No. 142, Original

In The
Supreme Court of the United States

STATE OF FLORIDA,

Plaintiff,

v.

STATE OF GEORGIA,

Defendant.

STATE OF FLORIDA'S MOTION FOR AN EXTENSION OF EXPERT DISCOVERY

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INTRODUCTION

On Friday evening May 20, Florida received approximately 2200 pages of new expert reports for nine Georgia experts, accompanied by 464 gigabytes of related electronic materials (composed of several thousand files containing data, complex models, and other information).[1] May 20 was the second of two deadlines under Case Management Order ("CMO") No. 17 for the parties to exchange expert disclosures. *See* CMO No. 17 at 4, §§ 7.1, 7.2. Florida previously disclosed approximately 2500 pages of expert reports for twenty experts on February 29, 2016, and Georgia sought and was granted an extension of time in order to analyze Florida's disclosures and depose Florida's witnesses. *Id.* at 2.

By July 1 (the current deadline for completing expert depositions), Georgia will have had four months to analyze Florida's disclosures and to depose Florida's experts. In sharp contrast, without relief, Florida will have six weeks to analyze the voluminous materials received Friday and to depose Georgia's new experts. That six-week period already is substantially consumed by Georgia's continuing depositions of Florida's experts—including up to 22 days of anticipated testimony—and by the parties' ongoing confidential mediation process.

While Florida is still reviewing Georgia's newly disclosed material to determine the full scope of what Georgia provided, it is already apparent that a substantial number of Georgia's new expert opinions should have been disclosed on

[1] On May 20, Florida provided to Georgia four defensive expert reports comprising 187 pages and approximately 390 megabytes of supporting materials. One gigabyte consists of 1024 megabytes.

the Court's initial required disclosure date of February 29, 2016. It is also already apparent that the time currently remaining to take expert depositions in the Court's schedule is insufficient for Florida to analyze fully the information produced by Georgia on Friday and to conduct depositions. As set forth below, Florida and its experts estimate that Florida will require at least three to four weeks to download, review, run and analyze Georgia's reports and associated models before preparing to take depositions of Georgia's experts. By comparison, Georgia spent much of March and April reviewing Florida's expert reports before taking depositions.

The Court would be justified in precluding Georgia experts from testifying as to expert opinions that Georgia did not timely disclose. Florida is still analyzing Georgia's recent disclosures and is considering moving for such relief. For present purposes, however, because the Court's deadline for completing expert discovery is very fast approaching, Florida respectfully seeks an extension of the current deadline by 40 days, **until August 9, 2016**, to complete depositions of the experts disclosed on May 20.

Georgia's untimely expert disclosures have also prejudiced Florida in other ways. Among other things, absent leave to file rebuttal reports, Florida has been deprived of the opportunity to provide "defensive" expert opinions in response to many of Georgia's new disclosures. Georgia had, and took full advantage of, this opportunity, but, absent an order from this Court under the current Case Management Plan ("CMP"), Florida cannot file rebuttal reports. Given the breadth of information disclosed Friday, Florida has not yet determined whether to seek

leave to file any rebuttal reports, pursuant to CMP § 7.2. If Florida seeks such leave, its intention is to do so in the coming weeks, and to propose a schedule for filing rebuttal reports and completing depositions on August 9, 2016—the end date of the extension period requested here—in order to avoid any further need to extend the expert discovery period.

Florida has met and conferred with Georgia regarding Florida's request for an extension to take expert depositions until August 9, 2016. When seeking its own extension in a consent motion in March, Georgia previously acknowledged that "We understand from Florida that they, likewise, would like additional time after receiving our reports; and *we don't object to that*. We think both sides should have ample opportunity, cognizant of the need for expedition, to evaluate each other's very technical and complex expert analyses." Status Conference Tr. 12:11-18, Mar. 8, 2016 (emphasis added). Although Florida conferred with Georgia this morning, Georgia has not yet taken a position on this motion.

ARGUMENT

I. THIS REQUESTED DELAY MAY HAVE BEEN AVOIDABLE HAD GEORGIA TIMELY DISCLOSED ITS EXPERTS

Under this Court's CMP (as most recently amended by CMO No. 17), exchange of the parties' expert reports was to occur simultaneously. First, on February 29, 2016, the parties were required to exchange expert reports "in support of an issue upon which [a] party bears the burden of proof." CMO No. 17 at 4, §§ 7.1, 7.2; *see also* CMO No. 13 §§ 7.1, 7.2. Second, on May 20, 2016, the parties were allowed to respond to the initial set of expert disclosures by exchanging defensive

expert reports on issues for which the other party bears the burden. *Id.* The CMO does not specify that Plaintiff or Defendant must disclose expert reports on particular dates—instead, both deadlines apply to "any party." *Id.*

The Supreme Court's most recent and comprehensive articulation of the burdens in equitable apportionment cases is in *Colorado v. New Mexico*, 467 U.S. 310, 317-21, 323-24 (1984) (hereinafter *Colorado v. New Mexico II*), and *Colorado v. New Mexico*, 459 U.S. 176, 183-187 & n.13 (1982) (hereinafter *Colorado v. New Mexico I*). Florida, as the downstream State, must show that Georgia's upstream diversion of interstate water is causing or will cause Florida "real or substantial injury or damage." *Colorado v. New Mexico I*, 459 U.S. at 187 n.13; *see also* *Colorado v. New Mexico II*, 467 U.S. at 317; Florida's Response to Georgia's Consent Motion for Extension of Expert Discovery and Deadlines (Mar. 16, 2016), Docket No. 407. Georgia, by contrast, is required to demonstrate that its existing or planned diversions are nevertheless justified "under the principle of equitable apportionment." *Colorado v. New Mexico I*, 459 U.S. at 187 n.13; *see also* Lauren D. Bernadett, *Equitable Apportionment in the Supreme Court: An Overview of the Doctrine and the Factors Considered by the Supreme Court in Light of* Florida v. Georgia, 29 J. Envtl. L. & Litig. 511, 513, 521-22 (2014); William D. Olcott, *Equitable Apportionment: A Judicial Bridge Over Troubled Waters*, 66 Neb. L. Rev. 734, 737 (1987).[2] *Georgia* therefore bears the burden of proof to show that its

[2] The principal remedy Florida seeks is a consumption cap that would, *inter alia*, limit both Georgia's *current and future* attempts to divert additional interstate waters. Florida also notes that both Colorado and New Mexico are prior

current or anticipated upstream consumptive uses are equitable. For example, Georgia bears the burden of establishing that it has satisfied its "affirmative duty under the doctrine of equitable apportionment to take reasonable steps to conserve and even to augment the natural resources within [its] borders for the benefit" of Florida. *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983). Georgia bears the burden to show that Florida could implement "reasonable conservation measures [that] could compensate for some or all of the proposed diversion." *Colorado v. New Mexico II*, 467 U.S. at 317. And Georgia bears the burden to establish any "benefits to [Georgia] from the [existing and future] diversion[s]." *Id.*

Georgia, like any party in civil litigation, also bears the burden of proving its affirmative defenses, including its fifth affirmative defense that it should be absolved of fault due to any intervening and superseding causes of Florida's harms. Report of the Special Master, *Virginia v. Maryland*, Orig. No. 129, at 77 (Dec. 9, 2002) (Lancaster, S.M.); *Virginia v. Maryland*, 540 U.S. 56, 59, 76-77 & n.10 (2003); Fifth Defense, State of Georgia's Answer at 30-31; *see also 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.").

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appropriation states, while Florida and Georgia embrace riparian rights. *Cf. New Jersey v. New York*, 283 U.S. 336, 342-43 (1931) (taking into account the riparian rights doctrine applied in both states); Fla Stat. § 253.141; *5F, LLC v. Dresing*, 142 So.2d 936, 939-40 (Fla. Dist. Ct. App. 2014); Ga. Code Ann. § 44-8-1; *Hendrick v. Cook*, 4 Ga. 241, 241 (1848). Unlike the prior appropriation doctrine utilized in other states, the touchstone of the riparian doctrine is that past use does not entitle a user to a fixed amount of water in the future; instead, all uses of water must be reasonable in light of all the circumstances presented. *United States v. Willow River Power Co.*, 324 U.S. 499, 505 (1945); *Colorado v. New Mexico I*, 459 U.S. at 179 n.4; A. Dan Tarlock, Law of Water Rights & Resources §§ 10:20-21 (2015).

Georgia should have submitted expert reports on each and every issue for which it bears the burden of proof and on which it intends to rely on expert testimony, on February 29, 2016.[3] But, it did not. Instead, Georgia made the strategic decision to wait to see what experts Florida timely designated, and then filed nine new expert reports, the majority of which include opinions that should have been disclosed more than 2.5 months ago. By Florida's current calculation, more than thirty opinions set forth in the recently proffered reports should have been disclosed on February 29, 2016. Had Georgia timely made those disclosures, Florida could have been analyzing and deposing Georgia witnesses for the past 2.5 months, could prepared responsive defensive reports, and would be on even footing with Georgia. Because Georgia chose to withhold these opinions, Florida has been prejudiced.[4]

II. A FORTY-DAY EXTENSION IS NEEDED TO ANALYZE AND DEPOSE THE NEWLY DISCLOSED EXPERTS

Recognizing the importance of fully developed factual and expert evidence in original proceedings, the Court "has always been liberal in allowing full

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[3] Georgia's May 20 production includes opinions on a number of these topics. For example, Georgia has presented reports suggesting that its water consumption is justified by economic interests, *see, e.g.*, Expert Report of Suat Irmak, Opinion 1; Expert Report of Robert Stavins, Opinion 1, and that superseding or intervening causes are responsible for Florida's injury, *see, e.g.*, Expert Report of Peter Menzie, Opinions 3.2, 3.3.4; Expert Report of Philip Bedient, Opinions 2, 3, 5, 6, 8.

[4] As indicated above, Florida is considering whether to move to preclude future expert testimony regarding opinions that should have been, but were not, disclosed on February 29th. Florida is not suggesting that the Court should decide now whether to strike possible future Georgia expert testimony in connection with this motion for an extension. But those issues are nevertheless relevant in demonstrating why an extension is necessary now.

development of the facts." *United States v. Texas*, 339 U.S. 707, 715 (1950); *see also Nebraska v. Wyoming*, 515 U.S. 1, 13 (1995); *Mississippi v. Louisiana*, 506 U.S. 73 (1992); *Oklahoma v. Texas*, 253 U.S. 465, 471 (1920); *Kansas v. Colorado*, 185 U.S. 125, 144-45 (1902). As Georgia has noted, "[h]aving a 'fair opportunity' to respond to expert reports is particularly important in a case of this nature, which involves complex hydrologic, engineering, economic, ecological, and scientific issues." Georgia's Consent Motion for Extension of Expert Discovery Deadlines (Mar. 14, 2016), Docket No. 406 (hereinafter Georgia's Consent Motion).

Georgia's May 20 disclosures create a substantial need for an extension. In its March 14 consent motion for an extension, Georgia argued that the then existing deadline would prejudice Georgia's ability to defend its case and prevent the full and fair development of the record that equitable apportionment cases require. The same is true here. Without an extension, Florida will not be able to fully analyze Georgia's expert submissions and complete expert depositions.

A. Multiple Weeks Are Required To Review And Analyze The New Materials And Prepare For Depositions

First, before Florida's experts can analyze the voluminous data and models produced by Georgia, Florida must download, copy, categorize, and distribute the data in order to supply it to the appropriate experts for analysis. Though Florida has had a team working at this task all weekend, it does not expect to complete this process until near the end of the week. *Compare* Georgia's Consent Motion at 2 ("Even the most basic step of obtaining Florida's expert reports, reliance materials, and modeling, and then distributing those materials . . . took almost a week.").

Second, when that initial task is complete, Florida's experts will need multiple weeks to analyze the reports and underlying data. As Georgia recognized, "[a]nalyzing [ ] expert opinions requires much more than just reading and scrutinizing the reports, which themselves are long and complex." Georgia's Consent Motion at 3.

For example, the report of William H. McAnally is 330 pages long and includes multiple opinions which address Georgia's affirmative defense of an intervening and superseding cause—an issue on which Georgia bears the burden of proof. And the report of Suat Irmak, which opines solely on issues on which Georgia bears the burden, comprises 200 pages. The report of Romuald Lipcius also consists almost entirely of opinions that should have been disclosed in February, and is 111 pages long. Likewise, the report of Sorab Panday is 453 pages long, and the report of Charles Menzie is 543 pages. The second (replacement) report of Philip B. Bedient—who provided the only report Georgia disclosed on February 29 and was previously deposed—concerns almost entirely issues on which Georgia bears the burden of proof and comprises 208 pages.

Third, before Florida's experts can complete their analyses of Georgia's reports, they will need to review and analyze the data sets and models Georgia just provided. Georgia's supporting data and modeling production includes numerous hydrological and economic models. Each of these models must be analyzed and reviewed by Florida's experts. Verifying these models and running them with multiple variables could take at least 2 to 3 weeks, and potentially more. For

example, McAnally's report relies on several new models, including a hydrodynamic salinity numerical model, a salinity statistical model, and a dissolved oxygen statistical model. Florida will need to run and evaluate McAnally's models. Similarly, the Panday report relies on multiple models including a surface water budget model and complex groundwater model runs. The document production associated with his report includes more than 5,000 files, many of them modeling files, and the list of documents considered is 116 pages. Florida's groundwater expert expects it could take *4 to 5 weeks* just to evaluate Panday's modeling.

Certain of Georgia's experts also rely on the data and results of other experts, which compounds the considerable time it will take to analyze and unpack the data and models underlying the reports. For example, in his 543-page report, Menzie relies upon McAnally for salinity and dissolved oxygen modeling. Before Florida can fully analyze Menzie's opinions that build on this modeling, it will need to evaluate McAnally's work in developing and running these models. Likewise, Bedient's report relies on consumptive use analysis in the reports of Peter Mayer and Irmak, along with Panday's analysis for the translation of groundwater pumping into surface-flow depletions. Before Florida's experts can adequately assess Bedient's report, they will need to analyze the models in these other reports.

In sum, the work required before Florida can take these depositions will require at least 3-4 weeks, and perhaps longer. Although Florida hit the ground running, and spent this past weekend consulting with its experts to initiate this analytical process, Florida does not expect these efforts to be reasonably complete

until mid to late June. We note that Georgia consumed most of March and April conducting its own similar analyses on Florida's expert reports before beginning its expert depositions. Florida respectfully submits that it would be highly prejudicial if Florida were not afforded an opportunity to conduct analyses similar to that which Georgia already has enjoyed.

B. The Time Before The Current July 1 Deadline Already Is Substantially Consumed By Scheduled Deposition Days And Confidential Mediation

As detailed in Florida's May 6, 2016 Progress Report (Docket No. 423 at 2-4), Florida provided 20 expert reports on February 29, 2016 and Georgia provided one. On March 8, 2016, Florida issued a notice to schedule the deposition of Georgia's sole expert, and that expert has already been deposed on his initial report. Georgia spent the majority of March and April analyzing Florida's expert materials. Georgia first contacted Florida regarding scheduling depositions on March 25, 2016, and on that date noticed just one of Florida's 20 experts. Cognizant of the Court's July 1 deadline, Florida wrote to Georgia on April 1, 2016, to volunteer certain expert deposition dates (even though Florida had not received notices). Later that day, Georgia issued notices for the other expert depositions. Georgia proceeded to seek to take the majority of its depositions in May and June. On multiple occasions, Florida offered May dates, but conflicts led Georgia to ask for scheduling in June. *See* Florida's May 2016 Progress Report at 2-4 (detailing the sequence of expert deposition scheduling). For two witnesses, illness or medical procedures resulted in depositions scheduled in June. More recently, for convenience of counsel, Georgia has requested that two other witnesses' May depositions be postponed to June. At

present, up to 22 days of deposition testimony are scheduled before the current July 1 deadline (consuming the majority of available days in that period). In addition, the parties are involved in a confidential mediation process that is anticipated to consume time in June, including a scheduled all-day session in Atlanta.

In short, it would not be reasonably possible to prepare fully for, and to conduct depositions of, all of Georgia's newly disclosed experts before the July 1 deadline. This problem could have been ameliorated had Georgia disclosed many of its expert opinions on February 29, as was required. But under current circumstances, the schedule does not provide Florida with sufficient time. As a result, without relief Florida faces substantial prejudice.

C. A Forty-Day Extension Should Be Sufficient

After conferring with its experts this weekend, Florida believes that the requisite analyses, and all necessary depositions, with Georgia's cooperation, can be completed by August 9, 2016. Each of the necessary depositions are likely to cover multiple days (for up to 27 weekdays of depositions during that period). This extension should also provide Georgia sufficient time to conduct depositions regarding Florida's May 20 disclosures (4 expert reports, totaling 187 pages).[5]

CONCLUSION

Extending the deadline for depositions of experts disclosed on May 20 is necessary to ensure the full and fair development of expert discovery in this original action, and prevent substantial prejudice to Florida. *See United States v. Texas*, 339

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[5] It also appears that the parties' confidential mediation process will continue on certain July dates.

U.S. at 715; *see also Nebraska v. Wyoming*, 515 U.S. at 13. For the foregoing reasons, this Motion for an Extension of Expert Discovery should be granted.

Dated: May 23, 2016

Respectfully submitted,

__ /s/ Philip J. Perry_______

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Before the Special Master

Hon. Ralph I. Lancaster

CERTIFICATE OF SERVICE

This is to certify that the STATE OF FLORIDA'S MOTION FOR AN EXTENSION OF EXPERT DISCOVERY was served upon the State of Georgia on this 23rd day of May, 2016, and that this Certificate of Service has been served on this 23rd day of May, 2016 in the manner specified below:

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