

No. 142, Original

---

---

**In the Supreme Court of the United States**

---

STATE OF FLORIDA, PLAINTIFF

*v.*

STATE OF GEORGIA

---

*ON EXCEPTIONS TO THE REPORT  
OF THE SPECIAL MASTER*

---

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN  
SUPPORT OF OVERRULING FLORIDA'S EXCEPTIONS 2(d)  
AND 3(iv) TO THE REPORT OF THE SPECIAL MASTER**

---

JEFFREY B. WALL  
*Acting Solicitor General  
Counsel of Record*

EDWIN S. KNEEDLER  
*Deputy Solicitor General*

ERIC GRANT  
*Deputy Assistant Attorney  
General*

FREDERICK LIU  
*Assistant to the Solicitor  
General*

STEPHEN G. BARTELL

MICHAEL T. GRAY

JAMES J. DUBOIS

*Attorneys*

*Department of Justice  
Washington, D.C. 20530-0001  
SupremeCtBriefs@usdoj.gov  
(202) 514-2217*

---

---

## QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the Special Master erred in concluding that the United States Army Corps of Engineers (Corps) would not allow the additional water generated by a decree to pass through to Florida when needed and would apply its Master Manual without modification (Florida Exception No. 2(d)).

2. Whether the Special Master erred in declining to allow additional evidence, as to circumstances after the 2016 trial, concerning reasonable modifications that could be made to the Corps' Master Manual to accommodate a decree (Florida Exception No. 3(iv)).

**TABLE OF CONTENTS**

	Page
Interest of the United States.....	1
Statement .....	2
A. The Apalachicola-Chattahoochee-Flint River Basin.....	2
B. Prior proceedings and this Court’s decision.....	5
C. Proceedings on remand .....	13
Summary of argument .....	16
Argument.....	16
Conclusion .....	21

**TABLE OF AUTHORITIES**

Case:

*Florida v. Georgia*, 138 S. Ct. 2502 (2018) ..... *passim*

Rule:

Fed. R. Civ. P.:

Rule 19..... 6

Rule 19(b)..... 7

Miscellaneous:

U.S. Army Corps of Eng’rs:

1 *Final Environmental Impact Statement:  
Update of the Water Control Manual for the  
Apalachicola-Chattahoochee-Flint River  
Basin in Alabama, Florida, and Georgia  
and a Water Supply Storage Assessment*  
(Dec. 2016), [https://www.sam.usace.army.mil/  
Portals/46/docs/planning\\_environmental/acf/  
docs/01\\_ACF\\_FEIS\\_Dec%202016\\_Volume%  
201.pdf?ver=2016-12-07-164912-723](https://www.sam.usace.army.mil/Portals/46/docs/planning_environmental/acf/docs/01_ACF_FEIS_Dec%202016_Volume%201.pdf?ver=2016-12-07-164912-723) ..... 3, 4, 5, 10

IV

Miscellaneous—Continued:	Page
<i>Master Water Control Manual, Apalachicola-Chattahoochee-Flint (ACF) River Basin, Alabama, Florida, Georgia</i> (rev. Mar. 2017), <a href="http://www.sam.usace.army.mil/Missions/Planning-Environmental/ACF-Master-Water-Control-Manual-Update/ACF-Document-Library">http://www.sam.usace.army.mil/Missions/Planning-Environmental/ACF-Master-Water-Control-Manual-Update/ACF-Document-Library</a> .....	3, 4, 10

**In the Supreme Court of the United States**

---

No. 142, Original

STATE OF FLORIDA, PLAINTIFF

*v.*

STATE OF GEORGIA

---

*ON EXCEPTIONS TO THE REPORT  
OF THE SPECIAL MASTER*

---

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN  
SUPPORT OF OVERRULING FLORIDA'S EXCEPTIONS 2(d)  
AND 3(iv) TO THE REPORT OF THE SPECIAL MASTER**

---

**INTEREST OF THE UNITED STATES**

This is an original action brought by Florida against Georgia, seeking an equitable apportionment of the waters of the Apalachicola-Chattahoochee-Flint River Basin. The United States Army Corps of Engineers (Corps) operates dams and reservoirs in the Basin for purposes authorized by Congress. The United States has an interest in protecting the Corps' authority to operate those dams and reservoirs for their congressionally authorized purposes and in compliance with other federal requirements. At the Court's invitation, the United States filed a brief as amicus curiae addressing Florida's motion for leave to file a bill of complaint. The United States also filed a brief as amicus curiae in support of overruling one of Florida's exceptions to the 2017 report of the Special Master.

## STATEMENT

**A. The Apalachicola-Chattahoochee-Flint River Basin**

The Apalachicola-Chattahoochee-Flint River Basin consists of three rivers that can be thought of as forming a Y. *Florida v. Georgia*, 138 S. Ct. 2502, 2508 (2018). The Chattahoochee River is the western branch of the Y, starting in northern Georgia and flowing along Georgia's western border, first with Alabama, then with Florida. *Id.* at 2508, 2528. The Flint River is the eastern branch of the Y, starting south of Atlanta and flowing through central Georgia. *Ibid.* The two branches meet at Lake Seminole, at the Georgia-Florida border. *Id.* at 2508-2509, 2528. The Apalachicola River, the stem of the Y, flows southward from Lake Seminole, through the Florida Panhandle and into the Gulf of Mexico. *Id.* at 2509. "There, the fresh water of the Apalachicola River mixes with the Gulf's saltwater, forming Apalachicola Bay." *Ibid.*

The Corps operates several dams and reservoirs along the Chattahoochee River, but none along the Flint. Report of the Special Master 6 (Feb. 14, 2017) (2017 Rep.); see Report of the Special Master 6 (Dec. 11, 2019) (2019 Rep.) (incorporating by reference the description of the Corps' operations set forth in the Special Master's 2017 report). Three of the Corps' reservoirs along the Chattahoochee can store significant amounts of water. 2017 Rep. 6. The Corps also operates Jim Woodruff Dam, at the southern end of Lake Seminole. 138 S. Ct. at 2509. It is through Woodruff Dam that water flows into the Apalachicola River and eventually to Apalachicola Bay. See 2017 Rep. 41-45.

Congress has authorized the Corps to operate its dams and reservoirs in a manner that achieves various

“project purposes.” 2017 Rep. 38. Those purposes include managing flood risk, generating hydroelectric power, facilitating navigation, conserving fish and wildlife, promoting recreation, protecting the water supply, and preserving water quality. See *ibid.*; U.S. Army Corps of Eng’rs, *Master Water Control Manual, Apalachicola-Chattahoochee-Flint (ACF) River Basin, Alabama, Florida, Georgia* 4-1 and 7-2 (rev. Mar. 2017) (*Master Manual*).<sup>1</sup>

In “an effort to balance water control operations to meet each of the frequently competing project purposes to the greatest extent possible,” the Corps operates its system of dams and reservoirs as “a unified whole,” in accordance with a Master Water Control Manual (*Master Manual*). 2017 Rep. 38. The Corps adopted the original Master Manual in 1958 and issued a revised Master Manual in 2017. See *Master Manual* 1-2. In the intervening years, the Corps supplemented the original Master Manual with a series of interim operating plans for Woodruff Dam, including the 2012 Revised Interim Operations Plan (RIOP). See 1 U.S. Army Corps of Eng’rs, *Final Environmental Impact Statement: Update of the Water Control Manual for the Apalachicola-Chattahoochee-Flint River Basin in Alabama, Florida, and Georgia and a Water Supply Storage Assessment* 2-72 to 2-77 (Dec. 2016) (*Final EIS*); 2017 Rep. 41.

The revised Master Manual carries forward the basic framework of the RIOP. 2017 Rep. 45. It guides, among other things, the Corps’ decisions on how much water to release through Woodruff Dam under various circumstances. *Id.* at 41. Those decisions are keyed to three

---

<sup>1</sup> The 2017 Master Manual and related documents are available at <http://www.sam.usace.army.mil/Missions/Planning-Environmental/ACF-Master-Water-Control-Manual-Update/ACF-Document-Library>.

variables: the time of year, the combined amount of water in the Corps' reservoirs, and the total amount of inflow to the Basin. 1 *Final EIS* 2-73, Tbl. 2.1-5, and 5-61, Tbl. 5.4-3; 2017 Rep. 42. The amount of water Georgia consumes for municipal, industrial, agricultural, and other uses influences the third variable—basin inflow. 1 *Final EIS* 4-27.

When the combined amount of water in the Corps' reservoirs falls below a critical level, the Manual requires the Corps to institute "drought operations." 2017 Rep. 40-41; see 138 S. Ct. at 2521. During drought operations, the Corps maintains a flow of 5,000 cubic feet per second at Woodruff Dam in order to ensure sufficient flow for the protection of downstream threatened and endangered species. 1 *Final EIS* 2-72 and 2-76; *Master Manual* 7-11, Tbl. 7-3; see 138 S. Ct. at 2522.<sup>2</sup> At the same time, the Corps generally stores in its reservoirs basin inflow not necessary to meet that flow rate, in order to ensure that other "project purposes can at least be minimally satisfied." 2017 Rep. 38.

Drought operations conclude—and normal (non-drought) operations resume—when the Corps' reservoirs are replenished to a sufficiently high level. See 2017 Rep. 40-41; 1 *Final EIS* 2-76. During normal operations at certain times of year, when basin inflow exceeds 5,000 cubic feet per second, the Manual calls on the Corps to allow some or all of that additional flow to pass through Woodruff Dam to the Apalachicola River.

---

<sup>2</sup> When the combined amount of water in the Corps' reservoirs falls even lower (into the "Drought Zone"), the Corps institutes "emergency drought operations" and maintains a flow of only 4,500 cubic feet per second at Woodruff Dam. *Master Manual* 7-7; see 138 S. Ct. at 2522.

See 1 *Final EIS* 2-73, Tbl. 2.1-5, and 5-61, Tbl. 5.4-3; 138 S. Ct. at 2521.

#### **B. Prior Proceedings And This Court's Decision**

1. In 2013, Florida sought leave to file this original action against Georgia. 138 S. Ct. at 2510. In its complaint, Florida alleged that Georgia's consumption of water in the Basin had "reduce[d] the amount of water flowing to the Apalachicola River," particularly "during the low flow summer and fall periods." Compl. ¶ 21. Florida further alleged that the reduction had "damaged numerous species and habitats in the Apalachicola Region's ecosystem," Compl. ¶ 42, and had "precipitated a collapse of the Apalachicola Bay oyster fishery," Compl. ¶ 54. Florida sought "a decree equitably apportioning the waters" of the Basin and "capping Georgia's overall depletive water uses." Compl. 21. While acknowledging the Corps' role in determining how much water is released into the Apalachicola River, Compl. ¶ 23, Florida stated that it sought "no affirmative relief against the United States \* \* \* with respect to the Corps' operation of the federally authorized dam and reservoir system," Compl. ¶ 15.

Georgia opposed leave to file the complaint, and at this Court's invitation, 571 U.S. 1235, the United States filed a brief as amicus curiae. In its brief, the United States described the Corps' then-ongoing effort to revise the Master Manual, which was to conclude in March 2017. See U.S. Amicus Br. 8-10 (Sept. 18, 2014). The United States acknowledged that "commencing equitable apportionment proceedings" while that effort was ongoing "would be possible." *Id.* at 23. But the United States explained that "postponing the proceedings until after" the Corps had finished revising the Master Manual "would be the preferable course, so that Florida's

injuries, and the need for and scope of any equitable decree, c[ould] be more fully evaluated in light of the Corps' decisions about project operations in the Basin." *Ibid.* The United States therefore recommended "deny[ing] Florida leave to file its complaint without prejudice to refiling after" issuance of the revised Master Manual or, in the alternative, "grant[ing] Florida leave to file, but stay[ing] or provid[ing] for tailoring of any further proceedings until" that time. *Id.* at 23-24.

This Court granted Florida leave to file its complaint. 574 U.S. 972. The Court appointed Ralph I. Lancaster to serve as Special Master and directed him to conduct further proceedings and "to submit reports as he may deem appropriate." 574 U.S. 1021.

2. Before the Special Master, Georgia moved to dismiss Florida's complaint for failure to join the United States as a party. Doc. No. 48 (Feb. 16, 2015); see Fed. R. Civ. P. 19. Georgia argued that the case could not proceed without the United States as a party because "the amount of water that flows into the Apalachicola River is controlled by the United States through its operation of the Woodruff Dam," and because the Court "could not guarantee Florida what it considers to be an adequate flow of water into the Apalachicola River unless the United States can be bound by the Court's decree." Doc. No. 48, at 1-2.

The United States filed an amicus brief opposing Georgia's motion. Doc. No. 66 (Mar. 11, 2015). The United States explained that it could not be joined as a party "because it ha[d] not waived its sovereign immunity from suit." *Id.* at 9. It further explained that if the Court were to "remedy Florida's claimed injury" by entering a decree that "establishes a minimum flow at the Georgia-Florida border," the Corps might be unable to

“satisfy the federal statutory purposes of the projects” in the Basin “while also releasing sufficient water from Woodruff Dam” to satisfy such a decree. *Id.* at 8. The United States therefore argued that “disposing of the action in [its] absence” “may . . . as a practical matter impair or impede [its] ability to protect [its] interest[s].” *Id.* at 1 (quoting Fed. R. Civ. P. 19(b)) (third and fourth sets of brackets in original). But the United States argued that dismissal of the case was not required at that time, because a judgment in Florida’s favor would not necessarily prejudice the United States. *Id.* at 11. The United States explained that if, for example, the Court were to grant relief in the form of a cap on Georgia’s consumption alone—without “requir[ing] any alteration to the Corps’ operations”—“the United States’ interests would likely not be prejudiced.” *Ibid.*

The Special Master denied Georgia’s motion to dismiss. Doc. No. 128 (June 19, 2015). The Special Master acknowledged that “a decree establishing a required minimum flow at the Florida state line \* \* \* might conflict with certain of the Corps’ federal statutory obligations” and “prevent the Corps from achieving its other objectives, such as the provision of municipal or industrial water supply.” *Id.* at 9. But the Special Master observed that Florida had “disclaimed any intention to seek a decree establishing a minimum flow requirement.” *Id.* at 12. Instead, the Special Master noted, Florida had “request[ed] a cap on Georgia’s consumption.” *Ibid.* And the Special Master found it “plausible,” based on the facts as they then stood, that “a cap on Georgia’s consumption would lead to increased Basin inflows that would in turn allow for increased inflow into the Apalachicola River,” *id.* at 14-15, “without a change

to the Corps' operations," *id.* at 16. Given the possibility of a remedy that would "avoid any prejudice to the United States," the Special Master determined that the United States was "not an indispensable party" and that dismissal of the case was not required at that time. *Id.* at 22.

3. After extensive discovery, the Special Master held a five-week trial. 2017 Rep. 20-21. Florida sought to show that Georgia's consumption of water, particularly along the Flint River for agricultural purposes, had decreased the flow of the Apalachicola River, causing injury to Florida in both the Apalachicola River and Apalachicola Bay. Doc. No. 630, at 5-8 (Dec. 15, 2016). Florida contended that a cap on Georgia's consumption would increase the flow of the Apalachicola River and thus redress Florida's injury. *Id.* at 78-80. Georgia disagreed, arguing that such a cap "would not materially increase state-line flows without operational changes by the Corps itself." Doc. No. 629, at 5 (Dec. 15, 2016). The reason, Georgia contended, was that if additional flows occurred during times of drought or low basin inflow, the Corps would "follow[] its operating rules and store[] additional water upstream in Chattahoochee reservoirs to maintain a relatively constant flow of approximately 5,000 [cubic feet per second] into Florida." *Id.* at 7.

Although the United States "did not actively participate during discovery or trial," 2017 Rep. 17 n.20, the Special Master requested that the United States file a post-trial amicus brief addressing the Corps' operations in the Basin, including the extent to which the then-proposed revised Master Manual would "materially change[]" them. Doc. No. 579, at 1 (Dec. 14, 2016); see Doc. No. 577, at 1 (Dec. 14, 2016). In its brief, the United States explained that "[t]he proposed Manual

\* \* \* retains the same basic framework as the RIOP.” Doc. No. 631, at 10 (Dec. 15, 2016). The United States further explained that, during drought operations under both the RIOP and the proposed Manual, the Corps would generally offset any additional flows in the Flint River by storing more water in reservoirs on the Chattahoochee. *Id.* at 17; see *id.* at 10-11. The United States stated, however, that by leading to increased storage in reservoirs on the Chattahoochee, additional flows could delay or reduce the duration of drought operations—increasing the amount of time that the system operates under rules that would allow additional flows to be released into the Apalachicola River. *Id.* at 14. The United States, however, declined to “attempt[] to precisely quantify any particular effect on flows in the Apalachicola River from any particular amount of additional water” from a consumption cap. *Id.* at 13. The United States also declined to take a position on “whether Florida ha[d] proved that a consumption cap would produce enough additional basin inflow at the right times to redress Florida’s alleged harm and justify the cost of imposing a consumption cap in this case.” *Id.* at 19.

In February 2017, the Special Master submitted a report recommending that the Court deny Florida’s request for an equitable apportionment. 2017 Rep. 1-70. The Special Master determined that, “even assuming that Florida ha[d] sustained injury as a result of unreasonable upstream water use by Georgia,” Florida had not proved by clear and convincing evidence that its proposed remedy—a cap on Georgia’s water consumption—would redress Florida’s injury. *Id.* at 30-31; see *id.* at 27-30. Specifically, the Special Master determined that Florida had not shown that “any additional streamflow” from such a cap “would be released from Jim Woodruff

Dam into the Apalachicola River at a time that would provide a material benefit to Florida (*i.e.*, during dry periods).” *Id.* at 47. “Rather,” the Special Master found, “the evidence suggests that the Corps may operate its projects in the Basin to offset any increased flows into Lake Seminole during drought operations or when there are low flows by releasing less water from Corps reservoirs.” *Id.* at 48. The Special Master found that Florida had not shown that the Corps would “exercise its discretion” to release any additional flows from a consumption cap into the Apalachicola River. *Id.* at 58. The Special Master also found that Florida had “presented no evidence assessing the impact of a consumption cap on shortening the Corps’ drought operations or on increased pass-through flows during non-drought operations.” *Id.* at 65. The Special Master therefore concluded that, without the ability to “mandate a[] change in the Corps’ operations,” the Court could not “assure Florida the relief it seeks.” *Id.* at 3.

In his report, the Special Master noted that the Corps was in the process of finalizing its revised Master Manual. 2017 Rep. 35 n.29. The Special Master determined, however, that the revised Manual was “likely to have no appreciable incremental effect on flow conditions in the Apalachicola River compared to the [RIOP].” *Id.* at 46 (quoting 1 *Final EIS* 6-93) (brackets in original). Accordingly, the Special Master concluded that the revised Manual did “not materially affect” his determination that Florida had not shown that additional flows would reach Florida. *Ibid.* The following month, the Corps issued its revised Master Manual. See *Master Manual* 1-2.

4. Florida subsequently filed exceptions to the Special Master’s report. Among other things, Florida took

exception to the “Special Master’s conclusion that the [Corps’] discretion in operating its facilities precludes a finding of redressability.” Fla. Exceptions Br. i (May 31, 2017). The United States filed an amicus brief in support of overruling that exception. U.S. Amicus Br. (Aug. 7, 2017) (2017 U.S. Amicus Br.). That brief explained that, “during drought operations,” the Corps “would not generally expect” to exercise its authority under the revised Master Manual to release any increased flows from a consumption cap into the Apalachicola River. *Id.* at 28. The United States also explained that consideration of any changes to the revised Master Manual to provide for additional releases would require further administrative processes, involving public input and environmental reviews. *Id.* at 29-33.

This Court declined to adopt the Special Master’s report and remanded the case to the Special Master for further proceedings. 138 S. Ct. at 2508-2527. The Court determined that the Special Master had erred in requiring Florida, at the outset, to prove by clear and convincing evidence that the Court would be able to fashion an effective remedy. *Id.* at 2516. The Court held that Florida instead should have been required at that stage to show only that an effective remedy “is likely to prove possible.” *Ibid.* Conducting an “independent examination of the record,” the Court determined that Florida had met that “‘initial burden’ in respect to remedy.” *Id.* at 2518 (citation omitted). The Court understood the evidence to suggest that, “even when the Corps conducts its operations in accordance with the Master Manual, Florida’s proposed consumption cap would likely mean more water in the Apalachicola [River]” because, among other things, “a cap would likely allow the Corps

to conduct ‘nondrought operations’ \* \* \* more often.” *Id.* at 2523.

The Court, however, “reserv[ed] judgment as to the ultimate disposition of this case.” 138 S. Ct. at 2518. The Court emphasized that “Florida will be entitled to a decree only if it is shown that ‘the benefits of [an] apportionment substantially outweigh the harm that might result.’” *Id.* at 2527 (brackets and citation omitted). The Court stated that, “[i]n assessing whether that showing has been made,” the Special Master “may find it necessary” to “make more specific factual findings and definitive recommendations” on issues such as whether Georgia has taken more than its equitable share of water, whether Florida has suffered injury as a result of Georgia’s inequitable use of water, and the extent to which, “under the Corps’ revised Master Manual or under reasonable modifications that could be made to that Manual,” “additional water resulting from a cap on Georgia’s water consumption [would] result in additional streamflow in the Apalachicola River.” *Ibid.* The Court “add[ed]” that “[t]he United States has made clear that the Corps will work to accommodate any determinations or obligations the Court sets forth if a final decree equitably apportioning the Basin’s waters proves justified in this case.” *Id.* at 2526.

Justice Thomas, joined by three other Justices, dissented. 138 S. Ct. at 2528-2548. Justice Thomas understood the Special Master’s report to have rested not on a determination that Florida had failed to satisfy a “‘threshold’ redressability requirement,” *id.* at 2536, but rather on a determination that Florida had failed to show that “its proposed cap will benefit Florida more than it harms Georgia,” *id.* at 2528. In Justice Thomas’s

view, the evidence supported that determination because it showed that, “if this Court imposed Florida’s proposed cap on Georgia, Florida would not receive an appreciable amount of additional water during droughts.” *Id.* at 2541. Accordingly, Justice Thomas would have overruled Florida’s exceptions and denied its request for relief. *Id.* at 2548.

### C. Proceedings On Remand

Following its decision, this Court discharged Special Master Lancaster “with the thanks of the Court,” and appointed the Honorable Paul J. Kelly, Jr., to serve as Special Master. 2018 WL 3765202, at \*1.

1. On remand, the Special Master asked the parties whether additional discovery would be necessary to resolve the case. Doc. No. 639, at 2-3 (Aug. 23, 2018). In response, Florida requested an opportunity to present, among other evidence, expert testimony (1) “regarding the as-adopted version of the revised Master Manual” and (2) “modeling the ‘additional streamflow’ that would result from ‘reasonable modifications that could be made to the revised Manual.’” Doc. No. 644, at 21 (Oct. 2, 2018) (brackets and citation omitted).

The United States argued that “the extent to which flow could be increased in the Apalachicola River with ‘reasonable modifications’ to the Corps’ Master Manual” was “a question that should be considered only after all of the other factual matters before the Special Master are resolved.” Doc. No. 643, at 4-5 (Oct. 2, 2018). The United States explained that “it would be unnecessary to consider any possible modifications to the Master Manual” if, for example, “the Special Master were to conclude that a cap on Georgia’s consumption would

not produce sufficient additional streamflow to ameliorate Florida's injuries even if all of the additional streamflow were to reach Florida at all times." *Id.* at 5.

The Special Master denied Florida's request for additional discovery. Doc. No. 645, at 5-6 (Nov. 6, 2018). He determined that additional discovery on the revised Master Manual was unnecessary because "both the prior Special Master and the United States indicated that the revised manual was unlikely to change relevant flow conditions" as compared to the RIOP. *Id.* at 5. The Special Master further determined that "[e]vidence on potential reasonable modifications to the manual would be entirely speculative because the United States is not a party and cannot be bound by any final decree." *Id.* at 5-6. The Special Master noted the United States' suggestion that he "proceed with the major factual questions identified by the Court" before considering the possibility of "any manual modifications." *Id.* at 6. The Special Master, however, permitted the parties to address the possibility of "reasonable modifications" in supplemental briefing. Doc. No. 649, at 2 (Dec. 6, 2018).

2. Following supplemental briefing and oral argument, the Special Master submitted a report recommending that the Court deny Florida's request for an equitable apportionment. 2019 Rep. 6-7. The Special Master found that Florida had "not proved the elements necessary to obtain relief." *Id.* at 7. In particular, he determined: (1) that Florida had not proved by clear and convincing evidence that Georgia had caused Florida's claimed injury, *id.* at 8-25; (2) that Georgia's use of basin waters was "not unreasonable or inequitable," *id.* at 7; see *id.* at 25-54; and (3) that Florida had not proved, either by a preponderance of the evidence or by clear and convincing evidence, that the benefits of an

apportionment would substantially outweigh the harm that might result, *id.* at 54-80.

The third of those determinations rested on two independent grounds. First, the Special Master found that, under the Corps' existing operational rules, "Florida would receive no appreciable benefit from a decree," 2019 Rep. 62, because the Corps' operations "would prevent most streamflow increases from reaching Florida during the times when more streamflow is needed to alleviate Florida's alleged harms," *id.* at 7; see *id.* at 55 & n.37. The Special Master found that the Corps had historically not exercised its discretion to release "more water than the minimums required by its operational rules." *Id.* at 58. And he found that Florida would not appreciably benefit from any delay or shortening of drought operations that additional streamflow from a decree might produce. *Id.* at 55, 59-61.

Second, the Special Master found that, even "assum[ing] without deciding that the Corps could modify its reservoir operations to pass any additional flows to Florida," 2019 Rep. 61 n.41, the benefits of a decree would still not substantially outweigh the harms, *id.* at 62. In particular, the Special Master determined that, even if a decree generated an extra 1,000 cubic feet per second of flow into the Apalachicola River, the benefits to Florida would be small, while the costs to Georgia would be "over \$100 million per dry year." *Id.* at 78-79.

Having determined that Florida had not satisfied several elements of its claim, the Special Master declined to "reach the question whether the Corps could make reasonable modifications to its Master Manual so that flows would pass through to Florida during drought." 2019 Rep. 61. The Special Master noted that Florida had "not otherwise proved its case," regardless

of “whether the Corps would update its rules.” *Id.* at 55 n.36. He therefore concluded that nothing “turn[ed] on [his] decision not to reach th[at] question.” *Id.* at 61 n.41.

#### SUMMARY OF ARGUMENT

The Special Master determined that Florida was not entitled to relief because Florida had not shown, among other things, that the benefits of a decree capping Georgia’s water consumption would substantially outweigh the harms. The Special Master determined that Florida had not made that showing, even assuming that all additional flow generated by such a decree would pass through to Florida.

Given that determination, there was no need for the Special Master to consider the extent to which the Corps could reasonably modify its operations in the Basin, for even if the Corps could reasonably modify its Master Manual to allow all additional flow to pass through to Florida, Florida would still not be entitled to relief. And given the lack of need to consider the possibility of modifying the Master Manual, the Special Master correctly declined to do so. The Manual could not be revised without complex administrative proceedings, involving the examination and balancing of a wide range of interests. It was therefore sensible for the Special Master to regard the possibility of modifying the Manual as an issue to be reached only if necessary. Given that it was unnecessary to reach the issue here in light of his other findings, the Special Master did not err in declining to consider, or to allow additional evidence on, the possibility of modifying the Manual.

#### ARGUMENT

The Special Master determined that Florida had not proved several “elements necessary to obtain relief.” 2019 Rep. 7. The Special Master’s determinations with

respect to two of those elements—causation and inequitable conduct—do not implicate the Corps’ operations, and the United States takes no position on Florida’s exceptions to those determinations here. See *id.* at 8-54. The Special Master, however, did address the Corps’ operations in determining that the benefits of a decree would not substantially outweigh the harms. See *id.* at 54-80. To the extent that Florida’s exceptions to that determination also implicate the Corps’ operations, the United States addresses them here.

1. Florida argues that the Special Master’s “balance-of-harms” determination was “predicated” on the “premise” that “the Corps would *not* alter its operations.” Fla. Exceptions Br. 20 (Apr. 13, 2020) (2020 Fla. Exceptions Br.). In Florida’s view, that was error: Instead of “assum[ing] that the Corps would inflexibly follow its Master Manual,” the Special Master should have “analyze[d]”—and “take[n] evidence on”—“whether the Corps could make reasonable modifications to its Master Manual.” *Id.* at 43 (citation omitted).

In evaluating the benefits of a decree capping Georgia’s water consumption, however, the Special Master did not simply assume that the Corps would follow its “existing operational rules.” 2019 Rep. 55. Rather, he also considered whether the benefits of such a decree would not substantially outweigh the harms even if “the Corps could modify its reservoir operations to pass any additional flows to Florida.” *Id.* at 61 n.41. And the Special Master determined that, even “assuming \* \* \* that all extra streamflow generated by a decree would immediately pass through to the Apalachicola River,” the balance-of-harms would still not justify such a decree. *Id.* at 62.

Given the way in which the Special Master resolved that issue and others, there was no need to “reach” the question whether the Corps could in fact “make reasonable modifications to its Master Manual so that flows would pass through to Florida during drought.” 2019 Rep. 61. After all, the Special Master determined that, even if the Corps could modify its Master Manual so that all flows would pass through, the benefits of a decree would still not substantially outweigh the harms. *Id.* at 61 n.41, 62. And even apart from the balance-of-harms inquiry, the Special Master determined that Florida had “not otherwise proved its case” with respect to causation or inequitable conduct. *Id.* at 55 n.36; see *id.* at 8-54.

Those determinations rendered unnecessary any consideration of the extent to which the Master Manual could be reasonably modified. And the Special Master sensibly regarded modifying the Master Manual as a possibility to be considered only if necessary. As the United States has explained throughout this litigation, the Corps cannot revise the Master Manual unilaterally. Rather, revising the Master Manual would require additional administrative proceedings, involving public input and participation, examination of project purposes and federal statutory requirements, and review of environmental and other effects. See Doc. No. 643, at 5-6; 2017 U.S. Amicus Br. 30-31. Because “the Corps must take account of a variety of circumstances and statutory obligations when it allocates water,” *Florida v. Georgia*, 138 S. Ct. 2502, 2526 (2018), the Special Master was right to decline to consider the extent to which the Corps could reasonably modify its Manual where, as here, it was unnecessary to do so.

The approach the Special Master took is consistent with this Court's previous decision in this case. See 2019 Rep. 61. That decision did not require the Special Master to address whether reasonable modifications to the Master Manual could be made; rather, it stated merely that the Special Master "may find it necessary" to address that question. *Florida*, 138 S. Ct. at 2527. And while the Court noted that the Corps would "work to accommodate any determinations or obligations the Court sets forth if a final decree equitably apportioning the Basin's waters proves justified in this case," the Court did not require the Special Master to consider the extent to which such "accommodat[ions]" might be appropriate where, as here, such a decree did not "prove[] justified." *Id.* at 2526. The Special Master therefore did not err in declining to consider, or to allow additional evidence on, the extent to which the Corps could reasonably modify the Master Manual to accommodate a decree.

2. Florida also argues that the Special Master erred in determining that, under the Corps' existing operational rules, additional flow generated by a decree capping Georgia's water consumption would not appreciably benefit Florida. 2020 Fla. Exceptions Br. 43-44. But as explained above, the Special Master determined that, even if the Master Manual were modified to allow all additional flow to pass through to Florida, the benefits of such a decree would still not substantially outweigh the harms. 2019 Rep. 61 n.41, 62. Thus, even if the Special Master erred in his analysis of the extent to which the Corps would pass through additional flow under its existing protocols, Florida would still not be entitled to relief. This Court may therefore find it unnecessary to address Florida's contentions regarding the

effect of the Corps' existing protocols. In any event, the United States addresses those contentions here, to the extent appropriate.

Florida contends that the Special Master erred in finding that the Corps would not exercise its discretion to release additional flows, above 5,000 cubic feet per second, into the Apalachicola River during drought operations. 2020 Fla. Exceptions Br. 43-44; see 2019 Rep. 58. But as the United States has previously explained, basin inflow "has historically not been the primary factor in the Corps' decisionmaking process for making additional releases above 5000 [cubic feet per second] from Woodruff Dam during drought operations." 2017 U.S. Amicus Br. 28. Thus, under "the current operating protocols, the Corps would not generally expect those releases during drought operations to increase in parallel with increased flows produced by a cap on Georgia's consumption." *Ibid.*

Florida also contends that the Special Master erred in determining that any delay or shortening of drought operations brought about by additional flow would not give Florida any appreciable benefit. 2020 Fla. Exceptions Br. 44; see 2019 Rep. 55, 59-61. The United States, however, has previously declined to "attempt[] to precisely quantify" the benefits from additional flow, Doc. No. 631, at 13, or to express a view on whether "those benefits are of sufficient quantity to justify relief in this case," 2017 U.S. Amicus Br. 28. The United States likewise takes no position on those matters here.

**CONCLUSION**

The Court should enter an order consistent with the position expressed in this brief.

Respectfully submitted.

JEFFREY B. WALL  
*Acting Solicitor General*  
EDWIN S. KNEEDLER  
*Deputy Solicitor General*  
ERIC GRANT  
*Deputy Assistant Attorney  
General*  
FREDERICK LIU  
*Assistant to the Solicitor  
General*  
STEPHEN G. BARTELL  
MICHAEL T. GRAY  
JAMES J. DUBOIS  
*Attorneys*

JULY 2020