

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

UNITED STATES' STATEMENT OF PARTICIPATION

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The United States of America (“United States”), by and through its undersigned attorneys, and pursuant to paragraph 6 of Case Management Order No. 2, hereby submits its statement of its intended current participation in the above captioned matter, and states:

At the invitation of this Court, the United States is participating in this case as *amicus curiae*. The United States has advised the Court of the Government’s interest in the potential effects of this proceeding on the United States Army Corps of Engineers’ efforts to complete its update to the Master Manual for the Apalachicola-Chattahoochee-Flint River basin.

At this time, the United States intends to continue to participate as *amicus curiae* in the proceedings before the Master as is appropriate to protect its interests. As *amicus curiae*, the United States does not expect to participate directly in discovery or in the presentation of an affirmative case on factual issues at trial. Nevertheless, the United States plans to monitor the case, both to address any federal interests that might be implicated and to provide assistance to the Court in resolving the issues. *Cf.* Sup.Ct. R. 37(4). In addition, the United States expects that, if the Master files reports with the Court, the United States may file briefs as *amicus curiae* concerning the Master's recommendations.

The United States outlines its anticipated scope of participation below with the understanding that the federal government’s level of involvement could conceivably change as the case progresses. The United States makes reference to

the Special Master's Case Management Orders and Case Management Plan where appropriate.

A. Status Conferences and Case Management Orders

Paragraph 4 of the Case Management Plan currently requires the parties to file progress reports each month and provides that “[o]nly parties may participate in status conferences and other case proceedings.” When participating as *amicus curiae* in other original actions, the United States has been permitted to attend status conferences and other proceedings. *See, e.g., Montana v. Wyoming*, No. 137, Original, Docket 118 at 4 (Final Case Management Plan No. 1) (“An Amicus shall receive notices of, and may participate in and attend, status conferences of the States that the Special Master conducts.”); *Kansas v. Nebraska*, No. 126, Original, Docket 10 (Case Management Plan), Docket 25 (U.S. Statement of Participation) & Docket 72 (Corrected Case Management Order 2). So that the United States may adequately monitor the course of proceedings, the United States respectfully requests that the parties serve a copy of the progress reports on the United States and that the United States receive notice and the opportunity to attend status conferences and other proceedings concerning this case. *See* Case Management Plan para. 4. Although the United States requests the opportunity to attend those conferences and proceedings, the Government does not expect to participate actively as a routine matter. Instead, the United States would participate actively only to the extent the Government's interests are implicated in the conference or proceeding, usually as set forth in a filing before the conference or proceeding, and

where the Master has granted leave to be heard. The United States may be represented by counsel from the Office of the Solicitor General or from the Environment and Natural Resources Division who specialize in the resolution of water and natural resources disputes. The United States also requests to continue to be served with copies of all case management orders.

B. United States' Interest and Role as an *Amicus*

The United States is not, at this time, an intervenor in this case. Nonetheless, the federal government does have a unique perspective on the issues presented here. Pursuant to congressional authorizations, the Corps currently operates five federal dams in the ACF basin. Those federal projects are central components of water management in the basin and are operated in accordance with statutorily defined purposes. The Corps' operation of the system of dams in the ACF basin is controlled by a Master Manual governing all projects in the basin and separate reservoir regulation manuals for each individual project. The Corps is currently engaged in an administrative process for updating the Master Manual and the individual reservoir regulation manuals. The United States' interests as *amicus curiae* in this equitable apportionment are primarily related to the Corps' process to revise the manual governing the operation of the dams and reservoirs in order to implement the federal purposes of the federal projects in the ACF basin. The Supreme Court has already affirmed the United States' special role in this litigation by inviting its participation as *amicus curiae*.

C. Participation in Discovery

The United States, as *amicus curiae*, does not expect to conduct discovery.¹ Nevertheless, the United States does wish to monitor the course of the litigation and therefore requests service of all discovery requests, including those pertaining to interrogatories, requests for admission, requests for production of documents, and depositions. The United States does not in general expect to be attending most depositions or seeking copies of discovery responses, but the United States, at its own expense, may wish to attend particular depositions or to obtain copies of specific deposition transcripts or discovery responses.

In its capacity as *amicus curiae*, the United States is not subject to discovery or otherwise obligated to provide evidence except in accordance with applicable federal regulations, known as “Touhy” regulations, which generally govern the availability of testimony or other evidence from federal employees in litigation to which the federal government is not a party. *See, e.g.*, 32 C.F.R. §§ 516.40-516.56 (Department of the Army regulations); 43 C.F.R. § 2.82 (Department of the Interior regulations); *see also COMSAT Corp. v Nat’l Sc. Found.*, 190 F.3d 269, 278 (4th Cir. 1999)(“When the government is not a party, the decision to permit employee testimony is committed to the agency’s discretion.”)(citation omitted).

¹ Separately, as part of the notice-and-comment process for revising the Master Manual, Florida and Georgia and others have made submissions to the Corps on factual and legal issues relevant to that process. *See* United States Army Corps of Eng’rs, *Final Updated Scoping Report, Environmental Impact Statement, Update of the Water Control Manual for the Apalachicola-Chattahoochee-Flint (ACF) River Basin, in Alabama, Florida, and Georgia* 97-134 (Mar. 2013)

D. Motions

Under the Case Management Plan, the parties may file motions to dismiss or for summary judgment at any time on or before January 15, 2016. CMO 2 para. 5. Under Case Management Order 3, the State of Georgia must file any motion setting forth defenses under Federal Rules of Civil Procedure 12(b)(5) or (7) by February 9, 2015, except that Georgia may have until seven days after the filing of the United States' statement of intended participation within which to file a motion asserting that the United States is an indispensable party. To the extent the United States determines its participation in the briefing or arguments on such motions is appropriate to address the interests of the United States or provide assistance to the Court, the United States anticipates participating as *amicus curiae*.

E. Settlement Discussions

The United States notes that the current Case Management Plan provides little opportunity for formal mediated negotiation, though the Master has urged the parties to consider settlement options. If the Case Management Plan is revised, and mediated or formal negotiations occur, the United States requests the opportunity to participate in the negotiation process. The United States Department of Justice has considerable experience in facilitating settlement of complex water disputes through direct participation in negotiations and through alternative dispute resolution. The United States is particularly interested in any potential effects on

the federal water projects from any resolution or remedy that might be considered in this case.

F. Trial

The United States, as *amicus curiae*, may have an interest in monitoring any trial proceedings, but does not anticipate a need to participate actively in the presentation of evidence. For the reasons set out in Section (C) above, the availability of evidence from any federal employee would be determined in accordance with applicable Touhy regulations.

G. Reports of the Special Master

In light of the Court's invitation to the United States to participate as *amicus curiae* in this case, the United States expects that it would file briefs as *amicus curiae* concerning the Master's reports and recommendations to the Court.

Conclusion

At this time, the United States anticipates continuing to participate as *amicus curiae* throughout the proceedings before the Master. We do not expect federal participation to impose any undue burdens on the parties, and we are hopeful that the United States' participation will provide assistance to the Court in resolving this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing United States' Statement of Participation has been served this 9th day of February, 2015, in the manner specified below:

| For State of Florida | For State of Georgia |
|---|---|
| <p><u>By U.S. Mail and Email:</u> Allen Winsor Solicitor General <i>Counsel of Record</i> Office of Florida Attorney General The Capital, PL-01 Tallahassee, FL 32399 T: 850-414-3300 allen.winsor@myfloridalegal.com</p> | <p><u>By U.S. Mail and Email:</u> Craig S. Primis, P.C. <i>Counsel of Record</i> Kirkland & Ellis, LLP 655 15th St., NW Washington, D.C. 20005 Craig.primis@kirkland.com</p> <p><u>By Email Only:</u> Samuel S. Olens Nels Peterson</p> |

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