

In The
Supreme Court of the United States

STATE OF FLORIDA,

Plaintiff,

v.

STATE OF GEORGIA,

Defendant.

**GEORGIA'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION
TO DISMISS FOR FAILURE TO JOIN A REQUIRED PARTY**

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INTRODUCTION

Alabama is not a “required party” that must be joined under Rule 19. It is Georgia’s current understanding that Alabama consumes only a relatively small amount of water from the Apalachicola-Chattahoochee-Flint River Basin (“ACF Basin”). Because of that low level of consumption, adjudicating this dispute in Alabama’s absence will not impact the Court’s ability to provide “complete relief” to Florida or “impair or impede” Alabama’s minor interests in the ACF Basin. Fed. R. Civ. P. 19(a).

In both of those respects, Alabama is much differently situated than the United States—which by its own admission *is* a required party. The United States has imposed a “highly regulated system over much of the [ACF] basin,” Ga. Mot. Ex. A at 2 (“Scoping Report”), through which it controls ACF flows to serve federal purposes, U.S. Br. 22. The United States thus controls how much water makes its way to Florida, on what timetable, and in what amounts. Alabama, in contrast, operates no dams or reservoirs in the ACF Basin and consumes¹ only a relatively small amount of water from the basin as a whole—at least as far as Georgia is aware. Thus, although the United States must participate as a party in this case to ensure the Court can provide “complete relief” to Florida, to protect the extensive

¹ As used in this brief, water “consumption” refers to the amount of water that is withdrawn from, but not returned to, the ACF Basin. As explained below, certain Alabama water users withdraw water from the ACF Basin, but then return a high percentage of that water back into the Basin. The term “consumption” is used to refer to the net amount of water withdrawn, after returns are accounted for.

federal interests in the ACF Basin, and to avoid prejudicial limitations on the remedies available to the Court, Alabama’s participation is not required.

BACKGROUND

Alabama has relatively minor interests in the waters of the ACF basin. Only about 15% of the ACF Basin lies within the State of Alabama. *See* Scoping Report at 2. That 15% includes the western bank of the southern half of the Chattahoochee River, which forms the border between Georgia and Alabama, and a handful of tributaries to the Chattahoochee that begin within the territorial boundaries of Alabama. *See* Compl. ¶ 2. Although the Chattahoochee River flows along the Georgia-Alabama border, the River is entirely within the territorial boundaries of Georgia because the boundary between the two states begins “on the western bank of the Chattahoochee River.” *Alabama v. Georgia*, 64 U.S. 505, 515 (1859).

None of Alabama’s largest cities—such as Birmingham, Montgomery, Mobile, or Huntsville—withdraw water from the ACF Basin. Alabama also does not (to Georgia’s knowledge) extensively withdraw water from the ACF Basin for agricultural purposes. As of 2007, the largest consumers of ACF water in Alabama were the Farley Nuclear Power Plant in Dothan, Alabama, and the Mead Westvaco pulp and paper mill in Cottonton, Alabama. Georgia understands that both of those entities return the great majority of the water they withdraw back into the ACF basin, meaning that their consumption levels are low. Alabama does not (to Georgia’s knowledge) operate any dams or reservoirs in the ACF Basin.

Alabama has stronger ties to a separate river basin that is not at issue in this case—namely, the Alabama-Coosa-Tallapoosa River Basin (“ACT Basin”). The

Coosa and Tallapoosa Rivers arise in northern Georgia, before ultimately converging in Alabama to form the Alabama River. *See* U.S. Army Corps of Eng'rs, Final Environmental Impact Statement: Update of the Water Control Manual for the Alabama-Coosa-Tallapoosa River Basin in Georgia and Alabama, at 2-1 (Oct. 2014).² The majority of the ACT Basin—more than 17,000 square miles or about 73% of the Basin—lies in Alabama. *Id.* Birmingham and Montgomery, Alabama's largest cities, are located in the ACT Basin, and the waters in the ACT Basin are used for agricultural purposes. *See id.* at 4-14.

Issues concerning both the ACT and ACF Basins have often been litigated simultaneously. *See* Scoping Report at 13 (explaining that the 1992 Memorandum of Agreement between Alabama, Florida, and Georgia concerned both the ACT and ACF Basins); *id.* at 14 (explaining that compact negotiations concerned both the ACT and ACF Basins); *id.* at 13-17 (discussing litigation regarding both the ACT and ACF Basins). The issues relating to the ACT basin have not yet been resolved. This equitable apportionment case concerns only the ACF Basin.

ARGUMENT

The Special Master ordered the parties to submit supplemental briefs on the following three questions: (1) whether the State of Alabama is a required party that must be joined under Rule 19(a); (2) whether the State of Alabama can be joined under Rule 19(a); and (3) whether the State of Alabama is an indispensable party

²*available at* http://www.sam.usace.army.mil/Portals/46/docs/planning_environmental/act/docs/ACT_EIS_Volume/ACT%20EIS%20Volume%201.pdf.

under Rule 19(b). *See* Case Management Order No. 7 at 4 (Apr. 8, 2015). Georgia addresses each of those questions in turn below.

First, Alabama is not a “required party” under Rule 19 because (i) the Supreme Court could accord Florida “complete relief” without Alabama’s participation, *if* the United States were also a party; and (ii) Alabama’s absence will not “impair or impede” its relatively minor interests in the ACF Basin. Fed. R. Civ. P. 19(a). *Second*, the prudential considerations this Court considers in deciding whether to exercise its original jurisdiction counsel against forcibly joining Alabama as a party, when neither Florida, Georgia, or Alabama itself believe its participation is necessary. *Third*, Alabama’s relatively low rate of water consumption in the ACF Basin means it is not an indispensable party under Rule 19(b).

I. ALABAMA IS NOT A REQUIRED PARTY

The Special Master’s first question asks whether Alabama is a “required party” under Rule 19(a). As relevant here, an entity is a “required party” that “must be joined” if it meets either 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; or

Fed. R. Civ. P. 19(a).³ Alabama is not a required party under either test.

³ The final standard articulated in Rule 19 asks whether the nonparty entity is “so situated that disposing of the action in the person’s absence may ... leave an

A. If The United States Were A Party, The Court Could Accord Florida Complete Relief In Alabama’s Absence.

The absence of Alabama as a party will not impact the Supreme Court’s ability to accord Florida “complete relief” in this case. To the contrary, the Court’s ability to accord Florida relief depends entirely on the participation of the United States as a party—not on whether Alabama is also a party.

As Georgia has explained, and as Florida’s opposition brief confirms, *see* Ga. Reply Br. 11-12; *see also id.* 6 (collecting citations to Florida’s opposition brief), Florida’s alleged harms all stem from purportedly inadequate water flows from Georgia into the Apalachicola River during certain periods of the year. The only way to accord “complete relief” to Florida, therefore, is to ensure that flows of appropriate magnitude cross the Georgia-Florida border at appropriate times.⁴ Such flows can be ensured only in a case in which the United States is a party. *See* Ga. Mot. 11-15; Ga Reply Br. 7-9. Because the United States has “paramount power ... to control [ACF] flows for federal purposes,” U.S. Br. 22 (internal quotation omitted), only the United States can ensure that the multiple dams and reservoirs

existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations.” Fed. R. Civ. P. 19(a)(1)(B)(ii). Neither Florida nor Georgia has argued that the absence of Alabama or the United States presents a substantial risk of either state being subjected to potentially “inconsistent obligations.” *Id.*

⁴ It is worth re-emphasizing that Georgia does not believe that Florida will be entitled to any relief at all in this case because (among other reasons) Florida will not be able to prove that it is suffering a substantial, cognizable injury caused by inequitable water use. This brief, however, as with all of Georgia’s briefing with respect to its Rule 12(b)(7) motion, proceeds on the assumption that Florida is somehow able to establish such a substantial injury and clear the other legal hurdles to obtaining relief in this case.

in the ACF Basin are operated in a manner that provides Florida with the flows it purports to require—particularly during periods of drought or seasonal low flows.

Unlike the United States, the absence of Alabama as a party would not impact the Court’s ability to ensure that flows of appropriate magnitude reach Florida at appropriate times. Alabama does not (as the United States does) operate a system of dams and reservoirs on the ACF Basin. Alabama does not (as the United States does) have “paramount power” to control ACF flows. *Id.* And Alabama does not (as the United States does) consume large amounts of water in the ACF Basin to serve its own purposes. Instead, it is Georgia’s understanding that Alabama consumes only relatively small amounts of water from the ACF Basin, and that two of Alabama’s largest water users in the ACF Basin—the Farley Nuclear Power Plant and the Mead Mead Westvaco pulp and paper mill—return large amounts of water back into the Chattahoochee River. Georgia thus has no current reason to believe that Alabama’s water consumption will materially impact the Court’s ability to ensure that specific amounts of water are delivered to the Georgia-Florida border during specific periods of the year.

B. Disposing Of This Action Will Not Impair Or Impede Alabama’s Ability To Protect Its Interests.

For similar reasons, resolving this case without Alabama’s participation as a party will not impair Alabama’s ability to protect its interests. Because Alabama consumes relatively small amounts of water from the ACF Basin, its interests in the Basin are correspondingly limited. Alabama thus does not have a substantial, legally protectable interest in the waters of the ACF Basin. It is also unlikely that

any relief ultimately afforded by the Court would impair those minor interests. For example, an order requiring a certain flow rate at the Georgia-Florida border—which is the most direct and efficient form of relief in this case, *see* Ga. Reply Br. 6—would not impair Alabama’s ability to continue consuming relatively small amounts of water upstream of the Georgia-Florida border.

Alabama is thus much differently situated than the United States—which concedes that the federal government’s significant interests in the ACF Basin make it a required party. *See* U.S. Br. 7-9. Unlike Alabama, the United States has imposed a “highly regulated system over much of the [ACF] basin” by constructing a series of federal dams and reservoirs on the Chattahoochee River and at Lake Seminole near the Georgia-Florida border. Scoping Report at 2. As a matter of federal statutory law, the U.S. Army Corps of Engineers must operate those facilities to serve a number of congressionally mandated purposes, including “navigation, flood control, hydropower generation, recreation, the protection of endangered and threatened species, and at least some accommodation of municipal and industrial water supply.” U.S. Br. 13. By its own admission, therefore, the United States has “clear interest[s]” in the ACF Basin that may well be impaired if the case is resolved in its absence. *Id.* at 9. Alabama’s interests in the ACF Basin, in contrast, are not remotely similar in kind or degree to those of the United States.⁵

⁵ Georgia’s belief that Alabama is not a required party is based on its current understanding regarding the amount of water that Alabama consumes from the ACF Basin. Circumstances could change if Alabama dramatically increased its

II. PRUDENTIAL CONSIDERATIONS COUNSEL AGAINST JOINING ALABAMA AS A PARTY WITHOUT ITS CONSENT

The Special Master’s second question asks whether, if Alabama is a “required party” under Rule 19(a), Alabama can be forcibly joined by court order. *See* Fed. R. Civ. P. 19(a)(2) (permitting compulsory joinder by court order). Georgia has found no authority addressing whether the Supreme Court can join a non-party State in an original-jurisdiction case without that State’s consent. *Cf. Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 94 (1972) (stating in dicta that the Supreme Court could join a State as a party defendant in an original-jurisdiction case in which that same State’s political subdivisions were named as defendants). That said, it would be extraordinary for the Court to compel Alabama to be joined as a party—particularly when neither Georgia nor Florida has argued that Alabama’s participation is necessary.

Original-jurisdiction cases require the Court to exercise its “extraordinary power ... to control the conduct of one state at the suit of another.” *New York v. New Jersey*, 256 U.S. 296, 309 (1921). For that reason, the Court—in the context of deciding whether to grant a State leave to file a complaint in the first instance—has emphasized that its original jurisdiction “is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was

consumption of water from the ACF Basin in the future. Georgia, however, currently has no reason to believe that Alabama is planning to markedly increase its consumption levels. If Alabama does unexpectedly increase its water consumption, Georgia or Florida could address that new development either by seeking to modify any equitable decree that might ultimately be entered in this case, or by initiating a separate action against Alabama in this Court.

absolute.” *Louisiana v. Texas*, 176 U.S. 1, 15 (1900). This Court thus assumes jurisdiction over suits between states only in “the most serious of circumstances,” such as when the dispute is “of such seriousness that it would amount to *casus belli* if the States were fully sovereign.” *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995) (internal quotations omitted). Those same considerations apply when considering whether the Court should join a third-party State against its will. Even if this Court has the technical power to join Alabama as a party—despite Georgia’s, Florida’s, and Alabama’s unanimous agreement that its participation is not required—prudential considerations and respect for state sovereignty counsel against exercising that power in this instance.

III. IF ALABAMA IS NOT JOINED, THIS CASE COULD NONETHELESS PROCEED UNDER RULE 19(B)

The Special Master’s third question asks whether Alabama is an indispensable party under the factors included in Rule 19(b). It is not. Because Alabama consumes relatively small amounts of water from the ACF Basin, a judgment rendered in its absence would not prejudice its interests (to the extent Alabama has any legally cognizable interests in the ACF Basin at all). *See* Fed. R. Civ. P. 19(b)(1); *see supra* at 7-8. The Court, moreover, could provide Florida “adequate” relief without joining Alabama, because Alabama’s small rate of water consumption would not impact the Court’s ability to ensure that specific amounts of water are delivered to the Georgia-Florida border during specific periods of the year. *See supra* at 5-6.

CONCLUSION

For the foregoing reasons, Alabama is not a necessary party to this case under Rule 19.

May 1, 2015

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Before the Special Master

Hon. Ralph I. Lancaster

CERTIFICATE OF SERVICE

This is to certify that the GEORGIA'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO JOIN A REQUIRED PARTY has been served on May 1, 2015 via U.S. Mail upon the following parties:

<u>For State of Florida</u>	<u>For United States of America</u>
<p><u>By U.S. Mail and Email:</u> GEORGIA'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO JOIN A REQUIRED PARTY; Certificate of Service</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><u>By U.S. Mail and Email:</u> GEORGIA'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO JOIN A REQUIRED PARTY; Certificate of Service</p> <p>Donald J. Verrilli Solicitor General Counsel of Record Department of Justice 950 Pennsylvania Avenue, N.W. Washington, DC 20530 T: 202-514-7717 supremectbriefs@usdoj.gov</p>

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