgia's actions had on the viability of the Compact.

4. I began my role in the ACF negotiations with high hopes of reaching an agreement to allocate the waters of the ACF Basin and believing that Georgia was a good faith partner in that effort. At that time, I believed that Georgia was well aware of the harm that could be caused by its own consumption of water from the Chattahoochee and Flint rivers. I will describe the events that unfolded during our negotiations, which led me to conclude ultimately that Georgia was operating in bad faith and lacked the political will to resolve the dispute, absent compulsion from a court.

PROFESSIONAL BACKGROUND

5. I hold a Master's Degree in Public Administration from the Kennedy School of Government at Harvard University (1986) and a Bachelor's Degree from Indiana University (1982).

6. Immediately prior to becoming the FDEP Secretary in 1999, I served as the Commissioner of the Massachusetts Department of Environmental Protection, which, like my position in Florida, was the top environmental regulatory official in the state.

7. Prior to my work for the Commonwealth of Massachusetts, I served as Chief of Staff at the Council on Environmental Quality in Washington, DC under President George H. W. Bush. I had previously worked for the Environmental Protection Agency (EPA) Region 1 in Boston, Massachusetts.

8. I currently work as Vice President, Corporate Services and Sustainability at the Domtar Corporation, a leading provider of a wide variety of fiber-based products including

communication, specialty and packaging papers, market pulp and absorbent hygiene products with approximately 10,000 employees serving more than 50 countries around the world.

THE ACF COMPACT

9. This dispute between Florida and Georgia began to take shape in the early 1990s. In 1990, Alabama filed a lawsuit against the U.S. Army Corps of Engineers ("the Corps") in the U.S. District Court for the Northern District of Alabama because Georgia municipalities were attempting to enter agreements with the Corps that would allow them to withdraw water from Lake Lanier, a federal reservoir north of Atlanta, Georgia. If executed, the agreements would have given Georgia municipalities a Corps commitment to store water in the lake for that purpose, rather than recognizing that Alabama and Florida had rights to that water as well. Shortly after the case was filed, Alabama and the Corps jointly agreed to stay that proceeding, seeking instead to resolve their dispute through informal negotiations including the states of Georgia and Florida.

10. As part of the stay, the Corps "agree[d] not to execute any [water withdrawal] contracts or agreements which are the subject of the complaint in this action unless expressly agreed to, in writing, by Alabama and Florida." *Alabama v. the U.S. Army Corps of Eng'rs et al.*, No. 90-CV-1331, Doc. 41 (N.D. Ala. 1990). Florida and Georgia had been involved in settlement discussions, and later successfully moved to intervene in the case.

11. On January 3, 1992, the three states and the Corps signed a Memorandum of Agreement (MOA) tabling their dispute while they jointly developed a Comprehensive Study of the ACF. The MOA contained a provision that expressed the parties understanding that while existing and additional water use could continue in the ACF while negotiations continued, no party would acquire a permanent right to the waters they used during that period. In other words,

neither state could argue later that they were entitled to the amount of water that was being consumed within its borders because it was making use of the water. Over the years the states began referring to this as the "live and let live" provision. While I was FDEP Secretary and in connection with negotiations under the Compact during that time, I became familiar with the 1992 MOA. JX-4 is a true and accurate copy of the 1992 Memorandum of Agreement (MOA) signed by the states.

12. After entering the MOA, the parties engaged in a lengthy assessment process through the ACF Comprehensive Study that would lay out a "conceptual plan for water resource management of all water resources" and provide "an assessment of the existing and future water resource needs, including the needs of human, economic, natural, and other systems, of the states within the ACF Basin (Alabama, Florida, and Georgia) and the ACT Basin (Alabama and Georgia) and the extent of water resources available within each basin to service such needs." JX-4 ¶ 6. Georgia was an active participant in this process, as were Florida and Alabama, contributing significant resources toward the development of a shared set of data that would be relied upon by the states as negotiations continued. As that effort continued, the idea of an interstate compact was born; assessment of water uses developed in the Comprehensive Study was to be used as the basis in the interstate compact to create a water allocation formula among the states.

13. In 1997, building on the progress made through the five years of the Comprehensive Study, the states and the federal government reached a historic agreement known as the Apalachicola-Chattahoochee-Flint River Basin Compact, Pub. L. No. 105-104, 111 Stat. 2219. Florida, Georgia, and Alabama ratified the Compact through their state legislatures, and thereafter, the U.S. Congress also ratified the Compact. While I was FDEP Secretary and in

connection with negotiations under the Compact during that time, I became familiar with the Compact itself. A true and accurate copy of the Compact is at FX-209.

14. The purpose of the Compact, was to create a binding framework to equitably apportion the waters of the ACF Basin, to promote interstate comity, and to prevent disputes. FX-209, at 1. In approving the Compact, Congress directed the Corps and other federal agencies to support the ACF Basin Commission. The Compact did not lay out a formula for allocating the waters of the Basin; instead it set out a process for negotiations to do so. Any allocation under the Compact was required to be approved by unanimous vote of the states; and the Federal Commissioner, who was non-voting, could choose whether to concur or reject the states' proposed water allocation.

15. The Compact included the same "live and let live" provision contained in the 1992 MOA, which disallowed any "permanent, vested, or perpetual rights to the amounts of water used between January 3, 1992 and the date on which the Commission adopts an allocation formula." FX-209, at 6 (111 Stat. 224). Florida participated faithfully in the ACF Compact negotiations and operated on the belief that the Corps and Georgia were doing the same. Indeed, Georgia's then Governor, Zell Miller, stated that the Compact process was "unprecedented in the history of water resources management" in the "commitment of financial and personnel resources and the resultant trust that has been created among the parties." FX-205. Governor Miller also recognized that "Florida has a very real and significant interest in the future of the Apalachicola Bay and its surrounding environmental ecosystems, and in her other uses of water." *Id.* FX-205, in which these statements appear, is a true and accurate copy of the Remarks of Governor Zell Miller at the Inaugural Meeting(s) of the ACF and ACT Compact Commission,

which was produced by Georgia in this matter. I am familiar with these meetings and associated transcripts because of my role in negotiations with Georgia under the Compact.

16. The Compact initially was scheduled to terminate on December 31, 1998. It was extended more than a dozen times, but ultimately it expired on August 31, 2003.

GEORGIA'S BAD FAITH NEGOTIATIONS

17. Florida's position in the ACF Compact negotiation was that Georgia should agree to caps on its water consumption in the ACF. Without such caps, Georgia's future uses of water could grow at an unrestricted rate. Georgia's position was that a guaranteed minimum state line flow was more appropriate. Florida objected to a minimum flow for a fundamental reason: without a consumption cap, a "rare" minimum flow could become commonplace, as Georgia's consumption levels continued to rise.

18. For what I perceived as political reasons, Georgia officials periodically requested that we avoid making public references to "consumption caps" when discussing our negotiations – despite the fact that every model run that the states developed and examined over five years of negotiations included explicit consumption caps. Georgia officials encouraged us to instead couch our discussions in terms of "municipal returns" and "state line flows" at the Florida border. Georgia officials' aversion to frank discussions of consumption caps signaled to me and others involved on behalf of Florida that the most fundamental step in reaching an equitable apportionment of the waters of the Basin was being called into question.

19. Florida agreed for purposes of political comity to present model runs in terms of their projected delivery of water at the state line as Georgia desired. However, we never took caps off the table. As I recall, Consumption caps were embedded in every model run that Georgia and Florida ever discussed. Over time, it became clear to me that, regardless of the

terminology that the parties chose to use, Georgia had no interest in understanding, let alone maintaining, a flow regime that would ensure the survival of the Apalachicola ecosystem.

20. In retrospect, the aversion that my counterparts in Georgia had to speaking publicly and plainly with their own constituents about capping Georgia's water consumption was more alarming than Florida realized at the time. I believe Georgia's negotiators clearly understood that the "municipal return" and "state line flow" requirements we were discussing were, in fact, consumption caps by a different name. Unfortunately, with the accommodations we made around labels and language, Georgia effectively used the Compact process to mislead Florida that consumption caps were on the table, while sidestepping the frank discussions with constituents that this would require at home.

21. To prevent minimum state line flows from becoming targets to which Georgia would maximize its consumption of water, Florida actively asserted throughout the negotiations that the Apalachicola flow regime should mimic the historic flows in the river as much as possible. We believed, based on the hydrologic record, that the minimum flows should only occur a very small percentage of the time, essentially only in the worst of droughts when flows were at their lowest. For instance, I recall that the minimum low flow to the Apalachicola that we discussed with Georgia, was to be for a rare and very brief duration based on the historic flow data that served as the basis for all of our model runs.

22. In a letter I wrote to Harold Reheis during that time period, I indicated Florida's view that minimum flows would only occur 1.39 percent of the time. Page GA02256989 in exhibit FX-220 is a true and accurate copy of the letter I wrote to Mr. Reheis on April 25, 2003. That is my signature at the bottom of the page. In addition, Florida always asserted that adaptive

management should be part of any allocation agreement, which would allow the parties to revisit the state line flow formula if ecological harm occurred in the future.

23. Our position was consistent with that of both the U.S. Fish & Wildlife Service (FWS) and the U.S. Environmental Protection Agency (EPA). In 1999, FWS and EPA provided the parties with their "Instream Flow Guidelines for the ACT and ACF Basins Interstate Water Allocation Formula." FX-599. In that document, FWS and EPA set forth the "flow regime features that are necessary for maintaining the present structure and function of the riverine ecosystem" (FX-599, at 1) and to ensure compliance with the Endangered Species Act and the Clean Water Act. Indeed, the FWS and the EPA expressly stated that any "allocation formula that departs from the environmental baseline developed in the guidelines will require a more detailed review by both of our agencies." FX-599, at 1. I became familiar with these guidelines as a result of my role in the ongoing negotiations with Georgia at the time. FX-599 is a true and accurate copy of the guidelines from FWS and EPA that I received and reviewed.

24. The guidelines addressed the Bainbridge gage on the Flint River, the Whitesburg gage on the Chattahoochee River and the Chattahoochee gage below Lake Seminole. The guidelines provided specific, detailed minimum flow requirements for each of the gages. The required minimum flows at each gage varied over the course of the year, both to account for the natural seasonal variation in water input to the system and to ensure that sufficient water was in the rivers to protect endangered and threatened animals. Furthermore, the guidelines specified certain thresholds below which flows could not be permitted to drop for extended periods of time. These thresholds were crucial, because extended periods of low flows could have a disastrous effect on the flora and fauna of the ACF Basin, a prediction that I understand became all too real during the droughts that followed my tenure.

25. Florida understood that these Instream Flow Guidelines were intended enable the parties to develop an allocation formula which would protect the ecosystem and ensure compliance with applicable federal laws. It was clear to us that the FWS and EPA – the two federal agencies most concerned with ecosystem protection – believed, as Florida did, that minimum are not sufficient to protect the ecosystem. It was also clear to us that these agencies recognized how damaging low flows can be – and in particular that frequent low flows are especially harmful, such that a minimum flow approach would result in clear harm to the ecosystem. Indeed, the guidelines expressly stated that "Extreme low flow events are likely among the most stressful natural events faced by river biota" (FX-599, at 3) and that "[a]quatic populations can survive extremely stressful conditions and persist without essential habitat conditions occasionally, but not for many years in succession." FX-599, at 2. Florida was concerned that that was exactly what would happen if we agreed to minimum flows.

26. In retrospect, it was highly unlikely, if not impossible, to negotiate a water-sharing agreement under the Compact since Georgia eventually revealed it was unwilling to accept any consumption limits under any conditions. Indeed, it became apparent that Georgia was using the Compact's negotiation process coupled with enough repeated extensions that they eventually became routine, to buy more time and attempt to shift riparian equities with no regard for downstream environmental or economic consequences.

A. Walking Away from the Comprehensive Study

27. When I first became Florida's Environmental Secretary, I was soon advised that just months after the Compact was adopted, Georgia started walking away from long-established understandings reached in the years of Comprehensive Study of the Basin. In August 1998, Doug Barr sent a letter to Harold Reheis, Director of the Georgia Environmental Protection

Division and technical representative for Georgia. In it, he questioned why Georgia was proposing "significantly higher demand data sets for the municipal and industrial water needs." I became familiar with the August 1998 letter which Mr. Barr sent to Mr. Reheis in my role as FDEP Secretary and as a result of my role in the Compact negotiations. FX-212 is a true and accurate copy of the letter from Doug Barr to Harold Reheis, dated August 13, 1998. I understand that the letter was written in the regular course of business at the Northwest Florida Water Management District and is maintained as part of the official records of Florida.

28. Among other things, the number of irrigated acres for agriculture in the ACF Basin was a foundational element of the modeling by the parties in an attempt to develop an allocation formula. In order to derive an estimate of how much water Georgia required, it was necessary to estimate the number of irrigated acres.

29. The U.S. Census of Agriculture had estimated the number or irrigated acres in the Georgia ACF Basin at slightly over 400,000 acres. As I recall, in order to provide a buffer for potential expansion in the future and to hedge against a likely undercount by the Census, the parties modeling runs assumed Georgia would have approximately 600,000 irrigated acres.

30. However, on April 21, 2003, at a meeting of the ACF River Basin Commission in Dothan Alabama, Georgia gave a presentation that claimed it needed to ensure its ability to irrigate over 900,000 acres, a 50 percent increase over what had been built into all of the modeling runs to that date and more than double the actual estimated irrigated acres. This massive amount of new acreage required an enormous amount of water that had not been previously contemplated by Florida or Georgia.

31. In response, we asked Georgia where these 300,000 new acres came from and whether they could show them to us on a map. We were never provided that information. The

closest thing we received was a memo from Harold Reheis, dated April 29, 2003, that claimed Georgia had performed new research that had yielded a more reliable estimate than the Census estimate of the current irrigated acreage in the Basin. FX-219. FX-219 is a true and accurate copy of the April 29, 2003 cover letter and memorandum which Harold Reheis mailed to me and which I received. I believe we maintained this cover letter and memo at FDEP as part of our regular course of business and that it is part of the official records of Florida.

32. That memo identified over 700,000 acres of currently irrigated farmland (in 2003) in the Flint River Basin and nearly 70,000 more acres in the Chattahoochee River Basin. Furthermore, the memo cited the need to provide for Georgia's "backlog," an additional 140,000 acres of farmland for which irrigation permit applications had been received but not yet processed. In all, the memo reiterated Georgia's new claim that it required water to irrigate over 900,000 acres of farmland, but failed to provide precise information regarding the actual location of these newfound acres.

33. The last minute introduction of this huge expansion of acreage completely upended the modeling runs that had been performed. Arriving at a consensus, already extremely difficult, was made that much harder. The only answer that Georgia had to the concern of expanded acreage, more groundwater pumping, and the potential impacts to the flows of the Flint River was the Flint River Drought Protection Act, which had been enacted in Georgia a few years prior to the expiration of the Compact. *See* FX-10 (Legislative History of the Flint River Drought Protection Act). I became familiar with Georgia's enactment of the Flint River Drought Protection Act ("FRDPA") as a result of my role as FDEP Secretary and my role in negotiations with Georgia. I believe FX-10 to be a true and accurate copy of a Georgia State University Law Review article detailing the legislative history of the FRDPA.

34. What I understood of the new law was that it created a legal mechanism where Georgia would pay farmers not to irrigate their crops in drought years. I recall Harold Reheis suggesting this to justify the additional acreage. I remember being concerned that paying people not to use water could imply to farmers that they had a new property right – specifically a right to use whatever amount of water they had been permitted to use up to that point. I was also concerned because I thought such a scheme would only work if money was available, if it was done quickly when required, and if it was done in the right parts of the river basin.

35. Georgia departed from the parties' previous understandings in yet another way. In dry years, crops require more irrigation to make up for the relative lack of precipitation. Florida did not dispute this fact. This irrigation assumption was known as "the dry-year multiplier." However, shortly after negotiations began under the Compact, Georgia proposed a dramatically higher dry-year multiplier than had been contemplated by the parties during the Comprehensive Study. The closest Georgia came to an explanation was given in the same Reheis memorandum dated April 29, 2003. FX-219. That memorandum identified the purported need for 14.4 inches of applied irrigation. This was despite the fact that Georgia's own study referenced in the memo found that Georgia farmers had actually used an average of eight inches of water per acre per year. Georgia theorized that the eight-inch-per-year estimate was too low because the study period did not include "abnormally hot" years. However, the study period did include the major droughts of 2000 and 2001. Furthermore, Georgia assumed that future farmers would require more water because of changing "agricultural trends" in Georgia. Therefore Georgia argued it should disregard the findings of its own study, conducted during a drought, and err on the high side in predicting its irrigation needs. FX-219, at 9.

36. Georgia's memo stated that "a safe and appropriate estimate for average irrigation during dry years in the ACF Basin in Georgia is 80 percent above the normal year number, or 14.4 inches/acre/year." FX-219, at 9. I remember thinking to myself, they must be planning on growing rice, because that is an enormous amount of water.

37. Agricultural irrigation was not the only area where Georgia moved away from prior water use expectations. During the course of the Comprehensive Study, the parties also collectively relied on the reasonable expectation that much of the water consumed by Georgia's cities would be returned to the river as wastewater effluent for the eventual benefit of downstream users. A shared assumption of a 62 percent rate of municipal returns was built into every one of the modeling runs performed by the parties. FX-199, at 14. FX-199 is a true and accurate copy of a transcript of statements made by me and other representatives at an ACF River Basin Commission Meeting on March 18, 2002. FDEP has maintained it in the course of its regularly conducted business and as part of its official records. But as negotiations over the Compact continued, Georgia Governor Barnes informed Governor Bush that Georgia would never agree to state line flow commitments in conjunction with any rate of municipal returns. FX 199, at 2. Georgia's abandonment of this long-held understanding was disturbing since it was the basis of five years of negotiations. In large part because of Georgia's sudden unwillingness to adhere to the parties' long-established shared understandings from the Comprehensive Study regarding these basic, essential assumptions, I began to suspect that Georgia was disingenuous in its claimed desire to arrive at a final allocation.

B. Georgia's Secret Negotiations With the Army Corps

38. In December 2000, while Compact negotiations among the states were ongoing, the Southeastern Federal Power Customers ("SeFPC"), who purchased electricity generated by

hydropower at the Buford Dam at Lake Lanier, filed a lawsuit against the Corps in federal court in Washington, DC. The case was known as *Se. Fed. Power Customers, Inc. v. Caldera, et al*., No. 00-2975 (TPJ) (D.D.C.). The suit alleged that the Corps lacked authority for water withdrawals for water supply purposes, and sought compensation for the SeFPC's members based on the resulting reduction in low-cost hydropower produced at Buford Dam.

39. Georgia and local water supply providers moved to intervene in the lawsuit. The district court referred the parties to private mediation. Unbeknownst to Florida at the time, Georgia insinuated itself into this confidential mediation with the Corps. Meanwhile, both the Corps and Georgia were participating in ACF Compact negotiations with Alabama and Florida.

40. Florida later learned that, sometime in the year 2000, with no prior notice to Florida or Alabama, Georgia engaged in communications with the Corps seeking increased municipal and industrial water supply withdrawals or releases, and a reallocation of reservoir storage for such uses. Of course, this was the same conduct that prompted the initial 1990 lawsuit by Alabama.

41. Secretly circumventing the supposedly good faith ACF Compact negotiations, and knowingly disrespecting the "live and let live" provisions that defined the negotiating process, Georgia again attempted to persuade the Corps to enter into substantial long-term water supply contracts committing storage in Lake Lanier. In the Spring of 2000, Georgia wrote a letter formally asking the Corps to allocate approximately 705 million gallons per day from Lake Lanier to water supply for Atlanta and other local governments.

42. On January 9, 2003, the Corps signed a settlement agreement with the SeFPC requiring that the Corps enter into long-term contracts for water supply, effectively allocating water to Georgia. The next day, Florida learned for the first time that Georgia, although not a

party to the SeFPC lawsuit, had directly participated in non-public deal cutting between the Corps and the SeFPC. Not only was Florida surprised to learn of this duplicity by Georgia and the Corps, we were floored to realize that Georgia, a non-party to the lawsuit, had effectively changed the mediation over financial compensation to SeFPC into a negotiation for the same type of long-term contracts for water supply that had prompted Alabama's original lawsuit against the Corps in 1990.

43. The settlement agreement between Georgia and the Corps provided for the purchase of storage in the Lake Lanier Project, which entitled water supply providers to withdraw water from the Lake Lanier Project or the River consistent with the agreement. In effect, the agreement that Georgia negotiated in secret, while publicly negotiating with Florida and Alabama, allocated 537 million gallons per day of water from Lake Lanier to Georgia for municipal and industrial water supply. That water was supposed to be the subject of the ACF Compact process.

44. None of Georgia's above-described efforts were preceded by notice to Florida. All of them sought to achieve permanent allocations of water to Georgia in derogation of the spirit and letter of the law agreed to by the states in the Compact. Georgia performed an end-run around the Compact negotiations, securing its own interests through multiple lawsuits and covertly negotiating for permanent allocations of water with the Corps while dragging out the Compact negotiations.

45. Both Florida and Alabama immediately sought to have the agreement invalidated, and years of litigation ensued. Florida did not, however, immediately seek to dissolve the Compact.

46. In an effort to salvage the historic Compact, on July 22, 2003, the three Governors signed a Memorandum of Understanding (MOU) regarding the sharing of water in the ACF Basin. This last ditch effort by our political leaders to make sure that every avenue to achieve a negotiated agreement was exhausted suggests all parties were aware that Florida would not continue to extend the Compact indefinitely. Communications continued, and in late August 2003 Governor Bush went as far as proposing an allocation formula. But it was not to be. Florida's commitment to the hydrologic health of the Apalachicola River and Bay, in the end, was unacceptable to Georgia, and the Compact expired on August 31, 2003, almost five years after the Compact was initially set to expire.

47. I left the FDEP in 2004, but I took some consolation in later learning that Judge Bowdre – the federal judge who then presided over the original Alabama lawsuit – ruled in 2005 that Georgia's secret negotiations with the Corps for entry of new water supply contracts violated the 1990 stay order and thus constituted bad faith on Georgia's part. Judge Bowdre said in her ruling that "the court did find an inference of bad faith based on the fact that, while the Corps and Georgia were engaged with Alabama and Florida in discussions and negotiations involving allocation of water in Lake Lanier, they never mentioned to Alabama and Florida that they were simultaneously engaged in settlement discussions in the D.C. case that involved some of the same issues." *Alabama v. U.S. Army Corps of Eng'rs*, 357 F. Supp. 2d 1313, 1318 (N.D. Ala. 2005), *vacated and remanded on other grounds*, 424 F.3d 1117(11th Cir. 2005). I read that opinion when it was released, and Judge Bowdre's finding only confirmed my view of Georgia's actions at the time.

C. Reasons for Failure to Reach Agreement Under the Compact

48. The Compact was initially supposed to be a one year water allocation exercise. But because of the many extensions sought by Georgia and the slow pace at which it provided information and analysis of key hydrologic metrics and modeling, I watched our opportunity for agreement slip away over time.

49. Ultimately, I suspected Georgia did not want to reach an agreement, it simply wanted to keep the clock running. So long as the parties stayed at the negotiating table, Georgia could continue to consume more and more water to meet its immediate needs. By doing so, Georgia could claim, as they now do, that an equitable apportionment should be based on its extensive existing water uses.

50. My understanding from observations of my Georgia counterparts is that Georgia's unwillingness to reach agreement was primarily political and not based on science. They could not enter an agreement that would disappoint the expectations of water users in metropolitan Atlanta and farmers in southern Georgia by limiting their water consumption, regardless of the environmental impacts that may occur in Florida or Georgia. In fact, Bob Kerr, who was one of Georgia's negotiators, told me at one point that Lake Lanier homeowners would be irate with Georgia's politicians if they could not dock their boats. He told me that low lake levels meant that docks would go dry and boats would be on the bottom, and that was politically unacceptable even in the worst of droughts.

51. I also remember Harold Reheis telling me that his agency, the Georgia Environmental Protection Department ("EPD"), did not have the resources or the manpower to properly assess all of the agricultural irrigation permit applications it had received. However, the Georgia Legislature mandated that EPD issue permits for all pending applications. My

impression is that EPD was essentially told that analyzing potential impacts did not matter, and to just get the permits issued.

52. Refusing to acquiesce to any consumption restrictions allowed the state's political leaders to proclaim to their constituents that they were fighting for every drop of water in Lake Lanier and used by crops in the Flint River Basin. Georgia officials knew they would pay a political cost for any concession to Florida. By contrast, a lawsuit and any resulting limitation on water use, would not impose that political cost. Instead, Georgia's political leaders would be able to argue to their constituents that Florida and the courts were the proper target for their anger.

53. In the end, Governor Perdue of Georgia made clear in public statements what Florida had come to suspect, that Georgia would not allow Florida to dictate how it used its waters; in other words, no agreement on consumptive use caps would ever occur. Florida's hopes to amicably secure the water needed to sustain the Apalachicola River and Bay ecosystems ended on August 31, 2003, when the Compact expired because the parties could not reach agreement.

SUMMARY AND CONCLUSION

54. In sum, I always believed that a sensible resolution that appropriately limits Georgia water consumption and protects Florida's environment could have and should have been possible. Perhaps a judicial decree is now the only possible way to achieve that resolution.