No. 142, Original

In the Supreme Court of the United States

STATE OF FLORIDA, PLAINTIFF

v.

STATE OF GEORGIA

ON MOTION FOR LEAVE TO FILE A COMPLAINT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is filed in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the Court should deny Florida leave to file its complaint without prejudice to refiling after the United States Army Corps of Engineers (Corps) has issued a revised Master Water Control Manual (Master Manual) for the Apalachicola-Chattahoochee-Flint River Basin (ACF Basin). In the alternative, the Court should grant Florida leave to file, but stay or provide for tailoring of any further proceedings until the Corps has issued the revised Master Manual.

STATEMENT

A. The Apalachicola-Chattahoochee-Flint River Basin

The Chattahoochee River originates in north Georgia, flows southwest past Atlanta, and then flows south along Georgia's border, first with Alabama, then with Florida. At Georgia's southwest corner, the

Chattahoochee joins the Flint River, which originates south of Atlanta and flows through central Georgia. The Chattahoochee and the Flint join to form the Apalachicola River, which flows south through northwest Florida and into the Apalachicola Bay in the Gulf of Mexico. See Br. in Opp. App. 1a (map). The ACF Basin drains 19,800 square miles in central and west Georgia, southeast Alabama, and northwest Florida. About 74% of the Basin lies in Georgia, 15% in Alabama, and 11% in Florida. United States Army Corps of Eng'rs, *Final Updated Scoping Report, Environmental Impact Statement, Update of the Water Control Manual for the Apalachicola-Chattahoochee-Flint (ACF) River Basin, in Alabama, Florida, and Georgia* 2 (Mar. 2013) (*Scoping Report*).

B. Federal Projects in the ACF Basin

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

Flood Control Act of 1962, Pub. L. No. 87-874, § 203, 76 Stat. 1180, 1182.

Pursuant to those congressional authorizations, the Corps currently operates five federal dams in the ACF Basin. Four are in Georgia, each located on the Chattahoochee. See *Scoping Report* 4. The northernmost dam is Buford Dam, which is north of Atlanta and forms Lake Sidney Lanier. *Id.* at 5. Next is West Point Dam, followed by Walter F. George Dam and then George W. Andrews Dam, each of which is located on the stretch of the Chattahoochee that runs along the Georgia-Alabama border. *Id.* at 6-8; *id.* at 3 (map). The southernmost dam is the Jim Woodruff Dam in Florida, immediately below the confluence of the Chattahoochee and the Flint. *Id.* at 8. The flows of those rivers are impounded by Woodruff Dam and stored in its reservoir, Lake Seminole. *Ibid.* Water released from Woodruff Dam flows south into the Apalachicola. *Id.* at 3 (map).

The Corps operates the system of dams in the ACF Basin pursuant to a Master Manual governing all the dams and separate reservoir regulation manuals for each individual dam. The current Master Manual was completed in 1958, before construction of the West Point, Walter F. George, and George W. Andrews Dams. *Scoping Report* 17, 138. The Master Manual has not been comprehensively revised since then, due in recent years to restrictions resulting from litigation involving the Corps' operations. *Id.* at 13-17.

C. Past Litigation

1. In 1989, the Corps completed a draft Post-Authorization Change Notification Report (PAC report) that recommended a reallocation of some storage in Lake Lanier to water supply purposes in Geor-

gia. See *In re MDL 1824 Tri-State Water Rights Litig.*, 644 F.3d 1160, 1173 (11th Cir. 2011) (per curiam) (*Tri-State*), cert. denied, 133 S. Ct. 25 (2012). The draft PAC report included as an appendix a draft updated Master Manual for the federal projects in the ACF Basin. *Ibid.* The reallocated storage for water supply would have been utilized both by allowing withdrawals directly from Lake Lanier and by releasing water from Buford Dam for withdrawal from the Chattahoochee downstream. *Ibid.* The Corps had previously furnished some water supply through interim contracts with water supply providers. Most of those contracts expired by 1990, but the Corps continued to allow localities to receive water through the Buford Project. *Ibid.*

a. In 1990, Alabama filed suit to enjoin the Corps from carrying out the draft PAC report's recommendations. *Alabama* v. *United States Army Corps of Eng'rs*, No. 90-V-1331 (N.D. Ala. filed June 28, 1990) (*Alabama*); see also *Tri-State*, 644 F.3d at 1174 (summarizing litigation history). Florida and Georgia intervened, and the parties agreed to stay the litigation. *Ibid.* In 1992, the parties signed a Memorandum of Agreement (MOA) that provided for a comprehensive study of water issues in the ACF Basin and for the Corps to withdraw the draft PAC report. *Ibid.* The MOA contained a "live-and-let-live" provision that allowed the States to withdraw water from the ACF Basin for water supply and to make reasonable increases in those withdrawals, but the parties agreed that the MOA "shall [not] be construed as changing the status quo as to the Army's authorization of water withdrawals." *In re Tri-State Water Rights Litig.*, 07-

MD-00001 Docket entry No. 106, at ACF19320-ACF19321 (M.D. Fla. Apr. 14, 2008).

In 1997, after the study was completed, the parties replaced the MOA with the Apalachicola-Chattahoochee-Flint River Basin Compact (ACF Compact), to which Congress consented. See ACF Compact, Pub. L. No. 105-104, 111 Stat. 2219-2232. The Compact created a framework for negotiating an equitable allocation of water among the three States, Art. VII, 111 Stat. 2222-2224, and it contained a live-and-let-live provision that allowed for the continued withdrawal, diversion, or consumption of water of the ACF Basin, with reasonable increases, without giving any State a permanent right to the amount of water used between January 3, 1992 (the date of the MOA) and the date on which the States agreed to an allocation formula, Art. VII(c), 111 Stat. 2223-2224. The ACF Compact was set to expire on December 31, 1998, Art. VIII(a)(3), 111 Stat. 2224, but it was extended several times and remained in place until August 31, 2003, see *Tri-State*, 644 F.3d at 1175. The *Alabama* case remained stayed while the ACF Compact was in effect. *Ibid.*

b. Throughout that period, the Corps continued to operate the Buford Project to provide for water-supply withdrawals in Georgia without formal contracts with water-supply providers. *Tri-State*, 644 F.3d at 1175. In 2000, Georgia submitted a formal request to the Corps to reallocate storage in Lake Lanier to water supply to meet Georgia's needs through 2030. *Id.* at 1176. Georgia then filed suit seeking to compel the Corps to grant its request. See *Georgia* v. *United States Army Corps of Eng'rs*, No. 01-CV-00026 (N.D. Ga. filed Feb. 7, 2001) (*Georgia*).

The Corps later determined that, by operation of the Water Supply Act of 1958, 43 U.S.C. 390b, it lacked authority to accommodate Georgia's request without congressional approval. *Tri-State*, 644 F.3d at 1176. That Act authorizes the Corps to allocate storage "in any reservoir or project" for water supply to meet "present or anticipated future demand," provided that the beneficiary States or localities pay for the storage. 43 U.S.C. 390b(b). An exception, however, specifies that a "[m]odification[]" of an existing project "to include storage" for water supply requires congressional approval if the modification "would seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or * * * would involve major structural or operational changes." 43 U.S.C. 390b(d). The *Georgia* case was abated pending resolution of the *Alabama* case. *Tri-State*, 644 F.3d at 1176.

c. Meanwhile, the Southeastern Federal Power Customers (SeFPC), a group that buys electric power generated at Buford Dam, concluded that it was paying too much for that power because water-supply providers in Georgia were drawing on water from the Buford Project without paying enough to offset the loss in hydropower generation. *Tri-State*, 644 F.3d at 1175. In December 2000, SeFPC filed suit in the District of Columbia seeking to compel the Corps either to end the alleged overuse of storage for water supply, or to compensate SeFPC for the loss of hydropower value. See *Southern Fed. Power Customers, Inc.* v. *Caldera*, 301 F. Supp. 2d 26, 30 (2004) (*SeFPC*). The Corps, SeFPC, Georgia, and the water supply providers settled the case. *Ibid.* But on appeal by Alabama and Florida, which had intervened, the D.C. Circuit

concluded that the settlement violated the Water Supply Act of 1958 because it amounted to a reallocation of storage that would involve a major operational change and thus required congressional approval. *Southeastern Fed. Power Customers, Inc.* v. *Geren*, 514 F.3d 1316, 1325 (2008), cert. denied, 555 U.S. 1097 (2009); see 43 U.S.C. 390b(d).

2. a. After the *SeFPC* case was remanded to district court, the Judicial Panel on Multidistrict Litigation transferred it, along with the *Alabama* and *Georgia* cases, to the Middle District of Florida for consolidated proceedings. See *In re Tri-State Water Rights Litig.*, 481 F. Supp. 2d 1351 (J.P.M.L. 2007); *Southeastern Fed.* v. *Caldera*, 00-CV-02975 Docket entry No. 223 (D.D.C. Aug. 11, 2008) (transfer order). In those proceedings, the parties filed cross-motions for summary judgment addressing the Corps' authority to operate the Buford Project. *Tri-State*, 644 F.3d at 1177. The district court held that the Corps' interim operations, allowing releases from Lake Lanier for water supply purposes, constituted a "de facto" reallocation of storage in the reservoir to water supply that constituted a "major operational change" under the Water Supply Act of 1958 and thus required congressional approval. *In re Tri-State Water Rights Litig.*, 639 F. Supp. 2d 1308, 1347-1350 (M.D. Fla. 2009). The court also held that the Corps necessarily had correctly denied Georgia's much larger storage request. *Id.* at 1352.

b. The Eleventh Circuit reversed. *Tri-State*, 644 F.3d at 1160-1205. It concluded that the district court lacked jurisdiction over the claims by Alabama and SeFPC challenging the Corps' operation of the Buford Project because they did not challenge final agency

action by the Corps as required by the Administrative Procedure Act, 5 U.S.C. 704. *Tri-State*, 644 F.3d at 1181-1185. With respect to Georgia's reallocation request, the court held that Congress, in the 1946 Act, had unambiguously provided that the Buford Project would be operated to accommodate downstream water supply demands and therefore allowed an allocation of storage in Lake Lanier for that purpose. *Id.* at 1186-1192. The court declined, however, to define the precise scope of the Corps' authority under the 1946 and 1958 Acts to accommodate Georgia's request for water supply storage. *Id.* at 1196-1197. This Court denied certiorari. 133 S. Ct. 25 (2012).

c. In its decision, the Eleventh Circuit directed the district court to remand to the Corps to reconsider Georgia's water supply storage request. *Tri-State*, 644 F.3d at 1196-1197. The court gave the Corps one year (until June 2012) to arrive at a "well-reasoned, definitive, and final judgment as to its authority" to reallocate storage in Lake Lanier to water supply. *Id.* at 1205. The Corps discharged that obligation on June 25, 2012, concluding that it has sufficient statutory authority to meet Georgia's water supply request. See U.S. Army Corps of Eng'rs, Dep't of the Army, *Memorandum for the Chief of Eng'rs* 2, 47-48, http://www.sam.usace.army.mil/Portals/46/docs/planning_environmental/acf/docs/2012ACF_legalopinion.pdf. But the Corps did not decide to what extent it would allocate storage to water supply when balancing that demand against hydropower generation, navigation, and other authorized purposes. *Ibid.*

D. The Ongoing Effort to Update the Master Manual

Although the Corps' 1989 PAC report was withdrawn in 1992 pursuant to the MOA, the Corps has

conducted its operations in the ACF Basin in accordance with the draft updated Master Manual appended to the PAC report, with some modifications. See *Scoping Report* 13, 18-19; pp. 3-4, *supra*. The Corps began the Master Manual update process again in 2008, 73 Fed. Reg. 9780 (Feb. 22, 2008), but the Corps had to revise the scope of that process in 2009 to account for the district court's ruling in the multidistrict proceedings that the Corps lacked authority to provide water supply from Lake Lanier, 74 Fed. Reg. 59,966 (Nov. 19, 2009). After the Eleventh Circuit reversed that decision, the Corps again revised the scope of its proposed Master Manual update. 77 Fed. Reg. 62,224 (Oct. 12, 2012).

In March 2013, as part of its analysis under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, the Corps released a final scoping report for its update of the Master Manual, which summarizes public comments on the update process and describes the Corps' process for moving forward. *Scoping Report* 29-139. The update process, which is ongoing, will include a determination of whether and to what extent storage in Lake Lanier will be used to accommodate the present and future water supply needs of the Atlanta metropolitan area. *Id.* at 139. The update will also set the minimum flow rates required at Woodruff Dam to meet federal project purposes and the requirements of the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* The Corps expects to release a draft Master Manual and an environmental impact statement in September 2015, and it expects final approval and implementation of the Master Manual in March 2017. See U.S. Army Corps of Eng'rs, *ACF Master Water Control Manual Update*,

http://www.sam.usace.army.mil/Missions/PlanningEnvironmental/ACFMasterWaterControlManualUpdate.aspx (last visited Sept. 17, 2014).

E. The Current Controversy

1. Florida has sought leave to file this original action to obtain an equitable apportionment of the waters of the ACF Basin. Compl. para. 1; see *id.* at 21 (prayer for relief). Florida alleges that the ecosystem and economy of the Apalachicola region "are suffering serious harm" because of Georgia's consumption and storage of water from the Chattahoochee and Flint River Basins "for municipal, industrial, recreational, and agricultural uses." *Id.* para. 5. Florida alleges that "storage, evaporation, and consumption of water" in Georgia have "diminished the amount of water entering Florida in spring and summer of drought years by as much as 3,000-4,000 cubic feet per second," and that, in recent drought conditions, the average flow of the Apalachicola has been less than 5,500 cubic feet per second from late spring through fall, conditions that "were unprecedented before 2000." *Id.* para. 50.

Florida alleges that the depletion of freshwater flows during drought years precipitated a collapse in the oyster industry in Apalachicola Bay because of resultant rising salinity levels. Compl. paras. 6, 43, 54-56. Florida further alleges that reduced flows in the Apalachicola have resulted in the deaths of thousands of threatened and endangered mussels and rendered inaccessible the spawning habitat for the threatened Gulf sturgeon. *Id.* para. 58. Florida maintains that Georgia's consumptive uses are expected to double by 2040, and that the resulting reduction in freshwater flowing into the Apalachicola River will

jeopardize the "ecology, economy, and way of life" in the Apalachicola region. *Id.* paras. 7, 45, 59.

Florida acknowledges that the Corps controls releases into the Apalachicola from Woodruff Dam, but it contends that "[t]he Corps determines how much water to release from its reservoirs based, in part, upon calculated inflows to the ACF Basin." Compl. para. 23. Florida alleges that as Georgia's storage and use of water cause inflows in the Basin to decline, "less water reaches Florida due to both the hydrologic depletions and the Corps' operational protocols." *Ibid.*

Based on these harms, Florida asks the Court to equitably apportion the waters of the ACF Basin. Compl. para. 1; see *id.* at 21. Florida alleges that it has exhausted all other reasonable means to negotiate an equitable apportionment. *Id.* paras. 9-12.

Florida further alleges that all of Georgia's increases in municipal and industrial water consumption after 1992 were subject to the live-and-let-live provisions of the MOA and the ACF Compact, and that Georgia therefore has no vested rights in those increases. Compl. paras. 10-11. Accordingly, Florida also requests that the Court enter an order "capping Georgia's overall depletive water uses at the level then existing on January 3, 1992." *Id.* at 21.

2. Georgia contends that Florida's complaint is premature because Florida's alleged injury stems from inadequate flows from Woodruff Dam at the Florida state line, and the Corps is currently engaged in a process that will determine what those flows will be going forward. Br. in Opp. 17-25. Georgia further contends that, "[u]ntil the Corps' proceedings are completed, neither the parties nor the Court will know

whether the flow rate the Corps sets at the Georgia-Florida border injures Florida," or whether Florida would claim any separate injury caused by Georgia. *Id.* at 21. Georgia maintains that the Corps' process for examining and implementing the statutory purposes of the federal projects in the ACF Basin should "legally and logically" take precedence over an original action applying the federal common law of equitable apportionment, which serves only "to fill the interstices of federal statutory law." *Id.* at 23-25.

Georgia further contends that Florida has not alleged sufficient injury to warrant this Court's exercise of its original jurisdiction. Br. in Opp. 25-31. Georgia challenges Florida's allegations that Georgia's consumption of water significantly diminishes the flow of the Apalachicola, because Georgia states that it returns to the Chattahoochee 70% of the water it withdraws. *Id.* at 26. Georgia further contends that even if its consumption reduces flows in the Apalachicola as Florida alleges, Florida has not demonstrated that those reduced flows have caused any significant harm. *Id.* at 28-31. Georgia maintains that causes other than low flow in the Apalachicola, like drought and overharvesting, caused any harm suffered by the Apalachicola oyster industry. *Id.* at 29-31.

DISCUSSION

Florida has pleaded an interstate water dispute of sufficient importance to warrant this Court's exercise of its original jurisdiction, and no other judicial forum is suitable for resolving the overall controversy. Practical considerations, however, weigh against the Court's resolution of Florida's claims before the Corps has completed its process of updating the Master Manual for the federal projects in the ACF Basin.

The Court accordingly should deny Florida leave to file its complaint without prejudice to refiling after the Corps has issued its revised Master Manual. In the alternative, the Court should grant Florida leave to file, but stay or provide for tailoring of any further proceedings until the Corps has issued the revised Master Manual. The United States recommends the former disposition.

I. FLORIDA'S COMPLAINT ALLEGES A CONTROVERSY SUFFICIENT TO INVOKE THE COURT'S ORIGINAL JURISDICTION

This Court has original and exclusive jurisdiction over a justiciable case or controversy between States. See U.S. Const. Art. III, § 2, Cl. 2; 28 U.S.C. 1251(a). The Court has determined that its exercise of this exclusive jurisdiction is "obligatory only in appropriate cases." *Mississippi* v. *Louisiana,* 506 U.S. 73, 76 (1992) (quoting *Illinois* v. *City of Milwaukee,* 406 U.S. 91, 93 (1972)); see *Nebraska* v. *Wyoming,* 515 U.S. 1, 8 (1995); *Texas* v. *New Mexico,* 462 U.S. 554, 570 (1983). When deciding whether to exercise its exclusive original jurisdiction, the Court examines "the nature of the interest of the complaining State," "focusing on the seriousness and dignity of the claim." *Mississippi* v. *Louisiana,* 506 U.S. at 77 (internal quotation marks and citations omitted). The Court also considers "the availability of an alternative forum in which the issue tendered can be resolved." *Ibid.* In analyzing those considerations, the Court has "substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court for particular disputes within [the Court's] constitutional original jurisdiction." *Texas* v. *New Mexico*, 462 U.S. at 570. Applying those standards, Florida's complaint

presents a controversy of sufficient importance to invoke this Court's original jurisdiction.

A. In claiming that Georgia is depriving Florida of its equitable share of the water of an interstate stream, Florida asserts a substantial sovereign interest that falls squarely within the traditional scope of this Court's original jurisdiction. See, *e.g.*, *Montana* v. *Wyoming*, 131 S. Ct. 1765 (2011); *Texas* v. *New Mexico*, 462 U.S. at 567-568; *Arizona* v. *California*, 373 U.S. 546 (1963); *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945); *Wyoming* v. *Colorado*, 298 U.S. 573 (1936); *Kansas* v. *Colorado*, 185 U.S. 125 (1902). The Court has recognized that it has "a serious responsibility to adjudicate cases where there are actual, existing controversies over how interstate streams should be apportioned among States." *Arizona* v. *California*, 373 U.S. at 564.

Florida alleges that Georgia is storing and consuming more than its fair share of the Basin's waters (Compl. paras. 1, 50), that Georgia intends to increase storage and consumption (*id.* paras. 7, 45, 59), and that Georgia's storage and consumption currently harm Florida and will further harm Florida in the future on account of reduced freshwater flows in the Apalachicola (*id.* paras. 7, 45, 54-56, 58-59). Specifically, Florida alleges that Georgia's storage and consumption have contributed to a collapse of Florida's oyster industry and the destruction of thousands of members of threatened and endangered species, which is harming the ecosystem and the economy of the Apalachicola region (*id.* paras. 1, 6-7, 43-45, 54-56, 58), and that those harms will intensify as Georgia's water use increases (*id.* paras. 7, 45, 59).

Those allegations are sufficient to form a properly framed equitable apportionment suit. Allegations that one State is preventing another State from obtaining its equitable share of the waters of an interstate stream present a controversy that is of sufficient "seriousness and dignity," *Mississippi* v. *Louisiana*, 506 U.S. at 77 (quoting *Illinois* v. *City of Milwaukee*, 406 U.S. at 93), to warrant the exercise of this Court's jurisdiction. See, *e.g.*, *South Carolina* v. *North Carolina*, 558 U.S. 256, 259 (2010).

Georgia contends (Br. in Opp. 25-31) that Florida has insufficiently pleaded injury. In the early stages of equitable apportionment proceedings, however, the Court has focused on the *nature* of the injury alleged, not on the likelihood that the complaining State will be able to prove that injury. See *Kansas* v. *Colorado*, 185 U.S. at 145 (overruling demurrer and noting that the Court will not subject an equitable apportionment complaint to "minute criticism" at the pleading stage). Although the Court might take into account in quantifying each State's equitable apportionment that Florida has not established any harm to consumptive uses in Florida (see Br. in Opp. 28), the alleged injuries to Florida's economy and ecology are sufficient to invoke the Court's original jurisdiction. Furthermore, although one result of the proceedings Florida seeks could be that the Court determines Florida has not proved an injury sufficient to warrant an equitable decree at all, see *Idaho* v. *Oregon*, 462 U.S. 1017, 1027 (1983), Florida has sufficiently pleaded an injury at this initial stage. Cf. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (complaint must allege "sufficient factual matter" that, if "accepted as true," would "state a

claim to relief that is plausible on its face") (citation omitted).

Congress has recognized the need for an equitable apportionment of the ACF Basin, first in 1997 when it consented to the ACF Compact, see § 1, 111 Stat. 2219, and more recently in the Water Resources Reform and Development Act of 2014, Pub. L. No. 113-121, § 1051(a), 128 Stat. 1259. The 2014 Act states that the respective Senate and House Committees recognize that "th[e] ongoing water resources dispute" in the ACF Basin "raises serious concerns related to the authority of the [Corps] to allocate substantial storage at projects to provide local water supply pursuant to the Water Supply Act of 1958 absent congressional approval." *Ibid.* The 2014 Act declares that "[i]nterstate water disputes of this nature are * * * properly addressed through interstate water agreements that take into consideration the concerns of all affected States including impacts to other authorized uses of the projects," and that the responsible Committees "strongly urge the Governors of the affected States to reach agreement on an interstate water compact as soon as possible." *Ibid.* The 1997 Compact and the 2014 Act undermine Georgia's contention that Florida's alleged injuries are not substantial enough to warrant equitable apportionment proceedings.

B. There is no alternative forum in which this precise legal dispute can be definitively resolved. No other court, state or federal, can adjudicate an apportionment of waters among States. See U.S. Const. Art. III, § 2, Cl. 2; 28 U.S.C. 1251(a); *Mississippi* v. *Louisiana*, 506 U.S. at 77-78.

The parties could agree to an equitable apportionment through an interstate compact that is approved by Congress, see U.S. Const. Art. I, § 10, Cl. 3, as the States attempted in 1997 and Congress has urged this year. But Florida has detailed the States' unsuccessful efforts to reach such an agreement in the past and asserts that agreement is not possible, Compl. paras. 8-12, and Georgia in its response does not contend that negotiation of an interstate compact is likely to resolve this dispute.

II. THE COURT SHOULD POSTPONE EQUITABLE APPORTIONMENT PROCEEDINGS UNTIL THE CORPS OF ENGINEERS COMPLETES ITS REVISION OF THE MASTER MANUAL FOR THE APALACHICOLA-CHATTAHOOCHEE-FLINT RIVER BASIN

An equitable apportionment of an interstate river basin is not a simple undertaking. The factual issues involved can implicate complex matters of hydrology, geology, engineering, and economics, applied to great expanses of varied terrain and water uses. See *Nebraska* v. *Wyoming*, 325 U.S. at 618. Discovery, trial preparation, and trial concerning those issues is time-consuming and expensive. Although Florida's complaint states a claim that fits squarely within this Court's original jurisdiction, practical considerations counsel against this Court's resolution of Florida's claims before the Corps has completed its process of revising the Master Manual for the ACF Basin.

A. 1. The Corps' manual update process will define flow regimes intended to achieve federal project purposes in accordance with the Corps' statutory responsibilities. Two project purposes are directly implicated by Florida's complaint. For the first time, the revisions to the Master Manual will address re-

leases from Buford Dam to meet the federally authorized purpose of providing water supply to the Atlanta metropolitan area, in accordance with the Eleventh Circuit's decision in *In re MDL-1824 Tri-State Water Rights Litigation*, 644 F.3d 1160, 1186-1193 (2011), cert. denied, 133 S. Ct. 25 (2012). The Corps will determine whether and to what extent to meet Georgia's water supply storage request. *Scoping Report* 139.

In the manual update process, the Corps will also comply with its responsibility under the Endangered Species Act to consult with the Fish and Wildlife Service to evaluate the impact of various flow regimes from Woodruff Dam into the Apalachicola. The Fish and Wildlife Service has previously concluded that the current flow regime at Woodruff Dam—which requires minimum flow releases matching basin inflow when that inflow is between 5,000 and 10,000 cubic feet per second and a minimum flow of 5,000 cubic feet per second during times of drought—will not jeopardize the existence of any threatened or endangered species. *Scoping Report* 9; see Br. in Opp. App. 2a-36a. But as new information is collected in the manual revision process, that minimum flow regime may change.

The 1946 Act also specifies other purposes for the federal projects, such as hydropower generation and facilitating navigation, including naviagation in the Apalachicola River in Florida. The Corps' determination of the amounts of water needed to satisfy the various federal statutory purposes of its projects, including the minimum flow required at Woodruff Dam, should be taken into account in any equitable apportionment between the States.

Furthermore, the Corps' ongoing administrative process involves significant factual development concerning water resources in the ACF Basin, including the modeling and evaluation of the impact of alternate modes of project operation on socioeconomics, water resources, and biological resources throughout the Basin. See *Scoping Report* 139. The Corps' process will thus encompass much of the factual development and assessment that would ordinarily be conducted by a Special Master in equitable apportionment proceedings. See *Nebraska* v. *Wyoming*, 325 U.S. at 618.

To be sure, the United States does not own the water in the ACF Basin and the Corps has no authority to apportion water among States or determine water rights. That is not a part of the manual revision process in which the Corps is engaged, and this Court is thus ultimately the appropriate body to address Florida's pending claims. See Part I, *supra*. But the Corps does implement statutes enacted by Congress to accomplish specified federal purposes on this interstate river system. See *Arizona* v. *California*, 373 U.S. at 565 (equitable apportionment must give way where Congress has "exercised its constitutional power over waters"); *United States* v. *Commodore Park, Inc.*, 324 U.S. 386, 391 (1945) (noting "government's 'absolute' power, in the interests of commerce, to make necessary changes in a stream") (footnote and citation omitted). Permitting the Corps to complete its process for implementing the statutes it administers will provide the Court with relevant information about the hydrology of the Basin and the Corps' view of how the federal projects should be operated to satisfy the various purposes for which they were authorized by Congress. It would be premature, before

the Corps has completed its manual revision process, to decide in the abstract what effect should be given in an equitable apportionment action to the various federal statutory purposes or the Corps' assessment of the appropriate manner in which to balance and accomplish those purposes.

2. Furthermore, the extent of Florida's alleged injury could change after the Master Manual update is complete. The Florida Department of Environmental Protection submitted comments during the Corps' scoping process that addressed Georgia's water supply request and the flow rate at Woodruff Dam. *Scoping Report* 107-112. After modeling the ACF Basin, Florida developed its own proposed reservoir operating regime and presented it to the Corps for consideration. *Id.* at 111. Florida also urged the Corps to evaluate available measures to protect inflow to Florida when considering Georgia's request for water supply storage in Lake Lanier. *Id.* at 112. The Corps is considering Florida's comments as it evaluates multiple alternative operating regimes for the federal projects. If the Corps adopts Florida's proposed flow regime, in whole or in part, then the Master Manual revision could address some or all of Florida's concerns about flows in the Apalachicola.

3. As a practical matter, the Corps has a strong interest in completing its Master Manual revision uninterrupted by continued litigation distractions. Florida insists that it is not seeking relief against the Corps. Compl. para. 15. But if this case proceeds, the United States would need to decide whether intervention would be appropriate to protect the statutory purposes of the federal projects in the ACF Basin, and the United States would at a minimum remain actively

involved in these proceedings as amicus curiae to protect those federal interests. Allowing the Corps to complete its administrative process free from the distractions and restraints that are inherent in active litigation would benefit the Corps, the States, and ultimately this Court.

4. Under the doctrine of primary jurisdiction, a federal court may stay proceedings while an administrative agency addresses a matter "within the special competence of [the] administrative body." *United States* v. *Western Pac. R.R.*, 352 U.S. 59, 64 (1956). That doctrine counsels courts to "refer the initial determination to the regulatory agency where it may benefit from the agency's expertise and insight, and to ensure uniformity." *Williams Pipe Line Co.* v. *Empire Gas Corp.*, 76 F.3d 1491, 1496 (10th Cir. 1996). Similarly, in an action for equitable relief, principles of ripeness counsel postponement of a suit when the matter is not yet suitable for judicial proceedings because, *inter alia*, a federal agency has not yet reached a final decision on a relevant matter. See *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 145-149 (1967). By analogy to the doctrine of primary jurisdiction and drawing on principles of ripeness—and taking into consideration this Court's "substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court," *Texas* v. *New Mexico*, 462 U.S. at 570—a postponement in these equitable apportionment proceedings is warranted. Put another way, this is not yet an "appropriate" case for the exercise of the Court's exclusive original jurisdiction. See *Mississippi* v. *Louisiana*, 506 U.S. at 76.

B. There are several different approaches the Court could take that would account for the practical considerations described above. The Court could (i) deny Florida leave to file its complaint without prejudice to refiling after the Corps has issued the final revised Master Manual for the ACF Basin; (ii) grant Florida leave to file its complaint, but stay any further proceedings until the Corps has issued the revised Master Manual; or (iii) grant Florida leave to file its complaint and refer the complaint to a Special Master with instructions to structure the equitable apportionment proceedings in a manner that minimizes interference with the manual revision process.

As noted above (pp. 9-10, *supra*), the Corps expects to release a draft Master Manual and an environmental impact statement in September 2015, and it expects final approval and implementation of the Master Manual in March 2017. Under the first two approaches outlined above, a postponement of these proceedings could thus be expected to last for less than three years. In the United States' view, there is little practical difference between those first two approaches.

Alternatively, it may be possible to structure equitable apportionment proceedings in a way that avoids or minimizes interference with or duplication of the manual revision process and allows for full consideration of the Corps' revised Master Manual when it is adopted in final form. For example, Georgia has indicated that, if Florida is granted leave to file its complaint, Georgia would seek to file "a prompt motion to dismiss the complaint" on the grounds that Florida's requested relief cannot remedy the harm it has alleged, that the Corps is a required party that has not been joined, and that Florida has not alleged an injury

caused by Georgia that is sufficient to justify the Court's original jurisdiction. See Br. in Opp. 31 n.20. A Special Master could order briefing on this or other pretrial motions, and those motions could be considered in due course while the Corps completes the Master Manual revision.

Furthermore, an equitable apportionment of the waters in the ACF Basin presumably would involve factfinding concerning the Flint as well as the Chattahoochee River. Other than Woodruff Dam, which impounds the flow of the Flint at the Georgia-Florida state line, there are no federal projects on the Flint. Accordingly, if Georgia did not file pretrial motions, or if such motions were resolved before the Corps has finished its administrative process, the parties could conduct discovery on the Flint pending the Corps' completion of the Master Manual revision.

Although commencing equitable apportionment proceedings while the Corps is still in the process of revising the Master Manual would be possible, the United States believes on balance that postponing the proceedings until after the Corps' administrative process is complete would be the preferable course, so that Florida's injuries, and the need for and scope of any equitable decree, can be more fully evaluated in light of the Corps' decisions about project operations in the Basin.

CONCLUSION

The Court should deny Florida leave to file its complaint without prejudice to refiling after the Corps has issued a revised Master Manual for the ACF Basin. In the alternative, the Court should grant Florida leave to file, but stay or provide for tailoring of any

further proceedings until the Corps has issued the revised Master Manual.

Respectfully submitted.

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