No. 142, Original

In The
Supreme Court of the United States

STATE OF FLORIDA,

Plaintiff,

v.

STATE OF GEORGIA,

Defendant.

STATE OF GEORGIA'S RESPONSE TO STATE OF FLORIDA'S MOTION FOR AN EXTENSION OF EXPERT DISCOVERY

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INTRODUCTION

Rather than file a straightforward motion asking the Special Master for additional time, Florida has chosen to lodge an unfounded, unnecessary, and counterproductive attack on Georgia's litigation conduct. Such an attack compels Georgia to respond, lest its silence be viewed as acquiescence, and turns a simple extension request that might have been filed jointly into an inflammatory exercise. Thus, although Georgia does not oppose Florida's request, Georgia submits this response to address Florida's faulty legal arguments and misstatements regarding Georgia's conduct of expert discovery.

Georgia's expert reports were timely disclosed. The only relevant 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. Georgia disclosed an expert report addressing that issue on February 29. Florida bears the burden of proof on all remaining issues, including the burden to prove (by clear and convincing evidence) substantial injury, causation, inequitable upstream use, and redressability. Georgia disclosed defensive reports on those issues on May 20, as it was required to do by the operative Case Management Plan.

Throughout its motion, Florida tries to lay the blame for its need for more time on Georgia's doorstep. Extension requests should be based on the merits of the request and a legitimate need for additional time, not a finger-pointing exercise. That was not Florida's approach, however, so Georgia must clarify the record. It was Florida, not Georgia, that chose to retain ***twenty*** experts and issue ***twenty four*** expert reports. Much of this work was unnecessary, directed to tangential

issues in the case, or could have been consolidated into a smaller group of experts requiring fewer depositions. But Florida instead took a scorched-earth approach to expert discovery that has created an extraordinary amount of work that must be completed in what Florida fully knew would be a very tight timeline. For its part, Georgia attempted to be as efficient as possible and disclosed only nine experts. While that is not a small number, it was necessitated by Florida's decision to use twenty experts and the need for Georgia to respond to Florida's assertions so as not to be accused later of failing to respond to the scores of opinions offered by Florida.

If Florida genuinely believes it needs eleven weeks to review and analyze Georgia's nine defensive expert reports (and take depositions of those same experts), then Georgia does not oppose that request. But Florida should not predicate its request on baseless claims that Georgia "caused" Florida's predicament or "prejudiced" Florida's interests. That type of rhetoric is altogether unhelpful, particularly when deployed in a simple request for more time.

ARGUMENT

I. Georgia's Expert Disclosures Were Timely

Florida's primary reason for seeking more time is its apparent belief that "a substantial number of Georgia's new expert opinions should have been disclosed on the Court's initial required disclosure date of February 29, 2016." Fl. Mot. at 1-2. That is wrong. All of Georgia's reports were timely served, and Florida's contrary arguments rely on a mistaken view of the law.

Florida relies on a footnote in a factually inapposite case to argue that it only needs to prove "that Georgia's upstream diversion of interstate water is causing or

will cause Florida real or substantial injury or damage." Fl. Mot. at 4 (citing *Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982) (*Colorado I*)). Once it does that, Florida argues, ***all*** of the remaining burdens shift to Georgia.

That is not the law. Florida of course 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 proving such an injury does not shift all of the remaining burdens to Georgia. To the contrary, Florida also bears the burden of proving, for example, (i) that Georgia's upstream water use is inequitable; (ii) that its injuries were in fact *caused* by Georgia's upstream water use, and not some other cause, such as Florida's mismanagement of its own resources; and (iii) that Florida's requested remedy will in fact redress its purported harms.

Supreme Court case law is clear that Florida—not Georgia—bears the burden of proving that Georgia's upstream water use is inequitable. Florida is the state asking the Court to alter flows from the status quo. As a result, it bears the burden of proving that the current flow regime is inequitable and that the benefits of Florida's requested modification will substantially outweigh the costs. *See, e.g., Idaho ex rel. Evans,* 462 U.S. at 1028 (denying relief because the downstream state "has not proved that [the upstream states] have mismanaged the resource and will continue to mismanage"); *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").

In arguing that it somehow does not bear the burden to prove any inequity in Georgia's upstream water use, Florida relies on a footnote in *Colorado I* and text citing that footnote in *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—in this case Florida—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.

Here, it is Florida, not Georgia, that seeks to upset "established uses," *id.*, and "existing economies," 459 U.S. at 186-87. In fact, Florida has proposed a consumption cap on Georgia's current water usage precisely for that purpose. It is

therefore Florida that bears the burden of proving by clear and convincing evidence that existing uses are inequitable and that the benefits of its proposed changes to the status quo would substantially outweigh the harms that Georgia might suffer.

Florida also bears the burden of proof on causation. It must prove that its alleged injuries are directly caused by Georgia's upstream water use, and are not caused by other things such as Florida's mismanagement of its own resources. *See, e.g., Idaho ex rel. Evans,* 462 U.S. at 1023 (plaintiff downstream state "must shoulder the burden of proving that the ... fisheries in [the upstream states] have adversely and unfairly affected the number of fish arriving in [the downstream state]"); *Colorado v. Kansas*, 320 U.S. 383, 400 (1943) (holding that the downstream state "has not sustained her allegations" that the upstream state's water use "has worked a serious detriment to the substantial interests of [the downstream state]"). Indeed, Florida's own motion acknowledges that Florida must prove that Georgia's water use "is causing" it substantial injury. Fl. Mot. at 4.

Florida suggests that Georgia's decision to plead an affirmative defense of intervening cause somehow alleviates Florida's burden of proof on causation. Fl. Mot. at 5. But the expert reports Georgia submitted on May 20 go to its defenses against Florida's allegations, not its affirmative defenses. Any potential overlap between (i) Georgia's defense against Florida's attempts to establish the elements of causation and harm; and (ii) an affirmative defense pertaining to intervening causes does not and cannot relieve Florida of its burden to prove causation in the first instance. Florida can attempt to prove that Georgia's water use is causing it

injury, and Georgia can defend against such allegations by pointing to other causes of Florida's alleged injuries, such as Florida's mismanagement of its own fisheries and waterways. Those are defensive arguments that would be available to Georgia even if it had not chosen to plead an affirmative defense of intervening cause. And Georgia's decision to plead such an affirmative defense does not shift the burden of proof to Georgia or deprive Georgia of the ability to defend against Florida's causation allegations by pointing to other causes of Florida's alleged injuries.

Florida also bears the burden of proving redressability. Equitable apportionment does not "vindicate a barren right" to water. *Washington v. Oregon*, 297 U.S. at 523. Instead, Florida must prove that its requested remedy will in fact redress whatever substantial injuries (if any) it is able to prove. Because Florida has expressly limited its requested remedy to a consumption cap, 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." Order on State of Georgia's Motion to Dismiss For Failure To Join A Required Party at 13, Dkt. # 128 (June 19, 2015). Georgia, for its part, can defend against those allegations by showing how a consumption cap will not redress Florida's purported injuries.

In short, Florida bears the burden of proof on almost all of the issues in this case, including injury, causation, inequitable use, and redressability. For that reason, Florida's claims that Georgia's reports "should have been disclosed on February 29, 2016" are wrong. 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. Georgia therefore disclosed a single expert report on February 29, 2016, addressing that issue. Georgia's remaining reports were not due until May 20, 2016, the date on which Georgia properly disclosed them.[1]

There is some irony in Florida's unfounded threats to "preclude" Georgia's timely disclosed expert reports. Florida disclosed ***four additional*** expert reports on May 20, 2016, including at least two (by Drs. Hornberger and Sunding) that opine on issues on which Florida unquestionably bears the burden of proof (even under Florida's erroneous view of the law). Those reports, not Georgia's, "should have been disclosed on the Court's initial required disclosure date of February 29, 2016." Fl. Mot. at 1-2. And Florida has no basis at all for belatedly disclosing those reports now.

Florida suggests in its brief that Georgia should not be entitled to put on its expert case because of Florida's strained reading of the inapposite footnote in *Colorado I*. *See* Fl. Mot. at 2. Of course, though Florida has now raised and repeated essentially the same arguments in three different submissions, it has explicitly declined to ask for any relief with respect to Georgia's expert reports. And in fact no such action would be justified, given that Florida's views of the law are mistaken and Georgia's reports were timely. Florida also acknowledges elsewhere that the Supreme Court has "[r]ecogniz[ed] the importance of fully developed

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[1] Florida claims that "[u]nder this Court's CMP ... exchange of the parties' expert reports was to occur simultaneously." Fl. Mot. at 3. That is wrong. The CMP provides for ***staggered***, not simultaneous, expert reports, with the party with the burden of proof (Florida for all but one issue) disclosing first, and the party who does not bear the burden of proof (Georgia) disclosing second.

factual and expert evidence in original proceedings," and that "the Court 'has always been liberal in allowing full development of the facts.'" Fl. Mot. at 6-7 (quoting *United States v. Texas*, 339 U.S. 707, 715 (1950)). Consistent with its position that full factual and expert discovery is required in original jurisdiction actions, Florida should focus on the merits of the expert opinions instead of attempting to lay groundwork to avoid those opinions altogether.

II. Florida's Request For A 40-Day Extension

Florida asks for a 40-day extension of time to depose Georgia's nine experts. While Georgia does not oppose that request, several points in Florida's submission require a response.

First, Florida includes several pages discussing what it describes as "the voluminous data and models produced by Georgia." Fl. Mot. at 7. While Georgia's reports and supporting materials are indeed comprehensive, it is worth emphasizing that Georgia took a far more efficient approach to expert discovery than did Florida. Florida submitted 24 expert reports from 20 different experts; Georgia submitted 10 reports from 9 different experts. Florida submitted 1.3 terabytes of supporting materials; Georgia submitted less than half of that (464 gigabytes, according to Florida). Florida created multiple new models that seek to fundamentally rework the way the Federal Government has managed water in the ACF Basin for decades; Georgia relied on the models that the Federal Government has long accepted and endorsed. Georgia, in short, took the most efficient approach it could to expert discovery. Florida did not.

Second, Florida is asking for a 40-day extension of the expert discovery period, which would give Florida 80 total days to review Georgia's reports and depose Georgia's experts. Georgia, by contrast, had 75 days to prepare defensive reports responding to Florida's 20 expert reports. Florida is therefore asking for more time than Georgia had to respond to Florida's reports, when Georgia has half as many experts.

Third, and finally, Florida blames Georgia for the busy deposition schedule in June, claiming that Georgia pushed its depositions back. That is revisionist history. Mindful of the extensive time that would be required to depose Florida's 20 experts, Georgia requested that 6 of the depositions be scheduled in April or early May. Yet with the exception of one deposition, Florida did not accommodate Georgia's requests. Instead, Florida has repeatedly offered dates for its expert witnesses in June and has cancelled numerous depositions scheduled in April and May. Many weeks ago, Georgia emailed Florida to say that Florida's insistence on scheduling its depositions in June would pose scheduling problems. Yet Florida disregarded Georgia's concern, and continued to offer its witnesses for June dates. Florida has no basis for blaming Georgia for a busy deposition calendar when Georgia was the party that first identified this problem several weeks ago and took affirmative steps to avoid it.

CONCLUSION

Georgia does not oppose Florida's motion for an extension of expert discovery.

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 the STATE OF GEORGIA'S RESPONSE TO STATE OF FLORIDA'S MOTION FOR AN EXTENSION OF EXPERT DISCOVERY has been served on this 25th day of May, 2016, in the manner specified below:

For State of Florida	**For United States of America**
By U.S. Mail and Email	By U.S. Mail and Email
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