

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

THE STATE OF FLORIDA’S APRIL 1, 2016 PROGRESS REPORT

The State of Florida respectfully submits this Progress Report to the Special Master pursuant to Section 4 of the December 3, 2014 Case Management Plan (the “CMP”), as subsequently amended.

I. MEDIATION PROGRESS

The parties have been engaged in a substantive and serious confidential mediation process over the past month. This process has included: (1) an exchange of confidential materials; (2) telephonic sessions by each party one-on-one with the mediator over a multi-week period; (3) a lengthy in-person session at the mediators’ office involving multiple principals from each State; and (4) a plan for further in-person sessions, including in mid-April. An additional telephonic session among the parties and the mediator will also occur next week. The selected

mediator is nationally known and highly regarded, and has invested considerable time and effort in the mediation process.

As reported previously, Florida is hopeful that the mediation effort will produce different results than prior unsuccessful efforts to settle over the past 20 years. In 1998, Georgia's then-Governor announced his State's view that resolution was imminently required:

We fully recognize 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 ... [W]e can allocate the waters of these major river systems in a manner that is equitable and fair to all concerned.

Statement of former Governor Zell Miller (Feb. 18, 1998) (GA00128575). Likewise, in prior filings in federal litigation with the Army Corps of Engineers, Georgia acknowledged: "Whether or not Georgia obtains additional water supply [storage space] from Lake Lanier, ... ***Florida will still be entitled to its equitable apportionment of waters flowing from Georgia*** and could still file an equitable apportionment case in the United States Supreme Court." Brief of Plaintiff-Appellee at 9, *State of Georgia v. U.S. Army Corps of Eng'rs, et al.*, No. 02-10135D (11th Cir. Feb. 8, 2002) (emphasis added).

The prior Federal Compact in this case set the stage for negotiation of an allocation formula for the Flint and Chattahoochee Rivers. That process failed more than a decade ago (*see* Complaint for Equitable Apportionment and Injunctive Relief, at ¶ 10 (Nov. 3, 2014)), and multiple subsequent attempts to negotiate produced no meaningful progress. Florida earnestly hopes that the time and resources the parties are committing to this mediation process signals that the States can find a solution to break the decades old deadlock. Indeed, the need to do so becomes more urgent every year as Georgia's upstream consumption of water continues to grow.

II. EXPERT DISCOVERY PROGRESS

As detailed below, Florida has worked to ensure timely completion of expert discovery but remains concerned that Georgia's plans regarding submission of its expert reports are inconsistent with the CMP. These issues may mature for judicial resolution under the CMP shortly following May 20, 2016, the current date for disclosure of defensive expert reports.

A. Georgia's Decision to Characterize Most of its Expert Reports as "Defensive" May Threaten Further Delay

The CMP (as amended by Case Management Order No. 13), establishes that disclosures of expert testimony "in support of an issue upon which [a] party bears the burden of proof" were due "no later than February 29, 2016" while expert disclosures "on an issue concerning which it does not bear the burden of proof" may be made at any time up until April 14, 2016. *See* CMP §§ 7.1 and 7.2. This type of simultaneous disclosure schedule is intended to ensure that the case proceeds more rapidly than it would if the parties were each afforded an opportunity to file rebuttal reports seriatim.

On February 29, 2016, Florida disclosed twenty expert reports on a wide range of issues, including issues over which Florida does not bear the burden of proof.¹ Florida's purpose in disclosing all of these expert reports was to ensure that it was addressing all of Georgia's many allegations, and to facilitate expeditious completion of all expert discovery. Georgia, on the other hand, disclosed only one expert report on February 29, 2016. But in its subsequent submission seeking additional time for expert discovery, Georgia indicated that it "intends to designate **8-12 additional** expert witnesses." Georgia's Mot. for Extension of Expert Deadlines

¹ While Florida remains mindful of the Court's admonition to narrow issues for trial, it was compelled to respond to Georgia's attempts to deflect the blame for Florida's injury away from Georgia's upstream consumption to numerous other actors or causes. *See, e.g.*, Georgia's Firsts Requests for Admissions to Florida (Sept. 25, 2015) (issuing more than **three hundred** Requests for Admissions, several of which contend that Florida's injuries are attributable to a variety of factors purportedly unrelated to Georgia).

at 6 (March 14, 2016) (emphasis added). Florida is concerned that Georgia may have withheld expert reports that should have been exchanged on February 29, 2016, and that Florida may not have sufficient time under the current schedule to both analyze and address all the material Georgia intends to serve on May 20, as well as complete 8-12 additional expert depositions by the July 1, 2016 deadline.

Case Management Order No. 17 extended the deadline for the submission of defensive expert reports to May 20, 2016, and extended the deadline for deposing expert witnesses to July 1, 2016. Georgia therefore has three months, approximately 120 days, to depose the experts Florida disclosed on February 29, 2016.² Under the current order, Florida will have one-third of that time (approximately 40 days) to depose the 8-12 experts Georgia apparently intends to disclose on May 20, 2016. Depending on the number, nature, and scope of the expert reports Georgia discloses on or before May 20, Florida may find it necessary to seek additional time to conduct expert depositions,³ and as detailed below, may have grounds to request that the Court strike certain of Georgia's expert disclosures as untimely.

B. The CMP Prohibits Georgia from Submitting Expert Reports on May 20 on Issues for Which it Bears the Burden of Proof

Inextricably linked to the timing of expert report submissions is the issue of what burden of proof each party bears. May 20, 2016 is the deadline for submitting "defensive" expert reports: reports on issues concerning which a party does not bear the burden of proof. *See* Case Management Order No. 17. Without revealing the subject matter of the 8-12 additional expert witnesses it intends to disclose on May 20, Georgia contends these new individuals are all

² As of the date of the submission of this Status Report (April 1, 2016), Georgia has yet to take the deposition of a single expert Florida disclosed more than a month ago.

³ Georgia previously acknowledged that both parties should have sufficient time to review and analyze expert reports. *See* Status Conference Tr. 12:11-18, Mar. 8, 2016 ("We think both sides should have ample opportunity, cognizant of the need for expedition, to evaluate each other's very technical and complex expert analysis.").

“defensive” experts. *See* Georgia’s Reply in Supp. of its Mot. for Extension, at 2-5 (March 16, 2016).

Georgia bears the burden of proof on the *five* affirmative defenses it pled in this case. *See, e.g., Schaffer v. Weast*, 546 U.S. 49, 57 (2005) (“the burden of persuasion as to certain elements of a plaintiff’s claim may be shifted to defendants, when such elements can fairly be characterized as affirmative defenses or exemptions”); *FTC v. Nat’l Bus. Consultants, Inc.*, 376 F.3d 317, 322 (5th Cir. 2004) (“An affirmative defense places the burden of proof on the party pleading it.”); Answer, at 27-31 (January 8, 2015). The lone expert report Georgia has already submitted purports to support only its Fifth Affirmative Defense (Intervening and Superseding Cause), and Georgia has expressly disclaimed any reliance on expert testimony in support of its First and Second Affirmative Defenses (Waiver and Estoppel), *see* Georgia’s Reply in Supp. of its Mot. for Extension, at 4 n.1 (March 16, 2016). Having failed to timely submit any expert reports in support of its Third and Fourth Affirmative Defenses (Unclean Hands and Failure to Mitigate Harm), Georgia may not do so on May 20.

As the Supreme Court’s most recent cases discussing the parties’ respective burdens of proof in equitable apportionment actions make clear, Georgia also bears the burden to establish that its upstream diversions of water are justified under the principles of equitable apportionment. *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984); *Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982). Georgia ignores these recent cases in favor of older ones that do not address the parties’ burdens after injury has been shown, and that apply equitable apportionment factors in a prior appropriation context. *See* Georgia’s Reply in Supp. of its Mot. for Extension, at 2-4 (March 16, 2016). Here, both Georgia and Florida are *riparian* states, *see Pyle v. Gilbert*, 265 S.E.2d 584 (Ga. 1980); *Game and Fresh Water Fish Commission v. Lake*

Islands, Ltd., 407 So.2d 189 (Fla. 1981), so prior use confers no absolute right to use water. Accordingly, once Florida establishes injury, Georgia bears the burden to demonstrate that its ever-increasing diversions of water are reasonable, equitable, and outweigh the significant harm they cause Florida.⁴ But Georgia presented no expert reports in support of this issue on February 29 and is precluded from submitting any at a later time.

C. Florida is Responding Promptly to Georgia's Requests for Information Regarding Florida's Expert Reports

On February 29, 2016, Florida provided Georgia with twenty expert reports, together with all supporting information and data required by Federal Rule of Civil Procedure 26(a)(2). Since that time, Georgia has requested certain additional materials and explanations, presumably so its experts and consultants can better understand the expert reports submitted by Florida. Consistent with its practice of collaboration during fact discovery, Florida has responded expeditiously and forthrightly to all such requests, including those involving (i) the location and format/file-types of particular data and documents; (ii) operations of publically available software; and (iii) creating and using datasets. Florida will continue to respond promptly to requests from Georgia to facilitate review of expert materials. Florida expects similar courtesy from Georgia when it submits its 8-12 additional expert reports.

III. UNRESOLVED DISPUTES

While there are no current unresolved disputes under the terms of the CMP, Florida expects issues regarding burdens of proof and Georgia's submission of 8-12 additional expert reports will likely require prompt resolution on or shortly after May 20, 2016.

⁴ In any event, Florida's uses of water in the ACF Basin in fact precede Georgia's in time. See, e.g., *A River Meets the Bay: A Characterization of the Apalachicola River and Bay System*, ANERR, 2008 at 2. (http://www.dep.state.fl.us/coastal/downloads/management_plans/A_River_Meets_the_Bay.pdf (detailing the history of Florida's efforts to preserve the Apalachicola system)).

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CERTIFICATE OF SERVICE

This is to certify that the STATE OF FLORIDA'S APRIL 1, 2016 PROGRESS REPORT was served on this 1st day of April 2016, in the manner specified below:

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