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 STATE OF GEORGIA'S CONSENT MOTION FOR EXTENSION OF EXPERT DISCOVERY DEADLINES

The State of Florida consents, subject to the reservations discussed below, to Georgia's motion to extend the deadline for expert discovery. But Georgia's request raises two matters that require further elaboration at this time. The first is the burden of proof that each party bears in this equitable apportionment action, which, under the terms of this Court's Case Management Order, controls the deadline for the parties' expert disclosures. And the second is Georgia's mischaracterization of the nature of Florida's affirmative expert disclosures.

DISCUSSION

1. Case Management Order (CMO) No. 13 clearly specifies the parties' obligations concerning the disclosure of experts. It states that "[a]ny party that intends to rely upon expert testimony in support of an issue *upon which that party bears the burden of proof* shall provide full disclosure for such experts by no later than February 29, 2016." CMO No. 13 at 4 § 7.1,

(emphasis added). The order further provides that "[a]ny party seeking to rely upon expert testimony on an issue concerning which *it does not bear the burden of proof* shall provide full disclosure for such experts by no later than April 14, 2016." *Id.* § 7.2 (emphasis added). Allocating expert disclosures based on the burden of proof is a common practice in civil litigation and is recommended in the Advisory Committee Notes accompanying Fed. R. Civ. P. 26(a)(2). The obvious design of this framework is to facilitate the ***simultaneous exchange*** of each side's affirmative expert disclosures, and then to allow each side to present defensive expert reports, in response to the initial disclosures. Underscoring that design, the CMO forecloses the use of "rebuttal experts," except upon a showing of "good cause." *Id.* § 7.2.

Existing Supreme Court precedent clearly lays out the parties' burdens of proof in an equitable apportionment action such as this. *See Colorado v. New Mexico*, 467 U.S. 310, 317-21, 323-24 (1984) (*Colorado v. New Mexico II*); *Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982) (*Colorado v. New Mexico I*). Under these decisions, the downstream state (Florida, here) has the "initial burden" of proving, by "clear and convincing evidence," that it has suffered or will suffer an injury as a result of the upstream State's (Georgia, here) use of water. *Colorado v. New Mexico II*, 467 U.S. at 317; *Colorado v. New Mexico I*, 459 U.S. at 187 n.13. And, when such injury exists, the burden shifts to the upstream State to show, by "clear and convincing evidence," that the diversion is justified under the principle of equitable apportionment. *Colorado v. New Mexico II*, 467 U.S. at 317; *Colorado v. New Mexico I*, 459 U.S. at 187 n.13.

At summary judgment and trial, Florida will bear—and meet—its burden in showing that it has been injured by Georgia's ever-increasing consumption of the waters at issue. But what matters for present purposes is that Georgia will bear the burden of proof on any issues it seeks to raise in this case in arguing that its current or anticipated upstream consumptive uses are

somehow equitable. And because Georgia plainly bears the burden in showing that its use of the waters at issue is equitable, it was required to submit all expert testimony on those issues on which it intends to rely in this action on February 29, 2016. Georgia was not free to see what experts Florida designated and then wait until April 14, 2016, to designate its experts on these issues. Nor may Georgia hold back its expert case until this Court has made a finding that Florida has met its initial burden, effectively extending expert discovery into summary judgment or even the trial. Under the plain terms of the CMO, any expert reports on the issues on which Georgia bears the burden of proof were due on February 29, 2016.

Georgia, like any party, also bears the burden of proving the five affirmative defenses it pled. *See Taylor v. Sturgell*, 553 U.S. 880, 907 (2008) ("Ordinarily, it is incumbent on the defendant to plead and prove such a[n affirmative] defense." (citing *Jones v. Bock*, 549 U.S. 199, 204 (2007))); *Deputron v. Young*, 134 U.S. 241, 253 (1890); *see generally* 5 Charles Alan Wright, et al., Fed. Practice & Procedure § 1270 (3d ed.). The Supreme Court has repeatedly held that a State bears the burden of proving affirmative defenses it asserts in original actions. *See, e.g.*, *Virginia v. Maryland*, 540 U.S. 56, 59, 76-77 & n.10; *New Jersey v. New York*, 523 U.S. 767, 786-87 (1998); *Kansas v. Nebraska*, 135 S. Ct. 1042, 1071-72 (2015) (Thomas, J., dissenting).

2. Consistent with the CMO, Florida disclosed the affirmative expert testimony on which it intends to rely on February 29, 2016. In doing so, Florida, in an abundance of caution, not only designated the expert testimony that will prove that it has been *injured* by Georgia's ever-increasing consumption of the waters at issue, but also expert testimony that answers Georgia's numerous attempts to shift the blame for that injury to other actors or causes. Georgia's response

tries to portray Florida's expert submissions as unduly voluminous and technical. But that reflects a misunderstanding of these expert reports.

Florida has presented expert reports by several nationally recognized hydrology experts to address inter-related engineering disciplines utilized in analyzing surface water, ground water and other similar technical issues in the ACF Basin. While Georgia suggests that these reports are unduly voluminous, it overlooks that the underlying science involves modeling and other technical considerations that lend themselves to analyses of significant volumes of data. The U.S. Army Corps of Engineers engages in the same sort of modeling and this sort of scientific evidence is common in equitable apportionment actions like this.

Nevertheless, although the underlying scientific work is necessarily technical and thorough, Florida's presentation at trial will be simple, straightforward, and compelling, organized around a handful of simple and forceful principles, including that:

- Georgia's ever increasing consumption of the waters at issue is causing significant, and unprecedented, harm to Florida and its natural resources.
- A cap on Georgia's upstream consumption, including on agricultural irrigation, will produce significant additional flows on the Apalachicola River.
- Those additional flows will substantially benefit Florida, both in the context of the Apalachicola River and Bay, and in other ways.
- Georgia can comply with a consumption cap by adopting a variety of reasonable cost measures of the types that other states throughout the U.S. already employ.

Florida's hydrology experts, along with an expert on the operations of the U.S. Army Corps of Engineers, will also forcefully rebut Georgia's allegations regarding the Corps' operations of Chattahoochee River dams. Likewise, Florida's nationally recognized experts on river and estuarine biology will demonstrate how Florida has been and will be significantly harmed by Georgia's upstream diversions and how a cap on those diversions would benefit Florida. Aside from these individuals, Florida has retained experts on economic and other harm

in the Apalachicola Basin, and responded in depth to the many contrary allegations Georgia proffered in its affirmative defenses, its responses to contention interrogatories and elsewhere.

Georgia appears to object to the number of experts Florida has identified. But from the outset of this litigation, Georgia has questioned virtually every aspect of Florida's claims, while attempting to shift the blame for the grave ecological and economic harms being inflicted on the Apalachicola Bay area to an array of other factors. While Florida of course is not obligated to rely on every expert it has already identified at trial, it was required under the CMO to present its affirmative expert case on February 29, 2016. The number of experts it has identified, and the volume of data support their reports, simply underscores the strength of Florida's case.

Georgia, by contrast, designated just one expert on February 29, 2016. That expert's report focuses exclusively on the U.S. Army Corps of Engineers' activities in the ACF Basin, an issue that was the focus of Georgia's unsuccessful motion to dismiss. In that motion, Georgia claimed that the Court cannot accord complete relief to Florida without the United States participating as a party and that an order equitably apportioning water in the ACF Basin could impair federal interests. The Court heard argument on this issue and ruled in Florida's favor.

Georgia's expert, Dr. Philip Bedient, advances the counterintuitive proposition that the additional water made available by reducing Georgia's consumption will never reach Florida because the U.S. Army Corps of Engineers will simply stockpile the additional water in its upstream reservoirs on the Chattahoochee. That theory is refuted by Florida's expert reports and the actual way in which the Corps operates its system. In any event, Dr. Bedient's opinion addresses only that issue. Georgia did not disclose any expert testimony arguing that its consumption of the waters at issue is somehow equitable. Nor did it disclose any expert testimony supporting the following affirmative defenses—unclean hands, the failure to mitigate,

equitable estoppel, or waiver. Nor did Georgia disclose any expert testimony that would attempt to prove that Florida could have taken additional measures to prevent the harm it is now suffering, a (false) claim it has repeatedly advanced in this case. Georgia did not designate even one expert to address these topics, which are at the core of Georgia's own affirmative defenses.

Now, Georgia claims that it needs more time to assemble its complete expert case. But Georgia has known for years exactly what Florida's claims are in this action, including with respect to the injuries it is suffering—and, indeed, this dispute stretches back *decades*. And Georgia must have known (or should have known) for some time what expert testimony it wishes to rely upon on all the issues on which it bears the burden of proof, and there is no reason why Georgia could not have (and should not have) been preparing that testimony for months if not years. Perhaps it has been, and its forthcoming expert reports presumably will state when its experts began working on the case. But Georgia cannot claim prejudice in not having more time to develop its expert disclosures on the issues on which it bears the burden of proof.

3. Of course, Georgia was free to *forgo* expert testimony on the issues on which it bears the burden of proof and, indeed, it is free to *concede* that its consumption of the waters at issue—which has increased exponentially in the past few decades—is inequitable. But Georgia was not free to disregard the schedule set by this Court for the disclosure of expert testimony, to wait to see Florida's initial disclosures first, to designate all its expert testimony—even on issues on which it bears the burden of proof—as "defensive experts," and then to effectively deny Florida an opportunity to respond to those reports because of the general rule against "rebuttal" experts. Georgia refers in its motions to its forthcoming expert reports as "defensive reports." Time will tell, but the reports are only properly regarded as "defensive" if they concern an issue on which

Georgia does *not* bear the burden of proof. CMO No. 13 at 4 § 7.2. Georgia has missed the deadline set forth in the CMO for all expert reports that are not "defensive."

When a party fails to meet its expert disclosure obligations, a Court has the authority to bar the party from presenting any expert reports that were not timely filed. *See* Fed. R. Civ. P. 37(c)(1); 8B Charles Alan Wright, et al., Fed. Practice & Procedure § 2289.1 (3d ed.) (citing cases). In this case, that would prevent Georgia from filing (or relying on) any expert testimony that it did not submit on February 29, 2016, on issues on which it bears the burden of proof. In the interests of cooperation, Florida has consented to Georgia's proposed schedule for expert disclosures and depositions, but Florida has not of course consented that Georgia could belatedly disclose experts that should have initially been disclosed on February 29. Indeed, any late disclosure of such experts would be highly prejudicial to Florida.

As discussed, the CMO was designed so that the parties would make their principal expert disclosures simultaneously on February 29, 2016, and then would have an opportunity to submit defensive expert reports by April 14, 2016. Rebuttal experts currently are not allowed, absent a showing of good cause. *See* CMO No. 13 at 4 §§ 7.1 & 7.2. Florida is concerned that Georgia's forthcoming "defensive" expert reports will not be limited to issues on which it does not bear the burden of proof. To the extent that is so, then Georgia—by virtue of having failed to comply with the disclosure requirements in the CMO—will have an opportunity to respond to Florida's expert reports, but Florida will not be given an opportunity to respond to Georgia's reports. That would contravene the schedule designed by this Court and fair practice, and it would require Florida to seek appropriate relief from this Court at that time.

CONCLUSION

Subject to the foregoing, Florida does not oppose Georgia's request for an extension.

Dated: March 15, 2016

Respectfully submitted,

/s/ Philip J. Perry

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CERTIFICATE OF SERVICE

This is to certify that the STATE OF FLORIDA'S RESPONSE TO STATE OF GEORGIA'S CONSENT MOTION FOR EXTENSION OF EXPERT DISCOVERY DEADLINES has been served on this 15th day of March 2016, in the manner specified below:

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