No. _____

In the Supreme Court of the United States

SOUTHEASTERN FEDERAL POWER CUSTOMERS, INC.,
Petitioner,

v.

STATE OF GEORGIA, U.S. ARMY CORPS OF ENGINEERS, ATLANTA REGIONAL COMMISSION, GWINNETT COUNTY, GEORGIA, LAKE LANIER ASSOCIATION, STATE OF ALABAMA, STATE OF FLORIDA, ALABAMA POWER COMPANY, AND CITY OF APALACHICOLA, FLORIDA, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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February 13, 2012

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QUESTIONS PRESENTED

1. Whether Article III of the United States Constitution permits an appellate court independently to adjust resource allocations for a federal multipurpose water project based in part on United States Army Corps of Engineers ("Corps") reports that were never presented to Congress rather than solely on the Corps reports upon which Congress originally relied to authorize and allocate resources for the project.

2. Whether the Eleventh Circuit's ruling is inconsistent with the Due Process Clause of the Fifth Amendment and the Administrative Procedure Act because it makes judicial review of agency actions unavailable indefinitely, including review of water storage allocations made over a 40 year period, if the agency labeled the actions as "interim" and has not sought to evade judicial review.

3. Whether the Eleventh Circuit created an irreconcilable conflict with the D.C. Circuit by disregarding a directly relevant and fundamentally inconsistent ruling by the D.C. Circuit in the same underlying cases.

LIST OF PARTIES TO THE PROCEEDING

The following parties participated in the appeals to the Eleventh Circuit of the district court's order:

Southeastern Federal Power Customers, Inc.:

Alabama Municipal Electric Authority
Blue Ridge Power Agency
Central Electric Power Cooperative, Inc.
Central Virginia Electric Cooperative
East Mississippi Electric Power Association
ElectriCities of North Carolina, Inc.
Jim Woodruff Customers[1]
Municipal Electric Authority of Georgia
Municipal Energy Agency of Mississippi
North Carolina Electric Membership Corporation
Oglethorpe Power Corporation (An Electric Membership Corporation)
Orangeburg Department of Public Utilities
Piedmont Municipal Power Agency
PowerSouth Energy Cooperative
Santee Cooper

[1] Representing Central Florida Electric Cooperative; Suwannee Valley Electric Cooperative; Talquin Electric Cooperative; Tri-County Electric Cooperative; City of Chattahoochee, Florida; and City of Quincy, Florida.

South Mississippi Electric Power Association
Virginia Cooperative Preference Power Customers[2]
Virginia Municipal Electric Association #1

Alabama Power Company (a wholly owned subsidiary of Southern Company)

Atlanta Regional Commission

City of Apalachicola, Florida

City of Atlanta, Georgia

City of Gainesville, Georgia

Cobb County-Marietta Water Authority

Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works)

DeKalb County, Georgia

Fulton County, Georgia

Gwinnett County, Georgia

Lake Lanier Association

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[2] Specifically, B-A-R-C Electric Cooperative, Community Electric Cooperative, Mecklenburg Electric Cooperative, Northern Neck Electric Cooperative, Prince George Electric Cooperative, Rappahannock Electric Cooperative, Shenandoah Valley Electric Cooperative, and Southside Electric Cooperative.

John McHugh, Secretary of the Army

Major General Todd T. Semonite, Commander and Division Engineer, U.S. Army Corps of Engineers South Atlantic Division

State of Alabama

State of Florida

State of Georgia

Major General Meredith W. B. Temple, Acting Chief of Engineers, U.S. Army Corps of Engineers

United States Army Corps of Engineers

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 29.6 of the rules of this Court, Petitioner makes the following disclosure:

Petitioner Southeastern Federal Power Customers, Inc. ("SeFPC") is a not-for-profit corporation duly organized and existing under the laws of the State of Georgia. The corporation does not issue stock and does not have a parent company. The SeFPC is comprised of eighteen members, identified in the *List of Parties to the Proceeding*, that in turn represent not-for-profit rural electric cooperatives and municipal electric systems operating in Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, and Virginia. SeFPC's members and their member systems purchase power from the Southeastern Power Administration, which markets federal power generated in the southeastern United States.

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PETITION FOR A WRIT OF CERTIORARI

The Southeastern Federal Power Customers, Inc. ("SeFPC") respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") in this case.

OPINION AND DECISION BELOW

The decision for which review is sought is *In re MDL-1824 Tri-State Water Rights Litig.,* reported at 644 F.3d 1160 (11th Cir. 2011), petition for rehearing *en banc* denied September 16, 2011. The decision of the United States District Court that was the subject of the Eleventh Circuit's review was *In re Tri-State Water Rights Litig.*, 639 F. Supp. 2d 1308 (M.D. Fla. 2009) ("*Tri-State*"). Both of these decisions are included in the Appendix to this Petition.

JURISDICTION

The Eleventh Circuit entered final judgment on June 28, 2011, and denied Applicant's petition for rehearing *en banc* on September 16, 2011. On November 14, 2011, Justice Thomas extended the deadline for filing this petition for a writ of certiorari to and including February 13, 2012. This Court has jurisdiction over any timely filed petitions in this case pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution

Article I, Section 1: "All legislative Powers herein granted shall be vested in a Congress of the United States... ."

Article III, Section 1: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. ..."

Amendment 5: "No person shall ... be deprived of life, liberty, or property, without due process of law; ..."

The Rivers and Harbors Acts of 1945 and 1946 ("RHA"):

- 1945 RHA, Pub. L. No. 79-14, 59 Stat. 10, 11:

"Sec. 2: The following works of improvement of rivers, harbors, and other waterways are hereby adopted and authorized ... and shall be prosecuted as speedily as may be consistent with budgetary requirements, under the direction of the Secretary of War and supervision of the Chief of Engineers, in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein: ...

> Apalachicola, Chattahoochee, and Flint Rivers, Georgia and Florida; House Document Numbered 342, Seventy-sixth Congress; ... ."
>
> • 1946 RHA, Pub. L. No. 79-525, 60 Stat. 634:
>
> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following works of improvement of rivers, harbors, and other waterways are hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers, in accordance with the plans in the respective reports hereinafter designated: ...
>
> Apalachicola, Chattahoochee, and Flint Rivers, Georgia and Florida; in accordance with the report of the Chief of Engineers, dated May 13, 1946... ."

Section 301 of the Water Supply Act ("WSA"), 43 U.S.C. § 390 *et seq*.:

> "Modifications of a reservoir project heretofore authorized, surveyed, planned, or constructed to include storage [for water supply] which would seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or which would involve major structural or operational changes shall be made only upon the approval of Congress ... ."

A Bill Relating to the Use of Storage Space in the Buford Reservoir for the Purpose of Providing Gwinnett County, Georgia a Regulated Water Supply, Pub. L. No. 84-41, 70 Stat. 725 (1956):

> "... [T]he Secretary of the Army is hereby authorized to contract with Gwinnett County, Georgia, upon such terms and for such period not to exceed fifty years as he may deem reasonable for the use of storage space in the Buford Reservoir for the purpose of providing said county a regulated water supply in an amount not to exceed eleven thousand two hundred acre-feet of water annually, and is authorized to grant to Gwinnett County, at no cost an easement over Government lands at Buford Reservoir for the sole purpose of constructing, repairing, and maintaining necessary pipelines and pumping station to remove such water from said reservoir ... ."

Administrative Procedure Act ("APA"), 5 U.S.C. § 706:

> "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be -

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law; ..."

STATEMENT OF THE CASE AND FACTUAL BACKGROUND

This is one of the most important water resource project cases ever to reach this Court. Resolution of the questions presented here will affect millions of individuals and businesses, and will largely determine the framework for the allocation of water storage – and the related allocation of costs for that water storage – in a way that profoundly impacts the three states involved in this lawsuit (Alabama, Florida and Georgia) and three additional states (Mississippi, South Carolina and North Carolina) that are directly affected by the outcome of this case. The impact it will have on the legally protectable interests of parties such as hydropower, who have been reimbursing the federal government and taxpayers for the overwhelming majority of costs of federal multipurpose water projects, cannot be overstated. The decision

squarely usurps the role of Congress in authorizing federal multipurpose water projects and allocating costs in reliance on the contemporaneous reports and cost/benefit analyses presented to it by the Corps. The departure by the Eleventh Circuit from well-settled precedent regarding the interpretation of legislation authorizing federal multipurpose water projects and final agency action also will likely lead to more disputes over existing and future projects. For these reasons, review by this Court is imperative.

In the course of multidistrict litigation regarding the respective rights of parties in Alabama, Florida and Georgia to the use of water flowing in the rivers that form the Apalachicola-Chattahoochee-Flint ("ACF") river basin, the Eleventh Circuit was asked a relatively narrow, but crucial, question: whether Congress, when considering project benefits, authorized the Corps to allocate water storage in Lake Lanier – the reservoir behind the Buford hydroelectric dam that sits at the top of the ACF basin – to water supply when it authorized and funded the project.

Ignoring vital legislative history and contemporaneous interpretation by the Corps of its own reports that were accepted and authorized by Congress, the Eleventh Circuit relied instead on isolated excerpts from various Corps reports, including some that were never presented to Congress, to hold that Congress had authorized the Corps to allocate storage to water supply. This result is an egregious "bait and switch" for parties, like Petitioner, who were asked to reimburse the federal government and taxpayers for the majority of the project's capital and operational costs in exchange for a right to all useable storage – all of the "conservation" storage, or "power

pool" as the Corps originally referred to it – in the reservoir. The Corps assured Congress that it would seek prior approval from Congress before changing this initial allocation.

The Eleventh Circuit's decision rewrites the Buford project's legislative history in a manner that is fundamentally inconsistent with this Court's decision in *U.S. ex rel. Chapman v. Fed. Power Comm'n*, 345 U.S. 153 (1953) ("*Chapman*"), decisions of other circuits, including *U.S. ex rel. Chapman v. Fed. Power Comm'n*, 191 F.2d 796 (4th Cir. 1951), and over fifty years of operational history and agency precedent. In so doing, the Eleventh Circuit assumed the role reserved for Congress in the allocation of resources at a federal multipurpose water project in violation of Article III of the United States Constitution.

The Eleventh Circuit compounded its error by disregarding an earlier and directly relevant ruling by the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") in this same dispute that Congress had not allocated any storage to water supply and that the Corps must seek Congressional authorization before reallocating reservoir storage in a manner that would have a major operational impact. *See Se. Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316, 1324 (D.C. Cir. 2008) ("*Geren*").

A. Factual Background

For more than 50 years, hydropower customers in the southeastern United States have "borne the lion's share" of capital and construction costs for the water resource project at Lake Lanier, *Tri-State*, 639 F. Supp. 2d at 1325, and hydropower was allocated ***all*** of

the useable water storage in the reservoir by the Corps and Congress. Municipal water supply interests were allocated ***zero*** capital costs by the Corps and Congress, and, as the D.C. Circuit confirmed in *Geren*, water supply was therefore allocated ***no*** water storage. 514 F.3d at 1324.

The Buford project was officially authorized in the RHAs of 1945 and 1946. In typical manner for federal multipurpose water projects, the details of the authorization are found in reports prepared by the Corps that are incorporated into the statute by reference. *See* H.R. Doc. No. 76-342, at 9-87 (1939), incorporated into the 1945 RHA, and H.R. Doc. No. 80-300, at 10-40 (1947), incorporated into the 1946 RHA. In these reports, the Corps examined the direct benefits of the Buford project and assigned corresponding monetary values to them. In both reports, hydropower was estimated to be worth millions of dollars annually. No monetary value was assigned to water supply. *See, e.g.*, H.R. Doc. No. 80-300 at 38 P97, table 9. Both reports acknowledged the benefit to the Atlanta area through increased water flows, particularly during dry periods. *See, e.g.*, H.R. Doc. No. 80-300 at 27 P68, 28-29 P73, 34 P80. The earlier report noted "[t]here is apparently no immediate necessity for increased water supply in [the Atlanta] area though the prospect of a future demand is not improbable," H.R. Doc. No. 76-342 at 80 P260, while the later report explained that the benefit to Atlanta water supply was "incidental" to the authorized purposes. *See, e.g.*, H.R. Doc. No. 80-300 at 27 P68, 34 P80 (increased minimum flows from hydropower operations provided by the project will produce "incidental benefits" to Atlanta area).

These reports are consistent with Corps testimony before Congressional appropriations committees that all releases from the reservoir were expected to flow through hydroelectric turbines and that downstream water supply was incidental to hydropower production. *See, e.g., Civil Functions, Dep't of the Army Appropriations for 1952: Hearings Before the Subcomm. of the H. Comm. on Appropriations*, 82d Cong. 118-122 (1951). In fact, when it came time for Congress to appropriate the funds to construct the project, ***the City of Atlanta repeatedly declined to pay any of the reservoir's capital costs***, stating that Atlanta had other water supply options and that water supply from the reservoir was only an incidental benefit to the authorized project purposes.[3]

Corps officials told Congress during the appropriations process that project costs were not allocated to Atlanta because downstream flow was a natural result of project operations for the hydropower purpose. ***The agency assured Congress repeatedly during the appropriations process that it would return to Congress for authorization prior to allocating storage to water supply or altering project operations if accommodation of water supply in excess of releases incidental to the authorized operations became necessary due to population growth in the Atlanta region.*** *See id.*; *see also Tri-State*, 639 F. Supp. 2d at 1317. Other than water released downstream incidental to hydropower

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[3] The district court discussed in extensive detail the documents and testimony before Congress related to the authorization and appropriations process for the Buford project. *See Tri-State*, 639 F. Supp. 2d at 1312-17.

or flood control operations, the only water supply expressly authorized for this project was limited withdrawals by two municipalities whose water intakes were destroyed during reservoir construction.[4]

The understanding of Congress and the Corps that no water storage had been allocated to water supply at the Buford project was confirmed in 1956 when, prior to passage of the 1958 Water Supply Act ("WSA"), 43 U.S.C. § 390 *et seq*. (which Congress enacted precisely to authorize reallocation of storage in federal reservoirs for municipal and industrial water supply purposes provided that the reallocation did not seriously affect the originally authorized purposes or involve a major operational change), the Corps requested authority from Congress to permit water supply withdrawals by Gwinnett County, Georgia. Pub. L. No. 84-841, 70 Stat. 725 (1956). The legislative history of the act authorizing those withdrawals included an explanation that "enactment of legislation is necessary if water is to be supplied to Gwinnett County from the Buford Reservoir." S. Rep. No. 84-2689 (1956); H.R. Rep. No. 84-2672 (1956).

Nevertheless, the Corps over the years has operated the Buford reservoir and dam increasingly for the benefit of water supply, to the detriment of hydropower. *See*, *e.g.*, *Tri-State*, 639 F. Supp. 2d at 1352-53. Initially by means of "interim" contracts, and later with no contracts at all, the Corps has both permitted direct reservoir withdrawals and significantly increased off-peak releases (*i.e.*, at times

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[4] These two communities were Buford and Gainesville. *See Tri-State*, 639 F. Supp. 2d at 1315 and n.6.

when hydropower is least valuable) to augment the flows past Atlanta. Except for the Gwinnett County legislation, the Corps has never sought authorization for changed operations or reallocation of storage.

B. Proceedings Below

As with the factual background and legislative history, the district court's decision contains a very detailed discussion of the history of this litigation. *See Tri-State*, 639 F. Supp. 2d at 1333-39. To provide context for this petition, following is a brief summary of the proceedings below with focus on how the SeFPC's action against the Corps fits in the multidistrict litigation and this appeal.

After negotiating unsuccessfully for years with the Corps over its unauthorized operation of the Buford project for water supply to the detriment of hydropower customers, the SeFPC brought suit under the Administrative Procedure Act ("APA") against the Corps in 2000 in the U.S. District Court for the District of Columbia. SeFPC argued that the Corps had illegally diverted project water storage from hydropower to water supply, to the detriment of the project's hydropower purpose. The suit was initially resolved in January 2003 by court-mediated settlement among the SeFPC, the Corps, Georgia, and certain Georgia water-supply providers. Under the settlement, the Corps would have reallocated up to 22% of total storage space in Lake Lanier to water supply for an interim period of up to 20 years. The settlement, and resulting reallocations, would have become permanent if approved by Congress or if a final court judgment held that Congressional approval for

the reallocation and changed project operations was not necessary.

Approximately ten years earlier, Alabama had filed suit in the U.S. District Court for the Northern District of Alabama protesting a Corps proposal to contract with Georgia water users and to permanently reallocate Lake Lanier storage to meet area water-supply needs. No substantive proceedings were held in that case until 2003, when Alabama and Florida revived it to challenge the SeFPC settlement. They argued that the settlement violated a stay issued in the *Alabama* case barring the Corps from executing any contract or agreement related to the suit without Alabama's and Florida's consent. The *Alabama* court agreed and issued an injunction.

The D.C. court subsequently approved the SeFPC settlement contingent on dissolution of the *Alabama* injunction. *See Se. Fed. Power Customers, Inc. v. Caldera*, 301 F. Supp. 2d 26, 35 (D.D.C. 2004). Alabama and Florida appealed the approval to the D.C. Circuit. The D.C. Circuit dismissed, finding that the case was premature because of the conditional nature of the district court's order. In due course, the Eleventh Circuit vacated the *Alabama* injunction, *Ala. v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117 (11th Cir. 2005) ("*Ala. v. U.S.A.C.E.*"), and the D.C. court entered final judgment approving the settlement. Alabama and Florida renewed their D.C. Circuit appeal.

The D.C. Circuit vacated the settlement in *Geren*. Because Congress had not authorized the Corps to allocate any storage in Lake Lanier to water supply and the proposed settlement would have a major operational impact (as had the reallocations made

prior to the settlement), the court held that the Corps was required to obtain Congressional approval of the water supply contracts contemplated by the agreement because their implementation would constitute a major operational change for the Buford project under the WSA. *Geren* at 1318, 1325.

In separate proceedings commenced in February 2001, Georgia water users filed suit seeking to compel the Corps to grant a request, made several months earlier, for the permanent reallocation of a significant amount of storage in Lake Lanier away from hydropower to water supply. More than a year after the suit was filed, the Corps formally denied Georgia's request on the basis that it would constitute a major operational change to authorized project operations, would significantly affect the authorized hydropower purpose of the project, and therefore required additional Congressional authorization under the WSA.

In 2007, the Judicial Panel on Multidistrict Litigation transferred both the *Alabama* and *Georgia* cases to the U.S. District Court for the Middle District of Florida, along with two other actions then pending in Florida and Georgia federal district courts, *Fla. v. U.S. Fish & Wildlife Serv.*, Member No. 03:07-cv-00250 and *Ga. v. U.S. Army Corps of Eng'rs*, Member No. 03:07-cv-00251, for coordinated or consolidated pretrial proceedings. *See In Re Tri-State Water Rights Litig.*, 481 F. Supp. 2d 1351 (J.P.M.L. 2007). Following the D.C. Circuit's decision in *Geren*, the Panel *sua sponte* also transferred the SeFPC's case to the multidistrict litigation. *In Re Tri-State Water Rights Litig.*, MDL No. 1824 (J.P.M.L. June 3, 2008).

In July 2009, MDL Judge Paul A. Magnuson, sitting by designation from the U.S. District Court for the District of Minnesota, granted partial summary judgment for the SeFPC and the Alabama and Florida parties, holding that water supply is not an "authorized purpose" for which Congress authorized the Corps to allocate storage in the Buford project, and that additional Congressional approval was required for the Corps' accommodation of water supply. *Tri-State*, 639 F. Supp. 2d 1308. The Corps, Georgia and other parties appealed to the Eleventh Circuit.

The Eleventh Circuit reversed, finding not only that water supply was an authorized purpose of the Buford project, but that it was a primary purpose. In so doing, the appellate court ruled that the Corps has the authority to significantly reduce hydropower production and value to favor water supply, and remanded for the Corps to decide how much storage could be reallocated to water supply. 644 F.3d at 1195.

In addition, the Eleventh Circuit dismissed Petitioner's claims on the basis that there has been neither final agency action by the Corps, nor any unlawful failure to act. The appellate court took the view that because the Corps for decades has labeled all of its actions and decisional documents accommodating water supply interests as "interim," and because the Corps was not seeking to evade judicial review, these actions are unreviewable, irrespective of the severe and concrete legal harm to hydropower, which the Eleventh Circuit has acknowledged, *see Ga. v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1257-58 (11th Cir. 2002) ("*Ga. v. U.S.A.C.E.*"), and irrespective of the fact that there has been nothing "tentative" or "interlocutory," *Bennett v. Spear*, 520 U.S. 154,177-78

(1997), in the Corps' (i) diversion of water storage away from hydropower to water supply, (ii) failure to charge properly for that diversion, or (iii) major change in project operations from peak to off-peak hydropower generation. In so ruling, the Eleventh Circuit chose to ignore the D.C. Circuit's ruling in *Geren* that the temporary Corps actions at issue here in exactly the same underlying disputes are sufficiently final for purposes of judicial review.

REASONS FOR GRANTING THIS PETITION

I. THIS CASE RAISES THE CRITICALLY IMPORTANT QUESTION OF HOW CONGRESS ALLOCATES RESOURCES AND COSTS FOR FEDERAL MULTIPURPOSE WATER PROJECTS.

The fundamental flaws in the Eleventh Circuit's decision reflect a failure to identify the relevant legislative history of the authorizing legislation for the Buford project in accordance with this Court's precedent. The resulting failure to focus on the entire relevant legislative history and improper reliance upon Corps actions and reports that do not form part of the relevant legislative history led the Eleventh Circuit to reach conclusions that conflict with decisions by other circuits, including decisions in the same underlying cases, as well as testimony and reports that the Corps presented to Congress during the authorization process.

The issues presented here are of substantial importance to all who benefit from, or bear the costs of, federal multipurpose water projects across the nation. The ruling below is fraught with error and yields a

result with grave implications for interstate water disputes. Not only does the Eleventh Circuit's decision foment significant tension between Alabama, Florida and Georgia and leave Petitioner's members to continue the decades-long subsidization of municipal water supply; it also calls into question resource allocations for many federal multipurpose water projects, as well as the very process of Congressional authorization.

Enormous investments of time and money are required for federal multipurpose water projects like the one at issue here. The Buford reservoir and hydroelectric dam quite simply would not have been constructed but for the inclusion of hydropower as a primary purpose. As with many federal projects, taxpayers were reimbursed for nearly all of the construction and operating costs of the Buford project by the project's primary beneficiaries – here, mainly by hydropower customers – in accordance with the cost/benefit studies on which Congress based its authorization of, and appropriation of funding for, the project. This type of funding mechanism is a crucial means for achieving goals that serve the public interest.

As this Court explained in *Chapman*, authorizing legislation for federal multipurpose water projects is unique and must be interpreted based upon an expanded legislative history including the contemporaneous Corps reports and testimony that were presented to Congress and upon which Congress relied to authorize the project, as well as post-authorization reports and testimony relied on by Congress in the appropriations process. 345 U.S. at 163-65. If the Corps subsequently decides to make a

significant change to a project, it must seek authorization for the change from Congress, as the Corps in this case assured Congress it would do. The Corps, whose authority stems from Congress, cannot unilaterally decide that a change in circumstances should lead to a reallocation of resources. The certainty of Congressional authorization is a crucial element for ensuring both that the overall benefits outweigh the costs and that the costs are allocated in accordance with those benefits, and a significant change to the allocation of resources cannot be subsequently made without the explicit and considered authorization by Congress.

The Buford project became economically feasible only upon the inclusion of the hydropower purpose. The vast majority of the capital costs were assigned to hydropower interests, including to Petitioner's members. In accordance with the assignment of these costs, the project was designed to maximize hydropower production and hydropower value. Hydropower was allocated ***all*** of the available storage in the reservoir, which was all to be used for hydropower production.

The Eleventh Circuit's decision over fifty years later that the Corps now has authority to reallocate water storage to "substantially increase its provision of water supply," 644 F.3d at 1195, based on reports that the Corps wrote long after Congress allocated resources for the project and that Congress has never considered, or on isolated statements taken out of context from those original Corps reports that were relied upon by Congress, conflicts with the longstanding decisions of this Court, including *Chapman*. *See* 345 U.S. 153. It also creates a major

split in the circuits on this issue because the Eleventh Circuit's interpretation of the authorizing legislation stands in stark contrast to the long-standing, well-settled precedent on interpretation of the authorizing legislation for federal multipurpose water projects established in the United States Court of Appeals for the Fourth Circuit's ("Fourth Circuit") *Chapman* decision. *See* 191 F.2d 796.

The Eleventh Circuit's decision creates a further split in the circuits because it conflicts with an earlier ruling by the D.C. Circuit in this same dispute that no storage in Lake Lanier was allocated to water supply. *See Geren*, 514 F.3d 1316.

The Eleventh Circuit also exceeded its authority under Article III of the United States Constitution when it assumed the role of Congress by making its own resource allocation based in part on reports that were never presented to Congress and that were written by the Corps after Congress allocated resources and appropriated funding for the project.

Finally, the Eleventh Circuit incorrectly ruled that, because the Corps' failure to formally adopt a final reallocation report or enter into permanent (as opposed to "interim") water supply contracts based on proper statutory authority was not an intentional effort to avoid judicial review, such review of the illegal *de facto* reallocations of storage for water supply by the Corps over the past 40 years is unavailable. This ruling conflicts with longstanding decisions of this Court and courts in other circuits and is inconsistent with the Due Process Clause of the Fifth Amendment and the APA. Regardless of the Corps' intent, this result is improper. In this specific case, the

Eleventh Circuit has said that because the Corps agreed to voluntary stays with a few parties (not hydropower or numerous other interested parties), then no party has the right to challenge its long-standing illegal action, not even the SeFPC whose "due process property interest" in the Buford storage the Eleventh Circuit itself has recognized as a "legally protectable interest." *Ga. v. U.S.A.C.E.*, 302 F.3d at 1257-58. The decision creates a blueprint for federal agencies to inoculate themselves from judicial review of their actions. Under the Eleventh Circuit's reasoning, as long as an agency can characterize its actions as "interim" and convince a court that it is not actively seeking to evade judicial review, there can never be a "failure to act" or "agency action unlawfully withheld or unreasonably delayed" under the APA. 5 U.S.C. §§ 551(13) and 706(1) (2006).

Everyone, including the Eleventh Circuit, agrees that the outcome of this case will have a profound impact on millions of individuals and businesses in multiple states. In addition to its fundamental inconsistency with decisions of this Court and other circuits, the Eleventh Circuit's decision exacerbates the classic free rider problem associated with public goods by creating incentives for states and cities to refuse to pay their fair share of construction and capital costs for critical infrastructure in the hopes that they can leverage any subsequent necessity to pressure agencies to allow them to enjoy the benefits of the project at the expense of those who ultimately bore the costs and entered into long-term contracts in reliance on Congressional allocation of the related resources. In these circumstances, intervention by this Court is critical.

II. THE ELEVENTH CIRCUIT EXCEEDED ITS ARTICLE III AUTHORITY WHEN IT DEPARTED FROM THIS COURT'S PRECEDENT BY ALLOCATING RESOURCES BASED ON REPORTS THAT CONGRESS HAD NEVER CONSIDERED.

The Eleventh Circuit ignored this Court's precedent regarding the interpretation of legislation authorizing federal multipurpose water projects when it failed to identify the relevant legislative history and ordered the Corps to allocate storage to water supply on the basis of its own interpretation of the authorizing legislation rather than on the basis of the Corps' contemporaneous interpretation that was presented to and accepted by Congress. In so doing, the Eleventh Circuit impermissibly intruded into Congress's exclusive legislative domain in violation of Article III of the United States Constitution.

A. The Ruling Below Is Fundamentally Inconsistent with the Decisions of this Court and Other Circuits.

The Eleventh Circuit disregarded Congress's intent in authorizing the cost and resource allocations in connection with construction and operation of the Buford reservoir when it ignored the Corps' contemporaneous interpretations of its authority under the authorizing legislation, which incorporated reports that the Corps itself had authored. The appellate court instead found support for a novel interpretation of the Corps' authority in more recent Corps statements made in reports that were never presented to Congress.

This Court's decision in *Chapman* and the underlying decision by the Fourth Circuit that *Chapman* affirmed, 191 F.2d 796, both provide crucial guidance on the proper interpretation of Congressional intent regarding federal multipurpose water projects. As the Fourth Circuit correctly explained:

> [i]t should be remembered ... that legislation relating to flood control or rivers and harbors, is no haphazard matter, but is handled by Congress through experienced committees with long continuity of service having in charge long range programs of development. They are in constant touch with the governmental agencies charged with carrying out the programs, and in interpreting legislation with regard thereto, great weight must be accorded, not only to Congressional action which involves interpretation of prior legislation, but also to opinions expressed by members of the committees having the legislation in charge and members of the governmental agencies who carry out the programs.

191 F.2d at 802. For this reason, the Fourth Circuit held that a broader legislative history, including the Corps' contemporaneous reports and testimony at Congressional appropriations hearings, must be considered. *Id*. This Court affirmed, explaining that the post-authorization appropriations process that ultimately funds the project is essential to understanding the authorization. 345 U.S. at 163-64. Accordingly, under this Court's and the Fourth Circuit's decisions, contemporaneous Corps interpretation of its own authority under the statute, as explained in reports that were the basis for, and

were incorporated into, the legislation, and in testimony that communicated the Corps' understanding of its authority under the legislation and served as the basis for the appropriations, must be given strong weight as part of the legislative history for the federal multipurpose water project.

The Corps testified about its reports regularly before Congress during planning for, and construction of, the Buford project as members of Congress pointedly explored whether water supply should be allocated storage and associated costs. *See Tri-State*, 639 F. Supp. 2d at 1314-16. During the appropriations hearings for the Buford reservoir and hydroelectric dam, the Corps clarified certain aspects of the project covered in its reports, including both the incidental nature of the water supply benefit to Atlanta and its view that it did not have authority under the Rivers and Harbors Act to allocate storage away from hydropower for water supply beyond that needed to maintain a pre-determined minimum flow in the river, particularly where no costs were allocated for water supply. *Id*. at 1318. When specifically asked about future accommodation of increased water supply needs of Atlanta, ***the Corps told Congress that no costs were allocated at the time for water supply storage because the water supply benefit was incidental to the hydropower purpose, but if this changed and Atlanta needed increased water supply, the Corps would return to Congress to seek reauthorization prior to allocating storage away from hydropower***. *Id*. at 1317.

The Corps confirmed its understanding of the limit on its authority to accommodate storage for water supply when it sought Congressional approval to

reallocate a small portion of storage in the reservoir to Gwinnett County. The legislation approving the reallocation, Pub. L. No. 84-41, 70 Stat. 725 (1956), was passed on the basis that "enactment of legislation is necessary if water is to be supplied to Gwinnett County from the Buford Reservoir." S. Rep. No. 84-2689; H.R. Rep. No. 84-2672; *see also* 644 F.3d at 1169. As this was two years prior to passage of the WSA, the Corps' authority to act could only have been based on the RHA.

The Eleventh Circuit nonetheless held that the contemporaneous project interpretation which the Corps presented to Congress, and which Congress accepted, could be ignored because the Corps years later and in reliance on the WSA (but not the RHA[5]) changed its opinion on the limits of its authority to allocate storage in the Buford reservoir for water supply. This holding is flatly inconsistent with the well-established precedent of this Court and the Fourth Circuit. Specifically, this Court has explained repeatedly that an agency's contemporaneous interpretation of its authority under a statute that the agency was instrumental in authoring may not be disregarded where Congress was clearly made aware of that interpretation and did not object to it. *See, e.g., Chapman*, 345 U.S. at 160-164; *Howe v. Smith*, 452 U.S. 473, 485-87 (1981) ("*Howe*") (agency's contemporaneous construction of statute it both proposed and implements must be given great weight where Congress did not object to that interpretation);

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[5] As the Eleventh Circuit acknowledged, the Corps' interpretation of its authority under the RHA has never changed. *See* 644 F.3d at 1195.

Power Reactor Co. v. Electricians, 367 U.S. 396, 408 (1961) ("*Power Reactor*") (agency's contemporaneous construction of statute demands particular weight where brought to Congress's attention in hearings on implementation). An agency's amended interpretation of its authority, without clear evidence that Congress has acquiesced to the change, neither nullifies nor replaces the agency's original understanding as the legislative history of the statute. *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*Solid Waste*") citing *Bob Jones Univ. v. U.S.*, 461 U.S. 574, 595, 600-601 (1983) (upholding revised interpretation where evidence showed Congress was aware of the change).

The contemporaneous Corps interpretations of its own reports, which were incorporated into the legislation, are a crucial part of the legislative history of the Buford project. The Eleventh Circuit panel was not at liberty to disregard them simply because the Corps later changed its view about its authority under the WSA to accommodate municipal water demand. The Corps' interpretation of its authority to allocate storage to water supply under the subsequently-enacted WSA is not part of the relevant legislative history of the RHA, particularly since the Corps never presented it to Congress, and thus Congress could not have relied upon it when allocating project resources. For the same reason, statements in reports written by the Corps that were never presented to Congress are entitled to no weight whatsoever; and isolated, descriptive statements in reports that were never the basis of any consideration by Congress of the resource allocation at the Buford project are also not entitled to weight. Accordingly, the Eleventh Circuit's decision to substitute its own interpretation, to ignore the Corps'

contemporaneous interpretation of its authority as set forth in the reports to Congress that were incorporated into the authorizing legislation, and to instead give weight to subsequent Corps statements that were never presented to Congress, conflicts with this Court's decisions in *Chapman*, *Howe*, *Power Reactor*, and *Solid Waste*. *See FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986) (the reviewing court is not permitted to "make its own appraisals of the [evidence], picking and choosing … among uncertain and conflicting inferences." (internal cites omitted)). The Corps' conclusions, contemporaneous with the authorizing legislation, based on its own reports and representations to Congress, cannot be so easily set aside to support the panel's preferred outcome.

B. The Eleventh Circuit's Decision Impermissibly Intrudes Into Congress's Exclusive Legislative Domain.

Under the Eleventh Circuit's decision, so long as the Corps characterizes its action as "interim," the agency may, on an *ad hoc* basis, significantly alter the Congressionally approved allocation of storage and capital costs at the Buford reservoir by reallocating storage, but not costs, to a different group of beneficiaries. The Corps may do so despite its previous assurances to Congress that the Corps would not reallocate storage without first seeking authorization from Congress to do so. *Tri-State*, 639 F. Supp. 2d at 1316-17; 644 F.3d at 1169. Indeed, the Corps may act without any statement of the basis of its authority to make that change as required by the APA, 5 U.S.C. §§ 551-559, without any contracts, 644 F.3d at 1174, *see also Tri-State* at 1334-45, and without allocation of the associated costs of the resource to the newly-

benefiting party (water supply) or credit to the party to whom those costs were originally levied (hydropower).

The panel's decision not only *allows* the Corps unilaterally to consider changing the Congressionally approved allocation of storage and costs of the Buford reservoir; the remand order *encourages* the Corps to accommodate increased water supply, including by reallocating water storage to Atlanta water users. *See* 644 F.3d at 1192 ("the RHA authorized the Corps to allocate storage ... for water supply"); *id*. at 1195 (the RHA authorized the Corps "to substantially increase its provision of water supply and reallocate storage therefor"). By interpreting the RHA to allow for a substantial portion of storage in the reservoir to be set aside for water supply purposes, the panel has rewritten the statute and legislative history by judicial fiat. At the time of project construction, knowledgeable members of Congress probed Corps representatives about the status of water supply and were assured by the Corps that water supply, while contemplated, was an incidental benefit wholly derivative of the express hydropower, flood control and navigation purposes. *See, e.g*., 639 F. Supp. 2d at 1313-19. The Eleventh Circuit panel, however, made the policy decision that hydropower is subordinate to water supply, thus overriding the clear determination to the contrary that Congress made during the appropriations process, and ignoring the Congressionally approved allocations of capital costs.

This result cannot possibly comport with Congress's intent either under the authorizing legislation of the Buford reservoir or under the APA. If allowed to stand, the decision provides a roadmap for the Corps or other

federal agencies unilaterally to reallocate resources at other federal multipurpose water projects regardless of its previous assurances to, and joint actions with, Congress without fear of judicial review.

The panel's decision constitutes an impermissible intrusion into Congress's exclusive legislative domain in violation of Article III of the United States Constitution. Specifically, by accepting and rejecting various conflicting Corps interpretations rather than determining which interpretations the Corps had presented and Congress had accepted, the panel assumed the role of Congress in allocating resources and costs for a federal multipurpose water project and in directing the Corps to act based on the new interpretation. As this Court has explained: "[w]here Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notions of an 'equitable apportionment' for the apportionment chosen by Congress." *Ariz. v. Cal.*, 373 U.S. 546, 565 (1963). Though that case was about apportionment of water rather than water storage, the command to respect Congress's allocation of a resource applies with equal force to the allocation of storage and costs at the Buford project.

III. THE ELEVENTH CIRCUIT'S RULING THAT THERE HAS BEEN NO FINAL AGENCY ACTION CONFLICTS WITH THE PRECEDENT OF THIS COURT AND OTHER CIRCUITS.

It is axiomatic that an agency may only act within the boundaries of its statutory authority, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), and that it must announce the statutory basis for its

action. *See, e.g.*, 5 U.S.C. §§ 553(b)(2), 554(b)(2). Nevertheless, the Eleventh Circuit, which had previously found that the SeFPC has a "legally protectable" "due process property interest" "in the production of hydropower at the Buford Project," *Ga. v. U.S.A.C.E.*, 302 F.3d at 1257-58, ruled that the Corps' failure to announce the statutory basis for its actions affecting that "legally protectable" "due process property interest," as required by the APA, does not constitute reviewable final agency action because the delays, draft reports and "interim" measures did not reflect intent by the Corps to evade judicial review. 644 F.3d at 1196. This ruling conflicts with this Court's holding in *Norton v. S. Utah Wilderness*, 542 U.S. 55 (2004), that a claim may proceed where the challenge is based on a discrete agency action that the agency is required to take.

The record in this case demonstrates both that the Corps failed to cite proper statutory authority[6] (if indeed, it could have pointed to any) to enter into the "interim" contracts upon which it relied for more than twenty years to accommodate water supply requests to the detriment of hydropower, and that the Corps had absolutely no statutory authority to continue

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[6] *See*, *e.g.*, the Corps' September 3, 1999 responses to follow-up questions from the SeFPC regarding the statutory basis for accommodating water supply pursuant to interim and expired contracts, included in the Appendix hereto. The Corps' intent to enter into future contracts under the proper statutory authority, as it indicates in this document, does not render its prior actions any less illegal. *See also, e.g., Ala. v. U.S.A.C.E.*, 424 F.3d at 1122 (noting that the Corps in 1989 announced its intention to seek Congressional approval under the WSA for future water supply contracts with Georgia users).

accommodating water supply upon expiration of those "interim" contracts, which the Corps itself has acknowledged. This discrete action of identifying its statutory basis to act, which the Corps was required but failed to take, is the basis for the SeFPC's claim.

In its brief to the Eleventh Circuit, the Corps acknowledged that it "has not followed the procedures required to make a formal reallocation of storage" and that it has not "prepared the necessary reports under its guidelines and NEPA for a proposed reallocation; it has not provided public review and comment of a proposed reallocation; and the state and local interests have not agreed to pay for the storage a proposed reallocation would require." Corps' Brief as Appellees/Cross-Appellants at 55, 69, *In re MDL-1824 Tri-State Water Rights Litig.*, 644 F.3d 1160 (11th Cir. 2011) (Nos. 09-14657-GG, 09-14810-GG, 09-14811-GG). Under this Court's precedent, this failure is reviewable final agency action. The Eleventh Circuit's holding that there was no final agency action in the SeFPC's case is in direct conflict with this precedent.[7]

The Eleventh Circuit based its holding on two rationales. First, the court found that because the Corps' actions were temporary in nature, they "are not actions 'by which rights or obligations have been determined, or from which legal consequences will flow.'" 644 F.3d at 1181, citing *Bennett v. Spear*, 520 U.S. at 178. Second, the court concluded that the

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[7] It also conflicts with the Eleventh Circuit's own holding in *Fanin v. U.S. Dep't of Veterans Affairs*, 572 F.3d 868, 875 (11th Cir. 2009), that failure by an agency to act where there is an unequivocal statutory duty to act triggers "final agency action" review.

Corps' "sincere efforts to effectuate permanent water supply allocations ... ha[ve] been thwarted by the litigation process." *Id*. at 1184.

As to the first rationale, the D.C. Circuit in *Geren* reached the opposite conclusion. There, the D.C. Circuit held that even a temporary reallocation of storage required Congressional assent where the reallocation constitutes a major operational change or may cause a serious impact on the hydropower purpose. That court held that "it is unreasonable to believe that Congress intended to deny the Corps authority to make major operational changes without its assent, yet meant for the Corps to be able to use a loophole to allow these changes as long as they are limited to specific time frames, which could theoretically span an infinite period." *Geren* at 1324-25. Accordingly, intervention by this Court is necessary to resolve this conflict between the D.C. Circuit and the Eleventh Circuit in the same case.

As to the second rationale, the Eleventh Circuit points to a series of agreements and litigation maneuvers by various parties to the underlying proceedings of certain of these consolidated cases, all of which allegedly impacted timing on Corps action.[8] However, nothing cited by the Eleventh Circuit excuses the Corps' failure to announce the statutory basis for its actions. Moreover, the Eleventh Circuit's holding that the first prong of the *Bennett* test cannot be satisfied where the agency is not seeking to avoid

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[8] The Corps itself was a party to these agreements. The agency should not be allowed to preclude itself from acting and then complain that it was forced into inaction.

judicial review conflicts with this Court's decision in *Bennett v. Spear*, 520 U.S. 154 (1997), and the precedent of other circuits, including *Nat'l Assoc. of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272 (D.C. Cir. 2005). Specifically, the right to judicial review under the APA and the United States Constitution has never been contingent upon the intent of the agency such that the lack of ill intent by the agency insulates actions it describes as "interim" (here, spanning four decades) from judicial oversight.

In addition to these conflicts, the liberties the panel has taken with the record in this case are wholly inappropriate. In its decision, the Eleventh Circuit supported its finding of no final agency action by citing documents that post-dated the filing of the underlying lawsuits, the latest of which was filed in 2001. *See* 644 F.3d at 1184. In an APA case, district and appellate court review is limited to the record before the agency at the time of its decision. *See Citizens to Protect Overton Park v. Volpe*, 401 U.S. 402, 414-16 (1971).[9]

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[9] Also, while not relying expressly on an extra-record 2009 Corps memorandum that the district court had disallowed as a *post hoc* litigation rationalization, *see* 639 F. Supp. 2d at 1347; 644 F.3d at 1177, 1183 (a ruling that no party appealed), the Eleventh Circuit pointed to this memorandum as support for its findings numerous times. *See, e.g.*, 644 F.3d at 1177, 1183-84, 1196 n.31, 1201 n.36, 1203-04 n.41. References to this document by the panel (and by the Corps and Georgia parties throughout their briefs) were entirely improper.

IV. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE D.C. CIRCUIT'S RULING THAT CONGRESS ALLOCATED ZERO STORAGE TO WATER SUPPLY UNDER THE BUFORD PROJECT'S AUTHORIZING LEGISLATION.

In 2008, in an earlier proceeding in the same underlying cases, the D.C. Circuit found that zero storage space in the Buford reservoir was allocated to water supply, and that the WSA required prior Congressional approval before the Corps could reallocate the amounts of water storage at issue in this case to water supply. *Geren,* 514 F.3d at 1324. The D.C. Circuit in *Geren* had to consider the allocation of resources in the Buford reservoir in order to determine the permissibility of a 2003 settlement among Petitioner, the Corps and Georgia parties that would have reallocated up to 22% of water storage space in Lake Lanier to water supply on an interim basis for a period of up to 20 years. The settlement, and resulting reallocations, was to become permanent if approved by Congress or if a final court judgment held that such approval for the reallocation and changed project operations was not necessary.

The D.C. Circuit rejected the settlement. Looking at the history of the project, the majority held that "the appropriate baseline for measuring the impact of ... reallocation of water storage *is zero, which was the amount allocated to storage space for water supply when the lake began operation.*" *Geren* at 1324 (emphasis added). The court held that "[o]n its face, ... reallocating more than twenty-two percent ... of Lake Lanier's storage capacity to local consumption uses ... constitutes the type of major operational change

referenced by the [Water Supply Act]" that would require prior Congressional approval. *Id*. According to the D.C. Circuit, even the reallocation of 9% of reservoir storage unambiguously constitutes a major operational change. *Id*. at 1325.

Indeed, the clear understanding of Congress and the Corps that no storage had been allocated to water supply is confirmed by the events that occurred shortly after the original Congressionally approved storage and related cost allocations for the Buford project were made. In 1956, in order to reallocate a small amount of storage for municipal water supply to Gwinnett County, the Corps sought and obtained Congressional approval. Pub. L. No. 84-841, 70 Stat. 725 (1956). The legislative history of the 1956 Act expressly states that the legislation was "necessary" to allow the reallocation. S. Rep. No. 84-2689 (1956); H.R. Rep. No. 84-2672 (1956). Because the WSA had not yet been enacted at the time, Congress's and the Corps' determination that the Corps did not have the authority to reallocate to water supply even the relatively modest quantity of Buford storage then at issue could only have been based on the Corps' authority under the RHA.

The Eleventh Circuit brushed aside the D.C. Circuit's decision on the basis that the analysis was incomplete because it focused on the WSA without addressing water supply authority under the earlier RHA. 644 F.3d at 1179. However, the relevant statutory authority and legislative history are exactly the same because the D.C. Circuit acted in the same cases before the Eleventh Circuit, and the D.C. Circuit, interpreting this legislative history in accordance with this Court's direction in *Chapman*, looked at the

initial allocations of storage that were approved and appropriated for by Congress (*i.e.*, prior to enactment of the WSA) to determine that ***zero storage*** was allocated to municipal water supply, and that reallocation of the amounts at issue here would require prior approval by Congress. *Geren* at 1323-24 and n.4.

The Eleventh Circuit's ruling that water supply is a primary purpose of the Buford project such that the Corps must now allocate storage for water supply under the RHA, which predates the WSA, is in direct conflict with the D.C. Circuit's ruling in *Geren* that zero storage was allocated for water supply and that prior approval by Congress would be necessary to reallocate the amounts at issue here. The Eleventh Circuit attempted to justify its decision to disregard *Geren* by ruling that collateral estoppel did not attach because the D.C. Circuit's ruling in *Geren* allegedly was based solely on an analysis of the WSA while the Eleventh Circuit's analysis considered both the WSA and the RHA. 644 F.3d at 1196-97 n.31. However, to the extent that zero storage was allocated initially to water supply and the WSA required the Corps to seek prior Congressional approval before reallocating the amounts at issue here (as the D.C. Circuit ruled), the earlier RHA could not have made water supply a primary purpose such that the Corps must now, on remand, reallocate storage to water supply without seeking prior Congressional approval (as the Eleventh Circuit ruled). Moreover, the D.C. Circuit's ruling that no storage was allocated to water supply when the dam began operations and that the WSA requires the Corps to seek prior Congressional approval before reallocating the amounts at issue here necessarily means that the RHA neither requires nor allows the

Corps to reallocate such water storage amounts to water supply without seeking prior Congressional approval, particularly since neither court contends that the WSA has since been amended.

The Eleventh Circuit's conclusion rests upon an obvious error in applying the doctrine of collateral estoppel. Indeed, as this Court has explained, "once a court has decided an issue of fact or law necessary to its judgment, that decision ... preclude[s] relitigation of the issue in a suit on a different cause of action involving a party to the first case." *San Remo Hotel v. San Francisco*, 545 U.S. 323, 336 n.16 (2005). Here, there is no question that the case involves exactly the same issue – whether Congressional approval is necessary before the Corps can allocate any storage in the Buford reservoir to water supply – and exactly the same parties, so it makes no difference that the Eleventh Circuit is willing to entertain a different interpretative theory than the D.C. Circuit used. Regardless of whether collateral estoppel attached, however, there is nonetheless a pressing need for this Court to resolve the irreconcilable conflict between the ruling by the D.C. Circuit that Congress allocated zero storage space in the Buford reservoir to water supply and that Congressional approval is required before the Corps can allocate the amounts at issue here to water storage, 514 F.3d at 1324, and the ruling by the Eleventh Circuit that the Corps must allocate storage space in the Buford reservoir to water supply now without seeking further Congressional authority because water supply is a primary purpose of the project under the RHA, 644 F.3d at 1192, 1195, 1200-01.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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