No. 142, Original

In The
Supreme Court of the United States

STATE OF FLORIDA,

Plaintiff,

v.

STATE OF GEORGIA,

Defendant.

REPLY IN SUPPORT OF GEORGIA'S CONSENT MOTION FOR EXTENSION OF EXPERT DISCOVERY DEADLINES

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INTRODUCTION

Georgia and Florida agree that extension of the expert-discovery deadlines is both necessary and warranted. But at the same time Florida acknowledges its agreement with Georgia, it also raises "two matters" to which Georgia feels compelled to respond. Fl. Resp. at 1. *First*, Florida wrongly claims that Georgia's expert reports are somehow untimely—even though Florida bears the burden of proof on every issue in this case, aside from Georgia's argument that the United States is a necessary and indispensable party. *Second*, Florida launches into a defense of the merits of its 20 expert reports—even though this is neither the time nor the place to litigate those highly questionable findings.

ARGUMENT

1. Florida, Not Georgia, Bears The Burden Of Proof On Most Issues

To begin, Florida's arguments about which State bears the burden of proof in this case are wrong. Florida rightly concedes that, as the plaintiff in this litigation, it bears the burden of proving that it has experienced a real and substantial injury as a result of Georgia's upstream water use. *See, e.g.*, *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1027 (1983). But Florida then claims that, if it can make that showing, all of the remaining burdens shift to Georgia to defend its existing water use. That is wrong. Supreme Court case law makes it clear that ***Florida***, as the State seeking to alter flows from the status quo, bears the burden of proving that Georgia's upstream water use is inequitable. *See, e.g.*, *Washington v. Oregon*, 297 U.S. 517, 523-24 (1936) (explaining that "the burden of proof falls heavily on

complainant," the downstream state, and denying relief because "limit[ing] the long-established use in [the upstream state] would materially injure [upstream] users without a compensating benefit to [downstream] users"); *Kansas v. Colorado*, 206 U.S. 46, 117 (1907) (holding that the downstream state "has not made out a case entitling it to a decree" because, although the upstream state's diversion had caused "perceptible injury" to the downstream state through diminished flows, the upstream state had used the water for highly beneficial purposes including "transforming thousands of acres into fertile fields, and rendering possible their occupation and cultivation"); *Idaho ex rel. Evans,* 462 U.S. at 1027 (denying relief because the downstream state "has not proved that [the upstream states] have mismanaged the resource and will continue to mismanage").

In arguing to the contrary, Florida relies exclusively on *Colorado v. New Mexico*, 459 U.S. 176 (1982) (*Colorado I*) and *Colorado v. New Mexico*, 467 U.S. 310 (1984) (*Colorado II).* But those cases stand for the proposition that it is the State seeking a diversion from existing uses—not necessarily the upstream state—that bears the burden. In *Colorado I*, the Court explained that "the equities supporting the protection of existing economies will usually be compelling" and that a "state seeking a diversion" from those uses must "demonstrate[] by clear and convincing evidence that the benefits of the diversion substantially outweigh the harm that might result." 459 U.S. at 187. Similarly, in *Colorado II*, the Court made clear that the State seeking a departure from the status quo must "present clear and convincing evidence in support of its proposed diversion." 467 U.S. at 316. An

allocation of burdens that favors existing economies makes sense, the Court noted, because "'[t]he harm that may result from disrupting established uses is typically certain and immediate, whereas the potential benefits from a proposed diversion may be speculative and remote.'" *Id.* (quoting *Colorado I*, 459 U.S. at 187).

Here, it is Florida, not Georgia, that seeks to upset "established uses," *id.*, and "existing economies," 459 U.S. at 186-87. In fact, it has proposed a consumption cap on Georgia's current water usages precisely for that purpose. It is Florida, not Georgia, that bears the burden of proving by clear and convincing evidence that the benefits of its proposed changes to the status quo would substantially outweigh the harms that Georgia might suffer. *Id.*; *see also* Order on State of Georgia's Motion to Dismiss For Failure To Join A Required Party at 13, Dkt. # 128 (June 19, 2015) (explaining that Florida "shoulder[s] the burden of proving that the requested relief is appropriate" and that "a consumption cap is justified and will afford adequate relief").

Given that Florida bears the burden of proof in this case, Florida's suggestion that Georgia has somehow "missed the deadline set forth in the [Case Management Order]" for filing expert reports is unfounded. Fl. Resp. at 7. As relevant here, the only issue on which Georgia bears the burden of proof is with respect to its argument that the United States is a necessary and indispensable party.[1] Georgia therefore filed a single expert report on February 29, 2016, addressing that issue.

[1] Georgia also bears the burden of proof on its affirmative defenses of waiver and estoppel, but Georgia has elected to pursue those affirmative defenses using factual evidence as opposed to expert testimony.

Florida bears the burden of proof on all remaining issues, including its allegations that Georgia's upstream water uses are inequitable and that the benefits of its proposed diversion will outweigh the harms to Georgia. Georgia will be responding to those issues in its defensive expert reports. Georgia's expert reports will thus be timely when they are filed on or before the date this Court sets for defensive expert submissions.

2. Florida Consistently Maintained That Its Alleged Injury Need Not Be Fully Specified Until It Filed Its Expert Reports

Georgia disagrees with Florida's characterization of and justification for the 20 expert reports that Florida submitted, and particularly takes issue with the notion that the number of expert reports a party submits indicates anything at all about the relative strength of that party's position. However, those issues are irrelevant to the parties' joint extension request and Florida has acknowledged as much by joining in the request. Regardless of whether expert testimony of that volume and scope is warranted, Georgia must review and respond to the 20 expert reports that Florida has chosen to submit, a process that Florida does not dispute will take many weeks and will unavoidably extend well beyond the current April 14, 2016 deadline.

Georgia also disputes Florida's contention that Georgia has "known for years" exactly what Florida is claiming with respect to is alleged injury. As Georgia has noted in past submissions, Florida's position on its alleged injury has been a constantly moving target. For over two decades, Florida has pinned practically every harm it alleges in this case—from altered freshwater flows in the

Apalachicola River to impacts on various species—on the operations of the Army Corps, not on Georgia's water consumption. Since the beginning of this case, Georgia has asked Florida to clarify the injury allegedly caused by Georgia, but Florida's position has continued to be ever-changing. Georgia served Interrogatory 7 over a year ago, asking Florida to "[i]dentify and describe in detail each and every injury that Florida alleges is caused, at least in part, by Georgia's allegedly inequitable water use in the ACF Basin." Instead of responding with a complete answer, Florida first refused to respond at all, and has since disclosed its response in piecemeal fashion over a period of months, supplementing its answer now 5 times to assert a number of new, previously undisclosed forms of alleged harm. Now, in its expert submissions, Florida shifts focus yet again, asserting unspecified injury to generic "ecological productivity." Florida claims that its alleged injury has been known to Georgia for decades, but these alleged harms seem to have been generated solely for the purposes of this litigation. Every responsible Florida official deposed in this case testified that they never saw any contemporaneous reports tracking "ecological productivity," and prior to this litigation Florida did not perform any studies to track or quantify "ecological productivity."

In short, despite Georgia's repeated and consistent efforts to elicit additional information from Florida, the expert reports filed on February 29 were the first time Florida provided any detailed information on what injuries it was claiming. The notion that Georgia should have been preparing its expert testimony to respond to this sort of moving target for "months if not years" defies logic. There is no way in

which Georgia could have submitted expert reports on those previously undisclosed injuries, and any requirement to do so would have been highly prejudicial to Georgia.

At bottom, the "two matters" that Florida raises in its reply submission are misguided. Florida (not Georgia) bears the burden of proof on the vast majority of issues in this case. And Georgia has not known "for years" what Florida's alleged injuries attributable to Georgia are. But setting those disputes aside, the fundamental point for present purposes is that both Georgia and Florida agree that the expert-discovery deadlines should be extended to enable the full and fair development of the record that equitable apportionment cases require.

CONCLUSION

For the foregoing reasons, Georgia respectfully asks the Special Master to grant its consent motion for extension of expert discovery deadlines.

Respectfully submitted,

/s/ *Craig S. Primis*

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Before the Special Master

Hon. Ralph I. Lancaster

CERTIFICATE OF SERVICE

This is to certify that this REPLY IN SUPPORT OF GEORGIA'S CONSENT MOTION FOR EXTENSION OF EXPERT DISCOVERY DEADLINES has been served on this 16th day of March, 2016, in the manner specified below:

For State of Florida	**For United States of America**
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