

In The  
Supreme Court of the United States

---

STATE OF FLORIDA,

*Plaintiff,*

v.

STATE OF GEORGIA,

*Defendant.*

---

STATE OF FLORIDA'S BRIEF REGARDING  
JOINER OF THE STATE OF ALABAMA

---

PAMELA JO BONDI  
ATTORNEY GENERAL, STATE OF FLORIDA

ALLEN WINSOR  
SOLICITOR GENERAL  
*Counsel of Record*

JONATHAN GLOGAU  
SPECIAL COUNSEL  
OFFICE OF THE ATTORNEY GENERAL  
The Capitol, PL-01  
Tallahassee, FL 32399-1050  
Tel.: (850) 414-3300

CRAIG VARN  
SPECIAL COUNSEL  
FLORIDA DEPARTMENT OF  
ENVIRONMENTAL PROTECTION  
3900 Commonwealth Blvd. MS 35  
Tallahassee, FL 32399-3000  
Tel.: (850) 245-2295

GREGORY G. GARRE  
PHILLIP J. PERRY  
ABID R. QURESHI  
CLAUDIA M. O'BRIEN  
NICOLE RIES FOX  
LATHAM & WATKINS LLP  
555 11th Street, NW  
Suite 1000  
Washington, DC 20004  
Tel.: (202) 637-2207

CHRISTOPHER M. KISE  
JAMES A. MCKEE  
FOLEY & LARDNER LLP  
106 East College Avenue  
Tallahassee, FL 32301  
Tel.: (850) 513-3367

DONALD G. BLANKENAU  
THOMAS R. WILMOTH  
BLANKENAU WILMOTH JARECKE LLP  
1023 Lincoln Mall  
Suite 201  
Lincoln, NE 68508-2817  
Tel.: (402) 475-7080

*Attorneys for the State of Florida*

---

---

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
BACKGROUND.....	1
ARGUMENT .....	3
I. ALABAMA IS NOT A REQUIRED PARTY UNDER RULE 19(a).....	3
A. The Court Can Accord Complete Relief Between Florida And Georgia Without Joining Alabama As A Party.....	4
B. Allowing This Action To Proceed Would Not Impair Alabama’s Ability To Protect Its Own Interests .....	4
C. Prior Practice Supports The Conclusion That Alabama Need Not Be Joined To Adjudicate This Dispute Between Florida And Georgia.....	6
II. ALABAMA’S ABSENCE PROVIDES NO BASIS FOR DISMISSAL.....	7
CONCLUSION .....	8

TABLE OF AUTHORITIES

Page(s)

CASES

*Alabama v. United States Corps of Engineers*,  
357 F. Supp. 2d 1313 (N.D. Ala. 2005) .....2

*BBC Brown Boveri, Inc. v. Rainier National Bank*,  
899 F.2d 1224, 1990 WL 40209 (9th Cir. 1990) .....3

*Cunningham v. Macon & Brunswick Railroad Co.*,  
109 U.S. 446 (1883) .....7

*Gardiner v. Virgin Islands Water & Power Authority*,  
145 F.3d 635 (3d Cir. 1998).....3

*Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*,  
11 F.3d 399 (3d Cir. 1993).....4

*Nebraska v. Wyoming*,  
507 U.S. 584 (1993) .....5, 6

*New Jersey v. New York*,  
283 U.S. 336 (1931) .....5, 6

*Rochester Methodist Hospital v. Travelers Ins. Co.*,  
728 F.2d 1006 (8th Cir. 1984) .....5

*Southeastern Federal Power Customers, Inc. v. Geren*,  
514 F.3d 1316 (D.C. Cir. 2008), *cert. denied*, 555 U.S. 1097 (2009) .....3

*Wyoming v. Colorado*,  
259 U.S. 419 (1922) .....6

OTHER AUTHORITIES

7 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* (3d ed. last updated 2015) .....4

13 Charles Alan Wright et al., *Federal Practice and Procedure: Jurisdiction* (3d ed. last updated 2015) .....7

Fed. R. Civ. P. 19(a).....3, 7

Fed. R. Civ. P. 19(a)(1) .....4

	<b>Page(s)</b>
Fed. R. Civ. P. 19(a)(1)(A) .....	4
Fed. R. Civ. P. 21 .....	3

## INTRODUCTION

The State of Florida submits this brief pursuant to the Court's Case Management Order No. 7, dated April 8, 2015, asking the parties to address whether the State of Alabama should be joined as a party in this action. Florida's position is that Alabama is neither a required nor indispensable party within the terms of Federal Rule of Civil Procedure 19, and therefore need not be joined.

## BACKGROUND

As detailed in Florida's Complaint and Opposition to Georgia's Motion to Dismiss, the State of Florida brought this action against Georgia because Georgia's ever increasing consumption of upstream waters in the ACF Basin is imperiling the Apalachicola Basin in Florida and its ecosystem and economy. This case seeks to stem Georgia's consumption of the waters at issue, which will further damage the fragile ecosystem of the ACF Basin, and to remedy harm that has already been inflicted. Compl. ¶¶ 5-6. Florida did not name the State of Alabama to this action because Florida has asserted no wrongful act by Alabama. *See id.* ¶ 14 ("Although not opposed to Alabama's participation in this action, Florida asserts no wrongful act by Alabama and seeks no affirmative relief against Alabama.").

The Apalachicola River lies in Florida, and is formed at the confluence of the Chattahoochee and Flint Rivers. *Id.* ¶ 20. The Chattahoochee River arises in northern Georgia and flows south through Atlanta to the Georgia-Florida border. *Id.* ¶ 17. The southern half of the Chattahoochee forms the eastern border of a portion of Alabama. *See id.* ¶ 2; *id.* App. 1. This area generally is not densely populated. The Flint River

arises just south of Atlanta, and to the east of the Chattahoochee, and flows through Georgia until it joins the Chattahoochee River at the Georgia-Florida border. *Id.* ¶¶ 18, 20; *see id.* App. 1. Alabama does not border the Flint River. *See id.*

Since the failed attempts to negotiate a compact among the ACF Basin States, Florida has experienced increasingly grave and irreparable harm to the Apalachicola Basin as a result of diminishing water due to Georgia's increasing consumption. In light of that harm, Florida determined that it was necessary to pursue an option that both Georgia and the United States had specifically pointed to in prior litigation among these parties: to file an original action in the Supreme Court seeking an equitable apportionment between Georgia and Florida of the waters of the ACF Basin. *See* Florida's Br. in Opp. to Georgia's Motion to Dismiss 27, Doc. No. 75.

Because Georgia's over-consumption of waters is the cause of Florida's injuries, Florida filed a motion for leave to file the instant complaint with the Supreme Court to obtain relief against Georgia only. Accordingly, Florida's complaint focuses on Georgia's increasing diversion of waters from both the Chattahoochee River Basin and the Flint River Basin. Compl. ¶¶ 17-41. Florida seeks only to enjoin Georgia "from interfering with Florida's rights," as well as an order "capping Georgia's overall depletive water uses at the level then existing on January 3, 1992," the date designated by a Memorandum of Agreement the parties signed in prior litigation. *Id.* at 21 (Prayer for Relief).

In the past, Alabama has taken action when it deemed it necessary to protect its interests in the Chattahoochee River. *See, e.g., Alabama v. USACE*, 357 F. Supp. 2d

1313 (N.D. Ala. 2005); Mot. of Alabama for Leave to Intervene, *Georgia v. USACE*, No. 2:01-CV-0026-RWS (N.D. Ga. Feb. 4, 2003), ECF No. 113; *Southeastern Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316, 1318-20 (D.C. Cir. 2008) (motion to intervene), *cert. denied*, 555 U.S. 1097 (2009). While no doubt aware of this case, Alabama has not sought to intervene.

## **ARGUMENT**

Federal Rule of Civil Procedure 19 sets forth a two-step inquiry to determine whether a party must be joined. A court must first determine if the absent entity (here, the State of Alabama) is a “Person[] Required to Be Joined if Feasible.” Fed. R. Civ. P. 19(a). If the absent party is a “required” party, the court must then determine whether it is “feasible” to join that party. *Id.* If the absent party can be joined, the court may order that the party be joined. *See* Fed. R. Civ. P. 21 (“On motion or on its own, the court may at any time, on just terms, add or drop a party.”). “Only if a party cannot be joined under Rule 19(a), does Rule 19(b) come into play.” *Gardiner v. Virgin Islands Water & Power Auth.*, 145 F.3d 635, 640 (3d Cir. 1998); *accord BBC Brown Boveri, Inc. v. Rainier Nat’l Bank*, 899 F.2d 1224, 1990 WL 40209 (9th Cir. 1990) (unpublished). As explained below, Alabama is not a required party under Rule 19(a).

### **I. ALABAMA IS NOT A REQUIRED PARTY UNDER RULE 19(a)**

Rule 19(a) requires joinder of a party if: “(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; 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. P. 19(a)(1). Those criteria are not satisfied here.

**A. The Court Can Accord Complete Relief Between Florida And Georgia Without Joining Alabama As A Party**

It is clear that Florida can obtain "complete relief" in this case without joining Alabama as a party. Fed. R. Civ. P. 19(a)(1)(A). The inquiry under Rule 19(a)(1)(A) "is limited to whether the district court can grant complete relief to the persons already parties to the action." *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 405 (3d Cir. 1993). As set forth in its complaint, Florida seeks a decree against *Georgia* (only) "equitably apportioning the waters of the ACF Basin," and seeks an injunction preventing *Georgia* (only) "from interfering with Florida's rights" and an order "capping *Georgia's* overall depletive water uses at the level then existing on January 3, 1992." Compl. 21 (Prayer For Relief). Florida asserts no wrongful act by Alabama and seeks no affirmative relief against Alabama. *Id.* ¶ 14.

**B. Allowing This Action To Proceed Would Not Impair Alabama's Ability To Protect Its Own Interests**

Rule 19(a)(1)(B) requires joinder in "situations in which the action cannot be effectively adjudicated because the absentee claims an interest in the subject matter of the action and disposing of the case in the person's absence may prejudice either those already before the court or the absentee." 7 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 1604 (3d ed. last updated 2015). Under this subsection, courts require joinder "if the action might detrimentally affect a party's or



the absentee’s ability to protect his property or to prosecute or defend any subsequent litigation in which the absentee might become involved.” *Id.* Alabama to date has not claimed an interest in this action and “judgment in favor of [Florida] and against [Georgia] will not as a practical matter impair or impede its ability to protect [any interest it might claim].” *Rochester Methodist Hosp. v. Travelers Ins. Co.*, 728 F.2d 1006, 1016 (8th Cir. 1984).

*First*, Alabama’s interests will not be impeded by this action. As explained, Florida seeks to stem *Georgia’s* over-consumption of waters of the Chattahoochee and Flint Rivers through an order “capping Georgia’s overall depletive water uses.” Compl. 21 (Prayer For Relief). Such relief—which could be effectuated through any number of reasonable means—would impose no obligations on Alabama, and ensuring that *more* water is available in the ACF Basin cannot possibly impede Alabama’s interests.

*Second*, because Florida seeks relief only from Georgia, Alabama will not be bound by any judgment in this case. Thus, should Alabama wish at some point to assert its interests against Georgia, it may do so through a separate action for apportionment or an injunction. *See, e.g., Nebraska v. Wyoming*, 507 U.S. 584, 591-92 (1993) (discussed *infra*). Moreover, should Alabama deem participation *in this action* necessary “to protect its interests,” there is no reason it cannot move to intervene. *See, e.g., New Jersey v. New York*, 283 U.S. 336, 342 (1931) (discussed *infra*).

*Third*, there is no risk of subjecting Georgia to multiple or inconsistent obligations. An equitable apportionment of the waters at issue between Florida and Georgia will not subject (or expose) Georgia to any obligations vis-à-vis Alabama. That

conclusion is consistent with the fact that Georgia itself has taken the position that Alabama is not a required party. Telephone Conference Tr. 15, Doc. No. 100.

**C. Prior Practice Supports The Conclusion That Alabama Need Not Be Joined To Adjudicate This Dispute Between Florida And Georgia**

The Supreme Court's own decisions establish that the equitable apportionment remedy may be accorded among fewer than all States bordering the body of water sought to be apportioned. In *New Jersey v. New York*, for example, New Jersey sought an apportionment to enjoin New York (and New York City) from diverting waters from the Delaware River or its tributaries. 283 U.S. at 341. The rivers in question flow into the Delaware River where the river forms a boundary between New York and Pennsylvania. *Id.* The Delaware River continues to mark the boundary between New York and Pennsylvania until it reaches New Jersey, where it marks the boundary between Pennsylvania and New Jersey and serves as a border between Delaware and New Jersey. *Id.* at 341-42. Although Delaware and Pennsylvania shared a border with the waters at issue, neither Delaware nor Pennsylvania was deemed to be a required party to the action between New York and New Jersey. Delaware had no involvement in the case. Pennsylvania was permitted to intervene. *Id.* at 342.

Similarly, in *Wyoming v. Colorado*, 259 U.S. 419, 488 (1922), the Supreme Court entered a decree equitably apportioning waters of the Laramie River between Wyoming and Colorado only, even though the Laramie contributes substantial flows to the North Platte River in Nebraska. *See Nebraska v. Wyoming*, 507 U.S. at 596 (considering subsequent apportionment of the North Platte River among all three

States). As in these cases, equitable apportionment can readily be accomplished between Florida and Georgia without Alabama's participation as a party.

## II. ALABAMA'S ABSENCE PROVIDES NO BASIS FOR DISMISSAL

If this Court nevertheless determines that Alabama is a required party under Rule 19(a), it may order Alabama's joinder as a party. There is accordingly no basis to dismiss this action. Unlike the United States, Alabama does not enjoy immunity from suit as against other States. *See, e.g., Cunningham v. Macon & Brunswick R.R. Co.*, 109 U.S. 446, 451 (1883); 13 Charles Alan Wright et al., *Federal Practice and Procedure: Jurisdiction* § 3524 (3d ed. last updated 2015). Thus, joining Alabama as a plaintiff in this action is plainly "feasible" if need be. Fed. R. Civ. P. 19(a). Florida is not opposed to Alabama's intervention should it seek leave to intervene. Compl. ¶ 14. But if Alabama does so, the Court should request briefing on how Alabama's joinder should impact the current case management plan, including discovery, going forward.

## CONCLUSION

For the foregoing reasons, Alabama need not be joined as a party.

Respectfully submitted,

/s/ Gregory G. Garre

PAMELA JO BONDI  
ATTORNEY GENERAL, STATE OF FLORIDA

ALLEN WINSOR  
SOLICITOR GENERAL  
*Counsel of Record*

JONATHAN GLOGAU  
SPECIAL COUNSEL  
OFFICE OF THE ATTORNEY GENERAL  
The Capitol, PL-01  
Tallahassee, FL 32399-1050  
Tel.: (850) 414-3300

CRAIG VARN  
SPECIAL COUNSEL  
FLORIDA DEPARTMENT OF  
ENVIRONMENTAL PROTECTION  
3900 Commonwealth Blvd. MS 35  
Tallahassee, FL 32399-3000  
Tel.: (850) 245-2295

GREGORY G. GARRE  
PHILLIP J. PERRY  
ABID R. QURESHI  
CLAUDIA M. O'BRIEN  
NICOLE RIES FOX  
LATHAM & WATKINS LLP  
555 11th Street, NW  
Suite 1000  
Washington, DC 20004  
Tel.: (202) 637-2207

CHRISTOPHER M. KISE  
JAMES A. MCKEE  
FOLEY & LARDNER LLP  
106 East College Avenue  
Tallahassee, FL 32301  
Tel.: (850) 513-3367

DONALD G. BLANKENAU  
THOMAS R. WILMOTH  
BLANKENAU WILMOTH JARECKE LLP  
1023 Lincoln Mall  
Suite 201  
Lincoln, NE 68508-2817  
Tel.: (402) 475-7080

*Attorneys for the State of Florida*

May 1, 2015

**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 STATE OF FLORIDA'S BRIEF REGARDING JOINDER OF THE STATE OF ALABAMA has been served on this 1st day of May 2015, in the manner specified below:

<p><b>For State of Florida</b></p> <p><u>By U.S. Mail and Email:</u></p> <p>Allen Winsor Solicitor General Counsel of Record Office of Florida Attorney General The Capital, PL-01 Tallahassee, FL 32399 T: 850-414-3300 Allen.Winsor@myfloridalegal.com</p>	<p><b>For State of Florida</b></p> <p><u>By U.S. Mail and Email:</u></p> <p>Donald J. Verrilli Solicitor General Counsel of Record Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530 T: 202-514-7717 supremectbriefs@usdoj.gov</p>
--	---

<p><u>By Email Only:</u></p> <p>Donald G. Blankenau  Jonathon A. Glogau  Christopher M. Kise  Matthew Z. Leopold  Osvaldo Vazquez  Thomas R. Wilmoth  Floridawaterteam@foley.com</p>	<p><u>By Email Only:</u></p> <p>Michael T. Gray  Michael.Gray2@usdoj.gov</p> <p>James DuBois  James.Dubois@usdoj.gov</p>
<p><b>For State of Georgia</b></p> <p><u>By U.S. Mail and Email:</u></p> <p>Craig S. Primis, P.C.  Counsel of Record  Kirkland &amp; Ellis LLP  655 15th Street, NW  Washington, DC 20005  T: 202-879-5000  Craig.primis@kirkland.com</p>	<p><u>By Email Only:</u></p> <p>Samuel S. Olens  Nels Peterson  Britt Grant  Seth P. Waxman  K. Winn Allen  Sarah H. Warren  Georgiawaterteam@kirkland.com</p>

*/s/ Gregory G. Garre*  
\_\_\_\_\_  
GREGORY G. GARRE  
LATHAM & WATKINS LLP  
555 11th Street, NW  
Suite 1000  
Washington, DC 20004  
Tel.: (202) 637-2207

*Attorneys for the State of Florida*