No. 142, Original

In the Supreme Court of the United States

STATE OF FLORIDA,
Plaintiff,
v.
STATE OF GEORGIA,
Defendant.

ON EXCEPTIONS TO THE REPORT
OF THE SPECIAL MASTER

SUR-REPLY IN SUPPORT OF EXCEPTIONS TO REPORT OF THE SPECIAL MASTER

PAMELA JO BONDI
Attorney General
AMIT AGARWAL
Solicitor General
JONATHAN L. WILLIAMS
Deputy Solicitor General
JONATHAN GLOGAU
Special Counsel
OFFICE OF THE ATTORNEY GENERAL
The Capitol, PL-01
Tallahassee, FL 32399-1050
(850) 414-3300

GREGORY G. GARRE
Counsel Of Record
PHILIP J. PERRY
JAMIE L. WINE
CLAUDIA M. O'BRIEN
ABID R. QURESHI
BENJAMIN W. SNYDER
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for State of Florida
Additional Counsel Listed on Inside Cover

ROBERT A. WILLIAMS
General Counsel
FLORIDA DEPARTMENT OF
ENVIRONMENTAL
PROTECTION
3900 Commonwealth Blvd.
MS 35
Tallahassee, FL 32399-3000
(850) 245-2295

PAUL N. SINGARELLA
LATHAM & WATKINS LLP
650 Town Center Drive
20th Floor
Costa Mesa, CA 92626-1925
(714) 540-1235

CHRISTOPHER M. KISE
JAMES A. MCKEE
FOLEY & LARDNER LLP
106 East College Avenue
Suite 900
Tallahassee, FL 32301
(850) 222-6100

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

INTRODUCTION

From the outset, Georgia's position has been that Florida's equitable apportionment action should not proceed because, first, Georgia has not wasted any water or injured Florida in any way and, second, Florida could not get relief through an equitable apportionment in any event because the U.S. Army Corps' of Engineers is not a party to this action.

After a trial, the Special Master squarely rejected the first argument, and concluded that the case must be decided on the premise that "Florida has sustained injury as a result of unreasonable upstream water use by Georgia." Report 30. Georgia takes issue with Florida's characterization of the Special Master's statements as "findings." Resp. 4. But the Special Master's report describes in detail both the "real harm" Florida has "suffered . . . from decreased flows in the River," and Georgia's "largely unrestrained" agricultural water use. Report 31, 32; *see id.* at 31-34. Georgia did not file exceptions to the Special Master's report, and so has waived any challenge to it. As this case comes to this Court, both injury and inequitable conduct must be accepted (a point the United States squarely recognizes, *see* U.S. Br. at 19, 23, 31-32).

As for Georgia's claim that this case cannot proceed without the Corps, the Special Master initially rejected that argument, too, by denying Georgia's motion to dismiss. In doing so, the Special Master found that this case not only may proceed without the United States as party, but that it *should* proceed in the interests of "equity and good conscience," especially since Florida would be left without a remedy for its injury if this action were dismissed. FL Br. 23, 40. Georgia declined

to file any exception to that ruling, too, and so that also must be accepted as this case comes to the Court.

The Special Master nevertheless concluded that this case should be dismissed because, while a consumption cap undoubtedly would result in more water flowing into Florida from the Flint River, there was "no guarantee" that the Corps would not *offset* those additional flows by holding back water in reservoirs on the Chattahoochee River. Report 69. As Florida explained in its opening brief (at 29-36), the Special Master erred as a matter of law in requiring Florida to meet that "guarantee" standard in establishing redressability. This Court has never set such an impractical requirement, either in equitable apportionment cases or under Article III generally. In response, Georgia does not seriously defend the guarantee standard, but instead tries to recast the Special Master's report. The report, however, clearly refutes Georgia's position.

And Georgia has a bigger problem, anyway. After the Special Master issued his report, the Corps issued a Record of Decision (ROD) that addressed how the Corps would respond to a decree in this case. The Corps stated that, if this Court were to issue an equitable apportionment, the Corps "would take [that decision] into account and adjust its operations accordingly." U.S. Br. 30 (quoting ROD 18). In its brief to this Court, the United States not only has affirmed that it "stands behind that statement," but elaborated that "a decision by this Court . . . would necessarily form part of the constellation of laws to be considered by the Corps when deciding how best to operate the [ACF Basin]." *Id.* at 30, 32. The Special Master did not have the benefit of those

pronouncements when he issued his report, but they, by themselves, establish redressability under a proper analysis.

It is impossible to say, with complete certainty, how the Corps would adjust its operations in response to a decree. But as this Court has held, "asking for absolute precision in forecasts about the benefits and harms of [a requested apportionment] would be unrealistic." *Colorado v. New Mexico*, 467 U.S. 310, 322 (1984) (*Colorado II*). Instead, the Court has held, "[r]eliance on reasonable predictions of future conditions is necessary to protect the equitable rights of a State." *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1026 (1983) (*Idaho II*). Based on the United States' representations, it is at the very least reasonable to predict that the Corps would respond to an equitable apportionment by this Court just as one would expect—by adjusting its operations to effectuate that decree consistent with this Court's decision and other applicable law. Indeed, it is Georgia that asks this Court to rely on sheer speculation in arguing otherwise.

The Court should decline to adopt the Special Master's recommendation and return the case to him with instructions to allow it to proceed.

ARGUMENT

I. GEORGIA DECLINES TO DEFEND THE "GUARANTEE" STANDARD THE SPECIAL MASTER ACTUALLY APPLIED

As Florida has explained (at 29-30 n.6), the Special Master recommended (at 69) that this Court deny relief because there is "no guarantee" about how the Corps will react to a decree. The Special Master thought that

Florida had failed to establish redressability because it is "uncertain" (Report 34)—*i.e.*, not certain—that the additional water produced by a decree would flow through to Florida. This Court has never held a State to such a certainty standard in establishing redressability. And Georgia does not even attempt to defend that standard.

Instead, Georgia tries to duck the issue by claiming (at 4) that the Special Master "applied no such standard." *See also* Resp. 24. But that argument cannot be squared with what the Special Master actually said in his report. For example:

- The Special Master reasoned that, unless he could "mandate" a change in the Corps' practices, he could not be "assure[d]" that Florida could obtain relief. Report 3.
- The Special Master faulted Florida because it did not show "that the Corps *must* (or will choose to)" allow through "*all* additional flows." *Id.* at 48 (emphases added).
- The Special Master faulted Florida's evidence because it did not show that a decree "will *inevitably* provide timely relief." *Id.* at 52-53 (emphasis added).
- Although the Special Master found that "the Corps can release" more water, he stressed that this does not show "that the Corps will make such releases." *Id.* at 54; *see id.* at 56.
- And the Special Master faulted Florida's evidence because it failed to show that additional water would "*necessarily* pass downstream." *Id.* at 61 (emphasis added).

None of that makes sense unless the Special Master applied a *guarantee* standard (as he did).

Meanwhile, Georgia uses misleading quotes in attempting to recast the Special Master's report. For example, it suggests the Special Master found that "the Corps' operations *would* 'offset any increased flows' resulting from Florida's proposed cap." Resp. 35 (emphasis added) (quoting Report 47). But the Special Master did not find that the Corps *would* offset increased flows at all; he simply found that "the evidence suggests that the Corps *may* operate its projects . . . to offset any increased flows." Report 48 (emphasis added). And that just proves the point. The mere *possibility* of an offset was enough to defeat redressability only because the Special Master in fact applied a *certainty* standard.

Georgia also claims (at 34) that Florida has distorted the Special Master's ruling by emphasizing the Special Master's use of "'guarantee.'" But the Special Master used that language in perhaps the most important paragraph of his report—the "CONCLUSION"—where he stressed that "[t]here is no guarantee that the Corps will exercise its discretion to release or hold back water at any particular time." Report 69. And that was no accident; "guarantee" perfectly captured his redressability ruling. As the above quotations (and others, *see* FL Br. 29 n.6) demonstrate, the Special Master insisted that Florida establish a certainty that the Corps would act a particular way.

Georgia points to the Special Master's statement that the benefits of a decree were "uncertain and speculative." Resp. 35 (citing Report). But it fails to consider that statement in context. The Special Master

did not point to "uncertainty" in analyzing the *likelihood* that the Corps would act a particular way. Rather, he relied on Florida's inability to show that the Corps was *certain* to release water at any particular time as the basis for finding that it had failed to establish redressability. As the Special Master put it, "any release in excess of the mandatory minimum is inherently discretionary *and therefore uncertain*." Report 56 n.38 (emphasis added). Under his ruling, that "uncertainty"—*i.e.*, the lack *of* certainty about whether the Corps would accommodate a decree—was the dispositive factor.

As Florida has explained (at 29-36), that legal standard is clearly wrong. Article III has never imposed such a requirement. And this Court has held that "[u]ncertainties about the future . . . do not provide a basis for declining to fashion a decree" in this context, because "[r]eliance on reasonable predictions of future conditions is necessary to protect the equitable rights of a State." *Idaho II*, 462 U.S. at 1026 & n.10. Thus, this Court has declined to insist on "absolute precision"—*i.e.*, certainty—in predicting the future when it comes to determining whether relief will be effective. *Colorado II*, 467 U.S. at 322. Yet "absolute precision"—that is, a "guarantee"—is exactly what the Special Master demanded here in gauging redressability.

Because the Special Master based his report on a "single, discrete issue" (Report 30)—redressability—that he analyzed under the wrong legal standard, his recommendation cannot stand.

II. AS THE UNITED STATES' BRIEF UNDERSCORES, THIS ACTION SHOULD BE ALLOWED TO PROCEED UNDER A PROPER REDRESSABILITY ANALYSIS

Under a correct redressability standard, it is clear—no matter what evidentiary standard is applied—that the case should go forward. The United States' statements by themselves confirm this. It has acknowledged that a decree would benefit Florida even without any changes to the Corps' operating rules, has said the Corps' adoption of the current Master Manual should not "in any way prejudice the Supreme Court" as to an "apportionment of the waters of the ACF Basin" (ROD 18), and has said that it would adjust its operations as necessary to accommodate a decree. That is more than enough to prove that Florida is likely to benefit—significantly—from a decree. Indeed, while no more is required, the record establishes a high likelihood of real redress.

A. In Gauging Redressability, This Court Has Never Required A State To Show More Than A Likelihood Of Redress

As Florida has explained (at 30-34), under this Court's precedents, a State need only establish a *likelihood* of redress if a decree is entered. That is especially true where, as here, the State already has shown that is has suffered "real harm." Report 31.

Although it does not defend the Special Master's certainty standard, Georgia does try to ratchet up the settled likelihood standard. In effect, it asks this Court to hold that "reasonable predictions" (*Idaho II*, 462 U.S. at 1026) are not enough, and that a complaining State must instead prove that future conditions are

"*highly* likely" to improve as a result of a decree (Resp. 27 (emphasis added); *id.* at 28). This Court has never subjected a State to such a heightened redressability standard.

Georgia points (at 31-33) to *Washington v. Oregon*, 297 U.S. 517 (1936), and *Idaho ex rel. Evans v. Oregon*, 444 U.S. 380 (1980) (*Idaho I*). But as Florida has explained (at 32-34), those cases are no help to Georgia. First, neither involved a finding of either "real harm" or "misuse of resources" (Report 31), like the Special Master made here. *See Washington*, 297 U.S. at 523-24; *Idaho II*, 462 U.S. at 1027-28. And second, neither actually imposed a heightened redressability requirement. Indeed, even as it relies on these cases for support, Georgia is notably silent on the standard the Court actually applied in them. For good reason: the cases simply hold that where redress would be physically *impossible*, a decree will not issue. *Washington*, 297 U.S. at 523; *Idaho I*, 444 U.S. at 391-92.

This case does not involve anything like the "deep gravel" that would absorb water before it reached Washington, *Washington*, 297 U.S. at 523, or the "obstacles" that would stop fish from reaching Idaho, *Idaho I*, 444 U.S. at 392. Here, because Lake Seminole is a "run-of-river" project, it is clear that additional water from the Flint River *would* flow through to Florida. Report 37. The only question is whether the Corps would "offset" those flows by holding back releases upstream on a different river. And while it is true that the Corps *could* seek to offset the increased flows, the Special Master also recognized that the Corps could choose to allow through more water than its minimum requirements mandate—and that the

Corps has done just that in the past. Report 48, 54. The Special Master simply concluded that Florida had failed to show that this exercise of discretion was *guaranteed*.

Georgia's attempt to ratchet up the redressability standard also contradicts several key tenets of this Court's equitable apportionment cases: (1) Where, as here, a State *has* established injury, the Court should do everything it can to enter a decree, *Nebraska v. Wyoming*, 325 U.S. 589, 616-17 (1945); (2) the fact that a decree may be "difficult[]" to fashion is no basis to decline relief, *id.*; *Idaho II*, 462 U.S. at 1026; (3) instead of demanding "absolute precision" (*Colorado II*, 467 U.S. at 322-23) about what the future holds, "[u]ncertainties about the future . . . do not provide a basis for declining to fashion a decree," *Idaho II*, 462 U.S. at 1026; and (4) wasteful and inefficient uses, like the ones the Special Master identified along the Flint here (*see* Report 32-34), should not be tolerated, *Washington*, 297 U.S. at 524; *Colorado v. New Mexico*, 459 U.S. 176, 184 (1982) (*Colorado I*); *see id.* at 195 (O'Connor, J., concurring in the judgment).

Georgia points (at 29) to this Court's statements about the *equitable-balancing step* of an equitable apportionment action, at which the Court considers "the extent to which the benefits from the diversion will outweigh the harms to existing users." *Colorado II*, 467 U.S. at 323-24. But those statements do not support application of a heightened legal standard in determining the separate, threshold issue of redressability—before an equitable balancing of benefits and harms is even conducted.

The disconnect between the equitable-balancing analysis Georgia draws on now and the threshold

redressability question the Special Master actually decided is underscored by the difference between the evidence Georgia focuses on in its brief and the evidence the Special Master actually considered. Georgia makes the balancing of "benefits and harms" a central theme of its presentation to this Court, making apocalyptic (and overblown[1]) claims from the very first sentence of its brief on about the alleged harms of a decree *for Georgia*. But the Special Master never even considered—let alone endorsed—Georgia's contentions on that point. Because of his threshold redressability ruling, he never got to the equitable-balancing stage, and thus never made all the findings necessary for that stage.

If this Court declines to adopt the Special Master's recommendation, the case will go back to the Special Master. Presumably, after completing his fact finding (*see* Report 34), the Special Master will then undertake such an equitable balancing. But at that point, the findings the Special Master *has* already made will pose a significant problem for Georgia. As Justice O'Connor observed in her *Colorado I* concurrence, "[p]rotection of existing economies does not require that users be permitted to continue in *unreasonably wasteful or*

---

[1] For example, Georgia claims (at 18) that "reducing irrigation for row crops" would cost "over $335 million." But the expert it cites for that assertion admitted that his estimate was based on *eliminating* all irrigation, and that he did not even consider the effect on crop yields of more modest reductions. *See* Tr. vol. 17, at 4463:14-4468:15 (Stavins). Florida also showed that, in fact, the proposed conservation measures would cost only $35.2 million a year. *See* Sunding PFD ¶ 90 Table 4 (Nov. 4, 2016), Dkt. No. 555. Those measures have been implemented successfully by other States as well. *See id.* ¶¶ 59-66, 83-87, 90 & Table 4.

inefficient practices," 459 U.S. at 195 (emphasis added)—exactly the kind of waste and inefficiency that the Special Master found as to Georgia's consumption for agricultural purposes here. *See* Report 32-34.[2]

Finally, Georgia errs in suggesting (at 33-34) that the "clear and convincing evidence" standard that Florida bore—and met, *see* Report 31-32—in establishing *injury* somehow ramps up the legal standard that governs redressability. As *Colorado II* makes clear, the "clear and convincing evidence" standard is an *evidentiary* burden about what *evidence* is required to prove the elements of a claim—*i.e.*, what is necessary to tip the "*evidentiary* scales" in the proponent's favor. 467 U.S. at 316 (emphasis added). That evidentiary standard, even when it applies (*see* n.2, *supra*), does not change—or heighten—the *legal* standard for redressability.

In any event, under the correct legal standard, the record establishes redressability even under the clear-and-convincing-evidence standard.

---

[2] At that balancing phase, Georgia, not Florida, also will bear the burden of proof. FL Br. 36 n.8. In arguing otherwise, Georgia and its amici try to blur together the separate injury and equitable-balancing stages of the action, refusing to accept this Court's statement that the "burden . . . shift[s]" between those two stages. *Colorado I*, 459 U.S. at 187 n.13; *see Colorado II*, 467 U.S. at 317. In any event, because the Special Master based his recommendation on redressability, this case, in its current posture, provides no occasion to reconsider the burden at that separate stage, which presumably explains why the United States does not address this issue.

B. The United States Has Confirmed That It Would Accommodate A Decree

The Special Master should have concluded that Florida established likelihood of redress on the record before him. But in a sense, that inquiry is now academic because events since the Special Master issued his recommendation are sufficient by themselves to establish redressability.

After the Special Master issued his report, the Corps issued a ROD along with its new Master Manual, which makes clear how the Corps would respond to a decision in this case: The Corps "*would* take [that] development[] into account and adjust its operations accordingly," including by revising its Manual. U.S. Br. 30 (emphasis added) (quoting ROD 18). Georgia claims (at 41) that the ROD cannot "override[]" what the Special Master said about the United States' post-trial brief. But, as the United States notes (at 29), the Special Master never considered how the Corps would respond to a decision by this Court. Indeed, his recommendation is premised on an assumption that the Corps would *not* change its rules. *See* Report 61.

The Corps' commitment that it not only "will review" any equitable apportionment in this case but will also "adjust its operations accordingly" (ROD 18) is sufficient by itself to establish redressability. This Court has held that redressability is established where "the practical consequence" of a decree is "a significant increase in the likelihood that the plaintiff would obtain relief," even where an agency relevant to providing that relief would not be formally bound by the decree. *Utah v. Evans*, 536 U.S. 452, 464 (2002); *see also Federal Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998); *Bennett v. Spear*, 520 U.S. 154, 169-71 (1997).

Here, the agency has already made clear that it *would* review the decision and adjust its operations accordingly.

Georgia says (at 41) that Florida has "selectively quote[d]" the ROD. But as the material reproduced in the United States' brief (at 30) shows, Florida has not misrepresented the ROD at all. Georgia also suggests that the ROD is irrelevant because the "Manual *already reflects* [the Corps'] considered judgment" of how to balance authorized project purposes. Resp. 42. But the ROD specifically says that the Corps would "adjust"—*i.e.*, *change*—its operations in response to a decree, including by revising the Master Manual. ROD 18.

The Corps notes that it would consider "applicable law" in making such an adjustment. *Id.* But there is no inherent conflict between facilitating an equitable apportionment and complying with its statutory objectives. Indeed, the United States has recognized that a decree in this case would *not* prejudice its operations and, instead, could only facilitate them by leading to more water in the system. *See* U.S. Opp. to Ga.'s Mot. to Dismiss 16. And when the States tried to agree on an allocation formula, Congress made clear that the Corps should administer federal law *in furtherance of* that agreement. FL Br. 42. There is no reason to treat a decree from this Court any differently.

Moreover, as the United States recognizes (at 32), "a decision by this Court apportioning the waters of the ACF Basin ... would necessarily form part of the constellation of laws to be considered by the Corps when deciding how best to operate the federal projects in the ACF Basin for their congressionally authorized

purposes." The Corps' existing Manual cannot "already reflect[]" such a decision, Resp. 42, when no such decision exists yet. Even if the Corps would be "technically free to disregard" the decision since it is not a party to this case, the United States itself recognizes that a decision by this Court would "alter[] the legal regime to which the action agency is subject." *Bennett*, 520 U.S. at 169.

Indeed, the United States, in its latest brief, has stated that, "if truly effective relief for the oyster fishery cannot be accomplished without the Corps changing its operations, then such a determination by this Court would likely *require* that the Corps engage in the required public processes and environmental reviews for revising the Master Manual, and adjust its operations to the extent permissible under law and consistent with the Corps' mission of operating the ACF system for its congressionally authorized purposes." U.S. Br. 33 (emphasis added) (footnote omitted).

The fact that it is impossible to say, today, what the precise outcome of that administrative process will be cannot mean that the case must be dismissed. That is exactly the "chicken and the egg" problem that Florida pointed out in its opening brief (at 31). As this Court has previously recognized, asking for such "absolute precision in forecasts . . . would be unrealistic"—and is unnecessary. *Colorado II*, 467 U.S. at 322. The Corps' and the Solicitor General's statements confirm that a workable decree—and meaningful relief—is, at the very least, *likely* if this Court issues an equitable apportionment. That, in itself, establishes redressability.

C. Even If The Corps Did Not Adjust Its Rules, A Decree Would Still Be Likely To Provide Meaningful Redress

The major developments since the Special Master issued his report are reason enough to decline his recommendation and send the case back. But as Florida has explained (at 40-52), the evidence at trial showed that a consumption cap was likely to result in meaningful relief for Florida, even if the Corps did not change its existing rules.

The United States' brief supports this argument, too. For example, the United States confirms that:

- The amount of water flowing into the ACF system—or "basin inflow"—will increase if Georgia consumes less on the Flint River. U.S. Br. 6-9, 16, 27-28.
- "[I]t is likely that additional flows resulting from a cap on Georgia's consumption would reach Florida without any changes in the Corps' operational protocols . . . ." *Id.* at 33.
- A decree would create an "additional 'cushion'" in the Corps' reservoirs that would delay onset of drought operations, allow the Corps to meet minimum flow requirements "longer" during extended droughts, and quicken resumption of normal operations, in which flows are higher. *Id.* at 16, 18, 28.
- And the Corps has discretion to release additional water—above the minimum flow requirements—including for fish and wildlife protection. *Id.* at 8-9, 22-23, 25.

This would all materially benefit Florida by sending *more water* to the Apalachicola, and reducing the most harmful periods (drought operations).

Georgia focuses on the post-trial brief the United States filed before the Special Master, explaining how a different Manual worked. But pointing to that brief, the Solicitor General has now clarified: "The United States does not mean to suggest that a consumption cap would provide no benefit to the Corps' operations in the ACF Basin or to Florida." *Id.* at 28. Instead, the United States explains that "increased basin inflows would generally benefit the ACF system by delaying onset of drought operations, by allowing the Corps to meet the 5000 cfs minimum flow longer during extended drought, and by quickening the resumption of normal operations after drought." *Id.* The United States is then careful to note that it "takes no position on whether Florida proved that those benefits are of sufficient quantity to justify relief in this case." *Id.*

Without denying that "the Corps has historically exercised its discretion to release more than the required minimum under [its protocols]" (Report 55), the United States claims (at 27) that those releases have been driven "by the need to serve authorized project purposes" and other objectives. But, as the United States recognizes (*id.*), "fish and wildlife conservation" is among those very purposes. Therefore, a decree premised on a finding of harm to fish and wildlife, including oysters, would confirm, if not increase, the justification for prior releases.

Indeed, following the issuance of a new Biological Opinion by the U.S. Fish and Wildlife Service in 2016, the Corps is now obligated under the Endangered Species Act to "provide pulses of water" at key times,

to identify new ways to "provid[e] more floodplain inundation" along the Apalachicola, and—most importantly—to look for ways to "reduc[e] frequency of low flows." JX-168 at 3, 195. That may not mean that "*all* additional flows . . . resulting from a decree" would make their way to Florida under the existing rules, as the Special Master believed was required. Report 48 (emphasis added). But the 2016 Biological Opinion makes it likely that a material portion of them would. It also underscores that just reducing the frequency and duration of low-flow periods, as the United States has admitted (at 16, 18, 28) a consumption cap would do, will materially benefit the Apalachicola.

Georgia argues that this Court should ignore the benefits of limiting the period in which the Corps is in drought operations (by delaying the onset of drought conditions and quickening the resumption of normal operations), because "Florida did not prove the extent to which drought operations would be shortened as a result of the relief requested or the level of benefits such marginal increased flows would afford." Resp. 54. But that is incorrect.

Neither Georgia nor, for that matter, the Special Master, acknowledged or responded to the powerful evidence showing that if a consumption cap had been in effect during the 2011-12 drought, it could have prevented the Corps from entering drought operations *at all*. FL Br. 48-49. Both common sense *and* the evidence thus establish that reducing the amount of water wastefully consumed in Georgia during crucial periods would increase the amount of water left over for the Apalachicola during those same periods. Allowing more water through in non-drought periods

also would fortify the Apalachicola and allow it to better withstand drought conditions.

Georgia's reliance on the results of ResSim modeling does not change that. As Florida has explained (at 50) and Georgia does not dispute, ResSim cannot accurately account for the Corps' practice of stockpiling more water during wet periods than the minimum its protocols require. That discretionary practice has created a "cushion" that the United States agrees is beneficial, and as the United States has recognized, a consumption cap would only *add* to the cushion, increasing the benefits in the form of shortened or eliminated drought operations. U.S. Br. 16, 18, 28.[3]

Accordingly, even if the Corps had not made clear in its ROD that it would adjust its operations in response to a decree, ample evidence showed at trial that a consumption cap likely would provide meaningful redress to Florida without any changes to the Corps' operating rules at all.

D. The Increased Flows To Florida Resulting From A Decree Would Materially Improve Conditions In The Apalachicola Region

Because the Special Master never considered that the Corps would actually change its operating rules in

---

[3] Georgia claims (at 47 n.10) that ResSim's shortcomings are "canceled out" when comparing different scenarios. But ResSim's flaw for present purposes is that it treats materially different flow scenarios as though they are identical by ignoring the discretionary choices that the Corps retains over additional water. Comparisons do not eliminate that problem—they exacerbate it, by concealing the benefits that increased water would produce under the Corps' actual practices.

response to a decree, and concluded that Florida could not establish redressability unless the Corps' existing rules "guarantee" redress, he never considered the full beneficial effects that the additional flows created by a cap on Georgia's consumption on the Flint River would have on the Apalachicola if they *did* reach it. The evidence at trial, however, establishes that the increased water would have substantial beneficial effects.

Multiple biology and ecology experts testified that the Apalachicola River and Bay would substantially benefit from increased flows, especially as compared to a future in which Georgia would consume even more water (as it would, *see* Report 34). For the River, there is no question more water would benefit the system: a larger part of the floodplain would receive water through sloughs, the River ecology would stabilize, and harm to mussels, fish, and swamp trees would be reduced. *E.g.*, Allan PFD ¶¶ 65, 73-74 (Nov. 4, 2016), Dkt. No. 534; Tr. vol. 3, at 592:6-22, 596:17-598:1 (Allan); Tr. vol. 10, at 2629:7-15 (Kondolf). These findings are consistent with previous U.S. Fish and Wildlife Service and EPA findings. FX-599 at FL-ACF-02545883-84, -94.

The evidence of the benefits to the Bay—on which the Special Master's finding of harm focused (Report 31-32)—was likewise compelling. It showed that increased flows would prevent prolonged periods of very high salinity (as well as extreme temperatures and low dissolved oxygen episodes) that harm oysters and other aquatic life, improve food availability, and allow the Bay ecosystem to stabilize and move towards recovery. *E.g.*, Glibert PFD ¶ 5 (Nov. 4, 2016), Dkt. No. 541; Tr. vol. 7, at 1869:23-1870:12 (Glibert); Kimbro

PFD ¶¶ 7, 81-83 (Nov. 4, 2016), Dkt. No. 547; Tr. vol. 6, at 1603:16-1606:21 (Kimbro); White PFD ¶ 164 (Nov. 4, 2016), Dkt. No. 558. This Court previously recognized the direct relationship between increasing fresh-water flows and saving an oyster population in *New Jersey v. New York*, 283 U.S. 336, 345 (1931).

Georgia, meanwhile, grossly understates the benefits that a decree would produce for Florida. For example, Georgia describes (at 21) the roughly one-part-per-thousand reduction in salinity that increased flows would cause in the Bay as "*de minimis*" and claims that this would have "no ecological benefit." But the U.S. Fish and Wildlife Service found that the change would materially improve the survival rates of both oysters and juvenile Gulf sturgeon. JX-122, at 23-24; *see also* Tr. vol. 6, at 1570:24-1572:2 (Kimbro); Tr. vol. 7, at 1724:24-1725:14 (White); Tr. vol. 7, at 1869:23-1870:12, 1884:6-1885:7 (Glibert).[4] Georgia's attempt (at 21) to dismiss the increase in oyster population expected on a single oyster bar likewise ignores the evidence that other major oyster bars located closer to the river mouth would experience much larger benefits. *See* Tr. vol. 7, at 1724:24-1725:14 (White); Tr. vol. 6, at 1570:24-1572:2 (Kimbro).

The record also refutes Georgia's claim (at 17) that its total consumptive water use in the ACF Basin "has never reached a monthly average of 2,000 cfs," and that a consumption cap therefore could not produce

---

[4] Georgia speaks of the incremental changes in salinity only in absolute terms. As a comparative figure, however, that change is significant: In some key areas of the Bay, for example, salinities are normally between 0-5 parts-per-thousand. Tr. vol. 7, at 1870:2-5 (Glibert).

sufficient water to provide benefits in Florida. The evidence at trial showed that Georgia has vastly understated the extent of its consumption. *See* Hornberger PFD ¶¶ 3, 50-53 & Tables 1 & 2, 71, 76-77, 80-95 (Nov. 4, 2016), Dkt. No. 546 (finding significantly higher consumption levels using other data and modeling); Lettenmaier PFD ¶¶ 39-43 (Nov. 4, 2016), Dkt. No. 550 (similar).

In short, the evidence clearly showed that the Apalachicola would see meaningful benefits from increased flows of the magnitude that a reasonable consumption cap would be likely to generate. The Special Master never made any contrary findings. Under his redressability standard, the absence of a "guarantee" that the additional water would reach the Apalachicola simply ended the inquiry.

III. DISMISSING THIS ACTION WOULD BE GROSSLY INEQUITABLE

Dismissing this suit also would be directly at odds with the equitable principles that govern equitable apportionment actions. FL Br. 52-54.

After the trial, the Special Master concluded that:

- "There is little question that Florida has suffered harm from decreased flows in the River." Report 31.
- That includes an "unprecedented collapse of its oyster fisheries," which "has greatly harmed the oystermen of the Apalachicola." *Id.* at 31-32.[5]

---

[5] While Georgia tries to trivialize Florida's interest in protecting its oyster fisheries—and those that fish them—this Court has already recognized that interest as sufficiently weighty to support an equitable apportionment. *New Jersey*, 283 U.S. at

- Meantime, "Georgia's upstream agricultural water use has been—and continues to be—largely unrestrained." *Id.*
- Despite its "sharp increase in water use [since 1970], Georgia has taken few measures to limit consumptive water use for agricultural irrigation." *Id.* at 33.
- "Even the exceedingly modest measures Georgia has taken have proven remarkably ineffective." *Id.*
- And Georgia's mindset is simply that its "agricultural water use should be subject to no limitations, regardless of the long-term consequences for the Basin." *Id.* at 34.

Those conclusions are not only overwhelmingly supported by the evidence, but Georgia waived any challenge to them by declining to file exceptions.

Georgia does not dispute the time-honored principle that "equity will not suffer a wrong without a remedy." *See* FL Br. 53 (citing authorities). Instead, it just argues that "[a] court of equity is not called upon to do a vain thing." Resp. 57 (quoting *Foster v. Mansfield*, 146 U.S. 88, 101 (1892)). But *Foster* and like cases involved situations where redress is *impossible*. *See Foster*, 146 U.S. at 102 (explaining that person bringing suit "could not *possibly* obtain a benefit from such action" (emphasis added)). That is by no means the case here. As discussed, not only is redress undeniably *possible* if this Court enters the requested decree, but, as Florida has explained, it is, at the least, *likely*. There is nothing "vain" about ordering relief here.

345; *see Idaho II*, 462 U.S. at 1030-31 (O'Connor, J., joined by Brennan and Stevens, JJ., dissenting).

Georgia points to no equitable principle that would deny relief in these circumstances (and there is none). Indeed, as Justice O'Connor observed in *Colorado I*, even the "[p]rotection of existing economies does not require that users be permitted to continue in unreasonably wasteful or inefficient practices." 459 U.S. at 195 (O'Connor, J., concurring in the judgment). That is even more true in riparian States like Georgia and Florida, which give less weight to established uses than prior appropriation States like Colorado and New Mexico. *See id.* at 179 n.4. And there is absolutely no reason to dismiss this action and thereby allow Georgia to continue to engage in what the Special Master himself recognized (Report 32-34) is "wasteful or inefficient" agricultural consumption along the Flint River.

If this Court dismisses this action, Georgia's wasteful consumption will continue (*see id.* at 34), and Florida's harms will persist, if not worsen. That is the last thing that equity would allow where, as here, relief is not only possible but, indeed, likely.

CONCLUSION

The Court should decline to adopt the Special Master's recommendation and return the case to the Special Master for further proceedings.

Respectfully submitted,

PAMELA JO BONDI
Attorney General
AMIT AGARWAL
Solicitor General
JONATHAN L. WILLIAMS
Deputy Solicitor General
JONATHAN GLOGAU
Special Counsel
OFFICE OF THE ATTORNEY GENERAL
The Capitol, PL-01
Tallahassee, FL 32399-1050
(850) 414-3300

GREGORY G. GARRE
Counsel of Record
PHILIP J. PERRY
JAMIE L. WINE
CLAUDIA M. O'BRIEN
ABID R. QURESHI
BENJAMIN W. SNYDER
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

ROBERT A. WILLIAMS
General Counsel
FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION
3900 Commonwealth Blvd.
MS 35
Tallahassee, FL 32399-3000
(850) 245-2295

PAUL N. SINGARELLA
LATHAM & WATKINS LLP
650 Town Center Drive
20th Floor
Costa Mesa, CA 92626-1925
(714) 540-1235

CHRISTOPHER M. KISE
JAMES A. MCKEE
FOLEY & LARDNER LLP
106 East College Avenue
Suite 900
Tallahassee, FL 32301
(850) 222-6100

Counsel for State of Florida

August 30, 2017