No. 142 Original

IN THE SUPREME COURT OF THE UNITED STATES
BEFORE THE SPECIAL MASTER, HONORABLE RALPH I. LANCASTER

STATE OF FLORIDA

Plaintiff,

v.

STATE OF GEORGIA,

Defendants,

BRIEF OF THE STATE OF COLORADO AS *AMICUS CURIAE*

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The State of Colorado, by and through counsel, hereby submits the following Brief as *Amicus Curiae*, pursuant to the Order on Motions for Leave to File *Amicus* Briefs that was entered by the Special Master on September 21, 2016.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Colorado straddles the Continental Divide, where snowmelt from the Rocky Mountains fills the headwaters of many of the nation's major rivers, including the Platte, Arkansas, Rio Grande, and Colorado. *See* Justice Gregory J. Hobbs, Jr., *Protecting Prior Appropriation Water Rights through Integrating Tributary Groundwater: Colorado's Experience*, 47 IDAHO L. REV. 5, 9 (2010). These river systems provide water to eighteen different States, a number of Indian Tribes, and the Republic of Mexico.[1] With respect to these and other rivers originating in the State, Colorado has been a party to court proceedings and negotiations that have resulted in nine interstate compacts and two equitable apportionment decrees.[2] Colorado is also home to several other interstate rivers and streams that are not yet subject to equitable apportionment decrees or compacts.

In this case, the States of Florida and Georgia have expressed conflicting views as to which State bears the burden of proof in an equitable apportionment.

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[1] *See* Convention of May 21, 1906 on the Equitable Distribution of the Waters of the Rio Grande, at http://www.ibwc.gov/Files/1906Conv.pdf; Treaty between the United States of America and Mexico Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, U.S. Mex., Feb. 3, 1944, 59 Stat. 1219.

[2] Colorado River Compact, codified C.R.S. 37-61-101 *et seq.* (2016); Upper Colorado River Compact, codified C.R.S. 37-62-101 *et seq.* (2016); La Plata River Compact, codified C.R.S. 37-63-101 *et seq.* (2016); Animas-La Plata Project Compact, codified C.R.S. 37-64-101 *et seq.* (2016); South Platte River Compact, codified C.R.S. 37-65-101 *et seq.* (2016); Rio Grande River Compact, codified C.R.S. 37-66-101 *et seq.* (2016); Republican River Compact, codified C.R.S. 37-67-101 *et seq.* (2016); Amended Costilla Creek Compact, codified C.R.S. 37-68-101 *et seq.* (2016); Arkansas River Compact, codified C.R.S. 37-69-101 *et seq.* (2016); *see also Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Wyoming v. Colorado*, 259 U.S. 419 (1922).

Compare State of Florida's Mot. for Ext. of Expert Discovery (May 23, 2016) at 4–5 *and* State of Florida's Pretrial Br. (Oct. 12, 2016) at 13–15 *with* State of Georgia's Resp. to Florida's Mot. for Ext of Expert Discovery (May 25, 2016) at 2–6 *and* State of Georgia's Pretrial Br. (Oct. 12, 2016) at 4–5, 16–17, 20. Although Colorado takes no position on the merits of Florida's complaint, it has a strong interest in the question of burden of proof. A decision on that question could potentially inform the limits and extent of Colorado's rights and obligations under its existing equitable apportionment decrees or interstate compacts, as well as options for apportioning water in the future.

INTRODUCTION

Equitable apportionment of an interstate stream is a delicate and complex matter. It involves a consideration of a wide range of interests, including the sovereign interests of affected States and the health and economic well-being of citizens within those States. For nearly a century, the Court has wrestled with "the problem of apportionment and the delicate adjustment of interests which must be made." *Nebraska v. Wyoming,* 325 U.S. 589, 618 (1945). Yet throughout that time, the Court has made clear that the complaining State faces a heavy burden to prove its injury and right to relief by clear and convincing evidence.

That is true for Florida in this case. It must prove by clear and convincing evidence the extent of its alleged injuries resulting from Georgia's use of water in the Apalachicola-Chattahoochee-Flint River Basin. As the complaining State, Florida must also prove a right to its requested relief by demonstrating that its injuries are not outweighed by whatever benefits Georgia derives from its use of water from the Apalachicola-Chattahoochee-Flint River Basin. *See Colorado v. Kansas,* 320 U.S. 383, 393 (1943).

Although both parties cite the cases of *Colorado v. New Mexico*, 459 U.S. 176 (1982) ("*Colorado v. New Mexico I")* and *Colorado v. New Mexico*, 467 U.S. 310 (1984) ("*Colorado v. New Mexico II")*, Colorado submits that those decisions do not control as to the burden of proof applicable in this case. Not only were those cases decided using the law of prior appropriation, not riparian law, as a guiding principle, but the factual setting was very different. In *Colorado v. New Mexico I* and *II*, Colorado had proposed a new diversion upstream from New Mexico on the

Vermejo River. Because the entire flow of the river had already been appropriated and placed to beneficial use in New Mexico, strict application of the law of prior appropriation would have prevented Colorado from completing its proposed diversion. Colorado nonetheless asked the Court to allow the diversion under principles of equity, and it was in those circumstances that the Court required Colorado to prove the benefit of its proposed future diversion or that the potential harm to New Mexico might be offset through New Mexico's own conservation measures. Because the limited factual and legal circumstances that were present in *Colorado v. New Mexico I* and *II* are inapplicable here, those decisions do not establish the burden of proof in this case.

Finally, an upstream State has no affirmative duty to protect flows for the benefit of a downstream State in the absence of a decreed equitable apportionment or interstate compact. Any finding to the contrary would be unsupported by the law and would inappropriately elevate one State's sovereign rights above another's. It would also violate the Court's long history of equitable apportionment, which has sought to achieve the delicate balance of interests between States.

ARGUMENT

I. The burden of proof rests on the complaining State to prove its injury by clear and convincing evidence.

In an equitable apportionment case—as in any case where the Court is asked to exercise its "extraordinary power" under the Constitution to control the conduct of one State at the request of another—the alleged injury must be of "serious magnitude" and must be established by "clear and convincing evidence."

Washington v. Oregon, 297 U.S. 517, 522 (1931); *Colorado v. Kansas*, 320 U.S. 383, 392 (requiring a plain showing of substantial injury to warrant a decree that would disrupt the economy of the upstream State); *Kansas v. Colorado*, 206 U.S. 46, 124 (1907) (finding that although Colorado's increased consumption diminished flows in the Arkansas River, Kansas failed to meet its burden of proving an injury of sufficient magnitude to justify a decree apportioning flows in the river). The complaining State's burden is even greater than it would be if the suit involved a request for an injunction between private parties. *Washington v. Oregon*, 297 U.S. at 524; *Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1936) ("The burden on Connecticut to sustain the allegations on which it seeks to prevent Massachusetts from making the proposed diversions is much greater than that generally required to be borne by one seeking an injunction in a suit between private parties."). Throughout its equitable apportionment decisions, the Court has remained "conscious of the great and serious caution with which it is necessary to approach the inquiry whether a case is proved." *Colorado v. Kansas,* 320 U.S. 383, 393 (1943).

The complaining State's burden of proof is high not only because it seeks to invoke the Court's "extraordinary power to control the conduct of one State at the suit of another," *Connecticut*, 282 U.S. at 669, but also because the consequences of a decision in its favor are grave. In addition to restricting a State's sovereign authority to allocate and administer the natural resources within its borders, equitable apportionment can lead to disruption and destruction of existing

economies. *See Washington,* 297 U.S. at 529 (noting the danger of "destroying possessory interests enjoyed without challenge for over half a century"); *see also id.* ("[T]o limit the long established use in Oregon would materially injure Oregon users without a compensating benefit to Washington users."). Thus, the Court has historically imposed a heavy burden of proof on a State that seeks to disrupt existing economies by limiting their water supply, even where imposing a limitation might lead to increased future economic production at a different point on the river. *See, e.g. Nebraska v. Wyoming,* 325 U.S. 589, 621 (1945) (refusing to limit Colorado's present uses of water and finding "the established economy in Colorado's section of the river basin based on existing uses of water should be protected."). Simply put, the sovereign and economic interests at stake justify the heavy burden imposed.

Here, as the State requesting apportionment, Florida must prove by clear and convincing evidence that it has suffered and continues to suffer injury as a result of Georgia's use of water within its own borders. Absent such proof, there is no basis for the Court to prevent Georgia from exercising sovereign control over the natural resources within the State. *See Kansas v. Colorado*, 206 U.S. 46, 117 (1907) (finding Kansas failed to meet its burden of proving injury despite having shown Colorado's increased consumption decreased flows in the Arkansas River). Nor is there a basis for ordering relief that would inflict damage on existing economic interests in Georgia.

II. As the complaining State, Florida must also prove by clear and convincing evidence that its alleged injury is not outweighed by benefits Georgia obtains from its use of the disputed water.

Although the burden of proof remains at all times on the complaining State, an equitable apportionment of interstate waters requires weighing the harms and benefits to the States involved. *Colorado v. Kansas*, 320 U.S. at 394. For example, in *Colorado v. Kansas*, Kansas alleged that irrigators in Colorado had improperly increased their use of the Arkansas River; Kansas therefore requested a decree apportioning flows of the river to limit those upstream uses. *Id.* at 389. After considering the harms and benefits to each State, the Court denied Kansas' request because of the harm it would inflict on Colorado interests: "[o]n this record there can be no doubt that a decree [apportioning the annual flow of the river], or an amendment or enlargement of that decree in the form Kansas asks, would inflict serious damage on existing agricultural interests in Colorado. How great the injury would be it is difficult to determine, but certainly the proposed decree would operate to deprive some citizens of Colorado, to some extent, of their means of support." *Id.* at 394. The Court, therefore, held that Kansas had failed to meet its burden to "sustain[ ] [its] allegations that Colorado's … [increased use] has worked a serious detriment to the substantial interests of Kansas." *Id.* at 399.

Similarly, in *Nebraska v. Wyoming*, although the Court found it appropriate to limit *future* uses of water, it refused to enjoin Colorado's *existing* uses even though under state law the complaining State had senior rights downstream on the same river. 325 U.S. at 621—622. After balancing the States' interests, the Court

held that those senior rights had to yield to the "countervailing equities" of an established economy in Colorado, even though it was based on junior appropriations. 325 U.S. at 622. The rule of priority that normally applied to competing uses was required to give way where a strict application of that rule "would work more hardship" on the junior user "than it would bestow benefits" on the senior user. *Id.* at 619; s*ee also Washington v. Oregon,* 297 U.S. at 523 (dismissing Washington's complaint and finding that "[t]o limit the long established use in Oregon would materially injure Oregon users without a compensating benefit to Washington users").

By the same token, Florida in this case must prove by clear and convincing evidence not only the extent of its injuries, but also that its injuries are not outweighed by whatever benefits Georgia derives from its use of water. If Florida fails to meet its burden on either point, then the Special Master should recommend that the Court dismiss Florida's complaint.

III. The Court's past decisions in a dispute between Colorado and New Mexico do not modify the burden of proof applicable to a complaining State in this very different context.

In the 1980s, the Court issued two decisions in an interstate water dispute between Colorado and New Mexico. *Colorado v. New Mexico I*, 459 U.S. at 176; *Colorado v. New Mexico II*, 467 U.S. at 310. While the Court in those decisions recognized additional considerations regarding the burden of proof in such a dispute, the considerations were limited to the facts presented there and do not

apply in this case. Those decisions, thus, do not affect the requirement that Florida prove its injury and right to relief by clear and convincing evidence.

The *Colorado v. New Mexico* decisions were issued in light of the rule that equitable apportionment must be guided by the affected States' laws governing rights to the use of waters. *See Nebraska v. Wyoming,* 325 U.S. 589, 618 (1945). That rule applies regardless of whether the relevant States follow the common-law doctrine of riparian rights or the law of prior appropriation. *See Wyoming v. Colorado*, 259 U.S. 419, 458–59 (1922). Under the riparian rights system—commonly followed by Eastern, Midwestern, and Southern States—the "fundamental principle" is that "each riparian proprietor has an equal right to make a reasonable use of the waters of the stream, subject to the equal right of the other riparian proprietors likewise to make a reasonable use." *United States v. Willow River Power Co.*, 324, U.S. 499, 505 (1945). In contrast, many Western States (including Colorado and New Mexico) follow the rule of prior appropriation, whereby a water user acquires a continuing right to use water by diverting it from the stream and applying it to beneficial use. *Wyoming v. Colorado*, 259 U.S. at 459. As between different appropriators on the same stream, the one first in time has a superior right. *Id.*

In *Colorado v. New Mexico I*, the Court reiterated that, where both States recognize the doctrine of prior appropriation, that doctrine becomes the "guiding principle" in an allocation between the States. 459 U.S. at 183–84. Colorado, however, had asked the Court to hold that equity required a departure from that

guiding principle. Specifically, despite the fact that both Colorado and New Mexico follow the doctrine of prior appropriation, Colorado requested that it be allowed to develop a new use that New Mexico proved would injure its water users. *Colorado v. New Mexico I,* 459 U.S. at 178–79. In that unique context, the Court held that Colorado bore the burden to prove that its proposed diversion for *future* uses both justified a departure from the States' laws governing water administration and justified the proven harm that would result. *Id.* at 187. Only under those circumstances did the Court require Colorado to prove either that the benefit of its proposed diversions would outweigh the harm to existing users in New Mexico or that the harm to those users could be offset. *Id.* at 187 n.13; *see also Colorado v. New Mexico II*, 467 U.S. 310, 321—22 (holding that Colorado failed to prove the potential benefits of its proposed diversion and that "the equities compel the continued protection of existing users of the Vermejo River's waters").[3]

The burden of proof analysis in *Colorado v. New Mexico* is inapplicable here for at least three reasons. First, neither Florida nor Georgia follows the doctrine of prior appropriation, meaning that this case should be guided by different principles. Second, there is no basis for imposing a burden of proof on Georgia in this case, because, unlike Colorado in the dispute with New Mexico, Georgia has not requested a departure from the applicable principles. Third, the focus of this equitable apportionment case is not solely on whether Georgia or Florida has

[3] Colorado thus bore a burden of proof not because it was the "proposed diverter," see Georgia's Pretrial Br. at 5; Florida's Pretrial Br. at 15, but instead because it sought an equitable apportionment that would have required the Court to depart from the relevant guiding principles. *Colorado v. New Mexico I,* 459 U.S. at 187.

proposed a new diversion for future uses; instead, Florida seeks to enjoin *existing* upstream uses.

Rather than the distinguishable *Colorado v. New Mexico* decisions, the Special Master in this case should be guided by the principles expressed in the Court's long history of equitably apportioning interstate streams. Under those principles, as discussed above, Florida must prove by clear and convincing evidence not only the extent of its injuries, but also that its injuries are not outweighed by whatever benefits Georgia derives from its use of the disputed water.

IV. An upstream State has no duty to protect or augment flows for the benefit of a downstream State in the absence of an interstate compact or equitable apportionment decree.

Florida quotes *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983) for the proposition that an upstream State has an affirmative duty to protect or augment stream flows for the benefit of the downstream State. Florida's Pretrial Br. at 4, 14 ("Georgia has an '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") (quoting *Idaho*, 462 U.S. at 1025). This broad assertion is incorrect. An upstream State has no affirmative duty to protect flows for the benefit of a downstream State in the absence of a decreed equitable apportionment or interstate compact. Rather, whether and to what extent a downstream State is entitled to streamflow depends on the equitable apportionment that is ultimately effectuated. For three reasons, Florida's argument is misplaced.

First, the quoted statement from *Idaho ex re. Evans* is dicta, not a holding. The Court did not impose a duty on any State to "conserve" or "augment" resources within its borders for the benefit of another State. Instead, it held that Idaho failed to meet its burden of proof and dismissed Idaho's request for equitable apportionment. *Idaho* , 462 U.S. 1017, 1029 (1983) ("[W]e adopt the Special Master's recommendation and dismiss the action without prejudice to the right of Idaho to bring new proceedings whenever it shall appear that it is being deprived of its equitable share of anadromous fish.").

Second, neither of the cases that the *Idaho ex rel. Evans* Court cited in support of its dicta stands for the proposition that an upstream State has an affirmative duty to protect or augment stream flows for the benefit of the downstream State. *See* 462 U.S. at 1025 (citing *Wyoming v. Colorado*, 259 U.S. 419 (1922) and *Colorado v. New Mexico I).* In *Wyoming v. Colorado*, the Court's holding was quite the contrary; it held that downstream water rights in Wyoming and Nebraska had to yield to the "countervailing equities" of an established economy upstream in Colorado. 259 U.S. at 485—486. Rather than requiring Colorado to augment the flow of the Laramie River, the Court instead allowed Colorado to *divert* the remaining dependable supply of the river. *Id*. And while the Court considered the effects of conservation on the dependable flow, it did so in the context of conservation efforts by both States, not just the upstream State. 259 U.S. at 484; *see also Colorado v. New Mexico*, 459 U.S. at 185 ("[W]e placed on *each* State the duty to employ 'financially and physically feasible' measures 'adapted to conserving

and equalizing the natural flow.'") (emphasis added) (quoting *Wyoming v. Colorado,* 259 U.S. 419, 484 (1922)). As the Court made clear, "[t]he question … is not what one State should do for the other, but how each should exercise her relative rights in the waters of this interstate stream." *Wyoming v. Colorado,* 259 U.S. at 484.

Likewise, in *Colorado v. New Mexico I* the Court did not impose a duty on the upstream State (Colorado) to conserve or augment stream flows for the benefit of the downstream State (New Mexico). Instead, in evaluating the harms and benefits to each affected State, the Court considered whether conservation efforts by the *downstream* State might offset injury in that State. 459 U.S. at 186. As to the upstream State, the Court asked only whether it had undertaken "reasonable steps" to minimize the amount of diversion that would be required. *Id*. In no event do the decisions in *Wyoming v. Colorado* or *Colorado v. New Mexico I* support the broad proposition that Florida now advances.

Third, if Florida's argument were adopted, it would inappropriately elevate one State's sovereign rights above another's. By arguing that an upstream State has an affirmative duty to conserve and augment stream flows for the benefit of the downstream State, Florida asks the Special Master to prioritize a downstream State's sovereign right to apportion water within its borders over the upstream State's sovereign rights to use water within its borders. That would be contrary to the Court's long history of equitable apportionment, which has cautiously sought the delicate adjustment of interests only upon the clearest showing of injury and the

right to relief. *See Nebraska v. Wyoming,* 325 U.S. at 618; *also Washington v. Oregon*, 297 U.S. at 524; *Connecticut v. Massachusetts*, 282 U.S. at 670.

CONCLUSION

For the foregoing reasons, Florida must prove by clear and convincing evidence the extent of its injuries resulting from Georgia's use of water in the Apalachicola-Chattahoochee-Flint River Basin and that those injuries are not outweighed by whatever benefits Georgia derives from its use of water from that basin.

Respectfully submitted this 21st day of October, 2016.

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CERTIFICATE OF SERVICE

This is to certify that the foregoing **Brief of the State of Colorado as *Amicus Curiae*** has been served this 21st day of October, 2016, in the manner specified below:

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