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' BRIEF AS *AMICUS CURIAE* IN OPPOSITION TO GEORGIA'S MOTION TO DISMISS FOR FAILURE TO JOIN A REQUIRED PARTY

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INTRODUCTION

The State of Georgia has moved to dismiss this action for the failure to join the United States as a required party. The United States files this brief as *amicus curiae* in accordance with Case Management Order 5. In the view of the United States, the United States is a required party because, based on the complaint, disposing of the action in the absence of the United States "may . . . as a practical matter impair or impede the [United States'] ability to protect [its] interest[s]." Fed. R. Civ. P. 19(a)(B)(i). But, in equity and good conscience, this case may proceed at this time because the Supreme Court can likely shape adequate relief while avoiding prejudice to the United States. See Fed. R. Civ. P. 19(b). The case should proceed with the understanding that, if it appears that relief cannot be issued without prejudicing the interests of the United States or that relief would be inadequate or lack sufficient finality among the parties, then the case must be dismissed. The proposed role of the United States set forth in its Statement of Participation will ensure that any conflicts with the United States' statutory duty to operate the federal projects in the Apalachicola-Chattahoochee-Flint River Basin (ACF Basin) for their authorized purposes can be identified and avoided as the case evolves.

BACKGROUND

I. Federal Projects in the ACF Basin

In 1939, the U.S. Army Corps of Engineers transmitted a report to Congress recommending development of the ACF Basin for multiple purposes, including

navigation, hydroelectric power, national defense, commercial value of riparian lands, recreation, and industrial and municipal water supply. H.R. Doc. No. 342, 76th Cong., 1st Sess. 77 (1939). Congress approved the Corps' plan in the River and Harbor Act of 1945, Pub. L. No. 79-14, § 2, 59 Stat. 10, 17. In 1946, the Corps recommended several changes to the original plan, including moving a proposed hydropower generating dam and reservoir further upstream from Atlanta to its eventual location at Buford, Georgia. H.R. Doc. No. 300, 80th Cong., 1st Sess. 27-28 (1947). Congress authorized the modified plan in the River and Harbor Act of 1946, Pub. L. No. 79-525, § 1, 60 Stat. 634, 635. In 1962, Congress authorized the construction of a dam at West Point, Georgia. See Flood Control Act of 1962, Pub. L. No. 87-874, § 203, 76 Stat. 1173, 1182.

Pursuant to those congressional authorizations, the Corps currently operates five federal dams in the ACF Basin. The northernmost dam is Buford Dam, which is north of Atlanta and forms Lake Sidney Lanier. Ga. Mot. Exh. A (Scoping Report) 5. Next is West Point Dam, followed by Walter F. George Dam and then George W. Andrews Dam, each of which is located on the Chattahoochee along the Georgia-Alabama border. *Id.* at 6-8; *id.* at 3 (map).

The southernmost dam is the Jim Woodruff Dam in Florida, which is immediately below the confluence of the Chattahoochee and the Flint. *Id.* at 8. The flows of the Chattahoochee and the Flint are impounded by Woodruff Dam and stored in its reservoir, Lake Seminole. *Ibid.* Water released from Woodruff Dam flows south into the Apalachicola. *Id.* at 3 (map). The current flow regime at

Woodruff Dam requires releases matching basin inflow when that inflow is between 5,000 and 10,000 cubic feet per second and a minimum flow of 5,000 cubic feet per second during times of drought. Ga. Mot. Exh. A at 9. During time of low natural inflows to Woodruff Dam, flows are supplemented by releases from the Corps' upstream projects to maintain the 5,000 cubic feet per second minimum outflow.

The Corps operates the system of dams in the ACF Basin pursuant to a Master Manual governing all projects in the Basin and separate reservoir regulation manuals for each individual dam. The Corps is currently engaged in an administrative process for updating the Master Manual and the individual reservoir regulation manuals. *Id.* at 1. In March 2013, as part of its analysis under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, the Corps released a final scoping report for its update of the Master Manual, which summarizes public comments on the update process and describes the Corps' process for moving forward. Ga. Mot. Exh. A 29-139. The update process, which is ongoing, will include a determination of whether and to what extent storage in Lake Lanier will be used to accommodate the present and future water supply needs of the Atlanta metropolitan area. *Id.* at 139. The update will also set the minimum flow rate required at Woodruff Dam to meet federal project purposes and the requirements of the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* The Corps expects to release a draft Master Manual and an environmental impact statement in September 2015, and it expects final approval and implementation of the Master Manual in March 2017.

The United States does not own the water in the ACF Basin and the Corps has no authority to apportion water among States or determine water rights. But the Corps implements statutes enacted by Congress to accomplish specified *federal* purposes on this interstate river system while accommodating, to the extent possible, uses of the waters of the system as allowed by state law.

II. Florida's Complaint

Florida filed this original action to obtain an equitable apportionment of the waters of the ACF Basin. Compl. para. 1; see *id.* at 21 (prayer for relief). Florida alleges that the ecosystem and the economy of the Apalachicola region "are suffering serious harm" because of the consumption and storage of water in Georgia from the Chattahoochee and Flint River Basins "for municipal, industrial, recreational, and agricultural uses." *Id.* para. 5. Florida alleges that "storage, evaporation, and consumption of water" in Georgia have "diminished the amount of water entering Florida in spring and summer of drought years by as much as 3,000-4,000 cubic feet per second," and that, in recent drought conditions, the average flow of the Apalachicola has been less than 5,500 cubic feet per second from late spring through fall, conditions that "were unprecedented before 2000." *Id.* para. 50. Florida alleges that the depletion of freshwater flows during drought years precipitated a collapse in the oyster industry in Apalachicola Bay because of resultant rising salinity levels. *Id.* paras. 6, 43, 54-56. Florida further alleges that reduced flows in the Apalachicola have resulted in the deaths of thousands of threatened and endangered mussels and rendered inaccessible the spawning

habitat for the threatened Gulf sturgeon. *Id.* para. 58. Florida maintains that Georgia's consumptive uses are expected to double by 2040, and that the resulting reduction in freshwater flowing into the Apalachicola River will jeopardize the "ecology, economy, and way of life" in the Apalachicola region. *Id.* paras. 7, 45, 59.

Florida acknowledges that the Corps controls releases into the Apalachicola from Woodruff Dam, but it contends that "[t]he Corps determines how much water to release from its reservoirs based, in part, upon calculated inflows to the ACF Basin." Compl. para. 23. Florida alleges that as Georgia's storage and use of water cause inflows in the Basin to decline, "less water reaches Florida due to both the hydrologic depletions and the Corps' operational protocols." *Ibid.* Based on these harms, Florida asks the Court to equitably apportion the waters of the ACF Basin. *Id.* para. 1; *see id.* at 21 (prayer for relief).

Florida further alleges that Georgia has no vested right in its increases in municipal and industrial water consumption after 1992. Compl. paras. 10-11. Accordingly, Florida also requests that the Court enter an order "capping Georgia's overall depletive water uses at the level then existing on January 3, 1992." *Id.* at 21. Florida requests other relief as necessary in a general residuary plea for relief, but does not specifically request an order setting a mandatory flow rate at the Florida state line, either on an average annual basis or in drought conditions.

III. Georgia's Motion to Dismiss

Georgia contends that the United States is a required party that cannot be joined because of its immunity from suit, and that the action cannot go forward

without the United States. In Georgia's view, complete relief is unavailable without the United States because Florida's alleged injuries stem from the amount of water flowing through Woodruff Dam, which is controlled by the Corps. Thus, Georgia contends, without a judgment requiring the Corps to release water during low-flow periods, nothing would require the Corps to send any extra water provided by Georgia downstream to Florida. Similarly, Georgia contends that the case cannot be adjudicated without prejudicing the United States' interests because of the overlap between any equitable apportionment and the Corps' ongoing effort to revise the Master Manual for the basin. As a result, Georgia contends the case must be dismissed. Georgia argues that proceeding would prejudice both parties and the United States, that relief cannot be shaped to avoid that prejudice and any such judgment would be inadequate, and that Florida may pursue effective relief, even though not an apportionment, through the Corps' administrative process.

ARGUMENT

The Supreme Court uses the Federal Rules of Civil Procedure as "guides" in original actions. Sup. Ct. R. 17.2. Under Rule 19, a court engages in a two-part inquiry to determine if the case must be dismissed for non-joinder: First, it must determine whether the absent party is required. Second, if the party cannot be joined, the court must determine whether "in equity and good conscience" the case should proceed or be dismissed. Although Florida's complaint eschews seeking relief that could affect the Corps' projects, such a possibility cannot be foreclosed at this early stage in the proceedings. That possibility is enough to make the United States

a required party. The United States cannot be joined as a party because it is immune from suit, and it does not intend to intervene. The Court must therefore determine whether the case should be dismissed. Applying the Rule 19(b) factors, the United States concludes that the case may proceed at this time, subject to dismissal if it appears that adequate relief between the parties would prejudice the United States' interests or that relief would be inadequate or lack sufficient finality among the parties.

I. The United States is a required party that cannot be joined.

Under Rule 19(a), a person is a "required party" that must be joined if the court cannot accord complete relief among existing parties, Fed. R. Civ. Proc. 19(a)(1)(A), or if:

> (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; or
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. Proc. 19(a)(1)(B). Georgia contends that the United States is a required party under either provision.

Under Rule 19(a)(1)(B)(i) a possibility of relief that may impair or impede the absent party's interests is sufficient to constitute a practical impairment within the meaning of the Rule. *See Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 108 (1968) (noting that an absent party is a required party if "there existed, when this case went to trial, at least the possibility that a judgment might

impede [the absentee's] ability to protect his interest, or lead to later relitigation by him."). The Corps has an interest relating to the subject of the action that may be impaired as a practical matter by this litigation if the equitable apportionment that Florida requests takes the form expected by Georgia.

Although Florida's complaint eschews seeking relief that could affect the Corps' projects, such a possibility cannot be foreclosed at this early stage in the proceedings. The relief requested by Florida includes (i) entry of a decree equitably apportioning the water of the ACF Basin; (ii) entry of an order capping Georgia's overall depletive water uses at the level existing on January 3, 1992; and (iii) "any other relief that the Court may deem just and appropriate." Compl. p.21. Georgia raises the possibility that, to remedy Florida's claimed injury and equitably apportion the waters of the ACF Basin, the Court may impose relief that establishes a minimum flow at the Georgia-Florida border. To the extent the Corps determines that it could not satisfy the federal statutory purposes of the projects in the ACF Basin (which are being defined in the ongoing Master Manual update process) while also releasing sufficient water from Woodruff Dam to satisfy such an equitable apportionment decree, then the United States' ability to protect its interests may, as a practical matter, be impaired. See Fed. R. Civ. P. 19(a)(1)(B).[1]

The United States regulates the flow of the Chattahoochee and Apalachicola Rivers through the operation of five dams, each of which was constructed for specific

[1] It is therefore unnecessary to decide whether the Court can accord complete relief among the existing parties. As explained in the next section, however, the case may proceed regardless because adequate relief may be available.

purposes, including navigation, hydroelectric power, national defense, commercial value of riparian lands, recreation, and industrial and municipal water supply. See p. 1-2, *supra*. The Corps must also operate the system to comply with the Endangered Species Act and other federal statutory requirements. *See, e.g.*, 16 U.S.C. 1531 *et seq.*; Water Supply Act of 1958, 43 U.S.C. § 390b; Fish & Wildlife Coordination Act of 1958, 16 U.S.C. 661-667e; Flood Control Act of 1944, 16 U.S.C. § 460d; 33 U.S.C. § 708. The United States thus has a clear interest in this action to the extent that relief might regulate, limit, or define the volume or rate of flow through the Corps' projects.

Although the United States would not be legally bound by the terms of a judgment of equitable apportionment if it is not a party to this suit, the Corps might be confronted by a conflict between the federal statutory purposes of its projects and Florida's right to flows under the decree. That possibility is a practical impairment of the Corps' interests sufficient to make the United States a required party to this action. *Provident Tradesmens Bank & Trust Co.*, 390 U.S. at 108. Of course, the United States cannot be joined involuntarily because it has not waived its sovereign immunity from suit. *Arizona v. California*, 298 U.S. 558, 571-72 (1936). The Court must therefore examine whether in equity and good conscience this case must be dismissed. As explained in the next sections, the Court should conclude that the case may proceed at this time, subject to revisiting the question as the facts are developed.

II. Dismissal is not required at this time.

Rule 19(b) provides that "if a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." The Rule sets forth four non-exhaustive factors for courts to consider when making that determination: (1) the extent of prejudice to the non-party and the existing parties from a judgment; (2) the ability to avoid or lessen that prejudice through protective provisions or shaping the relief; (3) whether the judgment would be adequate; and (4) whether the plaintiff would have an adequate remedy if the case is dismissed. As the Supreme Court has summarized the issue: "An appropriate statement of the question might be 'Can the decree be written so as to protect the legitimate interests of outsiders and, if so, would such a decree be adequate to the plaintiff's needs and an efficient use of judicial machinery?'" *Provident Tradesmens*, 390 U.S. at 112 n.10.

Thus, "the issue of joinder can be complex, and determinations are case specific." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 863 (2008). Courts have been reluctant to dismiss a case if dismissal can be avoided. Accordingly, they have taken actions to avoid dismissal, like ordering amendment of the complaint to restructure the relief requested, reforming or modifying judgments after they are entered, and delaying consideration of the issue until there is further factual development, including trial. *See generally* 7 Charles Allen Wright, et al., Federal Practice and Procedure §§ 1608-09; *Provident Tradesmens,* 390 U.S. at 111-12. With

that preference to avoid dismissal in mind, at least three of the four factors counsel in favor of allowing this case to proceed at this time.

A. Neither the United States nor the parties would necessarily be prejudiced by a judgment in this case without the presence of the United States as a party.

Although the United States' ability to protect its interests may be impaired or impeded as a practical matter if this litigation is allowed to proceed, a judgment in this case would not necessarily prejudice the United States or the parties. Florida's complaint is currently drawn to avoid prejudice to the United States. Florida asks for an equitable apportionment and an order "capping Georgia's overall depletive water uses at the level then existing on January 3, 1992." Compl. p. 21. An equitable apportionment undoubtedly can take the form of a limitation on water consumption by an upstream state. *See* Colorado River Compact Art. III (apportioning between upper and lower basin on aggregate acre-foot basis). And a cap on Georgia's *consumption* would not necessarily require implementing action by the Corps and might not require any alteration to the Corps' operations to enable Georgia to comply with such a cap. Thus, if the Court were to grant the relief in the form of a consumption cap imposed on Georgia and only that relief, it appears that a judgment could be fashioned so that the United States' interests would likely not be prejudiced.

Georgia relies heavily on *Arizona v. California*, where the Supreme Court dismissed an equitable apportionment action for failure to join the United States. That case, however, is different from this one in at least two key respects: the

United States exercises significantly more control over the disposition of the water to the affected States in the Colorado River Basin than it does in the ACF Basin, and implementation of the relief sought by Arizona would have required direct action by the Bureau of Reclamation (Reclamation) whereas the relief sought here would not necessarily require actions by the Corps. In *Arizona v. California* the Supreme Court construed the Boulder Canyon Project Act, § 1, 43 U.S.C.A. § 617, and concluded that "it is evident that the United States, by congressional legislation and by acts of its officers which that legislation authorizes, has undertaken in the asserted exercise of its authority to control navigation, to impound, and control the disposition of, the surplus water in the river not already appropriated." 298 U.S. at 569-70. For the Court to determine Arizona's "equitable share" of the unappropriated water, it would have needed to adjudicate "the rights of the United States to dispose of that water in aid and support of its project to control navigation, and without challenging the dispositions already agreed to by the Secretary's contracts with the California corporations, and the provision as well of section 5 of the Boulder Canyon Project Act that *no person shall be entitled to the stored water except by contract with the Secretary*." 298 U.S. at 571 (emphasis added). Thus, for Arizona to have been apportioned an equitable share by decree would inexorably have required action on the part of Reclamation in its operation of the federal project to deliver the water, including entry into contracts with Arizona as required by the Act implemented by the United States. As a result, "[e]very right which Arizona assert[ed] [was] so subordinate to and dependent upon the rights and the

exercise of an authority asserted by the United States that no final determination of the one c[ould] be made without a determination of the extent of the other." *Id.*

To be sure, Congress has required the Corps to regulate the ACF Basin and to do so for the federal purposes of navigation, flood control, hydropower generation, recreation, the protection of endangered and threatened species, and at least some accommodation of municipal and industrial water supply. See pp. 1-2, *supra*. But the Corps does not "control the disposition" of the water among the States in the way Reclamation does on the Colorado River.[2] The Corps does not enter into contractual arrangements with each State for the delivery of particular amounts of water. Instead, the Corps operates its system of dams and reservoirs to meet their federal purposes, which currently involves matching basin inflows at Woodruff Dam during most times and maintaining a flow of 5,000 cfs during low-flow times. Ga. Mot. Exh. A at 9.

[2] In a later *Arizona v. California* case, 373 U.S. 549 (1963), the Supreme Court held that the Boulder Canyon Project Act effected an allocation of the 7.5 million acre-feet of water available to the Lower Basin through the exercise of the Secretary of the Interior's contracting power under Section 5 of the Act. *Id.* at 583. The Supreme Court also defined the unique role of the Secretary in managing the Colorado River through the Secretary's Section 5 contracting power. Section 5 provides that no one is to use stored water "except by contract" with the Secretary. *See* 43 U.S.C. § 617d. The Court found that Congress gave the Secretary adequate authority to accomplish the division of water among the Lower Basin States by giving the Secretary power to make contracts for the delivery of water and by providing that no person could have water stored in Lake Mead without a contract. 373 U.S. at 565.

Those federal purposes include accommodation of water supply at the Buford Project. But that purpose is unlike Reclamation's control of the disposition of the Colorado River among the affected States pursuant to the Colorado River Compact and the Boulder Canyon Project Act, which is accomplished through mandatory contractual arrangements. *See* 43 U.S.C. § 617d. Congress, in authorizing the Corps' regulation of Buford Dam and Lake Lanier to provide water supply for Atlanta, did not apportion water or assert federal control over the disposition of water as between Florida and Georgia. *See In re: Tri-State Water Rights Litigation*, 644 F.3d 1160, 1187-92, (11th Cir. 2011) (noting Congress provided for the location of Buford Project upstream of Atlanta to secure Atlanta's water supply, which at the time could be accomplished as a by-product of operating the dam for its other federal purposes). The level of the Corps' involvement in water supply is therefore quite different from that of Reclamation on the Colorado River, and does not directly control the disposition of water among the States. Given those differences, *Arizona v. California* is not controlling here on the "case specific" joinder issue. *See Pimentel*, 553 U.S. at 863.

Nor has Florida requested that the Corps be bound in a judgment to structure its operations so as to deliver more water to Florida or to change its operations in any manner. The complaint indicates that Florida believes that it can be made whole without any action by the Corps to implement a decree if Georgia reduces its consumption. Whether Florida has been harmed by that consumption and whether restricting consumption would redress Florida's harm are complex

factual determinations that cannot be made at this juncture; but if relief is limited in the way Florida has requested, the relief would likely not prejudice the Corps.[3] Georgia suggests that even if Georgia's consumption were reduced, both Florida and Georgia may still be prejudiced because "the Corps' federal statutory obligations might well require the Corps to impound much of the increased inflow . . . to serve upstream federal purposes, such as keeping reservoirs at certain levels." Mot. at 12. But at this juncture, it is not clear that the federal interests, which consist of authorized ACF system purposes and compliance with federal law, would require keeping reservoirs at specific levels that would be inconsistent with a decree.

Because the complaint seeks relief only against Georgia, and because Florida argues that the requested relief will be effective regardless of operational decisions by the Corps, the current posture of this case is closer to *Idaho v. Oregon*, 444 U.S. 380 (1980), than it is to *Arizona v. California*. In that case, Idaho sought an equitable apportionment of the total quantity of fish entering the Colombia River and heading to Idaho to spawn. The United States owned and operated eight dams on the River, and the Special Master concluded that the level of the Corps'

[3] *Texas v. New Mexico*, 352 U.S. 991 (1957), also relied on by Georgia, is similar. The Supreme Court's order dismissing that action is a one-line order, but the United States' brief urged dismissal because the suit was "not one to apportion the waters of the Rio Grande, but [was] rather one to compel operation of dams and other works in accordance with rights asserted under the Compact," which dams and other works were owned by the United States and operated by Reclamation. *Texas v. New Mexico*, No. 9, Original, Memorandum for the United States Under Order at 8 (October 17, 1956). On its face, Florida's complaint does not seek to compel the operation of the Corps' dams and other works but instead seeks a cap on Georgia's consumption.

involvement on the River rendered the United States an indispensable party to the suit because "at each dam, the Corps of Engineers must allocate water among the turbines, fish ladders, and spillways. Under varying river conditions, this allocation often requires a choice between the generation of power and the survival of migrating fish." 444 U.S. at 388. The Supreme Court concluded that despite that reality, the case did not have to be dismissed. The Court assumed that the operation of the dams was the primary reason more fish did not reach Idaho, but concluded that it did not matter because Idaho did not quarrel with the operation of the dams and contended persuasively "that greater numbers of fish reaching each dam will, under all but the most adverse river conditions, result in greater numbers of fish crossing each dam." *Id.* at 388-89.

The same is true in this case. Florida does not contend at this stage in the proceedings that any of the Corps' dams needs to be operated any differently than it is now or might be under the revised Master Manual. Moreover, Florida argues that less water consumed by Georgia will mean more water reaching each dam and more water flowing into Florida, without any change in operational criteria by the Corps. Florida also does not complain merely of insufficient "minimum" flows, but of reduced flows overall, including at times other than drought or low-flow periods. If Georgia's overall consumption were reduced, the Corps' ability to operate for authorized purposes or comply with federal law would likely not be prejudiced. Indeed, less consumption by Georgia could facilitate the Corps' efforts to meet

current and future requirements of the Endangered Species Act, to the extent those requirements consist of minimum flows from Woodruff Dam.

Georgia next contends that dismissal is warranted because of the mere possibility of prejudice to the United States, relying on the statement in *Pimentel* 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." 553 U.S. at 867. In context that statement is not as absolute as Georgia makes it out to be. In *Pimentel*, the Supreme Court confronted an assertion of foreign sovereign immunity in an interpleader action concerning specific property to which the Republic of the Philippines claimed ownership, and the Court relied on the "comity and dignity interests" of a foreign sovereign to conclude that an assertion of sovereign immunity required dismissal. *Id.* at 866. The Court did not stop after concluding there was a potential for prejudice; it examined the remaining factors and concluded that there was no way to proceed to an adequate judgment in that case without prejudicing the foreign sovereign's interest. *Id.* at 869-71. As explained below, it is still possible that an adequate judgment may be rendered in this case without prejudicing the United States. Thus, consistent with the Supreme Court's admonition in *Pimentel* that the joinder issue is "complex, and determinations are case specific," 553 U.S. at 863, and consistent as well with the reasoning of *Idaho v. Oregon* in somewhat analogous circumstances, the isolated statement from *Pimentel* that Georgia relies on does not control here.

Georgia's contention that a judgment rendered in the absence of the United States would prejudice both Georgia and Florida is based almost entirely on its assumption that Florida's injuries could only be adequately redressed through a required minimum flow rate at Woodruff Dam that would be dependent on the Corps to implement. Mot. to Dismiss 22-24. Georgia argues that the Court's inability to bind the United States to specific operations at Woodruff Dam leaves Florida without an adequate remedy and Georgia subject to violation of a decree through no act of its own. *Id.* Although the United States would not be legally bound by any decree of this Court requiring a minimum flow rate at Woodruff Dam,[4] it is impossible to say at this stage of the case whether, as a factual matter, such a decree is the only adequate relief available to Florida.

B. Prejudice to the United States and the parties can potentially be avoided through shaping the decree, while still according Florida adequate relief.

The second and third considerations overlap here: at this juncture we believe that it may be possible for the Court to shape relief or provide protective provisions

[4] That is not to suggest that the Corps would ignore such a decree if it were entered. The Corps may well be able to accommodate any agreement on water allocation between the states—subject to the limits of the Corps' authority. The Apalachicola-Chattahoochee-Flint River Basin Compact (ACF Compact) contained a provision calling for such accommodation. *See* ACF Compact, Pub. L. 105-104, 111 Stat. 2219, Art. VII (b) (Nov. 20, 1997) ("[O]nce an allocation formula is adopted, each and every officer, agency, and instrumentality of the United States shall have an obligation and duty, to the maximum extent practicable, to exercise their powers, authority, and discretion in a manner consistent with the allocation formula so long as the exercise of such powers, authority, and discretion is not in conflict with federal law."); see also *id.* Art. X (similar).

in the judgment while still according Florida adequate relief, and the Court should therefore allow the case to proceed. Woodruff Dam is operated as a run-of-the-river project, and the Corps' current flow regime is designed to match basin inflows between 5,000 and 10,000 cfs while maintaining a minimum flow of 5,000 cfs during times of low flows. Ga. Mot. Exh. A at 9. It is at least plausible that a cap on Georgia's consumption, particularly with respect to the Flint River, which is unregulated by the Corps, would increase the basin inflows and thereby increase the amount of water flowing into Florida. Georgia gives the Flint River short shrift, suggesting in a footnote that the Corps would increase impoundments upstream to offset increased flows from the Flint River. But that speculation is entirely unwarranted, particularly where the current operational protocols provide for matching basin inflows during most flow conditions. It is also plausible that an increased flow during wet times would provide a cushion during low-flow periods, so that it would be possible to maintain a flow rate of greater than 5,000 cfs for a longer period of time without any alteration of the Corps' operations. Thus, we cannot say at this juncture, without further factual development, that Florida will not be able to receive any minimum flow that might be adjudicated entirely through the imposition of a consumption cap on Georgia that does not affect the Corps' operation of the projects. If it can, then the case may proceed to judgment without the United States.

In considering the shaping of the judgment and the adequacy of relief, the United States intends to lend its views and expertise to inform the Court of the line

between relief that will prejudice the United States and relief that will not. The United States believes it can serve that function through its participation as *amicus curiae*, protecting both its interests and the Court's ability to render an adequate judgment. Georgia notes the scope of the United States' proposed participation, but the *amicus* participation we have outlined is in keeping with the United States' participation in other original actions involving the equitable apportionment of water. *See, e.g.*, *Montana v. Wyoming*, No. 137, Original, Docket 118, 4-5 (allowing *amicus curiae* to attend status conferences, request copies of discovery documents, attend depositions, file briefs in response to any motion or brief, and attend hearings); *Kansas v. Nebraska*, No. 126, Original, Docket 10 (Case Management Plan), Docket 25 (U.S. Statement of Participation) (requesting participation consistent with that requested here) & Docket 72 (Corrected Case Management Order 2) (deferring objections to *amicus* participation until an actual dispute over participation arose).

Moreover, the Supreme Court long ago recognized the special role the United States plays in matters litigated between States, and has allowed the United States to go so far as to introduce evidence and make arguments in disputes between States without becoming a party in the "technical sense." *Florida v. Georgia*, 58 U.S. 478 (1854). In that *Florida v. Georgia* litigation, the dispute was over the boundary between the States. The United States asked to be heard, and the States objected. There was a dispute about whether the United States could be a proper party, which the Court declined to decide. It did not need to decide the question because

the United States did not have to be made a party in the "technical" sense to participate in an original action. Thus:

> Upon the whole, we think the attorney-general may intervene in the manner he has adopted, and may file in the case the testimony referred to in the information, without making the United States a party, in the technical sense of the term; but he will have no right to interfere in the pleading, or evidence, or admissions of the States, or of either of them. And, when the case is ready for argument, the court will hear the attorney-general, as well as the counsel for the respective States; and, in deciding upon the true boundary line, will take into consideration all the evidence which may be offered by the United States, or either of the States. But the court do not regard the United States, in this mode of proceeding, as either plaintiff or defendant; and they are, therefore, not liable to a judgment against them, nor entitled to a judgment in their favor.

58 U.S. at 495-96. A more robust form of *amicus* participation for the United States in original actions is therefore entirely appropriate and will serve both the United States' interest in avoiding prejudice and the Court's interest in shaping the judgment so as to not require dismissal for failure to join the United States.

The Court should also consider, in structuring these equitable apportionment proceedings, that the Corps is engaged in an ongoing process to revise the Master Manual, which may well be completed before this equitable apportionment action. That process will provide valuable information helping to define the United States' interests here, and the information will assist the Court in crafting a decree that avoids prejudice to the United States and the parties. For navigable streams like the Chattahoochee and Apalachicola Rivers, "[t]he privilege of the states through which [they] flow[] and their inhabitants to appropriate and use the water is subject

to the paramount power of the United States to control" such flows for federal purposes. *Arizona v. California*, 298 U.S. at 569 (recognizing paramount federal power to improve navigation); *see also United States v. Commodore Park, Inc.*, 324 U.S. 386, 391 (1945) (noting "government's 'absolute' power, in the interests of commerce, to make necessary changes in a stream") (footnote and citation omitted). Thus, as we have explained, "[t]he Corps' determination of the amounts of water needed to satisfy the various statutory purposes of its projects, including the minimum flow required at Woodruff Dam, should be taken into account in any equitable apportionment between the States." *Florida v. Georgia*, No. 142, Original, Brief of the United States as *Amicus Curiae* at 20. To the extent a State disagrees with the United States' final agency action revising the Master Manual, review would be available under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

III. The Court may need to revisit the issue as the facts develop.

On balance, then, the United States is of the view that the case, as pleaded, should be allowed to proceed. If it appears in the future that relief cannot be shaped to avoid prejudice to the United States' interests, then dismissal may be appropriate at that time because the balance of equities under Rule 19(b) will have changed. See *Francis Oil & Gas, Inc. v. Exxon Corp.*, 661 F.2d 873, 879 (10th Cir. 1981) ("[A]t least as far as the record has so far been developed, the parties are not proven to be indispensable whereby the cause has to be dismissed. This may prove to be the result after trial, but a trial should be had before a decision is made."); 7 Wright, et al., Federal Practice and Procedure § 1609 ("The court also is free to reconsider a

previously decided question of indispensability if there is a showing of changed circumstances."). That possibility is contingent on the facts developed in this action and on the Corps' completion of the Master Manual revision. For now, though, the case should be allowed to proceed.

CONCLUSION

Georgia's motion to dismiss for failure to join the United States as a required party should be denied without prejudice to reconsideration as facts develop or if circumstances change.

Respectfully submitted,

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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 foregoing United States' Brief as *Amicus Curiae* has been served this 11th day of March, 2015, in the manner specified below:

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