No. 142, Original

In The
Supreme Court of the United States

STATE OF FLORIDA,

Plaintiff,

v.

STATE OF GEORGIA,

Defendant.

STATE OF GEORGIA'S MOTION TO DISMISS FOR FAILURE TO JOIN A REQUIRED PARTY

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INTRODUCTION

This action by Florida, seeking equitable apportionment of the waters of the Apalachicola-Chattahoochee-Flint ("ACF") River Basin, cannot proceed without the joinder of the United States. The federal government has imposed a "highly regulated system over much of the [ACF] basin." *See* Ex. A, U.S. Army Corps of Eng'rs, *Final Updated Scoping Report*, at 2 (Mar. 2013) ("Scoping Report"). Specifically, the U.S. Army Corps of Engineers operates a series of dams and reservoirs in the Basin—including the Jim Woodruff Dam at the headwater of the Apalachicola River through which water from the Flint and Chattahoochee Rivers must pass before entering Florida. *Id*. at 4. The Corps' control over those dams and reservoirs—and its operation of those facilities to serve statutorily prescribed federal purposes—makes the United States a "required party" to this litigation. As in prior equitable apportionment cases in which the United States declined to intervene notwithstanding intertwined federal obligations with regard to the waterway in question, this case must be dismissed. *See Arizona v. California*, 298 U.S. 558 (1936); *Texas v. New Mexico*, 352 U.S. 991 (1957).

This case cannot proceed without the United States as a party for two straightforward reasons. *First*, the Supreme Court cannot accord complete relief to Florida without the United States participating as a party. Florida's alleged injuries stem from purportedly inadequate flows from Georgia into the Apalachicola River. But the amount of water that flows into the Apalachicola River is controlled by the United States through its operation of the Woodruff Dam and the integrated system of federal dams and reservoirs upstream on the Chattahoochee. Thus, even

if Florida were to prevail in its suit against Georgia, the Supreme Court could not guarantee Florida what it considers to be an adequate flow of water into the Apalachicola River unless the United States can be bound by the Court's decree. *See Arizona*, 298 U.S. at 571-72 (dismissing equitable apportionment action because, *inter alia*, a decree entered in the "absence of the United States, could have no finality"). That would be particularly true during seasonal low-flow or drought conditions, when complying with the federal purposes for which the Corps operates the dams in the ACF Basin requires the Corps to impound more water in upstream federal reservoirs, rather than allowing additional water to flow into the Apalachicola.

Second, resolving this case in the absence of the United States will, as the Solicitor General has acknowledged, necessarily impact "the various purposes for which [the dams and reservoirs] were authorized by Congress" and "the Corps' assessment of the appropriate manner in which to balance and accomplish those purposes." U.S. Amicus Br. at 19-20 (Sept. 18, 2014). Many of the fundamental issues raised by Florida's complaint—including river flows, water-supply needs, and marine species conservation—are being evaluated by the Corps in its ongoing process of revising the manual governing the operation of the federal facilities in the basin—a review mandated by federal law. The issues in this case thus "could not be determined without ascertaining the rights of the United States to dispose of that water [in the ACF Basin] in aid and support of its project[s]." *Arizona*, 298 U.S. at 571.

Neither of those problems is solved by the government's recent proposal to "participate as *amicus curiae* throughout the proceedings before the Master." U.S. Stmt. of Participation at 7 (Feb. 9, 2015). Most significantly, mere *amicus* participation by the United States will not enable the Supreme Court to accord Florida relief because an *amicus* is not a formal party that can be bound by the Court's ultimate judgment. That is a fatal stumbling block to proceeding with this case: Florida can only get relief through an order that is binding on the United States, and yet the United States has refused to subject itself to an order entered in this case.

Nor will the government's involvement as an *amicus* prevent the prejudice to the United States that a decree in this case will cause. The extraordinary level of involvement the United States seeks to have in this case proves that federal interests and duties will be significantly affected by this litigation. Thus, rather than merely seeking leave to file *amicus* briefs, the United States seeks pseudo-party status so that it may receive status reports; be permitted to attend status conferences; be present at depositions; be privy to the parties' discovery requests, but not subject to discovery as a party itself; and participate in settlement negotiations. This is tantamount to a concession that the United States requires intimate and routine involvement in this litigation to protect its interests and fulfill its statutorily prescribed responsibilities. The only way the United States can have the rights of a full party is if it assumes the burdens of a full party—including most significantly the burden of being bound by a final order or decree.

Nor should there be any suggestion that the Supreme Court somehow decided this critical issue *sub silentio* when it granted Florida leave to file its complaint. The Court's one-line order provided no rationale for why it allowed Florida to proceed with its complaint, and the question of the United States' status as a required party was not before the Court at the leave-to-file stage. In fact, Georgia, Florida, and the United States all took the position that the question of whether this case could proceed if the United States declined to intervene was best addressed by the Special Master on a motion to dismiss. It would be wrong as a matter of law to infer that the Court's decision granting Florida leave to file its complaint was somehow a suggestion that this case can and must proceed regardless of what the United States decided to do.

In short, the United States' participation *as a party* (not as an *amicus*) is an indispensable requirement of moving forward with this case. Without the United States participating as a party that can be bound by a final judgment, the Court cannot accord Florida complete relief and the Corps' (and Congress's) objectives in the ACF Basin will be prejudiced. For those reasons, and for those explained below, this action should be dismissed for "failure to join a party under Rule 19." Fed. R. Civ. P. 12(b)(7).

BACKGROUND

A. The United States' Interests And Operations In The ACF Basin

The United States' interests in the ACF Basin reach back at least to 1874, when Congress authorized improvement projects to ensure the navigability of the Apalachicola, Chattahoochee, and Flint Rivers. *See* Ex. B, H.R. Doc. No. 76-342 at

2-3 (1939). The Corps made a recommendation to Congress in 1939 for the "comprehensive development of the Apalachicola[,] . . . the Chattahoochee and the Flint . . . in the combined interest of low-cost transportation and of hydroelectric power generation," with additional "value to national defense, to recreation, and in increasing the value of riparian lands." *Id.* at 5. The original plan called for "the construction of 5 dams in the Chattahoochee and one dam just below the head of the Apalachicola," as well as reservoirs "to regulate flows" for navigability purposes. *Id.* at 6. Congress approved the project, among other reasons, "in the interest of national security and the stabilization of employment." Rivers and Harbors Act of 1945, Pub. L. No. 79-14, §§ 1-2, 59 Stat. 10, 11-12, 17; *see also* Rivers and Harbors Act of 1946, Pub. L. No. 79-525, § 1, 60 Stat. 634, 634-35. Congress has separately directed the Corps to use its federal water projects, including those in the ACF Basin, to accomplish additional federal objectives. *See, e.g.*, 16 U.S.C. § 460d (recreational facilities); 16 U.S.C. § 662(a) (fish and wildlife conservation); 33 U.S.C. § 708 (domestic and industrial water supply); 43 U.S.C. § 390b (same); 33 U.S.C. § 1252a (water quality).

Today, the Corps "operates five dams in the ACF River Basin (in downstream order): Buford, West Point, Walter F. George, George W. Andrews, and Jim Woodruff." Scoping Report at 4.[1] Three of those dams—Buford, West Point, and

[1] The Court may consider the Scoping Report in resolving this motion to dismiss. *See Direct Supply, Inc. v. Specialty Hosps. of Am., LLC*, 878 F. Supp. 2d 13, 23 (D.D.C. 2012) ("[C]ourts may consider matters outside the pleadings when determining whether Rule 19 requires that a party be joined."); *Davis Cos. v. Emerald Casino, Inc.*, 268 F.3d 477, 480 n.4 (7th Cir. 2001) ("In ruling on a

Walter F. George—impound reservoirs that have substantial capacity to store water from the wet winter and early spring for release during the drier summer and fall. *Id.* at 18. The Corps does not own, and cannot equitably apportion, the waters in the ACF Basin. But because the Corps stores water in federal reservoirs and chooses the timing and quantity of releases from federal dams, the Corps has operational control over most of the water flows in the Basin.

Four of the federal dams in the ACF Basin are located wholly on the Chattahoochee River. The exception is Woodruff Dam, which is "immediately below the confluence of the Chattahoochee and Flint rivers and marks the upstream extent of the Apalachicola River." *Id.* at 4. No water flows into the Apalachicola River from either the Chattahoochee or the Flint unless and until the Corps releases that water from Woodruff Dam. Because Woodruff Dam does not have significant storage capacity, the Corps regulates flow into the Apalachicola by scheduling releases further upstream to ensure that the combined flows of the Flint and Chattahoochee meet certain minimums. *Id.* at 5.

The Corps' construction and operation of these dams and reservoirs has "resulted in a highly regulated system over much of the basin." *Id.* at 2. Pursuant to a number of statutory authorizations, the Corps regulates water flow in the ACF Basin to serve multiple congressionally mandated project objectives and other

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dismissal for lack of joinder of an indispensable party, a court may go outside the pleadings and look to extrinsic evidence."); *see also Papasan v. Allain*, 478 U.S. 265, 268 n.1 (1986) ("Although this case comes to us on a motion to dismiss . . . , we are not precluded in our review of the complaint from taking notice of items in the public record.").

requirements of federal law. *Id.* at 4. Those federal objectives include navigation, hydroelectric power generation, flood risk management, water supply, recreation, water quality, and fish and wildlife conservation. *See id.* at 4, 18. Balancing those sometimes-competing federal objectives requires the Corps to operate all of the dams and reservoirs in the ACF as "a unified whole." Compl. ¶ 22. As the Corps explained in its March 2013 Scoping Report:

> The complex hydrology and varied uses of the ACF system require that the [Corps] operate the system in a balanced operation in an attempt to meet all the authorized purposes while continuously monitoring the total system's water availability to ensure that minimum project purposes can be achieved during critical drought periods.

Scoping Report at 18.

In determining how best to manage water resources in the ACF Basin to serve federal purposes, the Corps employs its Master Water Control Manual. Among other things, the Water Control Manual guides the Corps in determining the timing and volume of water releases from the five federal dams in the Basin, including in "reducing flow releases as pool levels drop as a result of drier-than-normal or drought conditions." *Id.* at 18. The current Water Control Manual "has not been comprehensively revised since 1958," but the Corps is currently in the process of making a comprehensive revision. *Id.* at 17-19.

During the long delay in revising the Water Control Manual, the Corps has prepared and updated individual water control plans for the various federal dams in the ACF Basin. One of those plans—the Revised Interim Operating Plan ("RIOP")—"is intended to govern releases from Jim Woodruff Dam [into the Apalachicola River] until revised or replaced with a new Water Control Plan." *Id.*

at 9. Under the RIOP, the Corps maintains a minimum flow at the Florida-Georgia border of 5,000 cubic feet per second and limits the rate of river stage declines during Gulf sturgeon spawning season. *Id.*

B. Florida's Complaint & Proceedings To Date

Florida has brought this original action against Georgia seeking to "equitably apportion the interstate waters of the Apalachicola-Chattahoochee-Flint River Basin." Compl. ¶ 1. As grounds for that equitable apportionment, Florida alleges that "Georgia's water storage and consumption upstream of the Apalachicola River in the Chattahoochee and Flint River Basins has reduced Apalachicola River flows entering Florida." *Id.* ¶ 42. That "reduction" of inflows into the Apalachicola River, Florida alleges, has "damaged numerous species and habitats in the Apalachicola Region's ecosystem, and the overall economic, environmental, and social health and viability of the region." *Id.*; *see also id.* ¶¶ 55-59.

Florida acknowledges that "[b]efore reaching Florida, the waters of the Chattahoochee River are temporarily stored in reservoirs owned and operated by the [Corps]," *id.* ¶ 8, and that "the Corps' dams are operated as a unified whole to achieve multiple project purposes," *id.* ¶ 22. Florida also acknowledges that, immediately before entering Florida, water from the Chattahoochee and Flint Rivers must pass through the Woodruff Dam. *Id.* ¶¶ 20, 22. Nonetheless, Florida states that it "seeks no affirmative relief against the United States in this action with respect to the Corps' operation of the federally authorized dam and reservoir system, or any other interest." *Id.* ¶ 15.

Georgia served its answer to Florida's complaint on January 8, 2015. On February 9, 2015, the United States informed the parties and the Special Master that is does not intend to intervene and join this action as a party, but instead plans to "participate as *amicus curiae* throughout the proceedings before the Master," U.S. Stmt. of Participation at 7, including a request for extensive involvement in all phases of the proceedings.

ARGUMENT

Florida's complaint must be dismissed because the United States is a required party that cannot be joined. *See* Fed. R. Civ. P. 12(b)(7). Federal Rule of Civil Procedure 19 sets forth a two-step inquiry for determining whether a case should be dismissed for failure to join a party.[2] First, the Court must decide whether the United States is a "required party" under either of the alternative standards set out in Rule 19(a). Second, if the United States is a "required party," the Court must apply the factors listed in Rule 19(b) to "determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed."

Those inquiries require dismissal. The United States is a "required party" both because the Supreme Court cannot accord complete relief to Florida without the United States participating as a party, *see Arizona*, 298 U.S. at 571-72, and

[2] Although the Supreme Court has not articulated what legal standard applies to a motion to dismiss an original-jurisdiction case for failure to join a required party, the Court allows the Federal Rules of Civil Procedure to be taken as "guides" in original actions. *See* Sup. Ct. R. 17.2. The Supreme Court has also previously reviewed a Special Master's recommendation that applied Rule 19 in analyzing a required-party issue and did not suggest that looking to Rule 19 "for guidance" was in any way improper. *Idaho ex rel. Evans v. Oregon*, 444 U.S. 380, 386 (1980).

because an order equitably apportioning the waters in the ACF Basin (or providing other relief) very well could impair significant federal interests, *see id.* at 570-71. This case also cannot "in equity and good conscience" proceed without the United States because any judgment rendered in the absence of the federal government would prejudice the United States, Georgia, and Florida; could not be shaped to avoid that prejudice; would fail to resolve the dispute in its entirety; and because Florida has alternative remedies available to it.

I. THE UNITED STATES IS A REQUIRED PARTY

Rule 19(a) states that an entity is a "required party" that "must be joined" if it meets one of two alternative standards:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> > (i) as a practical matter impair or impede the person's ability to protect the interest;

Fed. R. Civ. P. 19(a)(1). Because of the significant role the Corps plays in impounding and regulating water flows in the ACF Basin—a basin the Corps itself has described as "highly regulated" by the federal government, *see* Scoping Report at 2—the United States is a "required party" under both of those tests.

A. The Supreme Court Cannot Accord Complete Relief To Florida In The Absence Of The United States As A Party

The Supreme Court cannot accord Florida "complete relief" in this case without the participation of the United States as a party.[3] Fed. R. Civ. P. 19(a)(1)(A). The injuries that Florida alleges—harm to threatened and endangered species and the oyster industry in the Apalachicola River and Bay—all stem from purportedly inadequate minimum flows into the Apalachicola River. *See* Compl. ¶¶ 50-60. According to Florida's complaint:

> Georgia's water storage and consumption upstream of the Apalachicola River in the Chattahoochee and Flint River Basins has reduced Apalachicola River flows entering Florida. This reduction has damaged numerous species and habitats in the Apalachicola Region's ecosystem, and the overall economic, environmental, and social health and viability of the region.

Id. ¶ 42. Throughout its complaint, therefore, Florida repeatedly alleges that it is concerned with reduced inflows to the Apalachicola River and the impact those reduced inflows are having on wildlife and habitat in Florida. *See id.* ¶ 44 (complaining of "reductions in inflows to the Apalachicola River"); ¶ 50 (alleging "extremely low flows" in the Apalachicola River); ¶ 55 (alleging that, in 2012, "Florida experienced the lowest average annual flow of the Apalachicola River" in 90 years); ¶ 56 (alleging that "low flows reduced available habitats in the Apalachicola River and thrust salinity levels in Apalachicola Bay above tolerable

[3] Although not directly relevant on a 12(b)(7) motion, Georgia notes for the record its strong disagreement with Florida's claims that (i) Georgia is causing significantly reduced inflows to the Apalachicola River by consuming water upstream; (ii) Florida's alleged injuries are caused by any such reduced inflows; and (iii) Florida is entitled to any relief at all in this case. If this case proceeds, Georgia will address those allegations at an appropriate time.

levels"); ¶ 57 (alleging that Florida will be harmed "[i]f inflows from the Apalachicola River continue to be reduced"); ¶ 58 (alleging that species have been harmed "as a result of low summer flows"); ¶ 59 (alleging that "low flow events will become more frequent and increase in severity").

Because Florida's alleged injuries all stem from "reductions in inflows to the Apalachicola River," *id.* ¶ 44, the only way to accord Florida "complete relief" is to ensure that flows are increased and certain minimum flows maintained into the Apalachicola throughout the year. The Court, however, cannot ensure year-round minimum flows into the Apalachicola—particularly during seasonal low-flow conditions in the summer or fall, or during periods of drought—without the Corps participating as a formal party that can be bound by the Court's decree. The Corps operates the integrated system of dams and reservoirs in the ACF Basin to serve *federal* statutory purposes, not the purposes of any individual state. *See, e.g.*, U.S. Amicus Br. at 3, 18; Scoping Report at 4, 8-9. Thus, even if Georgia were to reduce its water consumption, during low-flow conditions the Corps' federal statutory obligations might well require the Corps to impound much of the increased inflow created by Georgia's reductions to serve upstream federal purposes, such as keeping federal reservoirs at certain levels. *See, e.g.*, Scoping Report at 18 (noting that "some benefits such as lakeside recreation, water supply, and lake fish spawning are achieved by retaining water in the lakes throughout the year"). Without a judgment from this Court requiring it to do so, nothing would require the Corps to use extra water created by Georgia's reduced consumption to provide Florida with

the minimum flows on the Apalachicola that it purports to require. In fact, the Corps might very well be legally foreclosed from using any increased inflows for that purpose if releasing water downstream either harmed existing federal purposes or served no authorized statutory purpose.[4] *See, e.g.*, *Southeastern Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316, 1319-20 (D.C. Cir. 2008) (holding that settlement agreement allocating water storage in federal reservoir in ACF Basin exceeded the Corps' statutory authority).

In light of the United States' operational control over water flows, this case cannot proceed now that the United States has said that it will not waive sovereign immunity and participate as a party. As the Supreme Court has previously explained, it is not generally "induce[d] . . . to decide the rights of the states which are before it by a decree which, because of the absence of the United States, could have no finality." *Arizona*, 298 U.S. at 572. But even more than not providing "final[]" relief to Florida, any decree in this case issued without the United States as a party would fail to provide Florida "complete relief," because it would do nothing

[4] This is no less true with respect to Georgia's water usage on the Flint River, which is not impounded by any federal dams or reservoirs. To meet federal statutory purposes, during low-flow or drought conditions the Corps is likely to offset any increased flows from the Flint by impounding more water upstream on the Chattahoochee to serve the federal purposes for which the dams and reservoirs in the ACF Basin are operated. The net result of such operations would be that Florida, at least during periods of drought or seasonal low-flows in the summer and fall, could not be provided the consistent minimum flows that might be needed to accord "complete relief" for its alleged injuries.

to ensure that the Corps conducted its operations in a manner that maintained Florida's desired minimum flow into the Apalachicola River throughout the year.[5]

Florida concedes, as it must, that "the Corps' operational protocols" are at least partially responsible for "less water reach[ing] Florida." Compl. ¶ 23. Nonetheless, Florida argues that "[t]he Corps determines how much water to release from its reservoirs based, in part, upon calculated inflows to the ACF Basin," and "Georgia's storage and consumption reduces those inflows." *Id.* Whatever role Georgia's consumption of water may have on the Corps' calculations, Florida's acknowledgement that it is ultimately "[t]he Corps [that] determines how much water to release from its reservoirs" is a concession that this Court cannot deliver Florida complete relief unless the United States is a party. *Id.* Indeed, without the Corps as a party, neither Florida nor this Court can ensure that the Corps will use any increased inflows into the ACF Basin from Georgia to maintain a minimum flow in the Apalachicola River—as opposed to serving other federal purposes such as water supply, hydroelectric power generation, water quality, or navigation. That is particularly true in times of drought or seasonal low-flows, during which the Corps will inevitably be statutorily required to impound more

[5] In that respect, this case is different from *Idaho ex rel. Evans v. Oregon*, in which Idaho sought equitable apportionment of certain runs of anadromous fish in the Columbia River. 444 U.S. 380, 388 (1980). Although the United States operated a series of dams on the Columbia River through which the fish passed, there was an established fish-mortality rate at each dam that did not vary based on the manner in which the United States conducted operations. The actions of the United States thus had no impact on Idaho's harms, which were instead the result of overfishing in Oregon and Washington. *See id.* at 388-89. Here, by contrast, the Corps is concededly responsible (at least in part) for Florida's alleged injury.

water upstream to serve the purposes of the federal projects in the northern portion of the ACF Basin, rather than use that water to provide Florida with its desired minimum flow.[6]

At bottom, Florida cannot avoid the reality that providing it "complete relief" requires the joinder of the United States as a party, thus binding the federal government to any judgment or decree entered by the Supreme Court. That fact is alone sufficient to make the United States a "required party" under Rule 19(a)(1)(A). And as explained more below, *see infra* at 22-26, it is enough to justify dismissal of this case in its entirety, now that the United States has declined to intervene as a party.

B. Adjudicating This Case Would Impair The United States' Ability To Protect Federal Interests In The ACF Basin

Alternatively, the United States is also a "required party" because adjudicating this case in its absence will inevitably impact—and very well could impair—the various objectives Congress has set for the dams and reservoirs in the ACF Basin and the Corps' assessment of the appropriate manner in which to balance and accomplish those objectives. *See* Fed. R. Civ. P. 19(a)(1)(B); *see also*

[6] Even outside of the context of Supreme Court original-jurisdiction cases, courts routinely hold that such remedial barriers justify dismissal of a case in which the United States cannot be joined. *See Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony, Cal. v. City of L.A.*, 637 F.3d 993, 997 (9th Cir. 2011) (affirming dismissal for failure to join the United States where "[t]he district court could not award the relief that Plaintiff seeks in the absence of the United States"); *Carlson v. Tulalip Tribes of Wash.*, 510 F.2d 1337, 1339 (9th Cir. 1975) (affirming dismissal for failure to join the United States where the United States held title to the contested land and "[t]he United States is therefore a necessary party to any resolution of this boundary dispute").

supra at 5-7 (discussing the purposes for which the Corps operates its dams and reservoirs).

Many of the issues raised by Florida's complaint directly implicate the statutory factors the Corps is required to take into account in conducting operations in the ACF Basin. In fact, there is almost direct overlap with the issues the Corps is currently considering in revising the Water Control Manual. Those issues include, but are not limited to:

- Flow Regimes — Every day, the Corps operates its dams and reservoirs to alter river flows in the ACF Basin in ways designed to meet federal objectives. *See* Scoping Report at 4-9, 18. Moreover, "[t]he Corps' manual update process will define flow regimes intended to achieve federal project purposes in accordance with the Corps' statutory responsibilities." U.S. Amicus Br. at 17. Florida, however, complains primarily about inadequate river flows in the Apalachicola River, *see supra* at 8, and resolving Florida's claims would inevitably require the Court to make decisions about what flow regimes are required in different parts of the ACF Basin because flow levels at the state line necessarily depend upon the combined effect of all the Corps' upstream operations. In doing so, the Court would surely impact (and likely impair) the United States' own judgments about appropriate flow regimes in the Basin.

- Water Supply — In revising the Water Control Manual, the Corps is currently considering how much water to release from Buford Dam "to meet the federally authorized purpose of providing water supply to the Atlanta metropolitan area." U.S. Amicus Br. at 18. Florida's complaint similarly implicates metropolitan water needs in the Atlanta region. *See* Compl. ¶ 45. Florida has asked this Court to make judgments about how much water should be allocated for water supply efforts in Atlanta and its surrounding communities. If it were to do so, the Court would surely impact (and likely impair) the United States' own judgments about how much water should be released from Buford Dam for that purpose.

- Wildlife Conservation — The Corps currently operates its dams and reservoirs in the ACF Basin to ensure adequate water for threatened or endangered species. Additionally, "[i]n the manual update process, the Corps will . . . evaluate the impact of various flow regimes . . . [on] threatened or endangered species." U.S. Amicus Br. at 18. Each of Florida's alleged injuries stems from purported harm to wildlife, *see*

Compl. ¶¶ 56-59, Florida has asked this Court to evaluate whether wildlife in Florida is harmed by low flows in the Apalachicola River and (if so) how much flows would need to be increased to alleviate further harm. In doing so, the Court would surely impact (and likely impair) the United States' own judgments about what the effect of various flow regimes is likely to be on wildlife in the ACF Basin and Apalachicola Bay.

- Other Federal Purposes — The Corps operates the federal facilities in the ACF Basin to serve a number of other purposes, *see* Scoping Report at 18-19, and the manual update process will include a new "determination of the amounts of water needed to satisfy" those purposes, U.S. Amicus Br. at 18. Those same considerations would need to be taken into account by the Court in any equitable apportionment action. In doing so, the Court would by definition impact the United States' own judgments about how water should be managed to serve those purposes.

The substantial overlap between the interests of the United States and the issues in this case proves that the federal government is a required party. In *Arizona v. California*, Arizona brought an action against several states to equitably apportion the water in the Colorado River. 298 U.S. at 559-60. As in this case, the United States operated (or was constructing) several federal dams and reservoirs on the Colorado River to serve congressionally authorized objectives, including navigation, flood control, water storage, irrigation, and hydroelectric power. *Id*. at 569. Nonetheless, the United States declined to intervene. *Id*. at 559. The Supreme Court held, under those circumstances, that "there [could] be no adjudication of rights in the unappropriated water of the Colorado river without the presence, as a party, of the United States." *Id*. at 568. That was so, the Court explained, because the interests of the United States and Arizona were so intertwined that "no final determination of the one can be made without a determination of the extent of the other." *Id.* at 571. That is closely analogous to the facts here. Given the close relationship between Florida's claims and the Corps'

operations, the Court could not resolve this case without in some way passing upon the rights and purposes of the United States.[7] The United States is thus "an indispensable party to any decree granting the relief prayed by" Florida. *Id*. at 559.

The United States itself recognizes the substantial interests it has in the disputed issues in this case and any potential order of relief. The United States has explained that at least "[t]wo [of the Corps'] project purposes are directly implicated by Florida's complaint," U.S. Amicus Br. at 17, identifying both the Corps' ongoing consideration of water supply needs in the metro-Atlanta region and water-flow requirements for wildlife conservation, *id*. at 17-18. More recently, in its Statement of Participation, the government acknowledged that its federal dams and reservoirs "are central components of water management in the basin," *id*. at 4; that this case could have "potential effects . . . on the [Corps'] efforts to complete its update to the Master [Water Control] Manual," *id*. at 2; and that the "resolution or remedy that might be considered in this case" could have "potential effects on the federal water projects" in the ACF Basin, *id*. at 6-7.[8]

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[7] Once again, this case is distinguished from *Idaho ex rel. Evans v. Oregon*, 444 U.S. 380 (1980), in which Idaho sought equitable apportionment of various runs of anadromous fish in the Columbia River. Whereas in this case all parties—including Florida—acknowledge a compelling federal interest in the waters of the ACF Basin, the *Idaho* Court found that the United States had no interest in apportionment of the anadromous fish sought by Idaho. *See id*. at 391 ("Here, by contrast, the United States has made no attempt to control apportionment of the in-river harvest of anadromous fish, except to the extent that it has acted to protect treaty rights.").

[8] Florida and Georgia also previously acknowledged the United States' strong interests in the ACF Basin—and that any equitable apportionment of the waters in the Basin could potentially impair or impede those interests—when they entered into the Apalachicola-Chattahoochee-Flint River Basin Compact, Pub. L. No. 105-104, 111 Stat. 2219 (1997). That Compact (which is now expired) established the

To be sure, the United States has said that it believes it can protect its interests by "participat[ing] as *amicus curiae* in the proceedings before the Master." U.S. Stmt. of Participation at 2. But the United States does not merely seek leave to file an *amicus* brief or two as this case proceeds. Instead, the government asks that it be (i) permitted to attend status conferences and other proceedings, *id.* at 3; (ii) served with copies of the parties' regular status reports to the Special Master, *id*; (iii) provided with copies of all case management orders, *id.* at 4; (iv) privy to the parties' discovery requests to each other, including interrogatories, requests for production, and requests for admission, but not subject to discovery itself, *id.* at 5; (v) allowed to attend depositions, *id.*; and (vi) included in any settlement negotiations, *id.* at 6. By seeking such an extraordinary level of involvement—which goes far beyond that of a traditional *amicus* and more closely resembles the role of a full party—the United States concedes that its interests are inextricably intertwined with the resolution of this case.

Proving the point, the United States cautions that "the federal government's level of involvement could conceivably change as the case progresses." *Id.* at 2. But

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ACF Basin Commission, comprising three State Commissioners, as well as a Federal Commissioner to "serve as the representative of all federal agencies with an interest in the ACF." *Id.* at 2221. The purpose of the Compact was "to develop an allocation formula for equitably apportioning the surface waters of the ACF Basin among the states while protecting [federal interests]." *Id.* at 2222-23. The parties expressly "recognize[d] that the United States operates certain projects . . . that may influence the water resources within the ACF Basin," and "acknowledge[d] and recognize[d] that various agencies of the United States have responsibilities for administering certain federal laws and exercising certain federal powers that may influence the water resources within the ACF Basin." *Id.* at 2223. The Federal Commissioner was thus given the power to veto any allocation that the State Commissioners approved. *See id.* at 2223-24.

if *amicus* participation were truly sufficient to protect federal interests now, there is no reason that should change in the future. And as a practical matter, intervention by the United States in six or seven months' time would substantially complicate the case schedule, requiring new discovery requests, new expert reports, re-deposition of key witnesses, and re-litigation of key factual issues.

The United States' request that it be given the "opportunity to participate in the negotiation process" for any settlement is strong confirmation that the United States knows it is, in fact, a required party. *Id.* at 6. This is not a case where the United States' experience in water-resource issues merely counsels in favor of receiving federal-government input and guidance on a potential resolution. To the contrary, here the United States has asked to be included in settlement discussions precisely *because* any resolution of this case will have "effects on the federal water projects" in the ACF Basin. *Id.* at 6-7. What is true with respect to settlement is just as true with respect to any judgment ultimately issued by the Supreme Court: *any* resolution of this case—whether by court decree or voluntary agreement—will inescapably impact federal interests in the ACF Basin, and thus an adjudication of this case without the United States participating as a party would impair the Corps' ability to protect those interests. Likewise, the United States' participation solely as *amicus* will do nothing to enable the Court to afford Florida "complete relief;" what Florida considers to be adequate flow levels cannot be assured without

imposing a judgment on the United States, which the Court cannot do unless the United States is a formal party.[9] *See supra* at 11-15.

In the end, the government's strategy is obvious: the United States knows that the manner in which the Supreme Court resolves this case will have a significant impact on federal interests in the ACF Basin, *and* it knows that it cannot fulfill its congressionally mandated obligations to protect those interests by limiting its participation to that of a traditional *amicus*. But the United Sates also does not want to waive its sovereign immunity, submit itself to the jurisdiction of the Court, open itself to discovery as a party, and potentially be bound by any order or decree that is ultimately issued in this case. So the United States seeks to be treated as a pseudo-party—afforded the benefits of full party participation, but none of the concurrent obligations.

The Court should reject that invitation. By all accounts, Florida's claims implicate important federal interests that are likely to be impaired by any order or decree that is ultimately entered in this case. Those issues are so intertwined that "no final determination of the one [Florida's claims] can be made without a determination of the extent of the other [the United States' federal interests]."

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[9] In this respect, this case is much different than *Florida v. Georgia*, 58 U.S. 478 (1854), which involved a dispute over a tract of territory. There, the United States was allowed to participate as a non-party to protect its federal interests related to interstate border disputes. *Id.* at 495. But it was not necessary for the United States to join as a party because the Court could provide the relief sought by Florida without subjecting the United States to a judgment of the Court. *See id.* at 493. The Court thus explained that it was not requiring the United States to join as a formal party because, "[i]n a case like the one now before us, there is no necessity for a judgment against the United States." *Id.*

Arizona, 298 U.S. at 571. The United States is thus a "required party" to this case and, for reasons explained below, this case cannot proceed "without [its] presence, *as a party*." *Id*. at 568 (emphasis added).

II. BECAUSE THE UNITED STATES CANNOT BE JOINED AS A PARTY, THIS CASE CANNOT PROCEED AND MUST BE DISMISSED

Joining the United States as a party, of course, is not feasible because the United States enjoys sovereign immunity. The question, then, is whether "in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). For the following reasons, the case must be dismissed because it would be impossible (or at the very least grossly inequitable) to adjudicate Florida's claims in the absence of the United States.

A. A Judgment Rendered Without The United States As A Party Would Prejudice Florida, Georgia, And The United States Itself

In determining whether a case can proceed in the absence of a necessary party, a court must first consider "the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties." Fed. R. Civ. P. 19(b)(1). Largely for reasons discussed above, it is unavoidable that adjudicating Florida's complaint without the United States' participation as a party would prejudice the interests of Florida, Georgia, and the United States itself.

Florida, for its part, would suffer prejudice because—to the extent it is entitled to any relief at all—the Supreme Court would not be able to bind the United States to a decree, and thus could not ensure that Florida would actually receive its desired minimum flow in the Apalachicola River throughout the year. *See supra* at 11-15. Because the Corps controls how water is released into the

Apalachicola River, and because the Corps operates its integrated system of dams and reservoirs to serve a number of federal purposes unrelated to flows at the state line, the very real possibility exists that—no matter what the Court orders Georgia to do or not to do—Florida could not obtain the minimum flow in the Apalachicola River that it purportedly needs during all periods of the year, particularly during periods of drought or seasonal low-flow conditions. Florida may have made the strategic decision that it would be worse for Florida to have the United States in the case and assert federal interests, but that is no reason to send Georgia, the United States, and the Supreme Court on an expensive and litigious detour in the hope that Florida can secure some incomplete relief in this forum and then take its chances with the Corps in other proceedings.

Georgia would suffer similar prejudice from the United States' failure to participate in this case. In light of the operational control the United States has over water flows in the ACF Basin, any relief this Court ultimately ordered against Georgia—assuming, of course, that Florida is able to overcome the multiple hurdles necessary to show an entitlement to such relief—could be impeded by the Corps' operations. In other words, without the United States participating as party, Georgia could subsequently be found to be in violation of any decree entered by this Court through no fault of its own—such as if the Corps diverted additional water to serve other federal objectives in the ACF Basin. Rule 19 was intended to avoid precisely that prejudice.

Finally, the United States has numerous federal interests in the disposition of the waters in the ACF Basin that would be prejudiced by adjudicating this case in its absence. The United States itself has acknowledged the likelihood of such prejudice in this case, *see* U.S. Amicus Br. at 20-23; U.S. Stmt. of Participation at 2-7, and Florida and Georgia previously acknowledged the possibility of prejudice to the United States when they entered into the ACF Compact, *see supra* at note 8.

In *Republic of Philippines v. Pimentel*, 553 U.S. 851, 855, 865-69 (2008), the Supreme Court held that an action should have been dismissed under Rule 19(b) for failure to join the Republic of the Philippines as a required party, even though the Philippines had previously moved for (and obtained) its own dismissal from the case on sovereign immunity grounds. After reviewing its prior decisions "involving the intersection of joinder and the governmental immunity of the United States," the Court concluded that, "where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." *Id.* at 866-67.

Giving full effect to the doctrine of sovereign immunity, the Court explained, required not only that the Philippines be dismissed as a party, but also that its interests not be adjudicated or prejudiced in its absence. *See id.* at 868-69 (explaining that the privilege of sovereign immunity "is much diminished if an important and consequential ruling affecting the sovereign's substantial interest is determined, or at least assumed, by a federal court in the sovereign's absence and over its objection"). The same is true here: the United States' substantial interests

in the disposition of waters in the ACF Basin are hardly "frivolous," and there is clearly "a potential for injury" to those interests if this case proceeds in the absence of the United States as a party. *Id.* at 867. In such circumstances, "dismissal of the action must be ordered." *Id.*

B. The Supreme Court Could Not Lessen Prejudice To The Parties And The United States By Shaping Relief

There is no reasonable prospect that the Supreme Court could lessen the above-described prejudice by shaping relief or including protective provisions in the judgment. *See* Fed. R. Civ. P. 19(b)(2). In light of the federal government's extensive interests in the disposition of water in the ACF Basin, *see supra* at 5-8, any relief this Court could order—whether it be a state-line flow requirement, an equitable apportionment, or other relief—would necessarily prejudice the manner in which the Corps conducts its operations. Moreover, because all of Florida's alleged injuries stem from purportedly inadequate flow into the Apalachicola River, *see supra* at 8, any remedy the Supreme Court provided would need to be designed to ensure that Florida receives a certain minimum flow from Woodruff Dam into the Apalachicola. But there is simply no way the Supreme Court could ensure that Florida received, and Georgia provided, such a minimum flow if the United States is not a party that can be bound by a judgment from this Court. *See supra* at 11-15.

C. A Judgment Rendered Without The Participation Of The United States Would Not Be Adequate

Dismissal is also warranted because a decree entered in the United States' absence would not be "adequate." Fed. R. Civ. P. 19(b)(3). The Supreme Court defines "adequacy" for purposes of Rule 19(b)(3) to refer to the "public stake in

settling disputes by wholes, whenever possible," *Republic of Philippines*, 553 U.S. at 870 (citation and internal quotation marks omitted). Without the United States as a party, this dispute could be not be settled as a "whole[]" because there would be no mechanism for the Court to ensure that the Corps released adequate water into the Apalachicola to address Florida's alleged injuries during all periods of the year. The Court would, in other words, be issuing a "decree which, because of the absence of the United States, could have no finality." *Arizona*, 298 U.S. at 572. That is precisely what the Court has warned against, *id.*, and precisely what it should avoid doing here.

D. Florida's Claims May Be Addressed Through The Administrative Process

Finally, dismissal is warranted at this time because Florida has other remedies to address its asserted harms—namely, the Corps' updated Water Control Manual and, if necessary, an action filed under the Administrative Procedure Act. The Corps' ongoing process will address (among other things) the quantity, timing, and duration of flows that will be released into the Apalachicola River. The Corps, of course, cannot equitably apportion the waters in the ACF Basin or otherwise resolve *all* of the legal issues that could be addressed by the Court in this original action. But the practical reality remains that Florida cannot get complete relief without the participation of the United States in this action, while the Corps' administrative process could result in a flow regime in the Apalachicola River that satisfies Florida's asserted water needs—and thus remedies the very harms Florida asserts in this case. And even if Florida continues to claim harm after the Water

Control Manual is released, relief remains possible under the APA. While Florida has that alternative remedy available to it, the prejudice to Georgia of proceeding with this case in the absence of the United States outweighs any harm to Florida from dismissing the action now.

Georgia acknowledges that it presented a similar "alternative relief" argument—but not the other arguments made above—to the Court in opposing Florida's motion for leave to file its complaint. Nonetheless, the Supreme Court's decision to allow Florida to file its complaint, over the United States' and Georgia's objections, does not reflect a judgment by the Court that this can proceed without the United States participating as a formal party.

When the Court granted Florida leave, the United States had not yet decided whether it would waive its sovereign immunity and intervene, and thus the Court had no occasion to resolve that issue. *See* U.S. Amicus Br. at 20 (explaining that "if this case proceeds, the United States would need to decide whether intervention would be appropriate"). To the contrary, Georgia, Florida, and the United States all informed the Court that the United States' status as a necessary party would not be decided unless and until the Court granted Florida leave, the United States decided not to intervene, and Georgia filed a motion to dismiss. *See* U.S. Amicus Br. at 22-23 (proposing that Georgia's motion to dismiss for, *inter alia*, failure to join the United States be briefed at a later date); Fla. Suppl. Br. at 9-11 (Oct. 8, 2014) (same). The Court's decision to allow Florida to file its complaint thus reflected nothing more than a judgment that the case should be assigned to the Special

Master to address preliminary procedural issues precisely like this one—nothing more, nothing less.

The reasons Georgia and the United States gave for denying Florida's motion for leave are also distinct from the reasons why the United States is a required party under Rule 19. Georgia and the United States argued at the motion-for-leave stage that is would be "premature" to address Florida's claims before the Corps had completed its update to the Water Control Manual. *See* Ga. Opp'n at 17 (Jan. 31, 2014); U.S. Amicus Br. at 19-20. That argument was based on prudential considerations: although the Court *could* proceed with this case while the Corps was still updating its manual, Georgia and the United States argued that it should not do so. *See* Ga. Opp'n at 19-23; U.S. Amicus Br. at 17-21. The argument here, by contrast, is that the Court simply cannot proceed with this case at all unless the United States participates as a party—both because it will lack the power to afford Florida complete relief and because it will prejudice the interests of parties and nonparties.

Finally, although Georgia continues to believe that an APA action would afford Florida effective relief, even if such alternative relief were not available, that fact would not mean that this case should continue. Any prejudice to Florida from not being able to assert its claims for equitable apportionment would be "outweighed by prejudice to the [United States] invoking sovereign immunity." *Republic of Philippines*, 553 U.S. at 872. It is inescapable that "[d]ismissal under Rule 19(b) will mean, in some instances, that plaintiffs will be left without a forum

for definitive resolution of their claims," but that precise result is already "contemplated under the doctrine of . . . sovereign immunity." *Id.* In this case, the need to dismiss the action arises from the United States' decision not to join the action voluntarily.

CONCLUSION

For the foregoing reasons, the State of Georgia respectfully asks that this action be dismissed for failure to join a required party under Rule 19. *See* Fed. R. Civ. P. 12(b)(7).

Respectfully submitted,

/s/ *Craig S. Primis*

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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

CERTIFICATE OF SERVICE

This is to certify that the STATE OF GEORGIA'S MOTION TO DISMISS FOR FAILURE TO JOIN A REQUIRED PARTY has been served via email on February 16, 2015 and, in light of the Federal holiday, in hard copy via U.S. Mail on February 17, 2015 upon the following parties:

For State of Florida	**For United States of America**
By U.S. Mail and Email: STATE OF GEORGIA'S MOTION TO DISMISS FOR FAILURE TO JOIN A REQUIRED PARTY; Certificate of Service	By U.S. Mail and Email: STATE OF GEORGIA'S MOTION TO DISMISS FOR FAILURE TO JOIN A REQUIRED PARTY; Certificate of Service
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By Email Only: STATE OF GEORGIA'S MOTION TO DISMISS FOR FAILURE TO JOIN A REQUIRED PARTY; Certificate of Service Donald G. Blankenau Jonathan A. Glogau Christopher M. Kise Matthew Z. Leopold Osvaldo Vazquez Thomas R. Wilmoth floridawaterteam@foley.com	By Email Only: STATE OF GEORGIA'S MOTION TO DISMISS FOR FAILURE TO JOIN A REQUIRED PARTY; Certificate of Service Michael T. Gray michael.gray2@usdoj.gov James DuBois james.dubois@usdoj.gov
For State of Georgia By Email Only: STATE OF GEORGIA'S MOTION TO DISMISS FOR FAILURE TO JOIN A REQUIRED PARTY; Certificate of Service Samuel S. Olens Nels Peterson Britt Grant Seth P. Waxman Craig S. Primis K. Winn Allen Sarah H. Warren georgiawaterteam@kirkland.com	/s/ Craig S. Primis _____ Craig S. Primis *Counsel of Record* KIRKLAND & ELLIS LLP 655 Fifteenth Street, NW Washington, DC 20005 T: 202-879-5000 craig.primis@kirkland.com