No. 142, Original

In the

SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA,

Plaintiff

v.

STATE OF GEORGIA,

Defendant

OFFICE OF THE SPECIAL MASTER

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

June 19, 2015

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

Pursuant to Federal Rule of Civil Procedure 12(b)(7), Georgia filed a motion to dismiss Florida's Complaint for Equitable Apportionment and Injunctive Relief ("Complaint") on the basis that the United States is a required party that cannot be joined under Rule 19. The parties, as well as the United States as *amicus curiae*, have fully briefed the issues raised by Georgia's motion. At my request, the parties also briefed the related question of whether Alabama is a required party that must be joined under Rule 19. The parties, again joined by the United States, subsequently presented oral argument on Georgia's motion to dismiss. For the reasons discussed herein, Alabama need not be joined and Georgia's motion to dismiss is denied.

BACKGROUND

This original jurisdiction action arises from a dispute between the States of Florida and Georgia regarding Georgia's use of water in the Apalachicola-Chattahoochee-Flint River Basin ("ACF River Basin"), which encompasses parts of Georgia, Alabama, and Florida. In its Complaint, Florida alleges that it has suffered serious harm to its economy and ecology because of reduced flows in the Apalachicola River resulting from Georgia's increasing storage and consumption of water from the ACF River Basin.[1] Compl. ¶¶ 5-7, 42-43, 57-58. Florida seeks an equitable apportionment of the waters of the Basin. *Id.* at 21 (Prayer for Relief).

[1] For purposes of this Order on Georgia's motion to dismiss, I must accept the facts as pled by Florida. *See Davis Cos. v. Emerald Casino, Inc.*, 268 F.3d 477, 479 n.2 (7th Cir. 2001); *Direct Supply, Inc. v. Specialty Hospitals of Am., LLC*, 878 F. Supp. 2d 13, 23 (D.D.C. 2012). I may also look to extrinsic material introduced by the parties. *See Davis Cos.*, 268 F.3d at 480 n.4; *Direct Supply, Inc.*, 878 F. Supp. 2d at 23. Georgia attached as an exhibit to its motion the U.S. Army Corps of Engineers' *Final Updated Scoping Report* ("Scoping Report") relating to the ACF River Basin. *See Florida v. Georgia*, No. 142 Orig., Dkt. Nos. 48-49, State of Georgia's Motion to Dismiss for Failure to Join a Required Party, Ex. A (U.S. Army Corps of Eng'rs, *Final Updated Scoping Report* (Mar. 2013)). Florida did not object to Georgia's reliance on the Scoping Report, and in fact also cites the report in its briefing. I therefore also rely on it to the limited extent it provides pertinent factual information regarding the ACF River Basin.

Three rivers comprise the ACF River Basin.[2] Compl. ¶ 2. The Chattahoochee River arises in northeastern Georgia and flows 430 miles south, forming part of the border between Georgia and Alabama, to its confluence with the Flint River at the Georgia-Florida state line. *Id.* Georgia currently withdraws substantial amounts of water from the Chattahoochee River for municipal and industrial water supply in the Atlanta metropolitan area. *Id.* ¶¶ 17, 45. The Flint River, a significant source of irrigation water in southern Georgia, arises in the metropolitan Atlanta area and flows southward to join the Chattahoochee River at Lake Seminole. *Id.* ¶¶ 2, 18, 20, 46. Downstream of Lake Seminole, the Apalachicola River flows southward across Florida's panhandle and feeds into the Apalachicola Bay at the Gulf of Mexico. *Id.* ¶ 2, 20. The Apalachicola River sustains a unique ecosystem that in turn supports a resource-based economy in the region of the Apalachicola River and Bay (the "Apalachicola Region"). *Id.* ¶¶ 3-4, 24-35. Historically, the Apalachicola Region has been home to one of the most productive estuarine systems on the coast of the Gulf of Mexico, and its economy and community have evolved around that system. *Id.* ¶ 27, 30. As a whole, the ACF River Basin drains approximately 19,800 square miles in parts of Georgia, Alabama, and Florida. *See* Scoping Rpt. at 2.

While the Flint River flows unimpeded by any dams operated by the U.S Army Corps of Engineers (the "Corps") above Lake Seminole, the waters of the Chattahoochee River are temporarily stored in reservoirs owned and operated by the Corps. Compl. ¶ 8; *see* Scoping Rpt. at 3-5. The Corps operates five dams on the Chattahoochee River: Buford, West Point, Walter F. George, George W. Andrews, and Jim Woodruff. Compl. ¶ 22; *see* Scoping Rpt. at 4, 5-9. The Corps operates these dams as a unified whole to achieve multiple objectives, including navigation, hydroelectric power generation, national defense, recreation, and industrial and

[2] A map of the ACF River Basin, which was submitted at oral argument without objection, is attached hereto as Exhibit A.

municipal water supply. Compl. ¶ 8, 22; Scoping Rpt. at 4, 18; *see* River and Harbor Act of 1945, Pub. L. No. 79-14, ¶ 2, 59 Stat. 10, 17; H.R. Doc. No. 342, 76th Cong., 1st Sess. 77 (1939). *See also* River and Harbor Act of 1946, Pub. L. No. 79-525, § 1, 60 Stat. 634, 635; Flood Control Act of 1962, Pub. L. No. 87-874, § 203, 76 Stat. 1173, 1182. The Corps must also operate its system of dams and reservoirs in a manner that complies with various other federal statutory objectives. Compl. ¶ 8; Scoping Rpt. at 4; *see, e.g.*, Endangered Species Act, 16 U.S.C. 1531 *et seq.*; Flood Control Act of 1944, 16 U.S.C. § 460d; Water Supply Act of 1958, 43 U.S.C. § 390b. The Corps determines how much water to release from its reservoirs based in part on inflows to the ACF Basin, which are reduced by Georgia's storage and consumption. Compl. ¶ 23. Accordingly, when Georgia's storage and consumption increases, the calculated inflow to the ACF River Basin declines and the Corps releases less water downstream into the Apalachicola River. *Id.* The two dams furthest downstream, the George W. Andrews Dam and the Jim Woodruff Dam, are operated as "run-of-river" projects with limited storage to support project purposes. *See* Scoping Rpt. at 4-5. Accordingly, releases from these facilities generally match inflows to the facilities. *Id.* at 5, 9.

Florida, Georgia, Alabama, and the Corps have engaged in long-standing disputes over the use and management of the waters in the ACF River Basin. From 1990 through 2012, Georgia, Florida, Alabama, and the Corps were involved in extensive multi-state and multi-district litigation relating to the ACF River Basin that ultimately culminated in two decisions by United States courts of appeals. Compl. ¶ 8; *see In re MDL-1924 Tri-State Water Rights Litig.*, 644 F.3d 1160 (11th Cir. 2011); *Se. Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316 (D.C. Cir. 2008). In an effort to resolve some or all of the States' disputes, Georgia, Florida, and Alabama commenced a process to study the needs of the ACF River Basin in 1992, and in 1997,

following the completion of the study, Congress passed the Apalachicola-Chattahoochee-Flint River Basin Compact, Pub. L. No. 105-104, 111 Stat. 2219 (1997) ("ACF Compact"), which was ratified by the three States. Compl. ¶¶ 9-10; *see* Scoping Rpt. at 13-14. The ACF Compact subsequently expired. Compl. ¶ 10; *see* Scoping Rpt. at 13-14.

Florida initiated the current chapter in the long-running series of disputes between Florida and Georgia in 2013 by filing a motion for leave to file a complaint with the Supreme Court. The motion was granted by the Court on November 3, 2014. *Florida v. Georgia*, 135 S. Ct. 471 (2014). In its Complaint, Florida complains that increased storage and consumption of water by Georgia from the Chattahoochee and Flint Rivers for municipal, industrial, recreational, and agricultural uses has a direct hydrological impact on Florida by reducing the amount of water flowing into the Apalachicola River. Compl. ¶¶ 5, 21, 42. Florida asserts that the effect of Georgia's water use is particularly evident during low flow periods. *Id.* ¶ 21. Florida alleges that Georgia's water consumption has "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 in the Apalachicola River has been less than 5,500 cubic feet per second from May through December, conditions "unprecedented before 2000." *Id.* ¶ 50. Florida asserts that these "exceptionally low" average annual flows have been "extremely harmful" to the Apalachicola Region. *Id.* ¶ 55. Specifically, Florida alleges that the reduced flows have caused substantial harm to the ecosystem and economy in the Apalachicola Region. *Id.* ¶¶ 6-7, 43, 54. For instance, Florida asserts that the reduced flows have increased salinity levels in Apalachicola Bay, resulting in a collapse in Florida's oyster industry. *Id.* ¶ 56. Florida maintains that Georgia's water usage is expected to double by 2040, further "jeopardizing the viability of the Apalachicola Region's ecology, economy, and way of life." *Id.* ¶ 7; *see id.* ¶ 45.

Accordingly, Florida now seeks an equitable apportionment of the waters of the ACF Basin. Florida's Complaint includes the following prayer for relief:

> Florida prays that the Court require Georgia to answer Florida's complaint, appoint a special master, and after due proceedings, enter a decree equitably apportioning the waters of the ACF Basin.
>
> Florida further prays that the Court enter an order enjoining Georgia, its privies, assigns, lessees, and other persons claiming under it, from interfering with Florida's rights, and capping Georgia's overall depletive water uses at the level then existing on January 3, 1992.
>
> Florida also prays that the Court award Florida any other relief that the Court may deem just and appropriate.

Compl. at 21 (Prayer for Relief). Florida does not assert any claims against Alabama. *Id.* ¶ 14.

DISCUSSION

I. Florida's Complaint Need Not Be Dismissed For Failure To Join The United States As A Required Party.

Pursuant to Rule 12(b)(7), a defendant may move to dismiss a complaint for "failure to join a party under Rule 19." Fed. R. Civ. P. 12(b)(7). Rule 19 establishes a two-part inquiry relating to the joinder of absent parties. First, under Rule 19(a), a court must determine if the absent entity is a person required to be joined as a party if feasible. Fed. R. Civ. P. 19(a)(1). Second, under Rule 19(b), if the absent entity is required to be joined if feasible but cannot be joined, then "the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." *Id.* 19(b). *See Republic of Philippines v. Pimentel*, 553 U.S. 851, 862 (2008). The inquiry under Rule 19 turns on case-specific factors and rests on equitable considerations. *See id.* at 862-63.[3]

[3] I conclude that it is appropriate in this instance to follow Rule 19 as a guide. The Court allows the Federal Rules of Civil Procedure to be taken as guides in original jurisdiction actions, *see* Sup. Ct. R. 17.2, and the Court has previously reviewed a Special Master's recommended decision that looked to Rule 19 for guidance without indicating that the Special Master's decision to follow that rule was inappropriate. *See Idaho ex rel. Evans v. Oregon*, 444 U.S. 380, 386 (1980).

On a Rule 12(b)(7) motion, the moving party bears the burden to show that the nature of the interest possessed by the absent party means that the party should be joined if feasible and, if the entity should be but cannot be joined, that the absent entity or the parties would be so prejudiced by continuance of the action as to justify dismissal. *See Disabled in Action of Pa. v. Se. Pa. Transp. Auth.*, 635 F.3d 87, 97 (3d Cir. 2011); *Citizen Band Potawatomi Indian Tribe of Okla. v. Collier*, 17 F.3d 1292, 1293 (10th Cir. 1994). Given the presumption that the factual allegations of the Complaint are true, *see Davis Cos.*, 268 F.3d at 479 n.2, and given that all reasonable inferences are to be drawn in favor of the non-moving party, *see Paiute-Shoshone Indians of Bishop Cmty. of Bishop Colony, Cal. v. City of Los Angeles*, 637 F.3d 993, 996 n.1 (9th Cir. 2011), the moving party must often carry its burden by producing extra-pleading evidence such as affidavits of knowledgeable persons, *see Citizen Band Potawatomi Indian Tribe*, 17 F.3d at 1293.

For the reasons set forth below, I conclude that Georgia, as the moving party, has not carried its burden to demonstrate that dismissal is appropriate. I note that this conclusion is in accord with the general principle that "[d]ismissal . . . is not the preferred outcome under the Rules," *Askew v. Sheriff of Cook Cnty., Ill.*, 568 F.3d 632, 634 (7th Cir. 2009), and "is warranted only when the defect is serious," *Direct Supply, Inc.*, 878 F. Supp. 2d at 23. Georgia simply has not shown that nonjoinder of the United States "makes just resolution of the action impossible." *Univ. Reinsurance Co. v. St. Paul Fire & Marine Ins. Co.*, 312 F.3d 82, 87 (2d Cir. 2002).

A. The United States Is A Required Party That Cannot Be Joined.

The inquiry contemplated by Rule 19(a) "is a practical one." *Coastal Modular Corp. v. Laminators, Inc.*, 635 F.2d 1102, 1108 (4th Cir. 1980). Under Rule 19(a), a party must be joined if feasible if, "in that person's absence, the court cannot accord complete relief among existing

parties," Fed. R. Civ. P. 19(a)(1)(A), or, in the alternative, if the 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," *id.* 19(a)(1)(B)(i)-(ii). *See generally Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 123-24 (1968) (quoting *Shields v. Barrow*, 17 How. 130 (1854)). While Florida vigorously contests whether these factors are met here, Georgia and the United States make a persuasive case that the United States is a party required to be joined if feasible because relief granted by the Court might as a practical matter impair the interests of the United States. *See id.* 19(a)(1)(B)(i).

The Corps regulates the flow of the Chattahoochee River by the operation of five dams located along the Chattahoochee. Compl. ¶¶ 8, 22-23; Scoping Rpt. at 4-9. As Florida admits, these dams and related reservoirs must be operated so as to promote certain objectives and obligations created by statute. Compl. ¶ 8, 22. Specifically, the Corps must manage its facilities so as to provide for navigation, hydroelectric power, recreation, and industrial or municipal water supply. *See* River and Harbor Act of 1945, Pub. L. No. 79-14, ¶ 2, 59 Stat. 10, 17; H.R. Doc. No. 342, 76th Cong., 1st Sess. 77 (1939). The Corps must also abide by other federal statutory obligations in managing its facilities along the Chattahoochee River. Compl. ¶ 8; *see, e.g.*, Endangered Species Act, 16 U.S.C. 1531 *et seq.* Therefore, while the Corps does not own the waters of the ACF River Basin, it does have an interest in managing the flow of water in the Chattahoochee River in a manner that complies with applicable federal statutes. The United States' interest in complying with its statutory objectives and mandates is real and concrete, not inchoate, and is therefore legally protected for purposes of the Rule 19(a) required party analysis.

Cf. Citizen Band Potawatomi Indian Tribe, 17 F.3d at 1294 (finding "inchoate" interest insufficient to satisfy Rule 19).

Further, there is a real "possibility that a judgment might impede [the United States'] ability to protect [its] interest" in managing the flow of water in the Chattahoochee River in compliance with its statutory objectives. *Provident Tradesmens Bank & Trust Co.*, 390 U.S. at 108. Florida alleges that "[m]aintaining an ample flow of water from the Chattahoochee and Flint River Basins is critical to preserving the ecology of the Apalachicola Region," Compl. ¶ 24, and complains that "Georgia's water storage and consumption upstream of the Apalachicola River . . . has reduced Apalachicola River flows entering Florida," *id.* ¶ 42. In its prayer for relief, Florida requests not only that the Court enter an order "capping Georgia's overall depletive water uses" but also that the Court "enter a decree equitably apportioning the waters of the ACF Basin," and award "any other relief that the Court may deem just and appropriate." *Id.* at 21 (Prayer for Relief). In light of Florida's alleged harm and its request for an order equitably apportioning the waters of the ACF River Basin, it is certainly possible that the Court might find it appropriate to enter a decree establishing a required minimum flow at the Florida state line. *See, e.g.*, *New Jersey v. New York*, 283 U.S. 336, 346-47 (1931) (establishing minimum flow requirement in an action by New Jersey seeking to enjoin diversion of water by New York). Such a minimum flow decree might conflict with certain of the Corps' federal statutory obligations to the extent that maintaining the required minimum flow would prevent the Corps from achieving its other objectives, such as the provision of municipal or industrial water supply. *See* 43 U.S.C. § 390b (establishing policy that federal water projects be used to provide industrial and municipal water supply). *See also In re MDL-1824 Tri-State Water Rights Litig.*, 644 F.3d at 1192 (concluding that water supply is an authorized purpose of the Buford Project on the

Chattahoochee River). The fact that such a judgment may be entered, even if it will not necessarily be entered, is sufficient to make the United States a party that must be joined if feasible. *Provident Tradesmens Bank & Trust Co.*, 390 U.S. at 108.

In its briefing on Georgia's motion, Florida disclaims any request for a decree requiring a minimum flow at the state line. This alone, however, is insufficient to foreclose the possibility of such an order. Florida has not pointed to any case law suggesting that a plaintiff may preclude the Court from entering the most appropriate decree in light of the evidence presented at trial. To the contrary, courts have an obligation to grant the most appropriate relief to which a prevailing party is entitled. Fed. R. Civ. P. 54(c). *See Kirby v. U.S. Gov't, Dep't of Hous. & Urban Dev.*, 745 F.2d 204, 207 (3d Cir. 1984) ("As long as the plaintiffs have stated a claim for relief, it is the court's obligation to grant the relief to which the prevailing party is entitled whether it has been specifically demanded or not."); *United States v. Marin*, 651 F.2d 24, 31 (1st Cir. 1981) ("[I]t is the court's duty to grant whatever relief is appropriate in the case on the facts proved."); *Burton v. State Farm Mut. Auto. Ins. Co.*, 335 F.2d 317, 320 (5th Cir. 1964); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 803 (4th Cir. 1971). Further, the Supreme Court has broad authority in equitable apportionment cases to afford the relief most appropriate in light of all the circumstances. *See Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1026 n.10 (1983) ("Flexibility is the linchpin in equitable apportionment cases."); *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982) (Equitable apportionment "is a flexible doctrine which calls for the 'exercise of an informed judgment on a consideration of many factors' to secure a 'just and equitable' allocation." (quoting *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945))). Given courts' authority to grant relief not requested in the pleadings generally and the Supreme Court's broad discretion in equitable apportionment cases in particular, it would be improper to rely on Florida's

representations regarding the form of relief it seeks to limit the Court's authority.[4] *See* Compl. at 21 (Prayer for Relief).

Although the United States is a party required to be joined if feasible, it cannot be joined because it enjoys sovereign immunity and has not consented to suit. *See United States v. Sherwood*, 312 U.S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued."). It is therefore necessary to determine "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). It is to that inquiry that I now turn.

B. This Action May Proceed In Equity And Good Conscience Without The United States As A Party.

In undertaking the pragmatic, case-specific inquiry contemplated by Rule 19(b), *see Pimentel*, 553 U.S. at 862-63, *Provident Tradesmens Bank & Trust Co.*, 390 U.S. at 118-19,123-24, I consider the nonexclusive list of factors set forth in Rule 19(b) as guides, *see Idaho*, 444 U.S. at 386. These factors include "the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;" "the extent to which any prejudice could be lessened or avoided by" various measures such as "protective provisions in the judgment" or "shaping the relief;" "whether judgment rendered in the person's absence would be adequate;" and "whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." Fed. R. Civ. P. 19(b)(1)-(4). *See Idaho*, 444 U.S. at 386. Balancing the relevant factors, I agree with Florida and the United States that this original jurisdiction action can proceed in equity and good conscience.

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[4] True, Florida may shape the evidence that it presents as it sees fit, and therefore may choose not to demonstrate that a minimum flow decree is appropriate. The Court may also, as a prudential matter, decline to impose a remedy that Florida chooses not to seek. *See Robinson*, 444 F.2d at 803. But the type of evidence presented by Florida and the propriety of any particular form of relief is, at this stage, merely conjecture. What is not conjecture is the Court's authority to enter any appropriate decree.

1. Judgment Rendered In The Absence Of The United States Would Be Adequate.

I consider first whether the Court can render adequate judgment – assuming Florida demonstrates that it is entitled to relief – in the absence of the United States, *see* Fed. R. Civ. P. 19(b)(3), because that question is foundational to all of Georgia's arguments. Georgia's contention that the parties and the United States inevitably will be prejudiced by the continuation of this case absent the United States presumes that a minimum flow decree is the only effective remedy available in this case. I do not agree. Because I must accept the facts as pled by Florida, *see Davis Cos.*, 268 F.3d at 479 n.2, and must draw all reasonable inferences in Florida's favor, *see Paiute-Shoshone Indians*, 637 F.3d at 996 n.1, I conclude that it is possible that the Court will be able to shape a remedy that would afford Florida adequate relief absent the United States by entering an order capping Georgia's consumption of water from the ACF River Basin.

As an initial matter, while a minimum flow decree cannot be ruled out conclusively at this stage of the proceedings, a decree entering a cap on Georgia's consumption may be the most likely outcome in the event Florida prevails on the merits. While Florida's alleged injuries stem from reductions in inflows to the Apalachicola River, *see* Compl. ¶ 24, 42, 50, 55-59, Florida's allegations focus not on harm from inadequate *minimum* flows, but rather on harm arising from inadequate *average* annual flows, *see id.* ¶ 55. That is, Florida complains of reduced flows overall. Accordingly, Florida has not requested that it be assured a minimum flow at the state line; instead, Florida requests a cap on Georgia's consumption. *Id.* at 21 (Prayer for Relief). As I have already observed, Florida has also indicated that it intends to pursue the latter remedy and has disclaimed any intention to seek a decree establishing a minimum flow requirement. It may be that Florida has done so to keep its case alive by sidestepping the need to join the United States as a party, but it is allowed to do so. *See Idaho*, 444 U.S. at 392 (concluding that Idaho

had "sidestepped the need to join the United States as a party by seeking" a limited form of relief, namely "a share of the fish . . . being caught by nontreaty fishermen"). However, Florida's approach "is a two edged sword." *Id.* Having voluntarily narrowed its requested relief and shouldered the burden of proving that the requested relief is appropriate, it appears that Florida's claim will live or die based on whether Florida can show that a consumption cap is justified and will afford adequate relief. *See id.* (noting that Idaho's narrowed request for relief meant that Idaho "must . . . prov[e] that the nontreaty fisheries in those two States have adversely and unfairly affected the number of fish arriving in Idaho").

Georgia, however, takes the position that the only way to accord Florida complete relief is to ensure that minimum flows are maintained at the Florida state line throughout the year and that ensuring minimum flows would require alteration of the Corps' operation of its facilities upstream of the Apalachicola. Without the Corps being bound by any judgment entered by the Court, the argument goes, it is merely speculative that increased inflows will reach the Apalachicola River and ameliorate Florida's alleged harm because – according to Georgia – the Corps might impound any additional water upstream of the Apalachicola River to serve other federal purposes. According to Georgia, therefore, any judgment would be inadequate because it would not address the "public stake in settling disputes by wholes, whenever possible." *Pimentel*, 553 U.S. at 870 (quoting *Provident Tradesmens' Bank*, 390 U.S. at 111). But it is Georgia that carries the burden to prove that any decree providing for a cap on Georgia's consumption would be ineffective absent a decree binding on the Corps. *See Disabled in Action of Pa.*, 635 F.3d at 97; *Citizen Band Potawatomi Indian Tribe*, 17 F.3d at 1293. Georgia has failed to carry its burden because it has provided no evidence – none – supporting its claims.

To the contrary, the few facts before me at this stage of the proceeding support the conclusion that it is plausible that a minimum flow decree is not the only effective remedy for Florida and that a cap on Georgia's consumption would afford adequate relief by increasing flows in the Apalachicola River. Under the facts as pled by Florida, Georgia's water use has a direct hydrologic impact on Florida because any increase in Georgia's consumption decreases inflows into the ACF River Basin and reduced inflows cause the Corps to release less water downstream to the Apalachicola River. *Id.* ¶¶ 21, 23, 42. Absent evidence to the contrary, I must draw the (reasonable) converse inference in favor of Florida: any decrease in Georgia's consumption will increase inflows into the ACF River, allowing the Corps to release more water downstream. The United States agrees with this inference, taking the position that the Corps would not necessarily impound the additional water in the ACF River Basin that would come from a decrease in Georgia's consumption. The few facts I have before me also support this inference. Most notably, regardless of the Corps' actions, increased inflows into the Flint River would necessarily reach Lake Seminole, the southernmost reservoir operated by the Corps, because that river is not regulated by the Corps above Lake Seminole. *See* Scoping Rpt. at 4. Following its general operational protocols, the Corps would match the increased inflows into Lake Seminole with increased releases from the Jim Woodruff Dam (a "run-of-the-river" project) into the Apalachicola River. *See* Scoping Rpt. at 5, 9. This, in turn, would alleviate Florida's alleged harm from reduced average annual flows.[5] Compl. ¶ 55. Georgia has shown me no evidence to the contrary. Therefore, on the facts before me, I conclude that at this stage of the litigation it is plausible that a cap on Georgia's consumption would lead to increased Basin

[5] I recognize that the Corps' operations may differ during drought periods. *See* Scoping Rpt. at 9, 18. However, it is reasonable to assume that a cap on Georgia's consumption would render periods of reduced flow releases fewer and further between because of the increased reservoir levels that would result from Georgia's reduced consumption. In this scenario, too, Florida's harm from reduced overall flows would be ameliorated.

inflows that would in turn allow for increased inflow into the Apalachicola River, providing Florida with its requested relief.

I am persuaded that the facts of this case are similar to *Idaho v. Oregon*, in which the Court rejected a motion to dismiss for failure to join the United States. In that proceeding, Idaho sued Oregon and Washington, seeking an equitable apportionment of anadromous fish in the Columbia River destined for Idaho. 444 U.S. at 385. Runs of these fish were affected by, among other things, the eight dams on the Columbia River maintained by the Corps. The Corps necessarily faced a choice between releasing water to generate power or to facilitate migration of fish. *Id.* at 382-83. Accordingly, the Special Master concluded that the United States was an indispensable party because he could not ensure that any additional fish allowed to pass through Oregon and Washington would ever make it past the Corps' facilities and reach Idaho unless the decree bound the United States. *Id.* at 388. Looking to the factors of Rule 19(b), the Court rejected the Special Master's conclusion that "failure to join the United States as a party to th[e] litigation would prevent th[e] Court from rendering an adequate judgment." *Id.* at 389. The Court held that the United States' interest in operating the dams along the Columbia River did not make the United States indispensable because Idaho had "no quarrel with the operation of the various dams" and argued "quite 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. Likewise, Florida does not quarrel with the Corps' operation of its dams in the ACF River Basin. *See* Compl. ¶ 15. And, on the basis of the facts before me, I must assume that greater amounts of water reaching the Chattahoochee River will necessarily increase

the amount of water reaching the Apalachicola River without a change to the Corps' operations.[6] As in *Idaho*, therefore, adequate relief is available absent the United States.

2. Any Prejudice To Georgia, Florida, And the United States Could Likely Be Avoided By Shaping Any Relief Granted To Florida.

Having concluded that the Court will likely be able to render an adequate judgment in the absence of the United States by entering a decree establishing a cap on Georgia's consumption, I consider next whether granting this relief would avoid prejudice to the parties and the United States. *See* Fed. R. Civ. P. 19(b)(1)-(2). I conclude that the Court will likely be able to avoid prejudicing Florida, Georgia, and the United States by entering Florida's favored form of relief.

a. Any Prejudice To The United States Would Likely Be Avoided By Entering A Decree Capping Georgia's Consumption.

A decree establishing a cap on Georgia's consumptive use of water would likely avoid any potential prejudice to the United States. *See Pimentel*, 553 U.S. at 865 (considering prejudice to absent party). The most Georgia has done is speculate that any decree would impair the United States' judgments about how to establish flow regimes, determine releases for industrial and municipal water supply purposes, protect wildlife, and satisfy other federal purposes of the Corps' projects. As discussed above, Georgia has not put forward any evidence supporting the speculation that a decree establishing a cap on Georgia's consumption of water would require the Corps to undertake implementing actions in order to grant Florida adequate relief. To the contrary, Florida has expressly disclaimed any request for affirmative relief against the Corps with respect to the Corps' operation of its facilities, Compl. ¶ 15, and the United States agrees (at least at this stage of the litigation, and on the present facts) that a cap on Georgia's use of water would not impair or impede its interests because the Corps would not necessarily be

[6] At trial, of course, Florida will have to carry its burden on this point. While it is possible that Florida will fail in making this showing, this possibility goes to the merits and does not mean that an adequate judgment is impossible absent the United States. *Idaho*, 444 U.S. at 392.

required to alter its operations in order to afford Florida effective relief. The United States' position strongly suggests that its interests will not be impaired by a consumption cap. *See generally Gardiner v. Virgin Islands Water & Power Auth.*, 145 F.3d 635, 641 (3d Cir. 1998). Given the lack of any factual basis to conclude that a consumption cap – perhaps the most likely form of relief in the event a decree is entered – would impair the interests of the United States and given the United States' protestations to the contrary, I conclude that the Court can shape any relief so as to avoid any prejudice to the United States.

I am not persuaded that *Arizona v. California*, 298 U.S. 558 (1936), compels a contrary conclusion. In that case, Arizona sought an equitable apportionment of the unappropriated water of the Colorado River without joining the United States. *Id.* at 559-60. Under the Boulder Canyon Project Act, the Secretary of the Interior was authorized to construct and operate a dam and incidental works at the present site of the Boulder Dam, *id.* at 563, 569, and was also given the authority to contract for the storage of water and for delivery thereof, *id.* at 570. Acting pursuant to this authority, the Secretary had previously "undertaken . . . to control navigation, to impound, and control the disposition of, the surplus water in the river not already appropriated," including by way of contracts for the delivery of water. *Id.* at 570. Accordingly, Arizona's equitable share

> in the unappropriated water impounded above Boulder Dam could not be determined without ascertaining 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.

Id. at 571. Because Arizona's rights were "so subordinate to and dependent upon the rights" of the United States that "no final determination of the one [could] be made without a determination

of the extent of the other," the Court concluded that "a decree could not be framed without the adjudication of the superior rights asserted by the United States." *Id.* Here, by contrast, the determination of Florida's rights would not necessarily determine the rights of the United States. While the Corps regulates water flow in the ACF River Basin to some degree, it does not control the disposition of the water among the States and has not entered into contracts for the delivery of water. Further, as discussed above, there is no factual basis at this time to conclude that Florida could be accorded relief only via a mandated change to the Corps' operations. *Arizona* is therefore distinguishable. *See Idaho*, 444 U.S. at 391 (distinguishing *Arizona* on same grounds).

Perhaps understanding that it has not carried its burden as a factual matter, Georgia also argues that the Court's decision in *Republic of Philippines v. Pimentel* means that an action must be dismissed where an absent party asserts sovereign immunity and there exists a mere "potential for injury to the interests of the absent sovereign." 553 U.S. at 867. But *Pimentel* does not stand for the broad proposition that Georgia urges. In *Pimentel*, the absent sovereign had a non-frivolous claim of ownership to the contested assets – a claim that the lower courts had presumed to adjudicate in the absence of the sovereign. *Id.* at 867-68. Significantly, there were no alternative forms of relief that would have avoided adjudicating the absent sovereign's claim. *Id.* at 870. *Pimentel*, therefore, does not mean that the mere possibility of prejudice to an absent sovereign is sufficient to justify dismissal; rather, it stands only for the unremarkable proposition that when the substantial claims of an absent sovereign must necessarily be adjudicated in order to grant relief to the aggrieved party, then dismissal is appropriate. As discussed fully above, that is not this case. The United States does not have a claim of ownership to the waters of the ACF River Basin, and its interests will not inevitably be determined by the issuance of a decree

in this proceeding. *Pimentel* therefore does not relieve Georgia of its burden to establish the extent of any prejudice to the United States.

I also note that the United States is in a position to protect its interests. In another dispute between Florida and Georgia – a dispute over the boundary between the two States – the Supreme Court concluded that the interests of the United States could be protected adequately by allowing the United States to be heard during the proceedings without being made a formal party. *See Florida v. Georgia*, 58 U.S 478 (1854). In that earlier action between the States, the United States had a "deep interest" in the resolution of the dispute, such that "the ordinary practice of the court would require a person standing in the . . . position of the United States to be made a party." *Id.* at 493. The States, however, argued that the United States could not be made a party to the proceeding. *Id.* The Court declined to answer that question because the interests of the United States could be protected by allowing the United States to participate in the original jurisdiction proceeding by presenting evidence and argument without being made "a party, in the technical sense of the term." *Id.* at 495. Likewise, in Case Management Order No. 9, I have permitted the United States to participate as an *amicus curiae* during this proceeding "to the extent the interests of the United States are implicated." *Florida v. Georgia*, No. 142 Orig., Case Management Order No. 9 (April 23, 2015) ("CMO No. 9"). The United States will be able to mitigate any possibility of prejudice stemming from a decree entered by the Court by participating as *amicus curiae*. Accordingly, as in *Florida*, the United States need not be joined in order to have its interests protected.

In sum, I find that any prejudice to the interests of the United States can be avoided if the Court were to shape any relief granted to Florida by entering a decree establishing a cap on Georgia's consumption. Such a decree would not necessarily require the United States to alter

its conduct to afford Florida relief, and such a decree could be entered without determining the United States' rights and obligations to its prejudice.

b. Any Prejudice To Florida And Georgia Would Also Likely Be Avoided By Entering A Decree Capping Georgia's Consumption.

Entering a decree capping Georgia's consumptive water use would not only likely mitigate any possible prejudice to the United States, but also any possible prejudice to Florida and Georgia. *See Pimentel*, 553 U.S. at 869 (considering prejudice to the parties). Georgia has not shown that Florida would be prejudiced by a decree capping Georgia's consumption of water from the ACF River Basin absent the United States. As discussed above, at this stage of the litigation, I must conclude that Florida would receive sufficient water as a result of a cap on Georgia's consumption to provide it adequate relief. Nor has Georgia shown that it would be prejudiced by a decree establishing a cap on its consumption. Because shaping the relief in the form sought by Florida would not impose any minimum flow requirement, any risk to Georgia of being found in violation of a decree entered by the Court as a result of a decision by the Corps to divert water in the ACF River Basin to serve various federal objectives rather than maintain a minimum flow at the Florida state line would be ameliorated. While Georgia argues that a consumption cap would be prejudicial because it is the most intrusive and punitive remedy available, Georgia has again provided no factual basis to find that a consumption cap would be more prejudicial than a minimum flow requirement. A consumption cap need not dictate how Georgia must manage its water resources any more than a minimum flow decree, and would not necessarily create a greater economic impact than a minimum flow decree. Accordingly, I have before me no evidence suggesting that a consumption cap would be prejudicial to the interests of the existing parties to this proceeding.

3. Florida Would Have No Other Adequate Remedy Available If Its Original Jurisdiction Proceeding Were Dismissed.

I am also persuaded that, in the event this original jurisdiction proceeding were dismissed for nonjoinder, Florida would have no other adequate remedy. *See* Fed. R. Civ. P. 19(b)(4). Georgia argues that Florida could obtain adequate relief via the Corps' administrative process, and that an original jurisdiction action is not Florida's only remedy. This argument raises the spectre of judicial estoppel, *see New Hampshire v. Maine*, 532 U.S. 742, 749 (2001), because Georgia has previously argued that Florida's interest in adequate water flows should be settled through an equitable apportionment proceeding before the Court rather than a proceeding challenging an administrative decision by the Corps, *see Georgia v. Se. Fed. Power Customers*, Brief of Appellee the State of Georgia in Response to Brief of Appellant the State of Florida, 2002 WL 32641401, at *9 (filed Feb. 8, 2002). However, it is not necessary here to determine that Georgia is judicially estopped from asserting that Florida should seek relief in an administrative proceeding rather than an equitable apportionment proceeding because Georgia's argument fails on the merits. Florida now seeks vindication of a right broader than a mere administrative order from the Corps establishing a minimum flow regime. Such an order would remain subject to Georgia's increasing consumption of water upstream from the Apalachicola River. Conceivably, Georgia's consumption could continue to increase to the point that the Corps is unable to ensure any minimum flow into the Apalachicola River. Florida therefore seeks an equitable apportionment of the waters in the ACF River Basin between coequal sovereigns. *See* Compl. ¶¶ 59-60. That remedy is only available from the Supreme Court in an original jurisdiction proceeding. *See generally New Jersey*, 283 U.S. at 342-46. Accordingly, dismissing this case would foreclose the only proceeding which provides Florida with the opportunity to adjudicate its rights to a share of the water of the ACF River Basin.

* * * * *

Although the United States' interests in the flow of water in the ACF River Basin are sufficiently concrete and significant to warrant protection under Rule 19(a), the United States is not an indispensable party to the proceeding. Based on the facts as they now stand, there are adequate forms of relief available that would avoid any prejudice to the United States or the parties. In contrast, the inequity of dismissing this action at this time would be significant, given that Florida would have no other forum for obtaining an equitable apportionment of the waters of the ACF River Basin. I therefore conclude that "at least as far as the record has so far been developed, the [the United States is] not proven to be indispensable whereby the cause has to be dismissed." *Francis Oil & Gas, Inc. v. Exxon Corp.*, 661 F.2d 873, 879 (10th Cir. 1981).

II. Alabama Need Not Be Joined As A Party

I next turn to the issue I raised *sua sponte*, namely, whether Alabama should be joined as a party to this equitable apportionment proceeding. Though the parties had not raised the issue, I requested that the parties provide briefing on the following questions: (1) whether Alabama is a required party that must be joined under Rule 19(a); (2) whether Alabama can be joined under Rule 19(a); and (3) whether Alabama is an indispensable party under Rule 19(b). I conclude that Alabama is not a required party under Rule 19(a).[7]

As an initial matter, Alabama is not a party required to be joined if feasible because the Court can afford complete relief between the existing parties. *See* Fed. R. Civ. P. 19(a)(1)(A). It is true that a portion of the ACF River Basin lies within Alabama. *See* Compl. ¶ 2; Scoping Rpt. at 3. However, Florida seeks a decree against Georgia only. Compl. at 21 (Prayer for Relief). Florida asserts no wrongful act by Alabama, and seeks no affirmative relief against Alabama. *Id.*

[7] Because I so conclude, I need not – and do not – address the second and third questions that I raised and requested that the parties brief.

¶ 14. The circumscribed nature of Florida's claims means that Alabama need not be joined to afford complete relief. *See Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935) ("Colorado is said to be an indispensable party, because the bill discloses that the North Platte rises in that state and drains a considerable area therein. The contention is without merit. Nebraska asserts no wrongful act of Colorado and prays no relief against her.").

Further, Alabama is not a party required to be joined if feasible because Alabama is not so situated that disposing of the action in its absence would impair or impede Alabama's interests or leave an existing party subject to a substantial risk of multiple or otherwise inconsistent obligations. *See* Fed. R. Civ. P. 19(a)(1)(B). Because Florida seeks to stem Georgia's over-consumption only, *see* Compl. at 21 (Prayer for Relief), it appears at this time that Alabama will not be prejudiced were the Court to enter a decree in Florida's favor. A consumption cap would bind only Georgia, thereby avoiding prejudice to Alabama. Further, a minimum flow decree does not present the same possibility of prejudice to Alabama as it does to the United States, because there is no evidence before me that a minimum flow requirement would conflict with Alabama's interests (if any) in the waters of the ACF River Basin. Further, because Alabama will not be bound by any judgment in this case absent joinder, *see Pimentel*, 553 U.S. at 870-71, Alabama will be able to pursue any of its own interests in the future in a separate action. The possibility of such a future action would not leave Georgia subject to multiple or otherwise inconsistent obligations because any future decree would simply be in addition to the relief (if any) obtained by Florida. Indeed, by taking the position that Alabama need not be joined, Georgia itself concedes that any failure to bind Alabama would not be prejudicial to Georgia's interests – a concession that carries significant weight. *See Utah v. United States*, 394 U.S. 89, 95 (1969).

My conclusion that Alabama need not be joined involuntarily is bolstered by three further considerations. First, Alabama may move to intervene in the present action. *See South Carolina v. North Carolina*, 558 U.S. 256, 264-65 (2010) (discussing intervention in original jurisdiction cases); *New Jersey v. New York*, 345 U.S. 369, 371 (1953) (noting that Pennsylvania's motion for leave to intervene had been granted). Alabama is on notice of the possible ramifications of a Court decree, and may act to protect its interests if it believes that they are threatened. Second, the wishes of Alabama, as a sovereign entity, should be accorded appropriate respect in an original jurisdiction proceeding. *See South Carolina*, 558 U.S. at 267 (noting need to show "[r]espect for state sovereignty"); *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995) (noting that the Court assumes jurisdiction over suits between states only in "the most serious of circumstances," such as when the dispute "would amount to *casus belli* if the States were fully sovereign"); *Louisiana v. Texas*, 176 U.S. 1, 15 (1900) (noting that the exercise of the Court's original jurisdiction is "delicate and grave" and should not be "exercised save when the necessity was absolute"). Alabama should not be joined involuntarily unless there is a significant reason to do so. None has been presented to me. Third, the Court has previously issued a decree equitably apportioning the water of a river without joining all States with a potential interest in those waters. *See New Jersey*, 283 U.S. at 341-42, 345-48 (apportioning the waters of the Delaware River absent Delaware even though it formed the border of Delaware); *Nebraska v. Wyoming*, 507 U.S. 584, 596 (1993) (noting prior apportionment of the Laramie River between Wyoming and Colorado absent Nebraska, even though the Laramie contributes to the North Platte River in Nebraska). It appears at this time that there is no obstacle to doing the same in this proceeding relating to the ACF River Basin.

The State of Alabama need not be joined pursuant to Rule 19(a).

CONCLUSION

Although Georgia has shown that the United States is a party required to be joined if feasible, Georgia has not carried its burden to prove that the action cannot proceed in equity and good conscience without joinder of the United States. Georgia has not put forward any evidence demonstrating that it is impossible to render adequate judgment in the absence of the United States or that the interests of the United States or the parties necessarily would be prejudiced by any judgment entered in the absence of the United States. Taking Florida's allegations of fact as true and drawing reasonable inferences in favor of Florida, I conclude at this time that it is possible to fashion an adequate decree in the absence of the United States that would avoid prejudicing the United States and the parties. Accordingly, this action may proceed in equity and good conscience.

It is hereby ORDERED as follows: the State of Georgia's Motion to Dismiss for Failure to Join a Required Party is hereby DENIED.

Dated: June 19, 2015

Ralph I. Lancaster

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Special Master

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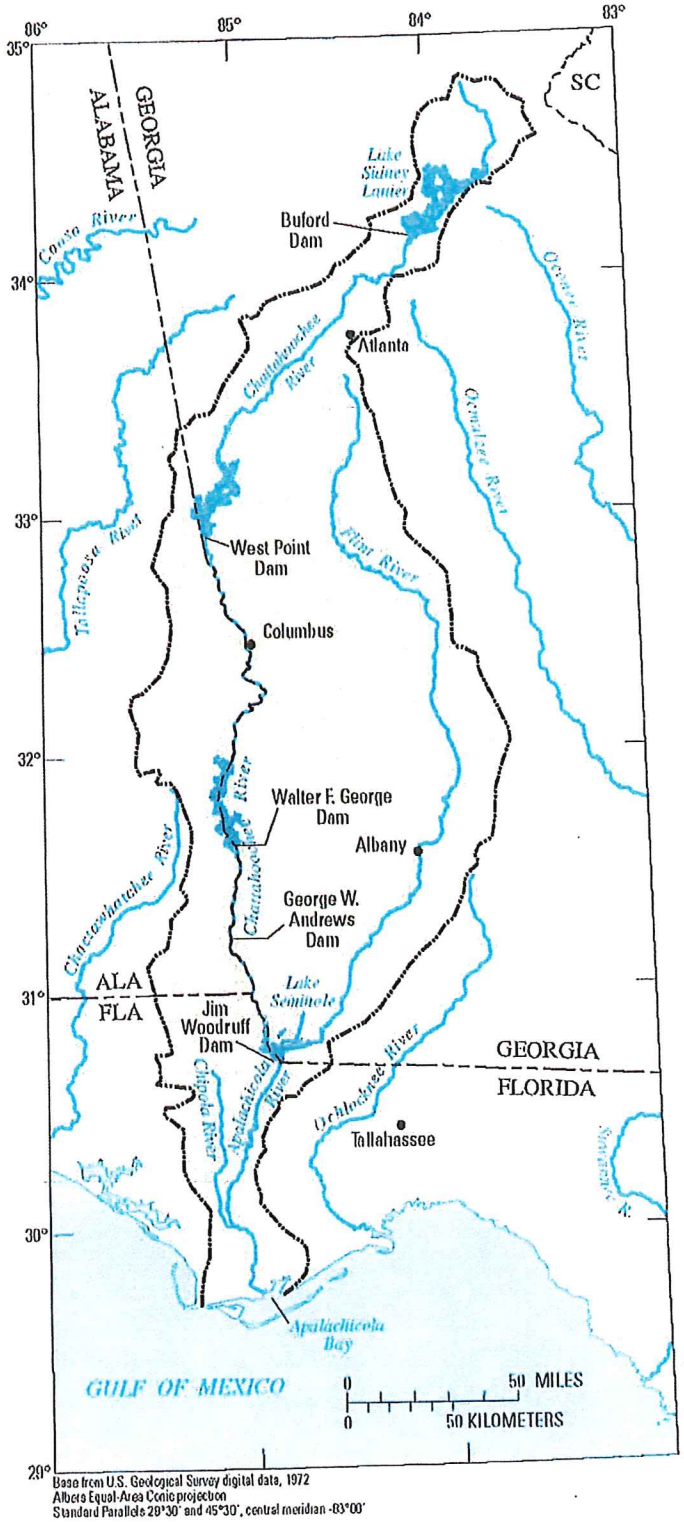
EXHIBIT A



Source: U.S. Fish & Wildlife Service, Biological Opinion on the U.S. Army Corps of Engineers, Mobile District, Revised Interim Operating Plan for Jim Woodruff Dam and the Associated Releases to the Apalachicola River (May 22, 2012), located at: http://www.fws.gov/southeast/news/2012/pdf/woodruffBOFinal.pdf.