SUPREME COURT OF THE UNITED STATES
No. 142, Original

STATE OF FLORIDA,	)
	)
Plaintiff,	)
	)
V.	)
	)
STATE OF GEORGIA,	)
	)
Defendants.	)

ORAL ARGUMENT before SPECIAL MASTER RALPH I. LANCASTER, held at the E. Barrett Prettyman Courthouse, U. S. Court of Appeals, 333 Constitution Avenue, NW, Washington, D.C., on June 2, 2015, commencing at 9:30 a.m., before Claudette G. Mason, RMR, CRR, a Notary Public in and for the State of Maine.

APPEARANCES:

For the State of Florida:	GREGORY G. GARRE, ESQ. PHILIP J. PERRY, ESQ. ALLEN C. WINSOR, ESQ. CLAUDIA M. O'BRIEN, ESQ. ABID R. QURESHI, ESQ. JOHN S. COOPER, ESQ. CHRISTOPHER M. KISE, ESQ. THOMAS R. WILMOTH, ESQ.
For the State of Georgia:	CRAIG S. PRIMIS, P.C. K. WINN ALLEN, ESQ. BRITT GRANT, ESQ. ANDREW PRUITT, ESQ. SARAH HAWKINS WARREN, ESQ. CHRISTOPHER LANDAU, P.C. SAM OLENS, Georgia AG RYAN TEAGUE, ESQ. JUDSON TURNER, ESQ. JOHN C. ALLEN, ESQ.
For the U.S.A.:	MICHAEL T. GRAY, ESQ.
Also Present:	JOSHUA D. DUNLAP, ESQ.

PROCEEDINGS

SPECIAL MASTER LANCASTER: Be seated, please.

Good morning, counsel.

MR. GARRE: Good morning.

MR. PRIMIS: Good morning.

SPECIAL MASTER LANCASTER: First, a little housekeeping. Are the acoustics good? Can you hear me all right?

Can you hear me back there?

Okay. There is no bailiff. I have assumed, since we are a relatively civil group, that we don't need one. But when you're entering your appearances, if you disagree and you want a bailiff, just let me know; and the clerk will arrange for it.

With me today are my case manager, Mr. Dunlap -- Josh Dunlap -- and our extraordinary court reporter, Claudette Mason.

I have instructed Claudette that if she has any trouble hearing any of you, she's to interrupt. So keep your voices up, please, so that she can be sure she gets you on the

record.

Now, with that, Georgia, appearances, please.

MR. PRIMIS: Craig Primis from Kirkland & Ellis for the State of Georgia.

MR. ALLEN: Winn Allen from Kirkland & Ellis for the State of Georgia.

MS. GRANT: Britt Grant, Solicitor General in the Office of the Georgia Attorney General for the State of Georgia.

MR. PRUITT: Andrew Pruitt, Kirkland & Ellis, for the State of Georgia.

SPECIAL MASTER LANCASTER: Mr. Primis, do you want to introduce the other lawyers from your side who are in the audience?

MR. PRIMIS: Certainly, your Honor.

From Kirkland & Ellis I have Sarah Warren and Chris Landau sitting in the front row. And then from the State of Georgia we are honored to have the Attorney General, Sam Olens. We have executive counsel to the Governor, Ryan Teague. We have the head of the Environmental Protection Division, Jud Turner, and a colleague from the Attorney General's Office, John Allen.

SPECIAL MASTER LANCASTER: Thank you.

Florida?

MR. GARRE: Gregory Garre from Latham & Watkins for the State of Florida.

MR. PERRY: Phil Perry from Latham & Watkins for the State of Georgia -- I mean, State of Florida.

MR. WINSOR: Good morning. I'm Allen Winsor from the Florida Attorney General's Office for Florida.

MR. GRAY: I'm Michael Gray for the United States of America from the Department of Justice.

SPECIAL MASTER LANCASTER: Thank you.

Would you like to introduce the other lawyers who are here?

MR. GARRE: Thank you, yes.

Your Honor, Claudia O'Brien from Latham & Watkins, State of Florida; Abid Qureshi from Latham & Watkins, State of Florida; John Cooper, Latham & Watkins, State of Florida. And then back there we have Chris Kise, State of Florida; and Tom Wilmoth.

SPECIAL MASTER LANCASTER: Welcome. Welcome.

Okay. If my memory is correct, we have an hour for each side. And Florida has ceded 20 minutes to the United States.

MR. GARRE: Yes.

SPECIAL MASTER LANCASTER: First, let me commend counsel on the quality of your briefs. They're extraordinary for both parties. I say that without hesitation.

I also suggest to you that not much will be gained by simply repeating what is in the briefs. So I would suggest that we probably won't need an hour, but I have assigned it. And if you want to use it, you can be my guest. So -- but, again, both Josh and I have read thoroughly and, I think, digested what you have given us.

So with that, Mr. Primis?

MR. PRIMIS: Thank you, Special Master Lancaster.

May it please the Court, prior to the argument we distributed to counsel for Georgia and the United States a map which we thought may be useful as a reference during the proceeding.

SPECIAL MASTER LANCASTER: Wonderful.

MR. PRIMIS: May I hand one to you as well?

SPECIAL MASTER LANCASTER: Please. Thank you.

MR. PRIMIS: I have also provided one to Mr. Dunlap.

This map was taken from a Fish & Wildlife Service publication, and we thought it provided a helpful depiction of the region.

With that, your Honor, we appreciate the opportunity to be heard here today on this important issue. The issue before the Court is whether to proceed with an equitable apportionment action where the United States plays a critical role in regulating the flow of water throughout the region, yet, refuses to be enjoined.

The Supreme Court has emphasized that an equitable apportionment action requires a delicate balancing among sovereign interests. The Court has said it requires the consideration of all relevant factors to come to a just and equitable solution. It's a power the Court does not undertake lightly,

and it should only be undertaken in an appropriate case. Because of the significant role the U.S. plays in regulating the water flow in this basin and its refusal to be enjoined, this is not such a case.

The United States has conceded it is a required party. It had to make that concession. Any decree by this Court will have an impact on Corps operations and the Corps' interest in the ACF basin. Those interests are defined by Congress, and they require the Corps to serve numerous federal purposes. The only just and equitable way -- and that's the test the Supreme Court applies -- to redress Florida's alleged harm is to include in that remedy both Georgia and the United States.

And I want to pause for one moment there to be clear. Georgia denies Florida's allegation that Georgia has used more than its fair share of water and that Georgia's water use has caused Florida's alleged harms. And in any equitable apportionment case, Florida has a very high burden to obtain relief. But on this motion, we're taking

their allegations as pled. And if they are to obtain any relief in this case, both the United States and Georgia will have to be included in the solution. It is inconsistent with the very nature of an equitable apportionment remedy and action to completely exclude one of the critical players from the solution at the outset of the case.

The problem then is that the United States is not a party to the case. It can't be enjoined against its will. And it has declared that it will not waive its sovereign immunity. So to avoid this fundamental problem, Florida would have the Court tie its hands and take a key remedy, the most obvious remedy, completely off the table. That remedy is a state line flow of a certain amount of water at specified times when Florida needs it. It's the most obvious way to address Florida's alleged harm, which Florida itself has identified repeatedly as lower flows coming into Apalachicola River during seasonal low flow or drought conditions.

But Florida repudiates that most obvious

form of relief and, instead, seeks to impose a highly prejudicial 1992 cap on Georgia's consumption. Florida does this because it knows that any remedy that requires or contemplates a certain amount of water coming through Woodruff Dam into Florida will require an Order binding the United States. But Florida's approach is completely inconsistent with the fundamental notion of an equitable apportionment. It ignores the basic proposition that in an equitable apportionment case, the Court can and, in fact, must consider all relevant factors to find a just and equitable solution.

In these circumstances, Florida is not seeking an equitable apportionment, at least not as recognized by the Supreme Court. It's trying to gerrymander an outcome to avoid the required party problem. And it does so while ignoring the institutional interests of this Court by excluding a key party who has the levers to help solve any problem that they have identified and by disclaiming the most obvious remedy for its alleged harm. It's Florida, not Georgia, that has created the

grounds for dismissal of its case.

And with that introduction, I would like to turn to the two issues on which this motion turns.

SPECIAL MASTER LANCASTER: Mr. Primis --

MR. PRIMIS: Yes, sir?

SPECIAL MASTER LANCASTER: -- before you do that, what types of relief are available in an equitable apportionment matter?

MR. PRIMIS: Well, the Court sits in equity; and the Court is entitled to find any just and equitable solution considering all relevant factors. That's from Colorado versus New Mexico.

SPECIAL MASTER LANCASTER: So we're not bound then -- the Court is not bound then by Georgia's prayer for -- Florida's prayer for relief?

MR. PRIMIS: Well, Florida's prayer for relief is -- well, the Court should not be bound by Florida's prayer for relief. But Florida's prayer for relief has two elements to it. The first is it seeks an equitable apportionment, which would put all remedies on the table. The second is the notion of

the 1992 cap which, in their briefing, sounds like that's the only thing that they're seeking; and they have repudiated everything else.

Now, if the Court is not going to limit the relief in that way, it's clear that the United States has to be involved in this because any other remedy that has water flowing through the five federal dams up and down the Chattahoochee and that impound the Flint and the Chattahoochee to the south will be affected by the amount of water flowing through and have federal duties that have to be balanced with what Florida is seeking here.

SPECIAL MASTER LANCASTER: How does Rule 54(c) come into play here?

MR. PRIMIS: I'm sorry, your Honor?

SPECIAL MASTER LANCASTER: 54(c), I think -- I don't have my book with me; but I think that 54(c) says that I'm not bound -- the Court -- forgive me, the Court is not bound by the prayer for relief.

MR. PRIMIS: Well, your Honor, if I understand your question correctly, if the

Court is not bound by -- we agree that the Court is not bound by Florida's prayer for relief. The Court -- and that's the problem we have and why we brought this motion because in an equitable apportionment where the Court is going to look at all the relevant factors, all of the evidence, the role of the United States, the impact that these dams and reservoirs play on the flow of water throughout the region and the impact on the Apalachicola River and bay, the Court -- if Florida is able to meet its substantial burden, the Court would then craft an equitable remedy that would use all the levers available in this basin to redress their harm. And the redress has to be tied somehow to the harm.

The harm here is alleged impact on wildlife due to low flows during drought periods. And the United States is central to the management of water under those conditions.

So if Florida is not able to limit the Court's relief -- and we strongly oppose the notion that they are -- then the United

States -- it's even clearer that the United States has to be involved in this case because they're critical to any solution that the Corps may work.

SPECIAL MASTER LANCASTER: Thank you. Sorry to interrupt.

MR. PRIMIS: Oh, no. Please.

So as I noted, the form of relief that's the most obvious is this state line flow which Florida repudiates for tactical reasons.

But the reason that the United States is so central here is not just that it has five dams along the Chattahoochee River, but that it operates those dams, in Florida's words in their complaint, as a unified whole. So water that is impounded at Lake Lanier, north of Atlanta, is used to supplement flows all the way down the river. And the fact that the Corps has to balance all these federal purposes, looking at the water supply as a whole, makes them critical to any solution that results in more water flowing through the final dam, that being the Woodruff Dam at Lake Seminole.

As Florida puts it in its complaint, that dams and reservoirs are managed by the United States as a unified whole to achieve multiple project purposes; whereas, the Government put it in its Fish & Wildlife 2012 biop, the Corps operates the ACF reservoirs as a system, and releases from Woodruff Dam reflect the downstream end result of system-wide operations.

Now, one factor that we do want to emphasize today is that one of the federal purposes -- and I assume the Court is familiar with the various federal purposes, navigation, flood control, fish and wildlife; but one of the federal purposes is water supply. And the 11th Circuit in the tristate litigation in 2011 held that water supply for metropolitan Atlanta is one of the federal purposes mandated by federal law. The quote from that case at 644 F.3d at 1190 is that Congress is focused on the need to ensure that the Atlanta area's water supply serves as strong evidence of the primary role given to water supply in the project. In light of that finding, the 11th Circuit held that the

Army Corps has a statutory obligation as a matter of federal law to address Atlanta's water supply.

So the federal and state involvement here cannot be separated in the way Florida suggests. Under federal law, as we speak, the United States Army Corps of Engineers is evaluating what water supply to give to Atlanta out of Lake Lanier and out of the Chattahoochee River. Florida would have this Court mandate different amounts of water use by Atlanta taking it back to 1992.

Those are conflicting and cannot be separated. The United States Army Corps needs to be involved to determine how much water Atlanta can receive and how much water will flow down the Chattahoochee River ultimately making its way into Florida.

These facts together make the United States a required party under 19(a). The dams and the reservoirs are operated together as an integrated whole to deliver different amounts of water to different parts of the basin at different times of the year.

And I do want to focus on that last

point just for a minute. We're not just talking about the volume of water, but it's also the timing of water. And that's a critical factor here because these dams impound substantial amounts of water, millions of -- millions and millions of gallons of water and millions of acres of storage.

SPECIAL MASTER LANCASTER: Is the Flint River regulated by the Corps?

MR. PRIMIS: The Flint River is unregulated by the Corps with a couple of caveats or asterisks I would put on that. The flows from the Flint River are calculated as part of the Corps' overall management of the dams and reservoirs on the Chattahoochee River, and so it does play a factor. And additional water on the Flint does not necessarily mean additional water to Florida. It may mean additional water that's impounded up north for various federal purposes.

The second point is that the Flint merges with the Chattahoochee at the Florida/ Georgia line. And the river is impounded at that point. It flows into Woodruff Dam and

is impounded at Lake Seminole.

SPECIAL MASTER LANCASTER: Isn't Woodruff a flow-through facility?

MR. PRIMIS: At times of the year it is. But there is a lake -- and you can see it on the map -- Lake Seminole. It doesn't have substantial storage, but it has some storage. And when flows are low or in times of drought, the water there needs to be supplemented by water from the Chattahoochee River. And those flows come either from the Lake Lanier or West Point Lake and flow south. So it is managed as an integrated whole. While you don't have the same dam and reservoir system on the Flint as you do on the Chattahoochee, there is a dam at the end of the Flint; and it's integrated into the entire ACF Basin system.

So the timing issue is critical because, as you look at the complaint from Florida, they do complain about low flows. And they complain in particular about times of drought and seasonal low flows. And that is when the Army Corps' influence in the basin is at its zenith. That's when all that water that is

impounded north of Atlanta and Lake Lanier and by the West Point Dam needs to be released and allowed to flow down to achieve various federal purposes resulting in more flow to Florida.

Given the United States' admission that it's a required party, then the issue that has really been enjoined here is whether in equity and good conscience the case should proceed in the absence of the United States. And Georgia submits that it should be dismissed now for two principal reasons. First, the United States is essential to crafting any meaningful remedy for Florida's alleged harms; and, second, Florida's pleading to keep the United States out of the case creates significant prejudice for Georgia and really undermines the nature of an equitable apportionment action.

With regard to the remedy, I just want to take a quick step back and focus on what Florida will need to prove to obtain any remedy in this case. As the Supreme Court said in Idaho versus Oregon, a state seeking equitable apportionment under our Original

jurisdiction must prove by clear and convincing evidence some real and substantial injury or damage. That's a high burden.

And when we look at the complaint to find out what Florida's grievance is, it's inadequate flows from Georgia through the Woodruff Dam, which is operated by the Army Corps of Engineers. That alone should be enough to require bringing the United States into the remedy. It's the lever that controls what water flows down the Chattahoochee and through Woodruff Dam, and it makes absolutely no sense to exclude them from the outset. To the contrary, if the Corps wants to ensure that Florida gets the water it seeks here, the Corps has to be involved in that solution. And this is not news to Florida or any of the players involved in this.

It's notable that Florida has picked 1992 as the date at which it wants to go back and cap Georgia's use. In 1992 Florida and Georgia entered into a Memorandum of Agreement to engage in a comprehensive study of water use in the region. Florida alleges

that in paragraph 9 of its complaint. What Florida left out of paragraph 9 of its complaint is that the Army Corps was a party to the 1992 Memorandum of Agreement. In other words, the Army Corps was involved in forging the agreement and was a party to the agreement that Florida now just used to justify its cap request.

And then in 1997 as a result of that initial Memorandum of Agreement, Florida and Georgia entered into an ACF Compact, right? And the Corps was, once again, included as a party to that. The Corps sat on the ACF Commission. The United States had input into decision making. It had a -- it was able to veto what was proposed by the three states to that Compact.

So if we ironically look back at the 1992 agreement that Florida bases its relief on, the Army Corps was involved. The Army Corps was involved when there was a Compact. This new approach to exclude the Army Corps is driven solely by the need to avoid this required party problem.

With regard to prejudice, we do want to

underscore how prejudicial what Florida is proposing is to Georgia. Now, if the Court were to determine that Florida's pleading of its relief is not binding and that it is not going to have its hand tied in terms of relief, then the case, as I said, should be dismissed because the United States would clearly be necessary and indispensable.

But just to indulge the argument for a moment, if Florida is allowed to proceed in the fashion it has identified, they are picking a highly prejudicial form of relief to Georgia. This is an equitable apportionment case, and that animates the entire analysis. It informs the Rule 19 analysis. And if we focus on all relevant factors necessary to secure a just and equitable allocation, it's clear that by eliminating the most obvious forms of relief, by eliminating the principal lever to deliver more water --

SPECIAL MASTER LANCASTER: Excuse me.

MR. PRIMIS: Yes?

SPECIAL MASTER LANCASTER: That's why I asked you about Rule 54(c), because I -- as I

read the rule, I am not bound by their prayer for relief. So I'm not bound by the consumption cap.

MR. PRIMIS: I understand, your Honor.

Then if -- all I was trying to underscore was the inconsistency with the notion of an equitable apportionment action to proceed the way they have suggested. But if the Court is not bound, then it brings me back to my principal argument, which is that in these circumstances if the Court is, in fact, going to indulge all potential solutions, we submit the case needs to be dismissed because we cannot proceed without a critical player that is animated by federal purposes, that is involved in both the flow of water into Florida under the Endangered Species Act at certain levels, that is focused on and mandated to look at Atlanta's water supply, all of these issues that are in play in this case, are currently being evaluated and updated and changed by the Army Corps. And we need to have the Army Corps bound and involved in any solution if Florida is able to obtain any redress for its

grievances.

I'll reserve the balance of my time unless the Court has any further questions.

SPECIAL MASTER LANCASTER: No, that's fine. Thank you very much.

MR. PRIMIS: Thank you, your Honor.

MR. GARRE: Thank you, your Honor, and good morning.

SPECIAL MASTER LANCASTER: Good morning.

MR. GARRE: Your Honor, Georgia has not met the heavy burden that it must meet to secure dismissal of this case at the very outset. Much of what you have just heard, No. 1, goes to the merits of the equitable apportionment action that will be tried before this Court after hearing from experts on both sides about the impact of the reduction of Georgia's consumption of water that Florida seeks on the harm that Florida is suffering today and will continue to suffer in the future, the ecological, environmental, and economic harm caused by Georgia's increasing consumption of water upstream. And, secondly, much of what you have just heard is precisely the same

arguments that Georgia made to the Supreme Court just months ago urging the Court not to allow this case to proceed at all.

Now, if I can go to address Georgia's arguments in more depth here, No. 1, let me begin with the remedy. The remedy that Florida is seeking in this case is a -- is an equitable apportionment of the resource, water, that both Florida and Georgia share. They're seeking a cap -- Florida is seeking a cap on Georgia's consumption of water which is going to result in more water flowing into Florida and redressing the harms that Florida complains about. I think that --

SPECIAL MASTER LANCASTER: Let me ask you the same question I asked Mr. Primis. What's your interpretation of Rule 54(c)?

MR. GARRE: Your Honor, I'm going to confess that I have not studied that rule for this hearing; so I don't want to speak definitively on it. But what I would say is this; I think the Court's -- the Supreme Court's decision in Idaho versus Oregon speaks almost directly to the situation of whether -- of how the way in which Florida

has crafted its complaint should bear on the question of whether the action should be dismissed for failure to enjoin the United States. In the Idaho versus Oregon case, your Honor, that dealt with an equitable apportionment action concerning the resource of fish, as opposed to water in this case. And in that case, Idaho, like Florida here, chose not to seek relief with respect to the operation of the dams that the fish had to cross to get from Idaho -- from Oregon to Idaho. Instead, Idaho, like Florida here, sought an equitable apportionment of the resource.

And what the Supreme Court said in denying -- in holding that the Special Master should deny the motion to dismiss for failure to enjoin the United States was, quote -- and this is on page 392 of the decision -- Idaho's narrow complaint is a two-edged sword. It has sidestepped the need to enjoin the United States as a party by seeking only a share of the fish now being caught by nontreaty fishermen in Oregon and Washington, but it now must bear the burden of proving

its case.

And Florida is in the exact same position here. Florida is not seeking any relief whatsoever with respect to the operations of the dams, just like Idaho did not in the Idaho case. Florida is not seeking a minimum flow regime at the Woodruff Dam at the border. It's not seeking any relief asking the Corps to control the dams or pull the levers in any specific way. Florida is seeking a reduction in the consumption of Georgia's -- Georgia's consumption of water.

And that is critical because any water that Georgia has consumed is water that is never going to reach Florida. It's water that is never going to reach the Corps' dams. And the premise of Georgia's case before you today is that the only way that Florida can secure relief is through relief with respect to the operations of the dams. And that's just -- that's just flat wrong.

Intuitively we can all accept -- and I think even Georgia has to acknowledge to some degree -- that any consumption of water by

Georgia is water that will never reach Florida. And then -- and so then one must confront Georgia's argument, well, the water has to flow through the Woodruff Dam before it reaches Florida. Well, that argument fails in a number of different respects.

First, let's take the Flint River, one of the two major waterways at issue before the Court. And the Court can see it on the map before you. The Flint River -- the capping the depletions on the Flint River itself, a river that is entirely unregulated by the Corps, as my friend just acknowledged, in itself could redress Florida's harms. That is to say that the additional water flowing into Florida as a result of depletions -- capping depletions on the Flint River could -- may, in itself, be able to redress Florida's harms. Our experts at trial will address that.

Now, Georgia's response is, well, wait. The water still has to flow through Woodruff. And the answer to that is precisely what your Honor recognized. Woodruff is a pass-through facility. It has, as my friend conceded, not

substantial, not significant storage capacity.

What that means is that water reaching Woodruff is water that is going to go through Woodruff. It's a pass-through facility. Georgia has acknowledged that. The Corps has explained that to the Court.

So then --

SPECIAL MASTER LANCASTER: Is it Florida's position that if I -- on behalf of the Court, after we actually have some evidence in, because we don't at this stage, if I found that a consumption cap was not the proper remedy, that I should dismiss the action?

MR. GARRE: Well, I think what your Honor -- well, No. 1, there are three facets to the relief. I would answer the question one is the equitable apportionment; one is the cap; and the other is the appropriate relief. But I think, ultimately, if you conclude after a trial that caps on consumption will not redress Florida's harm, then Florida will not have proved its case. I think fundamentally that's an issue that

goes to the merits whether Florida has met its burden.

We recognize we have a burden. We're asking for the opportunity to put that case on at a trial.

SPECIAL MASTER LANCASTER: But if I found, after the evidence was in, that a minimum flow requirement made more sense than a consumption cap, would Florida not be happy with that result?

MR. GARRE: Well, your Honor, of course, Florida would be happy with relief that would redress its harm; but I don't want to back away from the complaint that the Court -- Florida has brought to the Court, which is fundamentally a complaint about seeking a reduction of Georgia's consumption.

Now, there is a relationship ultimately between water flowing through the Corps' facilities and the relief that Florida seeks. We have to recognize that. But what this means is not calibrating any specific minimum flow regime which is going to require the Corps to pull the levers in any particular way to let the water pass through. What it

means is more water coming into the system is going to result in greater flows at Woodruff as well as all along the waterways of the Flint and the Chattahoochee. And more water into the system is going to result in fewer days in which the Apalachicola Basin is in the red, the days where the flows are so low -- this is in the summer and fall months where the real harm is being done in the region. And more water in the system is going to reduce the frequency, severity, and duration of that red zone period and, therefore, redress Florida's harms.

That's what our experts are going to show at a trial, your Honor. We're entitled to put on that case.

And, again, much of Georgia's argument before the Court today really goes to the merits of whether Florida can prove that the reduction in consumption that it seeks is going to redress the harms that it's suffering in Florida today and it's going to continue to suffer in the future as Georgia's water consumption, by its own admission, doubles by the year 2040. That's an issue

that goes to the merits.

And we're prepared to meet our burden, your Honor; but that will entail presenting expert testimony to you. That would entail you hearing the evidence and then deciding whether we're entitled to the relief that we seek.

SPECIAL MASTER LANCASTER: But you're not suggesting that I'm bound by your prayer for relief?

MR. GARRE: Well, your Honor, I must confess that the notion that a Court could grant relief that the parties hadn't requested and that the parties specifically and essentially had disavowed, we have made very clear we're not seeking a minimum flow regime operation of the Corps. I think it's a little bit surprising. But we're prepared to prove the case that we have made. I think this Court is not going to be in a position to assess what relief is appropriate until the end of the day.

I think as Rule 19 contemplates, I think ultimately the Court can and should shape the relief in a way that will not interfere with

the Corps operations. It may be that at the end of the case after we have had a trial and we see the evidence from both sides and even input from the United States as amicus that the relief will come into sharper focus; but I don't think any of us are in a position to know precisely what the nature of the case is going to look like after a trial today.

SPECIAL MASTER LANCASTER: And I'm not suggesting that. I'm just pressing you on 54(c), which is perhaps unfair. But take a look at it when you're finished.

MR. GARRE: Your Honor, I will. And I'll be happy to submit a short response to that if your Honor would permit it.

But I think, you know, if your Honor concludes that you have the authority to grant additional relief, then let me submit today that that would provide no basis for dismissing this action and denying Florida an opportunity to prove that it's entitled to the relief that it seeks.

And, again, ultimately I think we can all agree that the -- if Florida proves its case, your Honor would be in a position to

and ought to shape the decree in a way that would avoid impact to the United States. The Corps has come before you in the briefing and has suggested that we would be willing to work with the Corps if we got to that point in shaping a relief that would eliminate the need to impact Corps operation. So I think, you know, ultimately we're not going to be in a position to resolve that until following a trial.

But, today, I think the Court is in the same position that the Supreme Court was, the Special Master was, in the Idaho versus Oregon case. And in that case -- and that was a case where the United States was urging the Supreme Court and the Special Master to actually dismiss for failure to enjoin it because it did operate the eight dams on the Snake River and the Columbia River in the Idaho case. And the Special Master granted that motion. The Supreme Court reversed, concluding that the United States was not an indispensable party in that action because of the way in which Idaho had framed its complaint to seek only an equitable

apportionment.

Now, in this case the United States is here supporting Florida in its position that the United States ultimately is not an indispensable party. I'll tell you that we're not aware of a single case in which the Special Master or, frankly, another Court has held that the United States is an indispensable party over the United States' own position that it is not an indispensable party. And I think that that would be truly an extraordinary conclusion to reach.

We talked a little bit about the Flint River. I would like to emphasize that because it's the -- it's the 500-pound gorilla that Georgia does not want to talk about today. It's one of the two waterways at issue. It in itself may provide Florida the relief that it seeks.

Again, Georgia's response is, No. 1, that the Corps can still impound water at Woodruff. And that fails because Woodruff is a pass-through facility with insignificant storage capacity.

Georgia's other response is that the

more water is coming in through the Flint, then the Corps is going to use more water upstream on the Chattahoochee. And I think most telling on that is the United States' response on page 3 and 19 of its brief where it says that that's speculation, i.e., that the Corps will use additional water coming in from the Flint upstream on the Chattahoochee is, in the United States' words, entirely unfounded.

And, again, that's another reason why Georgia has failed to present a sufficient case today to meet its heavy burden that this case should be dismissed at the very outset.

At a trial, Georgia is entitled to put on a defense that the increased -- that the limits on depletions and consumption that Florida seeks on the Flint, which is where uses are fundamentally irrigation; and those irrigation uses are at their heart in the summer months leading into the red zone period that we have talked about. Georgia is entitled to put on a defense and say that limiting its increasing consumption of water is not going to redress Florida's harm, which

is tied directly to the decrease in water flowing into this ecological treasure, the Apalachicola Basin. Georgia could put on that defense, but that's a defense for trial. It goes to the merits of whether or not Florida has made its case that Georgia's increasing consumption has caused the injury that Florida has complained about. It's not a basis for this Court to dismiss this action at the very outset.

Georgia -- my friend from Georgia referred to the master manual, which is being subject to revision. Of course, that was the essence of the United States' suggestion to the Supreme Court a few months ago that this case should not proceed. The Supreme Court overlooked that and this Court should, too.

Fundamentally, nothing that the Corps says in the master manual is going to impact Georgia's consumption of water in the first place. And the reason that is is that, as the United States and even Georgia concedes, the United States does not own the water in the Chattahoochee or the Flint. It does not appropriate the water. It doesn't have the

authority to apportion the water.

And in that respect, this case is fundamentally unlike Arizona versus Colorado, the principal Supreme Court case that Georgia relies upon. In Arizona versus Colorado, that dealt with the fight over water in the Colorado River Basin. All of the water in that basin was appropriated to federal uses. And that meant, as the Supreme Court said in its decision in that case, that it was impossible for the Court to grant relief in that case without involving the Corps because any new apportionment of the water in the Colorado River Basin necessarily was going to require the Corps to rejigger the contracts appropriating the use of that water. And that's why this case is fundamentally different from Arizona versus Colorado. The Corps does not own, does not apportion -- have the authority to apportion the water in the Chattahoochee, much less the Flint River.

And so this Court can grant the relief that Florida seeks of capping Georgia's consumption of water without involving the Corps in any way.

I think I would conclude, your Honor, just by stressing the harms that Florida faces and the reason why Florida brought this action. There was much litigation that preceded this case, administrative litigation against the Corps and involving other parties in which Florida was complaining about similar harms, but was told time and again the real complaint, what you really need to be seeking is an equitable apportionment of the water. And the way to get that and the only way to get that is go to the Supreme Court, file an Original action; and that's where you should seek your relief.

And when it comes to equity and good conscience and whether this action should proceed, I really think it would be the height of inequity to permit Georgia to do as it has done thus far is to complain in the other administrative actions that the place Florida should go to get relief is an equitable apportionment action with the Supreme Court, and then come to find out that the Supreme Court correctly allows this action to proceed only to have Georgia say

that Florida's real relief and secure relief is in an administrative action challenging particular actions of the Corps or other federal entities.

That's not what this case is about, your Honor. This case is about an equitable apportionment of the resource. It's about Florida's attempt to save the economy, ecology, and environment of a treasured region, not only in Florida, of this country.

The Supreme Court allowed this action to proceed. Georgia has provided no basis for this Court to conclude that it's met its admittedly high burden of establishing that the action should be dismissed at the very outset before Florida has had an opportunity to prove its case.

Thank you, your Honor.

SPECIAL MASTER LANCASTER: Thank you very much.

The United States?

MR. GRAY: Good morning, your Honor.

SPECIAL MASTER LANCASTER: Good morning.

MR. GRAY: May it please the Court, it's our position that Georgia's motion to dismiss

for failure to enjoin the United States should be denied because while the United States is a required party, it remains possible that the Court would be able to provide adequate relief to Florida while shaping the judgment so as not to prejudice the interests of the United States.

I think I'll start with the question of whether you are bound by the complaint and the relief that the complaint seeks. And I think that you are not bound and that the complaint itself seeks broader relief than just the consumption cap. I think that's why the United States is a required party here. But I don't think that that means that the case ought to be dismissed.

What you are constrained by is Rule 19 and a failure to enjoin the United States. And the relief of a -- of a minimum flow requirement, as we have described, may have a power to impede the United States' interest in the basin as a practical matter. So I do not think under Rule 19 that relief would be available.

And Rule 19 is a flexible doctrine. And

the Courts have gone to great lengths to provide relief without dismissing a case that would impair a nonparty's interest even to the extent of, for example, revising judgments after they have been entered and it becomes clear that -- that the judgment would prejudice a nonparty's interest.

So I think you take the flexibility inherent in Rule 19 and the flexibility that is inherent in an equitable apportionment action, and you combine the two with what Florida says in its papers that it's seeking, which is a consumption cap, and the case begins to look a lot like the Idaho V. Oregon case.

And I do think that most of the objections that Georgia has made at this point really do go to the merits. And the last passage of the Idaho V. Oregon case quoted by Mr. Garre is the correct way to look at this. Florida is entitled to file a complaint that seeks narrow relief; but it's a double-edged sword, as the Court said, because it makes the case harder to prove. And in Idaho V. Oregon, Idaho wasn't able to

prove its case.

But I do think that our position is that those considerations go to the merits of the case and not to dismissal at this point in time.

SPECIAL MASTER LANCASTER: Can complete relief be afforded to Florida absent the U.S.?

MR. GRAY: I believe so. I think it's probably so because the relief that they seek is directed against Georgia. They seek no relief against the United States. They do not try to enjoin the United States to operate in any way. And so I believe that if Florida is able to prove its case that it is harmed by Georgia's consumption and that a cap on Georgia's consumption will remedy the harm, then it will have complete relief vis-a-vis Georgia.

Now, if -- Georgia may well be correct that Florida will not be able to prove its case. And at that point, judgment should enter in Georgia's favor just as in the Idaho V. Oregon case. But that's not a reason to prevent the case from going forward

at the outset.

SPECIAL MASTER LANCASTER: Would a consumption cap order avoid prejudice to the United States?

MR. GRAY: We believe so. And we -- and we -- of course, it's hard to know exactly at this point in the proceedings what that Order would look like or how the case might morph between now and when such an Order is issued. And we would use our amicus participation to help advise the Court on whether there is prejudice. But at this point in time, as we said, because it does not seek any action by the Corps or by the United States in any way to implement, we believe that it would not prejudice the United States' interests.

And I'll give -- I do think that its merits -- it is our position that it's a merits question. But by doing it, it would be helpful to give you one example of how a consumption cap might result in more water under some conditions; and that's if you -- if you look at Buford and West Point Dams, they both are flood -- part of their purposes is flood control. And you maintain flood

control purpose by maintaining empty space on the reservoir. So at Buford, they maintain the reservoir during the winter at 1,070 feet of elevation; and at West Point, I believe it's 628 feet of elevation. And they maintain that lake level, and they release water that comes in above that level. So if -- if the -- if the top of the conservation pool is being held at that level to preserve the flood storage space and a consumption cap causes the water inflows to increase, that water is going to be released by the Corps.

And I think that's just one example, in addition to the Flint, which has been discussed greatly, about how it might work.

And so at this point in the proceedings, we do not think that it would be impossible for Florida to prove its case. But as the Court said in the Idaho case, it's chosen to go narrowly; and I think it will have to live with that choice.

If there is nothing else, I think that's all for the United States.

SPECIAL MASTER LANCASTER: Thank you

very much.

MR. GRAY: Thank you.

SPECIAL MASTER LANCASTER: Mr. Primis?

MR. PRIMIS: Thank you, Special Master Lancaster.

I heard Mr. Garre to say that Florida is not seeking a flow; it's just seeking a reduction in consumption by Georgia. But there is no such thing as a cap cause of action under the Supreme Court's doctrine. It's an Equitable Apportionment Doctrine. And if we go back to the first principles of equitable apportionment and look at how it has unfolded over the years, it's clear that the Court is not to be limited. The Court is to look at all of the evidence. It's to have before it all the players who are going to play a role in solving the problem if the burden can be met. And Florida confirmed here today that that's not what they're seeking. They're not seeking an equitable apportionment as it's known to the Supreme Court. And we don't need evidence to know that the full panoply of relief is not before the Court if we proceed along the lines that

Florida and the Army Corps are suggesting without the Corps as a party.

I did want to respond to the point that this has already been argued to the Supreme Court and resolved by the Supreme Court. Not so. The issue of whether the United States is a required party has never been briefed to the United States Supreme Court; and none of the prior briefing ever addressed whether -- addressed the situation where the U.S. invoked sovereign immunity and refuses to be bound. So that issue is squarely before the Court, never before briefed or resolved.

And if the U.S. would just join the case and agree to be bound, we wouldn't have these fundamental problems. We wouldn't have Florida struggling to create a case where they gerrymander relief that seems counterintuitive. We wouldn't have the United States taking the very odd position that the case may or may not be able to just proceed, and they will just wait and see and come back and tell you later. That's not the way that this is supposed to work, and it's not the way that an equitable apportionment

action should be -- should proceed.

With regard to the cases cited, I would just simply note that in Idaho versus Oregon, it could not be a more different situation. The United States didn't have any federal purposes in impounding and storing fish. They didn't need to release fish strategically at certain times of the year to ensure that people got fish. That's the situation we have in the basin in Georgia and Florida.

And while it's true that the United States doesn't own the water, the United States and Georgia and Florida and the ACF Basin has mandated federal statutory responsibilities that don't give them discretion -- they have no discretion to ignore it. They might have some discretion as to how they employ it, but they don't have the discretion to ignore it. So in a fundamental sense, the case is much more similar to the Arizona versus California doctrine.

Just a few more points. The consumption cap that they have said that they want, it

does at some point need to be tied to the alleged harm, which is the flow of water across the state line and its effect on the wildlife in Apalachicola Bay. But in drought times, which are alleged throughout the complaint, significant federal statutory purposes kick in. And those don't have any direct relationship to Florida. And we know that under the existing manual, which admittedly is under review, that in times of drought, Florida gets a specified amount of water and no more. And if Florida wants more in this case, it needs the Army Corps to release it in times of drought. We know that.

With regard to the United States' view and their position that the case can proceed without them, we don't believe that's entitled to great weight because the United States has an interest in avoiding this litigation. We can understand that. But they don't have any interest in the prejudice that this would cause to Georgia if we proceed along these lines. And I don't think they're adequately taking into account the

institutional interest of the United States Supreme Court which is being told to proceed on a case, and the executive branch will just come in later and pull the plug or ask to have the plug pulled if it becomes inconvenient for them.

When the Court asked if the United States could get complete relief, I noticed that Mr. Gray hesitated. If they could get complete relief without the United States, he hesitated and closed his statements by saying we do not think it would be impossible for Florida to get that relief. Well, that's not, we submit, the question in an equitable apportionment action, which is to take the most prejudicial form of relief, a gerrymandered case, and then wait and see if it's possible to achieve that. That's not the purpose of what we're doing here.

In conclusion, while Georgia believes that it wins under Rule 19, I would just underscore that Rule 19 is only a guide in an Original action case. I know the Special Master is well aware of that. And we submit that the Rule 19 factors should be evaluated

in the context of the Court's broader Equitable Apportionment Doctrine of jurisprudence. And we believe that when the Court does that, it's clear that the Court should not have its hands tied; and Georgia should not have to labor under the threat of a prejudicial form of relief all to avoid a required party problem.

Unless the Court has any questions of Florida -- Georgia, Georgia is complete.

SPECIAL MASTER LANCASTER: Thank you.

We're going to take a 10-minute recess to allow counsel to confer among themselves to see if you have anything that you want to add to what we have discussed at this point. Then we'll come back in. And if not, we're done.

Thank you.

(A short recess was taken.)

SPECIAL MASTER LANCASTER: Please be seated.

Mr. Primis?

MR. PRIMIS: Yes. Thank you, your Honor. Just two quick points.

We did have a chance to go back and look

at Rule 54(c). And we just want to underscore that 54(c) is exactly our argument is that the Court is not bound -- whether it rules -- uses 54(c) as a guide or whether it looks to the Equitable Apportionment Doctrine, the Court cannot be bound by this prejudicial cap in form of relief that Florida seeks. And once we're out of that regime, it's unambiguously clear that the United States has to be enjoined.

Second, one thing that the United States said we wanted to comment on that we may be able to get through this case without prejudice to the United States; and that may not be impossible. But I want to focus on this prejudice point. Neither Rule 19 nor the Court's Equitable Apportionment Doctrine looks solely at the prejudice to the absent party. And I do want to underscore -- we talked about this in my opening statements; but I left it somewhat quickly. The prejudice to Georgia here is significant of going the way Florida has suggested and also fundamentally the interest of the Supreme Court in having available to it all the forms

of relief in an equitable apportionment action. There is significant prejudice to the Court in a case of this type to proceed as the United States is suggesting.

Thank you, your Honor.

SPECIAL MASTER LANCASTER: Before you sit down --

MR. PRIMIS: Yes, sir?

SPECIAL MASTER LANCASTER: -- at this stage of the proceeding where I have no evidence in front of me, what evidence do I have of the prejudice that you're suggesting?

MR. PRIMIS: Well, we know -- what the Court does have before it is the statutory mandates to the U.S. Army Corps of Engineers. It has the 11th Circuit decision. We have submitted the scoping report, which is properly before the Court. So it's not like there is an absence of information.

And what we do know and what is nonspeculative is the role that the Army Corps can play in providing more water at critical times throughout the entire region. That's known and it's a fact. And the other known fact is that by excluding them, we take

that possibility off the table entirely. You don't need to speculate or take evidence on that. The Army Corps will not be bound by whatever this Court does if they're not a party.

SPECIAL MASTER LANCASTER: Thank you.

MR. PRIMIS: Thank you, your Honor.

MR. GARRE: Thank you, your Honor. Just a few brief things.

First, with respect to the question of whether or not a cap on consumption is appropriate in an equitable apportionment action, I point you to page 11 of the United States brief where the United States said, quote, an equitable apportionment undoubtedly can take the form of a limitation on water consumption by an upstream state, end quote, citing the Colorado River Compact.

Second, the notion that Florida's complaint is somehow jerry-rigged I think is fundamentally false. A cap on consumption is precisely the relief that Florida needs in order to save this region. And that's why it's the relief that it's seeking. And, frankly, if Georgia's consumption of water,

which, again, by Georgia's own estimate is expected to double by the year 2040 -- if the consumption of that water is not capped, then there is no reason at all to tinker with the flow regimes at the border. There is going to be very little water in the basin at all.

So that's the reason why Florida is seeking a cap on consumption. It makes perfect sense because no one can do anything with the water that Georgia consumes before it reaches the Corps' dams and before it reaches Florida. So the relief that it's seeking is not jerry-rigged; it makes perfect sense. And Florida is entitled to seek that relief in this case.

And then, finally, with respect to the question of prejudice, I think even with the further elaboration that my friend has provided, there is no concrete evidence that Florida will be prejudiced. One can certainly understand why Florida would not want caps on its consumption; but the notion that Florida -- that Georgia would be prejudiced by a proceeding in which Florida is seeking an opportunity to prove that it is

entitled to caps on consumptions, that's not prejudice that entitles this Court to dismiss this case at the outset.

This Court can grant complete relief without involving the United States. And that's because Florida is not seeking any relief against the United States. It's not seeking any particular flow regime. This Court can grant the relief without the Corps. Any added flexibility that Rule 54(c) gives to this Court is flexibility that this Court should take into account after it's heard all the evidence, after Florida has an opportunity to present its case and both sides have had experts raising the issue as to the amount of water Georgia is increasingly using beyond its fair share of the waters at issue.

Thank you, your Honor.

SPECIAL MASTER LANCASTER: Thank you.

MR. GRAY: Unless the Court has questions for the United States, we're happy to rest on what we said.

SPECIAL MASTER LANCASTER: Thank you.

Counsel, thank you very much for your

excellent and abbreviated arguments. As you can appreciate, I will turn to this promptly and get you a decision just as soon as I can. In the meantime, I suggest that you proceed as if the motion is not granted so that we don't have any additional delays.

The quality of the briefing and the quality of the argument has been extraordinary, and I mean that sincerely. And it will be very helpful to us.

You will not be surprised that as I finish up, I urge you, again, to try to settle this matter. I assume we have some media in the room, and so we won't get into a discussion on that; but whatever the result is, whatever the Court does with this case after I make my report, we're talking a lot of money and a result that I suggest neither one of you may be very happy with. So, again, and again, and again, I'm going to urge you to discuss settlement seriously.

Thank you very much. We are adjourned.

MR. PRIMIS: Thank you.

MR. GARRE: Thank you.

(Oral arguments concluded at 10:37 a.m.)

CERTIFICATE

I, Claudette G. Mason, a Notary Public in and for the State of Maine, hereby certify that the foregoing pages are a correct transcript of my stenographic notes of the Proceedings.

I further certify that I am a disinterested person in the event or outcome of the above-named cause of action.

IN WITNESS WHEREOF, I subscribe my hand this 8th day of June, 2015.

/s/ Claudette G. Mason
Claudette G. Mason, RMR, CRR
Court Reporter

My Commission Expires
June 9, 2019.

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